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*

WRITS OF ERROR

WERE DENIED OR DISMISSED BY THE

SUPREME COURT OF TEXAS

IN THE FOLLOWING CASES IN THE
COURT OF CIVIL APPEALS

PRIOR TO JUNE 2, 1909.

[Cases in which writs of error have been denied or dismissed, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

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FIRST DISTRICT.

Houston Electric Co. v. Seegar, 117 S. W. 900.
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Barclay v. Deyerle, 116 S. W. 123.
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Solomon v. Southwestern Telegraph & Telephone Co., 117 S. W. 214.
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Texas & Pac. R. Co. v. Crawford, 117 S. W. 193.

WRITS OF ERROR DISMISSED.

THIRD DISTRICT.

Watson v. Dixon, 115 S. W. 100.

FIFTH DISTRICT.

Missouri, K. & T. Ry. Co. of Texas v. Hagler, 112 S. W. 788.

SIXTH DISTRICT.

Brown v. Clark, 116 S. W. 360.

THE SOUTHWESTERN REPORTER.

VOLUME 118.

STEWART v. JONES et al.

(Supreme Court of Missouri, Division No. 1.
March 31, 1909. Rehearing Denied April
13, 1909.)

1. PARTITION (§ 55*)—EQUITABLE PARTITION.

A suit was brought by the purchaser of the life interest of a widow in a homestead under her husband's will, and the interests of certain of the remaindermen therein, which homestead under the will was to be sold by the executor after the widow's death, which had not yet occurred, by a bill alleging that the power of sale was given to the executor in his official capacity, and, as he had been discharged, he could not make the sale, and that plaintiff elected to take in land the interests purchased from the remaindermen so far as they could be lawfully set off to him, and praying that the remainderman whose interests he had not purchased be held to possess the land in trust for plaintiff and others, and that she be required to convey to him the undivided portion which he had purchased, subject to the life estate, and that it be set off to him in severalty, if possible, without prejudice to the rights of defendants, and, if not, that the land be ordered sold and plaintiff be given the proceeds of the life estate and his share of the remainder interest. *Held*, that the suit was in effect a proceeding for equitable partition, and not a simple suit in equity to execute and determine a trust and put the beneficiaries in possession of their respective interests in the corpus of the trust estate.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 55.*]

2. PARTITION (§ 21*)—EQUITABLE—APPLICABILITY OF STATUTES GOVERNING PARTITION.

Under the maxim that equity follows the law, courts will, in proceedings for equitable partition, follow the statute, and hence a proceeding for equitable partition of land devised under a will is governed by Rev. St. 1899, § 4383 (Ann. St. 1906, p. 2415), providing that no partition or sale of lands devised by a will shall be made under the article (partition) contrary to the intention of the testator, expressed in the will, and section 4650 (page 2518), providing that all courts and others concerned in the execution of wills shall have due regard to the directions of the will and the intent of the testator.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 72; Dec. Dig. § 21.*]

3. WILLS (§ 440*)—CONSTRUCTION—INTENTION OF TESTATOR.

In construing a will, the intention of the testator is to be ascertained from the four corners of the will, both at common law and under Rev. St. 1899, § 4650 (Ann. St. 1906, p.

2518) providing that all courts and others concerned in the execution of wills shall have due regard to the directions of the will and the intent of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

4. WILLS (§ 614*)—CONSTRUCTION—SALE OF HOMESTEAD AFTER LIFE ESTATE.

(Where a testator, after devising a homestead to his wife for her life, directed that at her death the executor should sell it, it could not be said that his sole object was to provide a house for his widow, so that, where she parted with her interest therein during her lifetime in consideration of an annuity, the homestead could not be sold before her death for the benefit of the purchaser, but the testator's intent as expressed in the will should be enforced.)

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 614.*]

5. INJUNCTION (§ 28*)—SUITS FOR CONSTRUCTION—ENJOINING FURTHER SUITS.

Where the interpretation of a will is involved in difficulty, counsel are allowed latitude in hypotheses and theories, and persons having interests thereunder may litigate in regard to them on different hypotheses so long as they act in good faith, and the fact that they have brought three suits respecting the will would not justify an injunction restraining further suits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 81; Dec. Dig. § 28.*]

Appeal from Circuit Court, Boone County;
Alex. H. Waller, Judge.

Bill by John A. Stewart against A. H. Jones and others. From the decree, certain defendants appeal. Reversed, and bill ordered dismissed.

E. W. Hinton, for appellants. D. D. Duggins and Webster Gordon, for appellee.

LAMM, J. From a decree, executing and terminating an alleged trust under a will determining the interests of certain parties in the corpus of the alleged trust estate (consisting of a homestead tract), finding that the land could not be divided and allotted in kind equitably, and decreeing a sale by a special commissioner and a division of the proceeds, certain defendants appeal.

There is little or no dispute on the facts. Questions made here arise on the law applicable to those facts.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
118 S.W.—1

Attending to the case made, it is this:

In 1891 Patrick Henry Jones died, testate, a resident of Boone county, seised of a considerable estate in lands and chattels, leaving a widow (a second wife), and one daughter (Cora N.) by a former marriage, surviving him. Cora intermarried with her codefendant Ed R. Tillery, and one child was born of this marriage after Patrick's death, to wit, the defendant Mary, now an infant. The will of Patrick nominated his brother, Aquilla H. Jones, as executor, who qualified and took on himself the burden of administration. He is impleaded as a defendant under the name of A. H. Jones. Patrick left surviving him certain nieces and nephews, the children of two married sisters, Mrs. Carson and Mrs. Murray. As presently seen, the Murray children have a contingent, the Carson children had a vested, interest in Patrick's homestead. The Murrays are made defendants, but we cannot make out that they answered or took any part in the trial, nor do they prosecute an appeal.

Patrick's will was probated in common form in 1891 in the probate court of Boone county. No contest of it was ever made. After providing, in item 1, that he desired to be buried by the side of his first wife and children at Mount Zion Church, in Boone county, item 2 reads: "I devise to my beloved wife, Eliza K. Jones, the homestead upon which I now live consisting of 52⁰⁰/₁₀₀ acres, and being situated immediately west of the corporate limits of the town of Columbia, Missouri, to have and to hold the same during her natural life. This devise is in lieu of and in absolute bar and discharge of her right of dower in all my real estate."

After providing in item 3 that \$2,000 be paid Eliza by his executor, and that said sum and certain specific chattels are bequeathed to her in absolute bar and discharge of her dower in his personal property, item 4 reads: "I direct that at the death of my said widow, Eliza K. Jones, my executor shall sell the aforesaid homestead at public vendue, at the court house door in the said town of Columbia, after giving such notice of said sale as the law requires in sales of real estate under deeds of trust with power of sale, and after paying the expenses of sale, the proceeds thereof shall be divided equally per capita between my daughter, Mrs. Cora N. Tillery and the children of my sister, Mrs. Louisa Carson. In the event that my said daughter shall have died prior to the distribution of the proceeds of said sale, then her share therein shall descend to her bodily heirs, if any survive her, and if she shall have died without bodily heirs surviving her, then her aforesaid share shall descend and be equally divided between the children of my sister, Mrs. Elizabeth Murray."

After bequeathing to the trustees of the Methodist Episcopal Church South at Columbia \$1,000 in trust for the benefit of superannuated ministers and their widows and

orphans within the jurisdiction of the conference to which the Columbia Church belonged at the time, and directing it to be loaned and the income used (under certain safeguards) as indicated, item 6 reads: "I devise and bequeath to my beloved daughter, Mrs. Cora N. Tillery, all the residue of my estate, real, personal and mixed, to have and to hold the same absolutely in fee simple."

The widow elected to take under the will, and in 1899, the executor having made final settlement of his accounts, distribution and his discharge were ordered by the probate court.

Patrick's widow continued to reside on the homestead until, finally, contracting a second marriage with D. R. Vivion, she moved away, and for several years the premises were rented out at an annual rental of \$400.

On March 13, 1905, Mrs. Vivion quitclaimed her interest in the homestead to the plaintiff, Stewart, in consideration of \$5 and "other considerations"—the "other considerations" being his agreement to pay her an annuity of \$360. A few days before her deed, Stewart, who is a real estate dealer, acquired the interests of the Carson children under item 4 of the will. Their deed by apt narrations refers to the will, and recites that grantors sell their interests in the homestead, describing it, to Stewart for \$5,000 paid them by him. It not only grants, bargains, and sells their right, title, and interest to the described homestead, but has this clause: "And for said consideration we do further assign, transfer and set over unto the said John A. Stewart all our interest in and to the proceeds of said real estate, in the event of a sale thereof by the executor or under the provisions of said will and do authorize and empower him to have, demand, collect and receive and receipt for all the proceeds of said real estate in the event of such sale, that may be due us or either of us, so that said John A. Stewart shall by these presents be invested with any title that we may have to said real estate and be substituted to all our right, title and interest in the proceeds of the sale of the said real estate in the event the same shall be sold under the terms of said will."

It stands conceded that there are five of the Carson children. Under the per capita clause in the will, these children would share in the proceeds with Cora in the proportion of five to one. Stewart put the Vivion deed on record on May 31, 1905, and the Carson deed shortly before. We infer these several deeds were part and parcel of the same transaction. He owns land adjacent to the homestead, and is exploiting his holdings on the markets as residence property, laid out in lots and blocks, streets and alleys, and is selling to purchasers.

At the death of Patrick, his homestead was worth from eight to nine or ten thousand dollars. At the time of the trial, the residence parts of Columbia having shoved

on west, the homestead is now partly in the city limits and is about to be taken in wholly, and has increased in value to \$20,000 or upward. Some real estate experts gave it as their opinion at the trial that certain favored parts of it were worth so much as \$1,000 per acre, and that certain other parts were depreciated by a ravine and the proximity of a cemetery. These gentlemen also hazarded an opinion that the land was not susceptible of division in kind without serious detriment to the parties in interest, and that the present real estate market at Columbia bid fair to result in a good sale if the tract was put on the block at public vendue.

Going back a little before her sale to Stewart, Mrs. Vivion commenced a suit in the Boone circuit court against the executor of Patrick's will and the Tillerys, the Murrays, and the Carson children. Her petition is in two counts. By the first she pleads the terms of Patrick's will, that she had accepted it, and had intermarried with Vivion. Her petition then puts her counsel's construction on the meaning of the will, viz.: That testator intended thereby to give her a life estate in the homestead, and to devise the remainder over in two parts, one to the Carson children and the other to his daughter, Cora, or (in case of her death) to her daughter, Mary, or (in case of Mary's death) to the Murray children; that there was no child born to Cora at testator's death, but that Mary was born since; that there was doubt in defendants' minds, and in would-be purchasers', as to whether the intent of the will was as alleged by plaintiff, and as to whether the real estate could be sold; wherefore, plaintiff prayed that the will be construed, and that the meaning and legal effect of it be decreed to be as alleged by her. A second count alleges that plaintiff holds a life estate in the homestead, and that defendants own the remainder over in that tract as tenants in common; that the land cannot be partitioned in kind, and a partition and sale is prayed. To the first count, a demurrer was interposed on the grounds that plaintiff had no legal capacity to sue; that the petition did not state facts sufficient to constitute a cause of action. The second count for partition was demurred to on the ground that it appeared that partition is contrary to the intention of the testator as evidenced by his will. Presently, the demurrer was sustained, and leave was granted to amend. Presently, on the 17th of January, 1905, in vacation, the cause was dismissed by plaintiff, and the costs paid.

Such was the end of the first suit.

On the 5th day of May following, Mr. Stewart, having acquired the interests of the Widow Vivion and the Carson children, commenced a new suit in partition against the same parties, omitting the Carsons. His petition pleaded the terms of the will in *hæc verba*, but through his learned counsel, Mr. Hinton, he put his own construction on that

will, and pleaded its intendment as got at by that construction, viz.: After conventional averments, it is alleged that the homestead was devised to Patrick's widow for her natural life, with remainder over in shares per capita to his daughter, Cora, and the Carson children; that, at the death of the widow, the will provides that the executor should sell the land and divide the proceeds, per capita, between Cora and the Carson children, but that if Cora die prior to the distribution, then her share descended to the heirs of her body surviving her, and, in default of surviving heirs, then to the Murray children. After other conventional allegations, the petition avers that the five Carsons took an undivided interest of one-sixth each as tenants in common in remainder, and that Cora was tenant in common in remainder, owning an undivided one-sixth interest for her life, with remainder over to the heirs of her body, and, in default of such heirs surviving, then to the Murray children. Alleging that plaintiff had acquired the interests of the widow and the Carson children by conveyance, the pleader next averred that plaintiff owned the life estate of the widow and an estate in fee simple in and to the undivided five-sixths of the homestead, and that Cora owned an undivided one-sixth in remainder, subject to the conditions aforesaid; that partition in kind could not be made without great prejudice to the interest of all parties, wherefore partition was prayed, with a sale and a division of the proceeds after paying costs and expenses. Such proceedings were had in the second suit that issue was joined by answers setting up the terms of the will as an insuperable obstacle in the road to partition. Thereupon plaintiff, on June 15, 1905, filed his amended petition, averring, among other things, that the Carson heirs "became the owners at law and in equity of an undivided one-sixth each of said tract of land as tenants in common in remainder," subject to the widow's life estate; that the defendant Cora by the will "took and became the owner in law and at equity of an undivided one-sixth of said tract of land as tenant in common in remainder, though whether for her life only, with contingent remainder to the heirs of her body, or in fee upon condition, the plaintiff is not advised." The prayer of the amended petition was that the court determine the respective interests of the parties and make partition, and that the one-sixth interest of Cora in remainder be assigned and set off to her subject to the life estate of the widow, now held by plaintiff, and, if that could not be done without prejudice, that the land be sold, etc., and "for such other, further, greater, or different relief as the court may see proper, and to equity and good sense may belong." To that petition, defendants answered by refiling their former answers. Thereupon the cause was taken up, evidence heard, and it was sub-

mitted, the court taking time to consider. Thereafter, in August, 1905, the submission was set aside and plaintiff dismissed his action.

Such was the end of the second suit.

Thereafter, a third, the present, suit was brought by plaintiff against the Tillerys, Jones, and the Murrays. The petition sets forth that Patrick died seised of the homestead tract, describing it, leaving a will; that his sole and only heir at law was Cora; that he left a widow who married Vivion; that he had five nieces, to wit, the Carson children, naming them; that by his will, duly probated, the defendant A. H. Jones was appointed executor, who qualified, made final settlement and has been discharged, but nevertheless continues to claim some right, interest, or power as such executor in respect to the land, hence he is made a party defendant; that, for the purpose of providing a home for the widow after his death, said Patrick by his will devised the homestead to her for life in lieu of dower; that she accepted the will. Its provisions relating to the sale of the homestead on the death of the widow and the division of the proceeds are next set forth, with the averments that by the residuary clause testator devised and bequeathed the rest and residue of his estate, both real and personal, to Cora, "but did not otherwise devise or dispose of the legal title in remainder" to the homestead tract. That the power of sale given by the will for the benefit of Cora and the Carson children to the executor was given to him as such, strictly in his capacity as executor only, and that, since his discharge by the probate court, he is without further power or authority to make the sale as by will directed; that the homestead tract lies hard by the city of Columbia on the west, and is chiefly valuable for residence property; is susceptible of division in kind into a large number of building lots without any prejudice to the rights of any parties beneficially interested; that plaintiff has acquired the life estate of the widow by deed of conveyance, and has entered into possession; that by another conveyance he has acquired the interests of the Carson children in the land, and, by assignment from them, has become entitled to their respective rights under said will to the proceedings of the sale of said land; that, as grantee and assignee of the aforesaid beneficiaries, he has elected and desires to receive and take in land the aforesaid interests given by the will to the Carson children, so far as they can be lawfully set off to him; that the infant Mary has some interest in Cora's share of the land and in the proceeds; that the Murray children have some contingent interest in Cora's share and in the proceeds of the sale thereof; that Cora objects to any division or sale of said tract of land, and refuses to recognize plaintiff's rights therein. The prayer of the petition follows:

"Wherefore the plaintiff prays the court by

its proper decree to declare that the defendant Cora N. Tillery holds the legal title in remainder to said tract of land as heir at law and residuary devisee of the said Patrick H. Jones, deceased, in trust for the benefit of this plaintiff, and for the legal benefit of herself, the defendant Mary Tillery, and the defendants Lee, Erl, and Henry Murray, and that the beneficial interest of plaintiff is five-sixths thereof; and that the defendant Cora N. Tillery be ordered to convey to the plaintiff an undivided five-sixths of said land subject to said life estate, and that the same be set off to plaintiff in severalty if the same can be done without prejudice to the rights of the defendants, and if such division cannot be made, then the court order a sale of said land in fee, and that the life estate of said Eliza K. Vivion, now held by plaintiff, be commuted into money and paid over to him, and that the balance of the proceeds of sale be divided between plaintiff and defendants according to their respective interests, and that if necessary a suitable trustee be appointed for the purposes of such sale; and the plaintiff prays for such other, further, different or greater relief as the nature of the case may require and to equity and good conscience may belong."

To that petition, Jones, executor, answered, admitting some and denying other allegations, averring that he has fully administered testator's estate, "except the sale of the aforesaid lands and the distribution of the net proceeds thereof in accordance with the provisions" of Patrick's last will and testament; that Patrick's widow is still alive, and for that reason the sale and distribution cannot be had now.

The Tillerys, husband and wife, answered, admitting the will, its probate, that Patrick was seised in fee of the homestead tract, and that Mary is their only child. They deny all other averments.

Further answering, they plead specifically the provisions of the will; that their codefendant Jones qualified as executor; that Patrick's widow accepted the will; that the homestead tract, by the terms of the will, was to be sold on the death of the widow on the terms mentioned in the will, and the proceeds divided by the executor as therein set forth; "that by reason of said will, and by reason of the limitations, conditions, and directions of the said testator therein, partition of said real estate cannot be made, and that no sale of said land can be made during" the widow's life, and that said widow is still alive; wherefore, they pray that suit abate.

For further answer, they plead the two former suits for partition and sale of the homestead tract. They allege that in the first suit brought by the widow, the present plaintiff had full knowledge, and was aiding, advising, and counseling the widow in said suit; that the widow, knowing that the real estate could not be partitioned under the

provisions of the will, brought her suit for the purpose of vexing and harassing defendants, and of putting them to costs and the expense of hiring attorneys and attending a trial in the circuit court of Boone county (they, the defendants, residing in Saline county). They aver that, having bought the interest of the widow after a demurrer to her petition was sustained and she had dismissed it, the plaintiff straightway instituted a second suit in partition for the purpose of further vexing and harassing them, and afterwards did voluntarily dismiss the same; that the present suit followed hard on the heels of the second, and is the third for partition; that all said suits, including this, were vexatious, and set on foot willfully to harass, annoy, and cause trouble to defendants; that they have no adequate remedy at law to prevent such injury; wherefore they pray an order restraining plaintiff and all claiming through or under him from prosecuting this suit or similar suits for the partition of said land, and for all proper relief.

The minor, Mary, answered through her guardian ad litem, putting plaintiff on his strict proof.

The reply was a general denial of the affirmative averments in the Tillerys' answer.

The facts established at the trial are sufficiently indicated in the foregoing statement. There was no evidence tending to show that plaintiff aided and counseled the widow in her suit for partition and to construe the will, or that he caused such suit to be instituted, or at that time had any present or prospective interest in the subject-matter of the litigation, or that he sued groundlessly for the very purpose of harassing defendants and putting them to trouble and outlay.

The decree finds the facts, *seriatim*, as alleged in the petition to be true, and, *inter alia*, that the legal title in remainder in the homestead tract descended to and vested in Cora as the sole heir at law of Patrick in trust for the beneficiaries of said power of sale donated to Jones, executor, in the proportion of an undivided five-sixths thereof each for the benefit of the Carson children, naming them, and the remaining one-sixth for her own benefit, and contingently for the benefit of the heirs of her body and the Murray children, naming them; that the plaintiff, Stewart, owns the life estate of the widow; that the Carson children have conveyed their interests in the real estate to him, and assigned to him their interests in the proceeds of the sale of the land.

The decree closes as follows:

"And the court doth further find that the power of sale conferred by the will of Patrick H. Jones upon the executor thereof has lapsed by reason of his final settlement and discharge as such executor by the probate court as aforesaid. And that the plaintiff, Stewart, is entitled to have the trust in said tract

of land executed and terminated, and to have vested in him the legal title in remainder to an undivided five-sixths of said tract of land. And the court doth further find that said tract of land, by reason of the location, nature, and condition thereof, cannot be divided and allotted in kind to the plaintiff and the defendants without great loss and prejudice to their respective rights and interests, and that said tract of land ought not to be sold subject to the life estate aforesaid of the said Eliza K. Jones, now held by the plaintiff, Stewart, and that the said Eliza K. Jones is now 61 years of age. Wherefore, to the end that the trust in said tract of land may be terminated and executed, it is therefore ordered and decreed by the court as follows:

"(1) That the legal title in remainder to an undivided five-sixths of said above-described tract of land be divested out of the defendant Cora N. Tillery and vested in the plaintiff, John A. Stewart.

"(2) That said above-described tract of land be sold for the purposes set forth in this decree in the same manner and upon the same notice as in case of sales of real estate under execution.

"(3) That upon the approval of such sale, after the payment of all costs in this cause, five-sixths of the proceeds of sale be paid to the plaintiff, John A. Stewart, and that the life estate of the said Eliza K. Jones held by the said Stewart in the remaining sixth be commuted to its present value and paid over to the plaintiff, and the balance thereof be paid to the defendant Cora N. Tillery, and in the event of her death prior to such time, then to the heirs of her body now surviving her, and in default of heirs of the body her surviving, then to the defendants, Lee Murray, Erl Murray, and Henry Murray.

"(4) For the purpose of carrying out the provision of this decree, it is ordered that Fountain Rothwell be and he is hereby appointed the special commissioner of this court, and that before entering upon the discharge of his duties he enter into a bond in the sum of \$20,000, with sufficient sureties to be approved by the clerk of this court, conditioned for the faithful discharge of his duties hereunder, and that he report all his proceedings hereunder to the court for approval."

From that decree, after unsuccessful motions for new trial and in arrest were filed in due time, this appeal, as said, is prosecuted.

We had a purpose in elaborating the allegations of the petitions and answers in the series of suits, having a common purpose, culminating in the one at bar. It was to show a gradual growth and evolution in, or shifting of position on, the rights of parties litigant and of the legal principles determinative of those rights. The briefs of learned counsel for respondent, in luminous

order, with plith and strength, discuss with ripe scholarship a bundle of abstruse and subtle questions on real estate law, arising at law and in equity. We are beholden to counsel for profit from his research, but such, and only such, of those questions as we deem vital on appeal, will be considered.

1. At the very door of the case lies the question, looming large, whether this is an equitable partition suit (as argued by appellant), or a suit in equity, pure and simple, to execute and determine a trust and to put the beneficiaries in possession of their respective interests in the corpus of the trust estate (as argued by respondent). Attending to it, it will be observed that the word "partition," used in the first suits, is sedulously avoided in this. But the results aimed at by the former suits were aimed at in the present, and (what is more) attained by the decree. To use a huntsman's homely simile, the tracks in all the suits led to the same hole, and that hole a partition. We need bother ourselves but little with the mere words used, for they go but skin-deep. The value of words is to get at the thought. The heart of the thing sought was partition. The thing got was partition. If a hungry child wants bread and butter from its mother and gets it, is the form of the request, whether sign, cry, or some veiled verbal formula, material?

One of the chief cases relied on by plaintiff for the termination and execution of a nonproductive trust (*Donaldson v. Allen*, 182 Mo. 626, 81 S. W. 1151) was a suit to determine a trust, as here, and having partition as its goal. See, also, *Donaldson v. Allen*, 213 Mo. 293, 111 S. W. 1128. In the latter case it was held that equitable features are everyday incidents of partition suits, for example (among others), "divesting title, decreeing a trust, or establishing title as a step incident to partition. *Garesche v. Levering Inv. Co.*, 146 Mo. 436, 48 S. W. 653, 46 L. R. A. 232; *Donaldson v. Allen*, 182 Mo. 626, 81 S. W. 1151; *Budde v. Rebenack*, 137 Mo. 179, 38 S. W. 910; *Rozler v. Griffith*, 31 Mo. 171; *Dameron v. Jameson*, 71 Mo. 97; *Holloway v. Holloway*, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339; *Padgett v. Smith*, 206 Mo., loc. cit. 314, 103 S. W. 943."

To hold that a suit actually resulting in partition is not a partition suit is to coyly toy with shadow and pass by substance. We hold that, for the application of the law to the facts, the case must be deemed, to all intents and purposes, a proceeding for equitable partition.

2. The next question in logical order is whether the following statute controls in equitable partition, viz.: "No partition or sale of lands, tenements or hereditaments, devised by any last will, shall be made under the provisions of this article, contrary to the intention of the testator, expressed in any such will." Rev. St. 1899, § 4383 (Ann. St. 1906, p. 2415).

There is a cognate section in the chapter on "wills," in pari materia, which must be construed with the one just quoted, reading: "All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them." Rev. St. 1899, § 4650 (Ann. St. 1906, p. 2518).

While equity, in a general way, is compassed by the venerable definition of Aristotle, viz., "A correction of the law, where by reason of its universality it is deficient" (*Fonblanque, Eq. [Laussat's Ed.] p. 10*), yet there is between law and equity such comity that, on the one hand, the law is frequently enlarged and enriched by borrowing equitable principles, and, on the other, the maxim, "Equity follows the law," has play in arriving at just ends in the administration of justice. Speaking to that maxim, Judge Story says (1 Story, *Eq. Juris. [13th Ed.] § 64*): "It may mean that equity adopts and follows the rules of law in all cases to which those rules in terms may be applicable; or it may mean that equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law."

In *Donaldson v. Allen*, 213 Mo. 293, 111 S. W. 1128, we held in judgment the question whether attorney's fees might be allowed to a successful plaintiff and taxed as costs in an equitable partition. It was contended, in that case, that such fees could be allowed, under the strict letter of the statute on Partition, only in partition suits brought under the statute, and not in equitable partitions. The statute (section 4422) limits the allowance of reasonable attorney's fees to those attorneys bringing a suit "under this article," precisely as it is suggested here that section 4383, supra, is limited by its letter to partitions and sales of lands "under the provisions of this article." In holding that such fees could be taxed as costs, we laid stress on the maxim that equity follows the law, and pointed out that it was the doctrine of this court that, in equitable partition, the court will proceed according to the statute. *Spitz v. Wells*, 18 Mo. 468; *Holloway v. Holloway*, 97 Mo., loc. cit. 639, 11 S. W. 233, 10 Am. St. Rep. 339.

In *Stevens v. De La Vaulx*, 166 Mo., loc. cit. 26, 27, 65 S. W. 1003, in speaking of section 4383, supra, and its application to equitable partitions, after pointing out the object of testator in that case, our Brother Valliant said: "He (testator) preferred his own judgment in that matter to theirs (i. e., the devisees)." * * * The property was his, and he had a right to do with it as he pleased, and those who take of his bounty must take it on the terms he imposes. To make partition of his property now, however advantageous from a business point it might be to all concerned, would be to do violence

to the intention of the testator expressed in his will, and to disregard the mandate of the statute above quoted. That we cannot do. *Ex parte Cubbage v. Franklin*, 62 Mo. 364; *Sikemeier v. Galvin*, 124 Mo. 367, 27 S. W. 551; *Lilly v. Menke*, 126 Mo. 211, 28 S. W. 643, 994; *McQueen v. Lilly*, 131 Mo. 17, 31 S. W. 1043. The learned counsel argue for appellant that this is not a statutory procedure for partition to which the statute above quoted applies, but it is an invocation of the broad powers of a court of equity to relieve the parties against an unfortunate condition not foreseen by their testator, which results in impairment of the rights of all. So far as we can see from the record, the plaintiff is the only party in interest who is dissatisfied with the terms of the will or who is asking that they be disregarded. Broad as the jurisdiction of a court of equity is, it is nevertheless within the limits of the statute law of the state, and the chancellor is as much bound to obey that law as is the judge in a law court. But a court of equity, exercising its ancient jurisdiction uninfluenced by the statute above quoted, would not make partition at the suit of a devisee in express violation of the will. A court of equity would no more at the suit of a devisee require a trustee, in violation of the will, to incur or sell a part of the trust property merely to render the rest more profitable, than it would at the suit of a prospective heir require a man to improve his own estate or protect it from decay."

That the statute in hand applies to equitable partitions is suggested in *Evans v. Blackiston*, 66 Mo., loc. cit. 439 et seq. That equity follows the law is illustrated by the proposition that equity courts will follow and enforce the statute of limitations. *Burrus v. Cook*, 117 Mo. App., loc. cit. 403, 93 S. W. 888. We refer to the dissenting opinion of Ellison, J., in that case, since it was held a correct pronouncement of the law when the case came here on his dissent. See *Burrus v. Cook* (Mo.) 114 S. W. 1065.

The very rights asserted by plaintiff arise alone under the will of Patrick Henry Jones; i. e., no will, no rights in him. The Carson children were not heirs at law of Patrick; they took under the will. The widow took under the will, not otherwise. Plaintiff stands in their shoes; ergo, plaintiff takes under the will or not at all. He must take, therefore, cum onere, the bitter with the sweet in its provisions, and he cannot, by going into equity, hold any rights in the homestead free from the valid limitations and restrictions of that instrument. It follows him into a court of conscience like the skeleton in Holbein's Dance of Death, and confronts him at every step.

It follows that sections 4383 and 4650, supra, must be held to apply to the subject-matter of this litigation, and we so hold. Any other view would trample down the plain law.

8. It is hornbook doctrine that the intention of the testator, not from one word, but from all the words, not from one corner, but from the four corners of the will, is the touchstone of judicial interpretation of a will. That, also, is the statutory rule. Section 4650, supra. In getting at testator's intention and giving effect to his intentment, a court, called upon to interpret his will, puts itself as nearly as may be in his environment, stands in his shoes, and looks with his perspective through his eyes.

With which generalization, we come to the next question in logical order, viz.: What was the object and intention of testator as evidenced by his will? It is alleged in the petition, and argued by counsel for respondent at our bar, that the sole object of testator was to provide a home for his widow, Eliza; that his only purpose in postponing a sale of the homestead was to provide such home for her. The conclusion drawn is that as such object has been subserved, after the widow has parted with her home, equity will not concern itself to maintain the status quo, but will sell the land in advance of the period named in the will and divide the proceeds. *Hamlin v. Thomas*, 128 Pa. 20, 17 Atl. 506. But learned counsel, through inadvertence, argues unsoundly, we think, by assuming a premise not true. Patrick Henry's will does not say that his only object was to preserve a home for his widow. That may well have been one of his objects, but not the only one. He knew his widow, in the course of nature, would be likely to survive him a term of years. He owned a valuable homestead on the edge of an ambitious and growing town, long of slow or no growth, but on the verge of rapid expansion. Who shall say he did not anticipate the growth of that town and the rise in the value of suburban property presently, just as has happened? We find such an object commented upon in the case of *Loomis v. McClintock*, 10 Watts (Pa.) 274, and by Gibson, C. J., in *Styer v. Freas*, 15 Pa. 339. With that in view, he makes it contrary to his will to partition his homestead among those participating in his bounty until the happening of a certain event, to wit, Eliza's death. When that time arrives, his daughter, Cora, takes, or (if she be dead) her own daughter, Mary, takes, and if both be dead, then the Murray children take her per capita share. When that time arrived, if there were no Carson children alive and no one to inherit through them, there would have to be a different alignment of takers. Shall we say that this testator did not mean that this property should be held intact in anticipation of increasing value until the event of Eliza's death, when the definite takers would be settled and determined by the will? Or shall we say that equity will seize the situation as of the year 1905 and divide the proceeds among those then alive? If we say the latter, and if, when Eliza dies, the prop-

erty would then have passed to different takers, has the will been obeyed? Have we not flown in the face of the intent of the testator and made it impossible to perform the will? It seems to us plainly so.

It is argued that Cora holds the naked legal title in the homestead, subject to the life estate, under the residuary clause of the will in trust awaiting the execution of the power donated by the will; that the trust has become unprofitable, and equity should end it, as was done in *Donaldson v. Allen*, supra. Let us see about that. It seems to be profitable to Mrs. Millery and those interested with her. The land is rising on the market. The plaintiff, as life tenant, voluntarily assumed the burden of repairs and taxes. In this condition of things, it may be profitable to him to at once bring this situation to an end and to have commutation of the life estate in a large lump sum, which he may put in his pocket, and to have five-sixths of the remainder given to him as assignee of the Carson children; but this situation he brought on himself, he went into it with eyes wide open, in "a hazard of new fortune," and it creates no condition appealing persuasively to a chancellor. Clearly he is not entitled to a sale and division if the widow, Eliza, and the Carson children were not entitled to one, and, if we should hold that they were so entitled prior to the time appointed by the will, we would be making a new will for Patrick Henry Jones. He seems to have been quite capable of making his own, and we will give effect to it.

4. What we have said disposes of the case. Questions relating to equitable conversion and equitable reconversion seem to us afield. The right to elect to reconvert into real estate under certain conditions and thus avoid a sale under the power in a will treating real estate as converted into money, discussed in *Williams v. Lobban*, 206 Mo. 399, 104 S. W. 58, is not controlling in this case. In the *Williams Case* those who were to take under the will were definitely determined by its terms. Without awaiting the execution of the power of sale, all the beneficiaries but one sold. His interest passed by execution sale under the ruling in *Eneberg v. Carter*, 98 Mo. 647, 12 S. W. 522, 14 Am. St. Rep. 664. It was held, in effect, that though the estate by the terms of the will was subject to the doctrine of equitable conversion, yet that all the beneficiaries had elected to reconvert it into real estate by their several sales and deeds made; and that a grantee, holding under mesne conveyances, held the land freed from the power to sell donated to the executor by the will. It is manifest that the *Williams Case* is not this case.

As we read the *Mandlebaum Case*, 29 Mich. 78, 18 Am. Rep. 61, somewhat relied upon by plaintiff, that is not this case. That case was on all fours with the *Williams*

Case, and, in discussing the principles of law underlying the judgment rendered, *Christiancy, J.*, pointed out that the question did not involve a will limiting the property over to another. On page 89 of 29 Mich. (18 Am. Rep. 61), he said: "The estate devised is not a conditional one to be forfeited or to revert to the heirs of the testator, or to go over to others on a breach of the restrictions, not one which is to vest at some future day, or upon the happening of some future event, but an absolute vested remainder or estate in fee, and though not to come into actual enjoyment until the death of the widow, to whom a life estate is given, it is just as much vested and the devisees have just as much right to sell the interest or estate devised as if there had been no intervening estate for life. And the question of validity of the restriction is, in my view, precisely the same in all its legal aspects as if no life estate had been given to the widow, but the whole had been given in fee directly to these devisees, as an absolute estate in fee and in possession, with the same provisions restricting the power of sale."

The *Mandlebaum Case*, it seems to us, lends no countenance to the contention of plaintiff, because the will there is essentially different from the will here. The same may be said of the wills in judgment in the *Sikemeier Case*, 124 Mo. 367, 27 S. W. 551, and the *McQueen Case*, 131 Mo. 9, 31 S. W. 1043.

I am inclined to the individual opinion that one part of the beneficiaries under a will such as this have no right to elect to reconvert an estate, equitably converted into money, back into real estate, and have their election enforced in equity, but the point is not necessary to the case, and therefore is reserved.

Neither is it necessary to decide whether the defendant, Jones, by virtue of his discharge as executor in the probate court, has lost the power of making the sale, for if he has not lost that power, then he can make it when the time arrives. If he has lost it, then it may be that a court of equity, rather than see a trust fail for want of a trustee, will appoint one to execute the power. Or it may be that, under section 137, Rev. St. 1890, reading, that, "The sale and conveyance of real estate under a will shall be made by the acting executor or administrator with the will annexed, if no other person be appointed by the will for the purpose, or if such person fail or refuse to perform the trust," an administrator, *de bonis non*, cum testamento annexo, might be appointed to execute the power. (See authorities cited in counsels' briefs.) Those are interesting questions which naturally will arise when the right time comes, but a consideration of them at this time would not only be in the nature of obiter, but would throw no light on the turning point in the

case, which is the construction of the will and the testator's intention.

5. We do not think the facts justify an injunction restraining plaintiff and those holding under him from prosecuting further suits. The interpretation of the will was not without difficulty. Counsel, however learned, are allowed some latitude in hypotheses and theories in that behalf. The plaintiff and his predecessor were entitled to go into court on one hypothesis or another, so long as they acted in good faith, did not move willfully with the purpose of harassing and annoying defendants, and were willing to assume the burden of costs incident to an unsuccessful venture. It is not likely another suit in partition will be instituted during the widow's life.

The decree is reversed, and the bill is ordered dismissed. All concur, except WOODSON, J., not sitting.

MATHIESON v. ST. LOUIS & S. F. RY. CO.

(Supreme Court of Missouri, Division No. 1.
Feb. 25, 1909. Rehearing Denied
March 13, 1909.)

1. EVIDENCE (§ 85*)—JUDICIAL NOTICE—STATUTES OF OTHER STATES.

The courts of this state do not take judicial notice of the statute of another state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. § 85.*]

2. PLEADING (§ 376*)—ISSUES—ADMISSIONS BY REPLY.

Where the answer pleads the entire statute on which the action is founded, and the reply admits the truthfulness of such plea, the entire statute is before the court, though the petition contains only a portion thereof.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 376.*]

3. MASTER AND SERVANT (§ 256*)—INJURY TO SERVANT—ACTION—SUFFICIENCY OF PETITION—NOTICE OF INJURY.

A petition against a railroad company for injuries to an employé, under a statute making railroad companies liable for injuries to any employé through the negligence of its agents or employes if he gives "notice in writing of the injury so sustained," is insufficient if it fails to allege the giving of such notice.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 812; Dec. Dig. § 256.*]

4. APPEAL AND ERROR (§ 171*)—REVIEW—SCOPE AND THEORY OF CASE.

Where an action was tried as if based on a statute, plaintiff will not be allowed, on review, to base the action on the common law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069; Dec. Dig. 171.*]

5. COMMON LAW (§ 11*)—TERRITORY SUBJECT TO.

The territory which now composes the state of Kansas, having been acquired by the United States under a treaty with France, was never subject to the common law of England.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 9; Dec. Dig. § 11.*]

6. EVIDENCE (§ 80*)—PRESUMPTIONS—COMMON LAW.

The presumption that the common law is in force in another state applies only to those

states which were carved out of English territory.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80; Common Law, Cent. Dig. §§ 14-16.]

7. STATUTES (§ 281*)—PLEADING STATUTES.

To be available in an action in the state, a statute of another state adopting the common law must be pleaded.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 281.*]

8. PLEADING (§ 180*)—SUFFICIENCY OF PETITION—AIDER BY REPLY.

Plaintiff must recover, if at all, on the cause of action stated in the petition, and not on one stated in the reply.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 358; Dec. Dig. § 180.*]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by William A. Mathieson against the St. Louis & San Francisco Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

This cause was begun in the circuit court of Jackson county to recover damages for personal injuries alleged to have been sustained by plaintiff, on December 1, 1903, whilst he was employed as a member of a switching crew working in defendant's yards in Kansas City, Kan. A trial was had which resulted in a judgment for plaintiff for the sum of \$15,000, and defendant duly appealed the cause to this court. The petition, in substance, alleged the incorporation of the defendant; that on the 1st day of December, 1903, plaintiff was employed as a switchman in the defendant's yards in Kansas City, Wyandotte county, Kan., and was engaged on said day in switching freight cars into the packing plant of the Fowler Packing Company; that plaintiff was a member of a switching crew under the charge and control of an agent, servant, and vice principal of defendant named Merten, and that in the course of his employment plaintiff was upon a string of freight cars being switched into said plant, and Merten was alongside of said cars; that he (Merten) notified the plaintiff that he was about to uncouple the last two cars, and plaintiff was thereupon proceeding along the top of such string of freight cars, relying upon the notification of said Merten, and was passing from the top of the third car to the top of the fourth car when said Merten carelessly and negligently, and without warning to plaintiff, uncoupled the cars between said third and fourth cars, thereby causing said cars to separate, and causing said plaintiff to fall to the track below, striking upon the cross-ties, and wounding him as thereafter set out. The petition further alleged as follows: That at all times hereinafter mentioned it was and is provided by the laws of the state of Kansas, as follows: "Every railroad company organized or doing business in this state shall be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

liable for all damages to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés to any person sustaining such damage." "That said injuries to plaintiff were directly caused by the carelessness and negligence of the defendant, its agents, servants and employés, in this: That said foreman, Merten, carelessly, negligently, and unskillfully, and without warning to plaintiff, uncoupled said freight cars at a point where plaintiff was passing from one of said cars to the other, where he knew, or by the exercise of reasonable care might have known, that plaintiff was in a position of imminent peril upon the tops of said cars, and engaged in passing from the one to the other; that said Merten carelessly, negligently, and unskillfully, and without warning to plaintiff, uncoupled the third car from the fourth car, after having notified the plaintiff that he was about to cut off but two of said cars, thereby cutting off three of said cars, although he knew, or by the exercise of reasonable care might have known that plaintiff was in a position of peril, passing along the tops of said cars, and liable to be thrown thereby to the track below." The petition alleges that by reason of the foregoing negligent acts of the defendant, its agent, servant, vice principal, and foreman, Merten, the plaintiff was thrown from his position on top of said freight cars, and fell to the cross-ties, and thereby his feet, and the bones, muscles, flesh, cords, and sinews thereof, were bruised, crushed, sprained, and broken, and the arches of both feet were broken, so that the insteps were sunken and depressed, and that plaintiff has suffered, and will in the future continue to suffer, great pain and anguish of mind and body, and had lost all of his time and earnings, and will continue to lose them in the future; that such injuries were permanent, and that plaintiff's earning capacity had been entirely destroyed, all to his damage in the sum of \$15,000, for which judgment was prayed. The answer of the defendant contained a general denial, a plea of contributory negligence, and a plea of assumption of risk. It also contained the following allegations: "(4) For a fourth and further answer and defense to said amended petition defendant avers that plaintiff has stated in said petition that he was working for defendant in and about its yards and connections in Wyandotte county, Kan., and that at the time he was injured he was working in said Wyandotte county, Kan., and the accident of which plaintiff complains in his petition happened in said county and state of Kansas. Defendant further avers that the law of the state of Kansas set up in said amended petition was amended on March 4, 1903, by the Legislature of the state of Kansas, and as amended is as follows: 'Every railroad company organized or doing business in this state shall be liable for all damages done to any employé of said company in con-

sequence of any negligence of its agents, or by any mismanagement of its engineers, or other employés, to any person sustaining such damage; provided, that notice in writing of the injury so sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within ninety days after the occurrence of the accident.' Defendant further avers that plaintiff has failed to comply with said law of the state of Kansas, in that he has failed to give to defendant, within 90 days after the occurrence of said accident, any notice of the injury sustained by him, stating the time and place thereof, and that by reason thereof plaintiff cannot recover herein." The reply filed by the plaintiff denied the allegations of the defendant's answer, and further pleaded that the plaintiff had given notice to the defendant within 90 days after the occurrence of the accident.

W. F. Evans, I. P. Dana, and W. J. Orr, for appellant. Walsh & Morrison and Virgil Conkling, for respondent.

WOODSON, J. (after stating the facts as above). 1. Counsel for appellant insists that the petition filed herein does not state facts sufficient to constitute a cause of action. This action is based upon the statute of Kansas, set out in full in appellant's answer. By reading the petition it will be seen that all of that part of the statute beginning with the word "provided" and ending with the word "accident" was not pleaded in the petition. The law is too well settled to require the citation of authorities in support thereof that the courts of this state will not take judicial notice of legislative enactments of our sister states; and, were it not for the fact that the answer of appellant pleads the entire act, only a portion of it would be before us. But since the answer pleads the entire section, and the reply admits the truthfulness of that plea, we must hold that the entire act is properly before the court. That statute does not purport to give an absolute cause of action in favor of an employé of a railroad company who is injured through the negligence of its engineers or other employés, but only gives the injured employé that right provided he gives the company notice in writing of the injuries sustained, and of the time and place it occurred, within 90 days after the accident occurred. That being true, then it is clear respondent had no cause of action until he gave the statutory notice. In other words, it is apparent from reading the statute that the company was not liable for such damages merely because respondent was injured by other employés of the company, for the simple reason that he had no cause of action under the statute until the notice was properly given. The giving of that notice was one of the essential elements of respondent's case, and it should therefore have been alleged in the petition,

and established by the proof, before he would have been entitled to a recovery. Without that allegation the petition is fatally defective, and does not state facts sufficient to constitute a cause of action.

Where the right of the plaintiff to recover depends upon conditions stated in the same section of the statute which gives the right of action, then the petition must allege the performance of those conditions or requirements, otherwise it will state no cause of action. *McIntosh v. Railroad*, 103 Mo. 131, 15 S. W. 80. In the case above cited, Barclay, J., in discussing the question of pleading a cause of action given by a similar statute, used the following language: "It was expressly held in *Barker v. Railroad* (1886) 91 Mo. 86, 14 S. W. 280, that any person claiming statutory damages for the death of another, under section 2121, Rev. St. 1879, must, both by pleading and proofs, bring himself within its terms. Here the action was brought within the time (six months) during which the widow of deceased (had he left one) would have had the exclusive right to sue. Yet, the petition does not even show that he was unmarried when he died. The right of the parents to maintain the action depends in part on the facts that he left neither widow nor minor children surviving him, and that those facts should be alleged and proved, if denied." This court in the case of *Reno v. City of St. Joseph*, 169 Mo. 642, 70 S. W. 123, recognized the necessity of pleading the notice required by section 5724, Rev. St. 1899 (Ann. St. 1906, p. 2909), which only requires the notice to be given before an action can be maintained, and does not withhold the right of action itself until the notice is given, as in the case under the Kansas statute. If it is necessary to plead the statute in the former case, then a fortiori should it be pleaded in the matter. And the same view of the matter was taken by the Kansas City Court of Appeals in the case of *Burnette v. St. Joseph*, 112 Mo. App., loc. cit. 669, 87 S. W. 589. To the same effect is *Baird v. Railway Co.*, 146 Mo., loc. cit. 279, 48 S. W. 78. We are therefore of the opinion the petition does not state facts sufficient to constitute a cause of action.

2. Counsel for respondent seeks to avoid the result of the conclusions reached in paragraph 1 of this opinion by insisting that the petition states a good cause of action under the common law, and that he is entitled to recovery independent of the statute pleaded. In our opinion that contention is untenable; and it is apparent from reading the petition that the suit is bottomed upon the statute, and no attempt whatever was made to state a cause of action under the common law. The record also shows that the case was tried upon that theory; and he should not be permitted now to change fronts in this court. But, independent of that, the territory which now composes the state of Kansas was ac-

quired from France by the United States under a treaty dated April 30, 1803, and consequently was never subject to the common law of England. The presumption that the common law is in force in a sister state applies only to those states which are carved out of English territory.

The St. Louis Court of Appeals, in the case of *McManus v. Railroad Co.*, 118 Mo. App., loc. cit. 160, 161, 94 S. W. 743, stated the rule in the following language: "The laws of the state of Idaho, if it has any, in regard to blocking guard rails, were not offered in evidence. The United States acquired territory out of which the state of Idaho was carved from Spain by the treaty of February 22, 1819, promulgated February 22, 1821, between the United States and the King of Spain. Hence Idaho was never subject to the laws of England, and the presumption cannot be indulged that the common law is in force in that state; and, in the absence of proof of its laws, we must apply the laws of this state in determining whether or not it was proper to submit to the jury to find whether the defendant was or was not negligent in failing to block its guard rails. *Flato v. Mulhall*, 72 Mo. 522; *McDonald v. Life Ass'n*, 154 Mo. 618, 55 S. W. 999; *Hurley v. Railroad*, 57 Mo. App. 675; *Witascheck v. Glass*, 46 Mo. App., loc. cit. 215." Speaking to the same point, this court, in *Flato v. Mulhall*, 72 Mo. 525, said: "As the contract for the acceptance was made in Texas, and as the acceptance itself was to have been made in Illinois, and the remedy is sought in this state, it becomes material to inquire what law is to govern us in determining the rights of the parties. The validity and legal effect of the contract alleged must depend upon the law of the place where it was made. *Carnegie v. Morrison*, 2 Metc. (Mass.) 397; *Bissell v. Lewis*, 4 Mich. 459. The contract of acceptance was of course valid by the law of Illinois, where it was to be given; but, as the defendants refused to give any acceptance whatever, the law of Illinois is not material. This suit for a breach of a promise to accept, made in Texas, the nature and extent of the obligation assumed by the defendants in making such promise, assuming that it has been proved, should properly be determined by the law of that state. Under the previous decisions of this court, however, we cannot take judicial notice of the laws of Texas, and they were not offered in evidence. Counsel for the plaintiff ask us to presume, in the absence of evidence, that the common law is in force in Texas. This presumption can only be indulged with reference to those states which, prior to becoming members of the Union, were subject to the laws of England. Texas was a part of the Spanish possessions on this continent; and, if the common law ever prevailed there, or now prevails there, it must be by virtue of some statutory provision, of which we cannot take judicial notice. As no evidence

was introduced, and no presumption can be indulged as to the *lex loci contractus*, the law of the forum must govern." The Supreme Court of Arkansas announced the same rule as to the laws of Texas, in *Brown v. Wright*, 58 Ark. 26, 22 S. W. 1022, 21 L. R. A. 467: "It is insisted that the money became the property of the husband by the rule of the common law. We cannot presume that the law is in force there. *Thorn v. Weatherly*, 50 Ark. 237, 7 S. W. 38; *Garner v. Wright*, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715." And with reference to the laws of Indian Territory, in *Garner v. Wright*, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715, the Arkansas court said: "In similar cases the courts of this state will generally presume the common law to be in force in another state. *Cox v. Morrow*, 14 Ark. 603; *Thorn v. Weatherly*, 50 Ark. 243, 7 S. W. 33. But this presumption is indulged as to those states only that have taken the common law as a basis of their jurisprudence. Such a presumption would not be indulged as to the laws of the states of Louisiana and Texas, because we know that their jurisprudence is founded upon a different system. The same reason forbids such a presumption as to the laws of the Indian Territory, for we know that no system of law has been adopted there." The rule is clearly expressed in *De Sonora v. Bankers' Mutual Casualty Co. (Iowa)* 95 N. W. 232, thus: "We know that Mexico was a Spanish province for about 300 years, and then became, and still is, a republic. At no period of its history has it been under British sovereignty. Its institutions are Latin, and not Anglo-Saxon, and the common law is not presumed to be in force in any state or country where English institutions have not been established. *Savage v. O'Neil*, 44 N. Y. 298; *Davison v. Gibson*, 56 Fed. 443, 5 C. C. A. 543; *Norris v. Harris*, 15 Cal. 226; *Flato v. Mulhall*, 72 Mo. 522; *Brown v. Wright*, 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467; 13 Am. & Eng. Enc. of Law, 1065." From the foregoing observations it is seen that the common law never existed in the state of Kansas, without it has been adopted by statute; but, as there is no allegation in the petition or plea that such a statute exists in that state, we would be unauthorized to consider it, even though such statute does exist.

Counsel for respondent attempts to evade the effects of his failure to plead the entire section of the Kansas statute, and his compliance therewith, by alleging in his reply that he had given the notice required thereby within 90 days from the date of the injury. The law in this state is well settled to the effect that the plaintiff must recover, if at all, upon the cause of action stated in the petition, and not upon one stated in the reply. *Hill v. Rich Hill Coal Co.*, 119 Mo. 9,

24 S. W. 223; *Rhodes v. Holladay-Klotz Co.*, 105 Mo. App. 279, 79 S. W. 1145; *Milliken v. Commission Co.*, 202 Mo., loc. cit. 654, 100 S. W. 604. So, if we consider the petition from any view presented, it falls to state a cause of action.

We, therefore, reverse the judgment and remand the cause. All concur.

FULTON v. FREELAND et al.
(Supreme Court of Missouri, Division No. 1.
March 31, 1909. Rehearing Denied
April 18, 1909.)

1. WILLS (§ 164*)—UNDUE INFLUENCE—ADMISSIBILITY OF EVIDENCE.

Evidence of illicit relations between testator and his second wife before marriage is too remote to prove undue influence as to a will drawn about eight years thereafter.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 164.*]

2. WILLS (§ 38*)—MENTAL INCAPACITY OF TESTATOR—"INSANE DELUSION."

There is no such thing as an insane delusion founded on facts, and, if the idea entertained has for a basis anything substantial, it is not a delusion.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 73-81; Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3644-3646; vol. 8, p. 7689.]

3. WILLS (§ 55*)—MENTAL INCAPACITY OF TESTATOR—INSANE DELUSION—INSUFFICIENCY OF EVIDENCE.

Evidence held not to show an insane delusion on the part of a testator as to a conspiracy by his former divorced wife and her relations to do him bodily injury.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 55.*]

4. WILLS (§ 163*)—UNDUE INFLUENCE BY WIFE—PRESUMPTION.

The fact that testator's wife is the chief beneficiary raises no presumption of undue influence, though, if the testator was weak mentally and his wife transcended the limit of the rule, and attempted to foist on him a will of her own dictation, a different question would be presented.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 391; Dec. Dig. § 163.*]

5. WILLS (§ 166*)—UNDUE INFLUENCE BY WIFE—ILLICIT RELATIONS BEFORE MARRIAGE AS EVIDENCE.

Where evidence of illicit relations before marriage to show undue influence by a wife as to her husband's will is admitted, it must be followed by acts of undue influence after marriage.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 166.*]

6. WILLS (§ 163*)—UNDUE INFLUENCE—PRESUMPTION.

A will in favor of a mistress, or one with whom testator's relations have been meretricious, raises no presumption of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 395; Dec. Dig. § 163.*]

7. WILLS (§ 163*)—UNDUE INFLUENCE—BURDEN OF PROOF.

The burden is on contestant to show undue influence as to a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 389; Dec. Dig. § 163.*]

8. WILLS (§ 186*)—UNDUE INFLUENCE—INSUFFICIENCY OF EVIDENCE.

Evidence held not to show undue influence as to a will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 186.*]

Appeal from Circuit Court, Holt County; W. C. Ellison, Judge.

Action by James M. Fulton against Joseph L. Freeland and others. From a judgment for defendants, plaintiff appeals. Affirmed.

T. C. Dungan, C. F. Booher, and Geo. W. Wright, for appellant. J. W. Peery, for appellees.

GRAVES, J. Action by plaintiff, the son of William J. Fulton, deceased, contesting the will of deceased made in March, 1889. By said will it was provided: (1) Expenses of funeral to be paid out of personal property; (2) that executor sell so much of testator's property as may be required to pay debts and pay same; and (3) bequest of \$1 "and more" to the plaintiff.

The remaining four paragraphs or items of this will read:

"Item 4th. I hereby devise and bequeath to my beloved wife, Elzie, all the residue of my estate, both real and personal.

"Item 5th. In case my said wife shall die before, or with me, I herein devise the residue of my estate to my stepdaughter, Lizzie McPike, in estate tail to her and the heir or heirs of her body forever.

"Item 6th. In case my stepdaughter dies without issue I devise the said residue of my estate, one-half to Pauline Engleman of Parkville, Missouri, and one-half to Mary Scott of Pueblo, Colo.

"Item 7th. I hereby appoint Joseph L. Freeland to execute this, my last will and testament."

<Grounds of contest, as alleged, were:> (1) That said will was executed "by and through the fraud, deception, persuasion, and undue influence of the defendant Elzie Fulton and Joseph L. Freeland, Lizzie McPike, and J. P. Tucker, or one or all of them, and of other persons related to said Elzie Fulton or friendly to her, and conspiring and conniving with her to procure said instrument, whose names are to this plaintiff unknown, and for that reason cannot be here stated." (2) Testamentary incapacity, thus stated: "That long prior to the signing and publishing of said instrument the mind of said William J. Fulton has become diseased and subject to a morbid delusion and hallucination amounting to a permanent and fixed insanity incapable of being removed and eradicated from the mind of said testator, which said delusion was in substance that the plaintiff herein and said testator's divorced wife had entered into a conspiracy for the purpose of inflicting bod-

ily injuries upon said testator, and to wreck said testator financially; that said delusion was without reason and unfounded in any fact or substance whatever, but purely a delusion and insane conception of said testator induced, created and perpetuated fraudulently and wrongfully by the defendant Elzie Fulton and her friends until his death, February 9, 1902, for the purpose and with the intention of procuring from said testator the will sought in this proceeding to be vacated and annulled." <And (3) a general charge (in which is plead the alleged evidence) of a fraudulent scheme upon the part of Elzie Fulton, then Elzie McPike, a widow, beginning in 1876, when testator was married to another woman, by which the said Elzie by illicit relations with deceased sought to gain undue influence over him, separate him and his wife, and then marry him, and procure the will in question securing to her and her relations the property and estate of deceased, which alleged fraudulent scheme it is charged was carried out by the said Elzie and others.>

By answer the defendant admitted the execution and probate of the will, the death of testator February 9, 1902, the qualification of defendant Freeland as executor, and denied all other allegations. Further answering, they averred that William J. Fulton was a citizen of Platte county when said will was made and published, over the age of 21 years and of sound mind, and that the said will, a copy of which was attached to the answer, was the last will and testament of William J. Fulton, and prayed that the same might be so declared.

Reply, general denial of the new matter in the answer.

<As above stated, plaintiff is a son of deceased by a first wife. Defendant Elzie Fulton is the second wife and widow of deceased.> Lizzie McPike is the daughter of Elzie Fulton by her first husband, William McPike, and Pauline Engleman and Mary Scott are sisters of Elzie Fulton.

The history of this cause as depicted by the versatile pen of plaintiff's learned counsel lacks only stage settings for a modern play. More or less of it will be required for a proper understanding of the points in dispute, and especially on the point made that the trial court erred in excluding certain testimony offered. The suit was brought in Platte county, but on change of venue was tried in Holt county.

In 1852, William J. Fulton was married at Adrain, N. Y., to Mary J. Hadley, then a girl of 14 years and an orphan. The young wife had inherited 17 acres of land and some money from her father. The young couple remained there, on this place, until 1863, when they removed to Wyandotte, Kan. Prior to this removal the plaintiff in this case was born of this marriage. In

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1876, the Fultons removed to Parkville. Upon reaching the West, William J. Fulton began contracting with a railroad company to furnish ties, timber, and wood, and though he and his wife, Mary, suffered the hardships of tie camps, there was amassed considerable property. Troubles began shortly after the removal to Parkville. Two miles south of Parkville, and in the neighborhood wherein William J. Fulton had large interests and was working many men, lived the widow McPike on what is known as the "Roberts farm," the old homestead of Mr. Roberts, father of Mrs. McPike, and the home of Mrs. McPike before her marriage to William McPike. Fulton acquired an interest in this farm, and he and Mrs. McPike farmed it together. Mr. Fulton at that time was a business man of large affairs, and it is claimed by the plaintiff that Mrs. McPike at this time conceived the idea of separating Fulton and his wife, Mary, and ultimately marrying Fulton, and then procuring a will of the character of the one finally made, and to this end she used all the wiles of a crafty widow, even to the extent of maintaining illicit relations with Fulton. The evidence at the trial was largely by deposition, and a great mass of it pertained to alleged proof of the relations between Fulton and Mrs. McPike from 1876 up to their marriage in 1881. This proof came largely from former employes of Fulton, both colored and white, from employes of Mrs. McPike, and from parties who testified to neighborhood rumors. The testimony of this character was excluded by the court, and of this action error is assigned here.

Another contention of plaintiff is that, through the influence of Mrs. McPike, Fulton was led to believe that a conspiracy had been formed by and between his then wife, Mary, and her nephew, William Hadley, and others to kill Fulton and get his property. That Fulton believed there was such a conspiracy is amply shown by his acts and the testimony of his neighbors and friends, but as to Mrs. McPike's connection therewith the tendered evidence is not convincing. To the evidence bearing upon this alleged conspiracy we will divert later.

Following the thread of events, it appears that on September 3, 1880, William J. Fulton sued his wife, Mary J. Fulton, for divorce. In his petition he charged that they had not lived together as man and wife since the year 1870, although they both lived in the same house and he supported her. That he first suspected his wife of infidelity to him in 1868, and from that time until the filing of the petition she had been guilty of adultery with divers persons upon divers occasions, some of which persons and dates were named. That she used profane language toward plaintiff, and in the winter of 1879-80 attempted to kill him with a pistol. There was also the following charge: "That in the spring of

1880 she and William O. Hadley and divers other persons formed a conspiracy to murder the plaintiff and get possession of his property, and would have succeeded in all probability, but for the accidental and timely discovery of their hellish plot."

To this petition, Mary J. filed an answer and cross-bill. In the cross-bill she complains of inhuman treatment at the hands of defendant from almost the date of their marriage. That he compelled her, when 14½ years of age, to do all the housework for himself, his father, two sisters, brother, and brother-in-law, and to cut all necessary firewood. That he had, from that time on throughout their married life, been guilty of every kind of tyrannical action, so as to make her life unbearable and unendurable. That she was sick and suffering, and he neglected and abandoned her, and gave her no care, devotion, or affection. That whilst living in the same house with him in Wyandotte, Kan., and Parkville, Mo., she was wholly neglected and cruelly treated by plaintiff. That during such time he refused, neglected, and failed to pay any personal attention to plaintiff, and failed and refused to procure necessary nurses, physicians, and medicine for her. That "he has uniformly during all these years been cold, unaffectionate, bitter, distrustful, suspicious, ungenerous, revengeful, and brutal in his treatment of this defendant."

The cross-bill then proceeds to charge that he maliciously caused her to be arrested and imprisoned upon the charge of a conspiracy to murder him, and that the same was done to illegally assist him in this, his proceeding for divorce. The cross-bill also charges William J. Fulton with having been guilty of adultery with a number of women, naming them, and among which were Elzie McPike and Josie Fulton, the wife of his son, and M. Augusta Hadley, the wife of Mary J.'s brother.

March 31, 1881, the following decree was entered in that case: "This day the above-entitled cause coming on for final hearing upon the petition of plaintiff, the answer and cross-bill of defendant, and plaintiff's reply thereto, and the court, having heard all the evidence and arguments of counsel on both sides, finds that the plaintiff has by the proof sustained the charges of adultery specified in his petition against the defendant, and that the plaintiff is the innocent and injured party; the court, therefore, orders, adjudges and decrees that he be and is thereby divorced from the defendant; and, it not being necessary to pass upon the charge of conspiracy charged in plaintiff's petition, no finding is made upon that issue. The court further finds that none of the charges contained in defendant's cross-bill are sustained by the proof, and said cross-bill is dismissed. It is adjudged and ordered that the plaintiff pay the costs of this suit."

It appears that prior to August 20, 1880,

Mary J. Fulton had been East with her relatives and friends, and when she came back was arrested with her nephew, William Hadley, upon the charge of conspiracy to murder William J. Fulton. Fulton made affidavit to such charge before David Mitchell, J. P., August 20, 1880. State warrant was issued on same day, and William O. Hadley was apprehended on August 30th, and Mary J. Fulton on September 1st, following the issuance of the warrant.

All the foregoing records were introduced by the plaintiff in the present suit. The defendants then introduced record evidence showing that a change of venue was taken from Justice David Mitchell, and the cause transferred to Justice Adam Woods, where, upon a trial had, the defendants were found guilty and punished by a fine of \$200 and six months in the county jail. From this an appeal appears to have been taken, and the plaintiff in the case at bar introduced a record entry of the circuit court of Platte county of date April 1, 1881, showing that there was a nolle pros. entered by the prosecuting attorney. On November 2, 1881, William J. Fulton was married to Elzie McPike, and lived with her thenceforward to the day of his death.

Returning to the question of conspiracy, the plaintiff upon the first trial of this case introduced as a witness John Fulton, a brother of William J. Fulton. At the trial from which this appeal arises John Fulton was dead, but the stenographer's notes of his previous evidence was read to the court and jury in this case. In substance, this testimony is that William J. wrote to him in the East about his troubles and the fears he entertained as to foul play upon the part of his wife, Mary J., and her relatives, the Hadleys, and asked him to investigate what was being done. This witness made an examination, and in his testimony in chief said that there was nothing in the conspiracy. He admitted that he had written to William J. several letters, and was at a little station waiting to go home when a train from the West came in, and, to his surprise, William J. got off. That he stayed with William J. several days and nights, and tried to explain to him that there was nothing in his suspicions. He admitted that he was not on friendly terms with his brother after 1882. He came out and worked for his brother from 1880 to 1882. Being pressed on cross-examination, he admitted sending to his brother, prior to the unexpected visit of William J. in the East, the following letter, with which was inclosed a letter from C. B. Strong:

"Osterhout, August 16th, 1880. My Dear Brother: Inclosed find a letter from my man at Tidaout. I received a letter from M. R. M. to-day. He tells me that Mary left Hornellsville the 12th, one day later than she expected. So that you will see that Will H. must have left the 11th. They were probably both to leave together and I presume that

they are both in Kansas City now. Morg. tells me in a letter received from him, that Polly is writing Mary's history in full since she has been in Adrain, to send to you? As soon as I hear from Strong again I will let you know. The lady he speaks of is Mary. I expected she would stop there, as I wrote him to that effect. All I can say is, 'don't be caught asleep, not get fainthearted.' Your ever true brother, John Fulton."

"Tidaout, August 13th, 1880. Mr. J. Fulton—Dear Sir: Your letter of the 11th inst. to hand. The lady in question had not got here. He has given up going with the boat and his brother have taken the machinery out of it. Mr. Hadley left here two days ago. Which way I could not say, and I can't find anybody that knows. He may be going out of town for a few days, if so, I will let you know when he returns. But I think he has gone for good, as he has been making great calculations on going West with that boat and that failed him, so he had nothing to stay here for. Yours truly, C. B. Strong."

Being further pressed, after having seen the letter, he admitted that upon receiving his brother's letter of date July 5th, he had written to Strong to keep a watch on Mrs. Mary J. Fulton and the Hadleys, as he lived in their neighborhood. He admitted that M. R. M. mentioned in his letter was M. R. Miller, a brother-in-law, of his; that Will H. was William Hadley, who was afterwards tried and convicted at Barry in Platte county for a conspiracy to murder William J. Fulton; that the Mary referred to was Fulton's wife, and that the Polly referred to was Polly Hadley, wife of Henry Hadley, a brother of Mary J. Fulton. John Fulton came out West and advised with William J., and later, within two weeks, at the request of William J., went back to his home in the East, sold out, and came out to live in Platte county. He was also to further investigate upon his return East. He said that in the East upon this visit William J. was nervous and fearful of trouble from his wife and the Hadleys, and continued so to be until they severed friendly relations in 1882. They seem to have fallen out because William J. would not indicate what John was to get for his work, as we gather it from the evidence, and we further gather that the witness was hostile to the second wife of William J., or at least had no use for her.

In the admitted evidence the foregoing is all there is to explain the idea that William J. entertained about there being a boat constructed in the East to come West for the purpose of carrying out a conspiracy. What was contained in the other letters from John is only apparent by inference.

In the excluded deposition of Mrs. Susanah Spencer is found the fact that the Mrs. Hadley mentioned in the letters, supra, wrote a letter to William J. Fulton, which he showed to the witness, and in this the alleged details of the plot were given. The

witness says that William J. was nervous and pale when he showed her the letter. It also appears that this Mrs. Hadley came West and was here at the divorce trial. This evidence was offered by plaintiff and excluded as aforesaid.

There is some evidence as to Fulton's mental condition in 1880 about the time of this conspiracy matter. A fair sample of this evidence is that of the witness Frederick Kahn, who testified that Mr. Fulton thought there was a conspiracy to kill him. Going to the point in question, the language of the witness is: "Q. From your own knowledge and acquaintance with Mr. Fulton and your talks with him about this conspiracy, and the circumstances surrounding that entire transaction, I will ask you whether you considered Mr. Fulton's mind exactly right on that subject? A. Well, I really don't know; if I were to judge myself, I would say that he was not right on that subject—he had his mind concentrated on that one point. * * * Fulton, I thought, was a very successful business man. I knew him in 1889; he was a strong-minded, intelligent man at that time. Have had talks and business dealings with him before and after 1889. My opinion is formed from these transactions. Q. Now, I understood you, Mr. Kahn, that Mr. Fulton was just as sane on this conspiracy question as you are on any subject on which you firmly fix up your mind; is that correct? A. Well, I couldn't say as to that whether his mind was all right on that or not. Q. You don't say that it wasn't, do you? A. Well, I don't know that I can. Q. And you testified, I believe, that a great many people in this community also believed like Mr. Fulton—that a conspiracy to kill him did exist? A. Yes, he believed it, and the people believed it. Q. And a man by the name of Hadley—who was connected with this conspiracy—was seen loitering mysteriously around Parkville? A. There was a man here by the name of Hadley around Parkville, a good deal; they never called him Captain Arlington. Q. If Jim's name was connected in any way with that conspiracy, you never heard of it? A. I don't remember of it being. Q. If Jim was connected with it, you don't hear it from Mr. Fulton or anybody else? A. No."

Of this class of testimony, this is as strong as any appearing in the record for the plaintiff. That is to say, it goes as far as any to show a mental trouble in 1880 or 1881.

Plaintiff's evidence further tended to prove that his father was friendly towards him after his second marriage, although the wife was not; that they met at different places and talked; that his father helped him some financially; that the second wife said Jim could not have anything, if she could help it; that on several occasions she objected to his father talking to plaintiff; that Elzie Fulton was a high-strung woman and dispos-

ed to have her own way, and in some instances had gotten the husband to change his purpose, but the great bulk of plaintiff's testimony shows that, whilst the wife ran the house, Mr. Fulton ran his business affairs; that the home relations were not pleasant after the second marriage; that Mr. Fulton was a kindly, forgiving man, and would yield a point rather than have trouble; that Lizzie McPike often vexed him.

The printed abstract contains 370 pages of the evidence, much of which has been condensed, and in places it appears that some portions of a witness' testimony have been left out entirely.

Going to the date of the execution of the will in 1889, all the witnesses both for plaintiff and defendant say that deceased was a man of large business affairs; that he owned and managed large farms, sawmills, banks, and for three terms was mayor of Parkville. They all practically agree that he was a man of kindly disposition, and would yield a point rather than have trouble with an employé or others. They practically all agree that he was in sound health both physically and mentally in 1889. There is some evidence that even in after years he spoke of this conspiracy to kill him, and clung to the belief that it was true.

Besides showing on cross-examination of the plaintiff's witnesses (as in the instance of Kahn), the defendant, by a mass of testimony coming from citizens of high standing and many of them of state-wide reputation, showed the sound mental condition of deceased in 1889, and for years before and thereafter. So far as the record shows, the beneficiaries did not know of the will for some time after its execution.

Further, for the defendant, it is shown that Fulton at times mentioned his will to others, and expressed satisfaction as to its terms. It appears that he at first thought of making Park College a beneficiary in the event of his wife's death and his stepdaughter's death, and so informed the scrivener, who penciled a will to that effect; but several months later he requested Mr. McRuer, the scrivener, to call at his house and complete his will, and then told him that Mrs. Engleman had been as a sister to him, and told him to make her and Mrs. Scott beneficiaries in the event of the death of the wife and stepdaughter. In each draft of the will the portion to plaintiff was the same. To the scrivener he said that James, the plaintiff had been unfaithful to him, and in a way the record so speaks. From one or more witnesses it appears that at the time of the divorce proceedings James had threatened that they would pursue him until they broke him up. From much in the record the conduct of James was humiliating to his father. He was unable to get him to attend school. James persisted in acting as a kind of fakir at picnics and public gather-

ings. He espoused the cause of his mother at the divorce proceeding (a commendable act, generally speaking), but one which might afford the father ample reason to make other disposition of his property. He shot a negro at Parkville, and occasioned the old gentleman much anxiety and expense. After the second marriage of his father, he and his mother lingered around the house after dark, much to the discomfort of the father. A subsequent lawsuit by the first wife followed over some property, and James again espoused her cause. Whether true or not, the father believed that James at one time in Kansas City, about the date of this lawsuit, attempted to shoot him. Several years later, Mr. Fulton's bank at Parkville was robbed, and the evidence of the cashier and others is that Mr. Fulton thought that James was a party to that robbery. He had written his father letters which were defamatory of the second wife.

From the evidence, no one was present when Mr. Fulton dictated the terms of his will, except the scrivener, McRuer. After it was written, he took it uptown the next morning or shortly thereafter, and, meeting J. P. Tucker and L. A. Lathy on the sidewalk in front of Mr. Tucker's printing office, asked them to go upstairs to Tucker's office, and when there he signed the will, and they attested it as witnesses thereto. No one was present except the three, unless some workman in the rear end of the newspaper office. In general outline, such is the case. At the close of all the evidence the court directed a verdict for defendants establishing the will. Such further reference to the evidence as may be required will be noted in the disposition of the points made.

1. An orderly method of disposing of the points raised by plaintiff on this appeal is to take the question of the exclusion of certain testimony first, and this we will do. It is urged that the court erred in excluding that great mass of testimony tending to show illicit relations between deceased and Mrs. McPike from 1876 up to the date of their marriage. Was there error here? We think not. The divorce of the deceased from the first wife was in April, 1881, the marriage to the second wife in October, 1881, and the will was drawn in March, 1889. These occurrences are too remote. In *Underhill on Wills*, vol. 1, p. 213, it is said: "Evidence of illicit relations existing between the parties before their intermarriage, particularly if either of the parties were married at the time, is always relevant, though never controlling or conclusive of undue influence. But evidence of the illicit relations of the parties before marriage must not be too remote, or it will be rejected." To a like effect is *Gardner on Wills*, p. 203, where it is said: "Evidence is frequently inadmissible by reason of the remoteness, such as the relations between testator and his wife eight or nine years before the will was made, or

an estrangement between the testator and his wife, caused by the proponent, sixteen years prior to the making of the will, or a camping trip made by the testator and proponent nine years previous to the execution of the will, during which testator introduced proponent as his wife, though he had a wife then living."

The same question has been up in this state in the case of *Ketchum v. Stearns*, 8 Mo. App., loc. cit. 69. In that case, which in facts is very much like this case, it is said: "The plaintiffs sought to raise a presumption of undue influence affecting the execution of the will by proofs of the relations existing between the testator and his second wife before their marriage, which was about 11 years before the making of the will; by testimony showing the dependent condition of the disinherited children; by showing that the testator had had difficulties with his first wife, and had separated from her, and that some of the disinherited children had taken sides with their father in those controversies; by showing that the relations between the testator and his disinherited children were friendly and affectionate about the time of the making of the will; by showing that some of the first wife's children had assisted the testator in accumulating property; and by proving some conversation of the testator, in the same year in which the will was made, concerning his intended disposition of his property. There was also an offer to prove that one of the testator's daughters by his first wife had been obliged to leave her father's house, by reason of his second wife's request or influence to that effect. All the offers of testimony upon these matters were, upon defendant's objections, refused by the court, and these refusals are assigned for error. We can discover no ground of admissibility for any of this proposed testimony. The plaintiffs have undertaken to prove that the paper purporting to be the last will and testament of their ancestor was the product of an undue influence exercised upon him by Sarah M. Ketchum. 'Undue influence is that which compels a testator to do that which is against his will, through fear, through the desire of peace, or some coercive power which he is unable to resist, and but for the exercise of which the will would not have been made as it was.' *Pierce v. Pierce*, 3 Cent. Law J. 226. The testator was married to his second wife in 1855. His will was executed in 1866, and he died in 1877. Here is a period of more than 20 years, at some time during which these incidents of remote bearing, or none at all, are supposed to have indicated that the testator, in the hour when his will was written and signed, was acting under the coercive power above described, and that this coercive power was in fact held over him by Sarah M. Ketchum. Cause and effect are here far too widely separated for the purpose of fair investigation. All or any

of the facts tendered might or might not co-exist with a total absence of any such undue influence. They prove, or tend to prove, upon the question at issue, absolutely nothing. Their only effect, if introduced in evidence, might be, in the hands of ingenious counsel, to play upon the passions or prejudices of a jury, and give them an apparent excuse for thwarting the unkind discrimination of a father against some of his children."

The Ketchum Case, *supra*, came to this court, and the conclusion reached by the St. Louis Court of Appeals was approved. 76 Mo. 396.

In *Pierce v. Pierce*, 38 Mich., loc. cit. 419, Judge Campbell says: "We think there is very little testimony in the record on this subject which should have been admitted at all. The domestic scandals of many years ago could have no legitimate tendency to prove any modern state of things, and could only serve to burden the case with irrelevant and discreditable details that might and evidently did prejudice the jury, but which had no tendency whatever to show influence in 1871. The law does not confine the power of making wills to persons of blameless character, nor does it disqualify all others from being legatees. And whatever may have been the relations of the testator and his second wife 18 or 19 years before his death, and whatever may have been the circumstances of their marriage, it cannot be permissible to draw inferences from them concerning a condition of things many years thereafter, which, if existing at all, could be proved without difficulty as an existing fact, and not a possible contingency."

In a California case, *In re Flint*, 100 Cal., loc. cit. 398, 84 Pac. 865, wherein the will was executed nine years after the meretricious acts, the court said: "Conceding indiscretions to have been committed by these parties at this time, such evidence wholly failed to show any undue influence at a time many years after, for in the interim the parties were married, and she had been a lawful wife for years. The foregoing views are fully supported in *Webber v. Sullivan*, 58 Iowa, 260, 12 N. W. 319; *Batchelder v. Batchelder*, 139 Mass. 1, 29 N. E. 61; *Pierce v. Pierce*, 38 Mich. 418."

To a like effect is the opinion of the Supreme Court of Colorado in case of *In re Shell's Estate*, 28 Colo., loc. cit. 170, 63 Pac. 414, 53 L. R. A. 387, 89 Am. St. Rep. 181. In that case the illicit relations were in 1874 and 1875, the second marriage in 1880, and the will made in 1891. The court said: "The attempt was made to show that, while testator was living with his first wife, the proponent entered the family circle, and as a result of her machinations an estrangement took place between the husband and the first wife, which afterwards led to the divorce, and later to the marriage of proponent and testator. As near as we can ascertain from the meager abstract, the time to which this

occurrence relates was about the year 1874 or 1875, and it would seem that the second marriage took place in 1880 or perhaps later. While it is unwise to lay down any hard and fast rule respecting the time to which this class of testimony must relate, we are of opinion that, under the facts of this case, these circumstances were entirely too remote to be brought within the category of evidence tending to establish undue influence."

And so, too, in *Batchelder v. Batchelder*, 139 Mass., loc. cit. 2, 29 N. E. 62, that court thus states the rule: "The testimony offered to show what the relations between the testator and his wife were eight or nine years before the will was made relates to a period so remote that the court could properly exclude it."

We are of opinion that this evidence was too remote to be of probative force in this cause. Another question pertaining to this class of testimony will be discussed under the question of undue influence.

2. We will take the question of mental incapacity next, although the statement of facts leaves but little room for discussion. The only thing which is urged under the proof is that the testator in 1880, nine years prior to the execution of the will, had an insane delusion that he was to be injured by his first wife and her relatives, and, further, that he entertained a delusion as to the attitude of the plaintiff toward him. No pretense is made that testator was not of sound and disposing mind at the execution of the will in question, save and except these alleged delusions. Testator was in the prime of life and in active business pursuits. His business interests were varied, and his management thereof successful. His business judgment was good, as practically all the witnesses testify. He had vigor of will power, although mild in disposition and disposed to get along smoothly with his fellow man. In age he was about 50 years, and in good health.

Now, as to these alleged delusions. There is no such thing as a delusion founded upon facts. It is a mental conception in the absence of facts. If the idea entertained has for a basis anything substantial, it is not a delusion. There may be a misjudgment of facts, or there may be an accentuated opinion founded upon insufficient facts, but not a delusion rising to the dignity of a mental aberration. As to the conspiracy of his former wife and her relatives and friends forming a plot in the East to do him bodily injury, it cannot be said that this was a delusion in face of the facts. His brother had written him sufficient facts to remove his views from the realm of delusions. In addition, his brother had written him that Mrs. Bradley was writing the history of his wife at Adrain, N. Y., which she would mail him. He did get such letter, and grew nervous and turned pallid as he handed it to the servant to read. He had them arrested, and

upon trial before a jury they were convicted. Upon appeal being taken, it is true the case was dismissed by the prosecuting officer, but the officer testified in this case, and says that it was dismissed without the consent of deceased, and that deceased was angry when he found that the case had been dismissed. The prosecuting attorney, explaining his action, said that there were 150 witnesses in the case from Parkville, most of whom were favorable to the views entertained by testator, but that he concluded that inasmuch as Hadley, one of the defendants, had already been confined in jail for six months, he had been sufficiently punished, and that it was of doubtful propriety to try to convict the woman, he of his own motion dismissed the case. So that there was sufficient in substance to eliminate the question of a delusion. In fact, plaintiff's witness Kahn said that not only did deceased believe the matter to be true, but the people generally in Parkville so believed, so that, if testator was suffering from a delusion, many of the citizens of Parkville were likewise suffering. Nor were the views he entertained as to the hostile attitude of the son wholly imaginary, as the statement of facts shows.

The rule as to what constitutes an insane delusion is thus expressed in 1 Underhill on Wills, § 94, p. 126: "Thus the fact that the testator believed that his relatives had ill-treated him, or that they are inimical to him and have conspired to defraud him, and for that reason leaves his property to strangers, does not constitute an insane delusion, unless it appears that his belief was wholly without any basis whatever, and that the testator obstinately persisted in it against all argument which may have been employed to dissuade him. If there are any facts, however little evidential force they may possess, upon which the testator may in reason have based his belief, it will not be an insane delusion, though on a consideration of the facts themselves his belief may seem illogical and foundationless to the court; for a will, it is obvious, is not to be overturned merely because the testator has not reasoned correctly."

See, also, *Stull v. Stull*, 1 Neb. (Unof.) 395, 96 N. W., loc. cit. 202; *Bauchens et al. v. Davis et al.*, 229 Ill., loc. cit. 561, 82 N. E. 365; *Scott v. Scott*, 212 Ill. 597, 72 N. E. 708.

In the *Stull Case*, supra, the court says: "No belief that has any evidence for its basis is in law an insane delusion."

In *Sayre v. Trustee of Princeton University*, 192 Mo., loc. cit. 126, 90 S. W. 787, this court quotes with approval the above language from the *Stull Case*.

In the case of *Scott v. Scott*, supra, it is said: "An insane delusion is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the afflicted individual, and which

refuses to yield either to evidence or reason."

This language was quoted and approved in the later case of *Bauchens v. Davis*, 229 Ill., loc. cit. 561, 82 N. E. 365, which case has some features similar to the case at bar. In the *Bauchens Case* the children had sided with their mother in a divorce suit, after which the father entertained the idea that they were against him, and willed practically all his property to a stranger. The will was upheld, and his ideas as to his children were held not insane delusions because founded upon facts.

Under the facts in this case there was no sufficient evidence to establish an insane delusion, and with this eliminated there is absolutely nothing upon which to submit the issue of mental incapacity to the jury. The peremptory instruction, in so far as this branch of the case was concerned, was properly given.

3. (a) Going, then, to the question of undue influence, how stands the case? No attempt is made to show undue influence upon the part of any of the beneficiaries, save and except the wife. The fact that the wife is the chief beneficiary in the husband's will raises no presumption of undue influence. The law is concisely stated by Mr. Underhill thus: "The fact that a man bequeaths his estate to his wife, excluding his children, his father, or other relations, is absolutely immaterial upon the question of undue influence. The silent influence of affection and respect, augmented by the tender and kindly attentions of a faithful spouse, cannot be regarded as in any sense undue. Nor will the fact that the wife by solicitation, or even by urgent importunity, procures for herself all her husband's property, or a larger share than he devises to others, raise a presumption of law that the husband's will was procured by undue influence exerted by her, or that his mind did not act freely in preparing it. * * * It will not be presumed, because a wife has ample opportunity to exert an influence which may be undue, that she has in fact done so. Nor will any presumption of undue influence arise from the fact that the wife advised her husband in his business affairs and guided him through many difficulties, and at one time advised or requested him to make a will in her favor." Our court has long followed this rule. *Rankin v. Rankin*, 61 Mo. 295; *McFadin v. Catron*, 188 Mo., loc. cit. 219, 88 S. W. 932, 39 S. W. 771; *Myers v. Hanger*, 98 Mo., loc. cit. 439, 11 S. W. 974; *Jackson v. Hardin*, 83 Mo., loc. cit. 185; *Mays v. Mays*, 114 Mo., loc. cit. 540, 21 S. W. 921. Of course, if the husband was of weak mental capacity and the wife transcended the limit of the rule and attempted to foist upon a weak and diseased mind a will of her own dictation, then a different question would be presented. But such is not this case. There is some

feeling shown to have existed between the wife and the plaintiff herein, but in the evidence there is foundation for it. It is not shown that she ever mentioned the making of a will to the husband, but, on the contrary, it is shown that she did not know of it for some time afterwards. Under all the evidence the will was dictated by the testator. The wife was not present when it was executed. For years the husband kept this will, with ample opportunity and mental capacity to change it, but did not. On the other hand, he talked of it and was satisfied with its terms. The attempt to show undue influence in the procurement of this will fell far short of the quantum of evidence required of one who has this burden in a contest of a will.

(b) Referring again to the excluded evidence, and conceding its admissibility, still there would be no case for the plaintiff. The evidence is all in the record by way of depositions, and, if we held it relevant and proper, we could consider it as admitted and pass upon the case upon its merits without retrial. The only purpose of this evidence is to show undue influence, and wherever such evidence has been admitted the courts have always held that it must be followed by acts of undue influence after the marriage. Such was not shown here. Counsel for plaintiff overlooks the definition of undue influence as that term is applied to a wife.

The weight of authority seems to be to the effect that even where a person of sound and disposing mind makes a will in favor of a mistress, or to one with whom his relations have been meretricious, yet there is no presumption of undue influence. In the notes to the case of *In re Hess' Will*, 31 Am. St. Rep., loc. cit. 677, the learned annotator, after reviewing the cases, says: "As long as the absolute power of testamentary disposition is conceded, and the owner of property is allowed to dispose of it to whomsoever he pleases, and for such reasons as to him shall seem adequate, his right to make a bequest to one with whom his relations have been meretricious must be admitted, even though it be further conceded that the bequest was made because of these relations. Nor can the existence of those relations create a presumption of undue influence, and impose upon the beneficiary the burden of disproving the exercise of such influence."

In the very recent case of *Weston v. Hanson*—a case where, after a divorce from his wife, in the trial of which the children took the part of the mother, the testator made a will to his mistress—212 Mo., loc. cit. 273, 111 S. W. 51, this court, after reviewing the cases, said: "These cases are all answered by the evidence in the case at bar, which does not show that the defendant was present at the time of the execution of the will. Nor does it show that she ever knew that it was about to be executed, or that she had any

conversation with the testator in regard to it before its execution; but it does show that the testator was a man of intelligence, a shrewd business man who had occupied prominent positions, and that he was a man of fine physique and of strong will power; that he went alone to his attorney and employed him to prepare his will, gave him full and explicit directions as to how he wished to dispose of his property, also the names and places of residence of each of his children, and was at that time in possession of all his mental faculties; and it is only in the absence of some one or more of these conditions that the authorities which we have referred to, except *Dean v. Negley*, 41 Pa. 312, 80 Am. Dec. 620, and *McClure v. McClure*, 86 Tenn. 173, 6 S. W. 44, have held that a presumption of undue influence arises from meretricious relations existing between the donor and donee. *Dean's Case* has been overruled, or its holding modified, by subsequent cases in the same court, and this court and the St. Louis Court of Appeals declined to follow it. *Sunderland v. Hood*, 13 Mo. App. 232. Besides, such an inference would not be drawn from the evidence relating to the relations which existed between the testator and the devisee in the case at bar, in the absence of proof that Mary Hanson 'exercised her influence in the procurement of the will.' *Arnault v. Arnault*, 52 N. J. Eq. 801, 31 Atl. 606; *Dickie v. Carter*, 42 Ill. 376. The presumption is in favor of the theory that the will expresses the intention and purpose of the testator. 'Without proof that a mistress influenced a testator directly in procuring a will in her favor, it cannot be inferred from their relations that she secured an influence over him which she would naturally and improperly exert to advance her interest.' *Middleton's Case*, 68 N. J. Eq. 584, 59 Atl. 454; *Monroe v. Barclay*, 17 Ohio St. 317, 93 Am. Dec. 620; *Matter of Mondorf*, 110 N. Y. 456, 18 N. E. 256. The law as announced in *Middleton's Case*, supra, is, as we understand it, the law of this state as declared in *Sunderland v. Hood*, 13 Mo. App. 232, and *Sunderland v. Hood*, 84 Mo. 293, and to which we adhere."

In the case at bar the testator was fully as capable of making a will as was the testator in the *Weston Case*, supra. There is also the absence of any direct influence in the procurement of this will as was in the *Weston Case*. So that, even if all this mass of testimony covering the period of from 1878 to 1881 had been admitted, without something more it would have been insufficient to authorize the submission of the case to a jury. The court should never permit a case to go to a jury if such court is satisfied that under all the evidence a verdict for the plaintiff should not be permitted to stand. We are cited by counsel to the recent case of *Mowry v. Norman*, 204 Mo. 173, 103 S. W. 15, on the question that this cause should have been submitted to the jury. Counsel

misjudge that case in undertaking to apply it here. In that case facts were in evidence which showed a fiduciary relation between testator and the chief beneficiary. Physical infirmities were shown, and we held that proof of the fiduciary relation raised a presumption of undue influence, and it was for the jury to say whether this presumption had been overcome by the evidence of defendants. In the case at bar there is no presumption of undue influence, but on the other hand the burden was on plaintiff to show it. Failing to carry that burden, his case must fail.

Full research of this voluminous record and of the questions presented leads us to the conclusion that the trial court committed no error in directing the verdict for defendants. The judgment is affirmed. All concur, except WOODSON, J., not sitting.

JOYCE v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 1.
March 31, 1909. Rehearing Denied
April 13, 1909.)

1. JURY (§ 92*) — COMPETENCY OF JURORS — DISCRETION OF COURT—BUSINESS TRANSACTIONS WITH PARTY.

In an action against a street car company, one is not incompetent to sit as a juror because he is the agent of a railroad company, and as such agent solicits business from street railroads, and defendant is one of the best patrons of his road, and he was desirous of keeping the good will of defendant, and his rejection on that ground on a challenge for cause is an abuse of judicial discretion.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 420-422; Dec. Dig. § 92.*]

2. CARRIERS (§ 317*)—INJURY TO PASSENGER—EVIDENCE—NEGLIGENT CONSTRUCTION AND MAINTENANCE OF RAILING.

In an action against a carrier for injuries received by a passenger who was caught between the car and a railing parallel to the track extending over a viaduct, evidence is not admissible to show how similar viaducts are protected by railings in other cities, as the question in issue was whether the construction and maintenance of this particular railing was negligence, which was a question to be decided from evidence showing its construction.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1303; Dec. Dig. § 317.*]

3. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

In an action against a street car company for injuries to plaintiff while attempting to board defendant's car by being caught between the car and a railing parallel with the track across a viaduct, the court instructed that if plaintiff attempted to get upon defendant's car, and that he had a transfer in his possession entitling him to be carried as a passenger on that car, and that it was his intention to tender such transfer to defendant in payment of his fare, and that the car, when plaintiff attempted to board the same, was standing at the usual place to receive passengers, the plaintiff was a passenger of defendant. *Held*, that, while it was unnecessary to have instructed with reference to the transfer, as a passenger intending

to pay cash has the same right as one with a transfer, yet the error was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

4. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—ACTIONS—INSTRUCTIONS.

In an action against a street car company for injuries received by a passenger who was caught between the car and a railing extending parallel with the track over a viaduct, the court instructed that, if the jury found that plaintiff was a passenger, defendant was bound to exercise the highest reasonable practicable degree of care of very prudent men engaged in the street railway business to carry and receive plaintiff in safety, and any failure on its part was negligence, and that if the jury found that defendant negligently allowed the railing to remain dangerously close to the front of passing cars, and that defendant's servants controlling the car negligently failed to stop the car a reasonably sufficient time to permit plaintiff to get upon the car in safety, and that defendant's servants negligently started the car forward when they knew or should have known that plaintiff was getting on the car, and that plaintiff was injured thereby, and if plaintiff was at all times exercising for his own safety, such care as a reasonably prudent man would exercise under the same circumstances, the verdict should be for plaintiff. *Held*, that while the jury might infer from the instruction that the same degree of care was required of defendant in the construction of its platform and railing as in receiving and carrying a passenger, yet the instruction taken as a whole is not misleading.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

5. CARRIERS (§ 286*)—PASSENGERS—CARE REQUIRED IN CONSTRUCTION OF PLATFORMS AND RAILINGS.

It is the duty of a carrier to exercise ordinary and reasonable care in the construction and maintenance of station platforms and railings, including a railing extending from the end of a platform parallel with the track across a viaduct.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1142; Dec. Dig. § 286.*]

6. CARRIERS (§ 348*)—PASSENGERS—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action against a carrier for injuries to a passenger while attempting to board a street car by being caught between the car and a railing extending from the station platform parallel with the track across a viaduct, an instruction requested by defendant that if the jury found that, when the car started, plaintiff was standing on the platform of the viaduct with his hand holding onto the hand rail of the car, intending to board such car, and that after the car started, and while it was in motion, plaintiff attempted to get upon the car and was injured, that their verdict must be for defendant, was properly refused.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 348.*]

7. CARRIERS (§ 348*)—PASSENGERS—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action against a carrier for injuries to a passenger in attempting to board a car, there was evidence that, when the car started, plaintiff was some three feet from it, and did not have hold of it, and that he attempted to board it after it was in motion. *Held*, that an instruction that if plaintiff attempted to get upon the car while it was in motion he assumed the risk of danger, and that his injuries resulting therefrom were caused by his own neg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ligence and the verdict should be for defendant, was improperly refused.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 348.*]

8. CARRIERS (§ 320*)—PASSENGERS—ACTIONS FOR INJURIES—QUESTION FOR JURY.

Evidence, in an action against a carrier for injuries received while attempting to board defendant's car, held sufficient to carry the case to the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

Appeal from Circuit Court, Jackson County; Jno. G. Park, Judge.

Action by Thomas J. Joyce against the Metropolitan Street Railway Company for injuries received by plaintiff while attempting to board one of defendant's cars. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The court gave plaintiff's instruction No. 1, that if plaintiff attempted to get upon defendant's car, and that he had a transfer in his possession entitling him to be carried as a passenger on that car, and that it was his intention to tender such transfer to defendant in payment of his fare, and that the car at the time plaintiff boarded the same, or attempted to board the same, was standing at the usual and ordinary place for defendant's cars to stop to receive passengers, the plaintiff was a passenger of defendant.

Instruction No. 2 was that, if the jury find that plaintiff was a passenger on defendant's car, defendant owed plaintiff the duty of exercising the highest reasonable practicable degree of care of very prudent men engaged in the street railway business to carry and receive plaintiff in safety, and any failure on its part was negligence; and that if the jury find that defendant negligently allowed the railing mentioned in the evidence to remain dangerously close to the front of passing cars, and that defendant's servants controlling the car mentioned in the evidence negligently failed to stop the car a reasonably sufficient length of time to permit plaintiff to get upon the car in safety, and negligently started the car forward when they knew or should have known that plaintiff was getting on the car, if he was getting on the same, and that plaintiff was injured thereby, and if plaintiff was at all times exercising ordinary care for his own safety, that is, such care as a reasonably prudent man would exercise under the same circumstances, the verdict should be for plaintiff.

Instruction C requested by defendant and refused was that if the jury find that, when the car started, plaintiff was standing on the platform of the viaduct in question with his hand holding onto the hand rail of the car, intending to board such car, and that after the car started, and while it was in motion, plaintiff attempted to get upon the car and was injured, their verdict must be for defendant.

Ralph S. Latshaw and Henry J. Latshaw, Jr., for appellant. John H. Lucas, for appellee.

GRAVES, J. Plaintiff, an alleged passenger, sues the defendant, a street railway corporation, for alleged negligence by which he was injured. Verdict for the plaintiff signed by nine jurors in sum of \$5,000, and judgment accordingly. The accident occurred July 1, 1904, at Eighth and Main streets, in Kansas City, Mo., at which point the defendant maintained an overhead viaduct some 29 feet above Main street on Eighth street. The negligence charged is thus stated in the petition:

"Plaintiff states that on said July 1, 1901, at about 6 p. m. thereof, he was in the act of boarding one of defendant's said Independence avenue cars, east bound, on said viaduct, for the purpose of being carried on said car as a passenger to the eastern part of Kansas City; that while he was thus attempting to get upon said car he was injured, through the carelessness and negligence of defendant as hereinafter set forth.

"Plaintiff states that defendant carelessly and negligently built, maintained, and used said viaduct in a dangerous and defective condition in this, to wit: A certain iron railing or fence was allowed to be and to remain at the eastern end of the platform on said viaduct at or near the place where passengers were in the habit of getting on and off defendant's cars, with defendant's knowledge and consent; that said iron railing or fence was at all of said times by defendant carelessly and negligently allowed to be and remain in a dangerously close position and proximity to the front end of the cars and to the sides of the cars when passing said iron fence or railing, and said iron railing or fence was at all of the said times by defendant carelessly and negligently allowed to be and to remain in such a relative position to said cars that if a person should get between, or be knocked between, or fall between said iron fence and said passing car, there was not room enough for said car to pass without greatly injuring said person, all of which was well known to defendant, or by the exercise of due care and caution could have been known to defendant on July 1, 1904, and for a long time prior thereto.

"Plaintiff states that at the time he was getting on said car, and at the time he was injured as hereinafter stated, he was getting on said car at the usual, ordinary, and customary place for people to get on and off defendant's cars on said viaduct, and at the place where defendant invited the public to get on and off its cars, viz., at or near the eastern end of the platform of said viaduct, and about even with the sidewalk line on the east side of Main street.

"Plaintiff states that said carelessness and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

negligence of defendant furthermore consisted in this, to wit: That, while plaintiff was in the act of stepping upon said car to become a passenger thereon, defendant carelessly and negligently started said car up, thereby catching plaintiff between said iron fence and said car, thereby injuring him as hereinafter set forth, although the servants and agents in charge of said car knew, or by the exercise of due care and caution could have known, that plaintiff was then and there in the act of stepping upon said car to become a passenger thereon.

"Plaintiff further says that said carelessness and negligence of defendant furthermore consisted in this, to wit: That while plaintiff was in the act of stepping upon said car to become a passenger thereon, at said time and place, defendant's servants and agents then and there in charge of said car knew, or by the exercise of due care and caution could have known, that plaintiff was then and there in the act of getting upon said car as a passenger, and that he had not had reasonable time or opportunity to get safely upon said car.

"Plaintiff further says that said carelessness and negligence of defendant furthermore consisted in this, to wit: Defendant carelessly and negligently started up said car without first closing the doors of said car, or giving plaintiff any other warning of the intention of defendant's said servants and agents to start said car up.

"Plaintiff says that when defendant's servants and agents started said car up, as above set forth, while plaintiff was in the act of getting thereon as a passenger, plaintiff was thrown between and caught between the said car and the aforesaid iron fence or railing, and severely injured as hereinafter set forth.

"Plaintiff further says that, after he was thus caught between said car and said iron fence or railing, said car stopped after it had gone a few feet, and thereafter the servants and agents then and there in charge of said car carelessly and negligently started said car up while plaintiff was still pinioned and held fast between said car and said iron fence or railing, thereby increasing the injuries already inflicted as hereinbefore set forth, through the carelessness and negligence of the defendants as above set forth, although said servants and agents then knew, or by the exercise of due care could have known, that plaintiff then was pinioned and held fast between said car and said fence or railing."

Answer was a general denial, to which was added a plea of contributory negligence. Reply, a general denial. Such are the issues of the pleadings. From this judgment defendant appeals, but not until an adverse ruling upon timely motions for new trial and in arrest of judgment.

One William W. Baum was called and examined as a juror, and upon objection made

by the plaintiff was excused, to which action defendant objected. This action of the court is pressed as error, and hence a statement of the facts as to his qualifications becomes necessary. The rejected juror was a contracting freight agent for the Big Four Railroad. As such he solicited business from street railroads and all other corporations or individuals having freight coming from east of the Mississippi river or going east of that river, and had thousands of customers. His territory covered Missouri, Kansas, Oklahoma, Indian Territory, and portions of Iowa. Among the larger patrons of his line was the defendant in this case. The juror said, in response to questions by plaintiff's counsel, that he would naturally want to keep in the good graces of defendant; that if he could do the defendant any little favor which would not be against his conscience he would do it; that he would like to have all of defendant's business, and was trying to get it; that everything he could do that was not unfair or dishonest, and which he could conscientiously do to get the business, he would do. The above statements we have drawn largely from the questions of counsel, for the juror usually answered the leading and suggestive questions by a simple "Yes, sir."

Taken by defendant's counsel, he said he had numerous customers in Kansas City; that there were 23 railroads, and some 10 or 12 fast freight lines, in business in Kansas City; that his relations with defendant were the same as with any other customer; that Mr. Burgee was the general Western freight agent for his line, and he was under him. Then he was asked the following questions, which he answered thus: "Q. State, Mr. Baum, whether, if you were selected as a juror in this case, you would render a fair and impartial verdict according to the law, and the evidence, as you should understand it? A. Yes, sir; I would. Q. Have you any prejudice against the plaintiff in this case? A. No, sir. Q. Have you any prejudice in favor of the defendant in this case? A. No, sir."

Then, after stating that he did not then have, and never had had, a pass over the Metropolitan Line, the following occurred: "Mr. Latshaw: We challenge the juror for cause. The Court: You will be excused, Mr. Baum."

To this action of the court defendant excepted, and such is the first question presented by the record. Leaving this point, and going to the locus of the accident, the evidence shows that the Metropolitan had a double-track railway on Eighth street; that it had a viaduct beginning at Walnut street on the east and ending at Wall street on the west, and crossing Main street at a height of about 20 feet above the street; over Main street was a 60-foot platform on this viaduct for the ingress and egress of passen-

gers; to the south and north sides of the viaduct were stairways leading up to these platforms; one platform was to the south of the south track, and the other to the north of the north track; the longest cars were 43 feet, so that they could so stop as to leave both ends open to these platforms for the entering and exit of passengers. There were a number of photographs introduced in evidence, but they do not appear in the abstract. These were intended to represent the conditions at the point of the accident. As best we can gather it, there was at the end of these platforms an iron railing running first north and south from the sides of the viaduct to a point near the railway track, and then others running east and west parallel with the rails for some distance. The purpose of these was to keep a passenger in alighting from the car, should his end of the car fail to stop on the platform, from falling down in the street. The distance from this railing from the side of the car at the point where plaintiff was hurt is differently stated by the witnesses, ranging from $4\frac{1}{2}$ to $10\frac{1}{2}$ inches. Plaintiff in attempting to board a car was caught between the moving car and this railing (made of several $1\frac{1}{2}$ -inch gas pipe) running parallel with the track. As to how he got into the place is described by plaintiff and other passengers.

Plaintiff says that he came from the south on a Main street car until he reached the viaduct on Main and Eighth; that he procured a transfer to take an east-bound car on Eighth street to his home; that he went up the east steps on the south side to the platform, and when an east-bound car came he started to board the same; that he got on the steps, and was about to step to the platform, when the bell rang to start, and about the same time a man and woman came out to get off; that the man said, "Hold on, let me off"; that he looked forward to the motorman and saw that he was not going forward, and then stepped back to let the passengers off; that he held to the hand railing with his back to the west; that after the passengers got off he stepped forward to get in the position he first occupied. From this point on he describes the incident in this language: "And as I turned facing north to step onto the car, the car started, and it struck me right here (indicating on arm), and it throwed me back against somebody that had got off the car, or somebody that was behind me to get on the car, I don't know which, but it caused me to turn, and as I turned I was on the railing; the place was open below; I caught the rail with one hand and throwed my body over it; the car passed, and caught me right through the thighs; they stopped the car, and somebody called for them to go ahead; I was then laying with my head to the west, and my feet to the east on the rail, with my limbs

underneath the rail; they started the car again, and I called to them to stop, and others, and they did; then, there was a gentleman came running up the steps with what they call a machinist's wrench, and tried to unbolt the bolts at the head of the viaduct for me to get out, and they was rusted, and he couldn't do nothing with them, and he pounded on it; so somebody came with a crowbar and pried it out and lifted me out, and laid me down on the viaduct."

From this it appears that plaintiff was caught between the car and this iron railing by the onward movement of the car, and that after being caught the car was moved a few feet in an effort to release him, which effort proved futile, and he was pinioned there until a piece of iron piping was obtained with which to release him.

Matthew Hightower, witness for the plaintiff, and who was just behind him when the attempt to board the east end of the car was made, described the accident thus: "Q. Before the accident happened, and before you got on the car, you may tell the court and jury just what led up to the accident—how it happened. A. Well, I came up on the viaduct, and the old gentleman that got hurt, me and him both, was standing at the front end of the car, and he stepped up in the door of the car in the front end, and I stepped up on the step, and there was a lady and gentleman to get off, and the motorman says, 'Wait until these people get off,' so I stepped off— Mr. Loomis (interrupting): We object to that evidence because it is hearsay. (Objection overruled by the court; to which action and ruling of the court the defendant at the time duly excepted.) A. (continuing) And the old gentleman just caught hold of the arm of the car and swung himself around, and then I seen there was a big crowd on the car, and I broke for the back end to get on. Just as I stepped up on the steps of the cars, on the inside, they rang the bell to start; directly I heard some one hollering, 'Hold on, somebody's hurt,' and just looked around, and I seen it was the old gentleman standing in front of me that it caught, and somebody hollered and told them to stop, and they stopped the car, and then some one hollered, 'Back up,' and they backed the car back, and I hollered myself to stop. By that time they got within about four feet of the end of the bannister, and they stopped the car, and then we went and got gas pipe and other prizes, things for to get him out; we could not prize it over far enough to pull him out."

He further said that there was a good big crowd behind him to get on the car; that the conductor was on the rear steps when the bell rang to start; that there was a good big crowd on the car; that the front platform was badly crowded with people when he and plaintiff attempted to get on

there, but that they could get on there all right; that when the car started he, the witness, was on the rear vestibule.

Witness M. F. Smith says that he went to the platform to catch a car, and when he got there the plaintiff was pinioned between the car and the railing. He then describes the way in which plaintiff was released, which was by the use of the iron piping as a lever, with which "to pry the railing away from the car so the people outside could lift the man out." This lever was used from the inside of the car through one of the windows.

Charles Bollard, who was on the car, says that he did not see plaintiff until after he was caught between the car and railing; that the conductor was in the rear vestibule; that the car and both vestibules were crowded; that plaintiff was pinioned in there about 20 minutes.

Witness Ira Bruner, at the time a passenger on the car, described the incident in this language: "Q. Now, Mr. Bruner, you may tell these gentlemen here just what you saw there, what happened; tell it in your own way. A. Well, I was on the rear platform on the outside when the— There was a gentleman standing behind me between the controller box and the vestibule; I stood right in front of him: I had my hand on the post, the outside post, and when we reached Eighth street, or Main street, the car stopped for quite a few minutes, and I looked out towards the front end, and I seen Mr. Joyce; he was standing with his left hand on the handhold at the front end; that is, the handhold was on the back part of the front vestibule, and he had his left foot on the step, and there was some ladies or gentlemen got on or off the car, I could not say which; he was standing there, and I turned around, and the conductor gave the signal to go ahead, and I looked around, and the next I looked out and he was against the side of the car, right at the railing, and just at the time he was caught, and I hollered, 'Stop the car, there is a man caught,' and I ran perhaps two or three feet, and he was in between the railing and the car, and they stopped and somebody hollered, 'Go ahead'; and it was several people hollered, 'Go ahead,' and the car started and ran perhaps to about the middle of the car and stopped, and then I got off and several men got off, and we tried to get him out, and there was a carpenter on the car, and he had a hammer, and I took the hammer and I tried to break the head of the screws that held this gas-pipe railing, but could not, and somebody ran and got a piece of gas pipe and put it in between the car and the railing and pried it out so they could get him out."

This witness also says that car and both vestibules were crowded, and that the conductor was in the rear vestibule; that he heard the signal to start, and at the time

there were some people standing on the platform; that the car stopped quite a while before it made the first start. In a signed written statement made in response to a letter addressed to the witness by defendant, Mr. Bruner described the accident in this language: "I was on the rear platform of car which stopped on the viaduct at Eighth and Main—Independence avenue car. I looked toward the front of the car and saw the party waiting for some ladies to get on the car. They got on and the car started, and the man tried to get on, but was caught between the side of the car and the railing. I called to the conductor to stop the car, which stopped, but started again, when I called to him again; this time it stopped, and the passengers and others got off and released the man from between the car and railing."

C. T. Murray describes the accident crisply in this language: "I was on an Independence avenue car, and the signal for the car to go ahead, and there was a commotion, and somebody hollered a man got hurt, and the car was stopped, and in about half a minute there was another signal to go ahead, and they went ahead about 10 feet, I should judge, and they stopped again; I looked out the window, and right below me I saw a man wedged in between the iron railing and the side of the car, the iron frame of the car; there was a railing there, I should judge, about an inch and a half gas pipe, and he was caught in between that and the car; I then tried to get somebody to get a bar to pry him out; finally somebody brought the bar and we pried him out, and the car went ahead. That's about all I know of the case." This witness, who was, and for years had been, in the machinery business, was used as an expert on the manner in which the railing was constructed. His testimony in this regard is urged as error, and this portion of his testimony we will state under that subject in the opinion.

By W. A. Satterlee, assistant general manager of the defendant, the plaintiff got a good many details as to dimensions of cars, their construction, the construction of the viaduct and the platforms thereon, as well as the railings used thereon, and the purpose of such.

By Dr. Eubank, the attending physician, as well as one of the city physicians, the character of the injuries were shown. These were likewise shown by plaintiff and some of the other witnesses. Such was the plaintiff's case, at the end of which defendant interposed a demurrer to the testimony, which was overruled, the defendant excepting.

The evidence for the defendant tended to show that the plaintiff was injured in attempting to board a moving car.

By Emil Backstrom, the conductor in charge of the car which injured the plaintiff, it was shown that he was at the rear

vestibule of the car assisting passengers to alight and enter; that the car was crowded, all seats taken, aisles full, and both vestibules crowded; that at the viaduct crossing in question some 12 or 15 people got off and as many got on, with still others waiting on the platform; that he stopped the car about two minutes; that before he signaled the car to start he looked up the side of the car, and, seeing no one attempting to get on, gave the signals—two bells—to start; that plaintiff had ridden with him before, and when he looked forward he saw him standing some three feet from the car; that the car started upon his signals, and had run about half its length when he heard some one holler; that upon looking out as quickly as he could he saw the plaintiff pinioned between the car and the railing. He also says the car did not move backward, but moved forward a few inches, after the plaintiff was caught.

Hugh Parks, a young man attending the high school, was on the viaduct, and as a witness testified: That he was standing on the platform of the viaduct, intending to take the car by which plaintiff was injured; that he run up to the front vestibule to get on, but the car was so crowded that he did not attempt it; that plaintiff stepped off the car to let some one get off, and stepped two or three feet away, but held to the bar or handhold; that he (witness) turned to look west for another car, and then turned again toward the front vestibule, and about that time the man was trying to get on, and was dragged between the car and the railing whilst the car was in motion; that the car was in motion when the plaintiff tried to get on it; that the car and vestibules were loaded full.

C. E. Waldron, a grain merchant, says: That he boarded the car some three blocks to the west of Eighth and Main, at Wyandotte street; that he was standing next to the motorman, and facing east; that to his right was a Mr. Miller, a friend of his; that Miller faced the rear of the car to the west; that the car remained standing rather long, longer than usual; that the bell rang to start, and some people started to get off, and the car stopped; that these people got off, and the bell was sounded, and the car again started; that when these people got off and the second bell given there was a scrambling by people to get back on; that the car and front vestibule was crowded; that the car was not started until all those holding to the car were on it; that after it started Miller cried out that a man had been caught between the car and railing; that he saw no one attempting to get on as the car started; that the front platform was so crowded that he could not "twist around"; that he saw several people get off the car to let those going out get off, but could not say whether plaintiff was one of them.

Charles H. McKee, cashier of Home Tele-

phone Company, testified in behalf of defendant to this effect: That he had been subpoenaed by plaintiff, but not used; that at the time of the accident he was on the step of the car at the front platform or vestibule; that he got on at Eighth and Main; that as he got on the viaduct the car had started and the conductor stopped it, as some people wanted to get off, and he, witness, started to run to catch the car, but when he saw the crowded condition of car stopped; that as the car stopped he again started to the front end, when a man and a woman and perhaps a little baby got off; that there was a man standing on the step of the car, who got off to let these parties out; that he (witness) stepped around in front of him, and as the car started caught the front handhold and stepped on the car just as it pulled out; that just as he got on the car he looked back and saw this man with one hand on the back handhold take two steps, and witness then got off the step to the platform and saw no more; that at this time the car was in motion, and was in motion when he got on it; that the platform was very much crowded.

O. G. Miller, superintendent of the beef-house of the Armour Packing Company, testified: That he was on the platform of front vestibule at time of accident, having boarded the car at Union Depot; when car reached Eighth and Main it was very much crowded; that he was facing west; that there was one man between him and the south edge of the vestibule; that the vestibule was jammed full; that he was talking to Waldron; that after the car started he saw two men make a start for the car; that he was noticing this old gentleman, and felt that he was going to get hurt; that he next heard the old man holler; that he noticed the man in front of him get on, and then he noticed the old man, the plaintiff, start for the car while the car was in motion.

The above is a fair synopsis of the defendant's evidence.

1. W. W. Baum was a competent juror under the evidence in this case. *Glasgow v. Railroad*, 191 Mo., loc. cit. 355, 89 S. W. 915. The juror was frank in his statement of his connection with defendant. Defendant was his customer as much as an extensive farmer and stock raiser might be a customer of a merchant. Merchants as a rule would feel as kindly toward their customers as did this juror toward his customer, the defendant. Merchants would be as anxious to extend to their customers such favors as in good conscience they could, and nothing more is found in the record as to this juror. Merchants would try in every way, within reasonable, honorable, and proper bounds, to secure all of the trade of their respective customers, and nothing further can be charged to this juror under the evidence. No honorable merchant, if examined as a juror in a case wherein one of his customers was

a party, would answer otherwise than did this juror, yet where is the trial court that has sustained a challenge for cause in a case of that kind? Our reading of the books has not disclosed it. It remains for a corporation case to furnish a precedent and example. The sustaining of this challenge for cause was error. Not only so, but it goes beyond what we conceive to be sound judicial discretion. We are not unmindful of the fact that a sound judicial discretion is lodged in trial courts in the matter of selecting jurors, but there is likewise a limit to sound judicial discretion. In this case the limit was reached and passed. He was challenged for cause and the challenge sustained, simply because, as indicated by the record, he was in the employ of a corporation of which the defendant, through the efforts of the juror, or otherwise, was a customer. We cannot lend our assent to the proposition that this was the exercise of sound judicial discretion.

2. Part of the testimony of witness C. T. Murray is challenged by the defendant. Murray for 30 years had been engaged in the machinery business. He said that he had built several railings for bridges and for stairways, and things of that kind; that he had been pretty much all over the United States, "from Maine to California, from Savannah to Minneapolis," and in practically all of the large cities of the United States; that he had observed the construction of railings and guards along the sides of elevated street car tracks in New York and Chicago; that he had been on four different elevated lines in Chicago, and perhaps every line in New York City; that he had been on the elevated line in Kansas City which runs over to Kansas City, Kan.; that he had noticed the approaches to the cars, the railings, or whatever was used to prevent passengers from falling off of the structure.

Divers and pointed objections were made by counsel for the defendant whilst the above facts were being brought out. Finally, the court outlines certain views, which are best expressed in the language of the record:

"The Court: I will let him state what is the uniform distance, if there is any uniform distance, of guard railings from tracks at points close to arriving and stopping places, but he cannot say what he thinks is right, because he is not qualified." After an objection again: "The Court (interrupting): Well, I have been all over that exact question, Mr. Loomis."

This being followed by an explanation and suggestion by counsel, and then the record runs:

"The Court: I have found that it did in a certain case to my very great sorrow. You must first prove that there is a uniform distance observed by this witness, before I will let him state what that distance is. Mr.

Latschaw: Or construction? The Court: Yes, sir. Mr. Loomis: No, let the inquiry be limited to what the court says. The Court: I will not let specific instances go before the jury on direct examination, but I will let these two things go before the jury; if this witness is advised, or if it be a fact that there is a uniform distance for these guard rails to be used from the track rails, or that there is a uniform method of construction. Now, bear that in mind. Mr. Loomis: On that I desire to make the specific objection that the witness is not shown to have any knowledge sufficient to justify him in expressing an opinion as an expert on either of those issues. (Objection overruled by the court; to which action and ruling of the court the defendant at the time duly excepted.) Q. I will ask you the question in this form, Mr. Murray, whether or not on July 1, 1904, and about that time, there was a uniform construction for guard rails started and stopped for the discharge and receipt of passengers, used and considered for the purpose of keeping passengers on said platform from falling off of the elevated structure. The court: According to your observation. Q. (continuing). According to your observation. Mr. Loomis: The defendant objects to that question because it is not limited to the time nor place of the accident in question, and impliedly calls for the opinion and conclusion of the witness as to what constitutes similar conditions, and calls for his opinion and conclusion upon an issue of fact which is not the proper subject of opinion evidence, and upon which he has not shown himself competent or qualified to express an opinion. (Objection overruled by the court; to which action and ruling of the court the defendant at the time duly excepted.) A. Now, do I understand you want me to express whether— (Question read by the reporter.) A. (continuing). I want to know if I must express an opinion of exactly like where this happened, or whether it is the general construction of elevated railroads, elevated stations? The Court: The question is, Mr. Murray, what was the general construction, if there was a plan of general construction of guard rails and viaducts on which street car traffic passed. A. I should say there was. Mr. Loomis: We renew the objection, your honor, to that question, make the same objection to that question as to the former question, and the further objection that it calls for his opinion and conclusion of what is general construction, and assumes there was a uniform construction, of which there is no evidence. (Objection overruled by the court; to which action and ruling of the court the defendant at the time duly excepted.) The Court: I don't want your opinion, Mr. Murray; what we want is your observation. A. Yes, sir, there is. Mr. Loomis: We make the same objection. (Objection overruled by the court; to which action and ruling of the court the defendant at the

time duly excepted.) Q. Now, you may state, Mr. Murray, what that uniform construction was at that time, under those conditions that I have named in the former question. Mr. Loomis: We make the same objection. (Objection overruled by the court; to which action and ruling of the court the defendant at the time duly excepted.) A. The construction that I have always seen has been to run the rail out to the edge of the platform, and not run anything beyond that, so that there was no chance to get caught in beyond the platform, beyond the rail. Mr. Loomis: We move to strike out the answer for the same reason, and for the further reason that the witness is not shown to possess any knowledge as an expert railroad man as to what constitutes proper construction of a railroad structure. The Court: That part of the answer in which the witness says there is no chance for passengers to fall off, or words to that effect, is stricken out; the rest of the answer may stay in. (To which action and ruling of the court the defendant at the time duly excepted.) Q. I will ask you, Mr. Murray, to explain in detail that construction, so the jury will understand it. Mr. Loomis: We object to that for the same reasons, and for the further reason that it is not limited to the construction of other railroad stations at the time or the same locality in which the accident occurred. The Court: The objection is overruled; answer, Mr. Murray. (To which action and ruling of the court the defendant at the time excepted.) A. I would simply state that this platform and the rail— Here is the car track (indicating), and there is nothing on either side of it; that is the rail; there is no projection on this rail; in other words, there is no projection like that (indicating). For instance, if this was the platform, there is no projection like this in between the car and platform; it is simply, that is the construction right there (indicating). This is the platform, and there is no rail extending clear up to the car. The Court: The rail extends clear up to the car. A. It practically does, as close as it can be got up to the car, and then there is no projection beyond the railing outside of the platform. The Court: Lengthwise of the track? A. Lengthwise of the track. Q. Where does your track go? A. The track goes right along here; this is the track right along there. This is the platform."

Being taken on cross-examination, on the point involved, the witness said: That he had never built railroads; that he had never had anything to do with the construction of elevated stations; that he had never had anything to do with the operation of railroads or street railroads over elevated stations; that he was never engaged in the business of building elevated structures or stations for railroads operating on elevated structures; that he was in the machinery

business; that he had never drawn plans for such structures.

Now, going to the evidence of this witness as finally admitted, as best we can analyze it, the sum and substance is that he had observed other structures; that in other such structures there was simply a railing, running at right angles with the track, from the outside of the viaduct to a point near the rail, but that there was no railing running from this railing parallel with the track; that there was a general or uniform plan of construction of guard rails and viaducts upon which street car traffic is usually done; this general plan he describes to the jury in the quoted evidence above. Was there error in this? This witness does not testify as an expert in the broad sense of the term, although both plaintiff and defendant treat his testimony as such in the briefs. Nor was he permitted to express but one opinion, and that was as to there being a generally used plan for the construction of railings upon elevated structures used by street railways. This plan he was permitted to and did describe to the jury. This knowledge, if knowledge it can be called, was such as the witness had obtained by observation. The sum of the charge in the petition on this point was that the railing in question was negligently placed in the beginning too close to the railway track, and later negligently maintained too close to the track. What, then, was the purpose of this evidence? Evidently to show that there was a general plan for the construction of guard rails at elevated stations, and leave the jury to infer that, inasmuch as the one in question was not so constructed, it was negligently constructed. Was such testimony, introduced and admitted for this evident purpose, competent? To answer this question we must bear in mind just what was the object of the testimony. The object was to show that this railing running parallel with the track was negligently placed too close to the track and too close to the side of a car standing thereon. There is nothing difficult of description here. The platform could be and was accurately described; the railing could be and was accurately described; the distance between the railing and the side of a car standing on the track was given to the jury. There is not a thing which was not easily susceptible of accurate description, and in this case all things were accurately described, and measurements and distances shown. Under such circumstances the jury should be left to draw the conclusion of negligence or no negligence from the facts of the case, without being directed to details of the construction of railings in New York, Chicago, or elsewhere. Because railings were negligently or not negligently put up elsewhere, does not show that this one was negligently placed too close to the side of a moving car. We doubt the competency of this witness to express an opinion as to whether or not there

was a general plan followed in the construction of railings at elevated stations, but conceding his competency, and conceding the general plan, it does not follow that such is competent evidence to show a negligent structure here. A structure entirely different from a general plan may be entirely safe. Indeed, a structure different from that in general use may be even safer and better than the one in general use. The question is, was the structure under consideration negligently constructed and negligently permitted to remain? The only defect charged is that it was placed too close to the track and thereby too close to a moving car, or, broadening a little, that the railing should not have to have been there at all. With every fact of easy description, this was a question solely for the jury upon the peculiar facts concerning this structure.

Under the head of Evidence of Negligence, in 17 Cyc. p. 56, it is said: "The issue of negligence can in most cases well be determined by the judgment of a jury, and the inference, conclusion, or judgment of witnesses is rejected. This rule has been applied, for example to the question whether a bridge, road, roadway, sidewalk, or track, or other place, machinery, mechanical appliance, rate of speed, situation, or other thing or collection or combination of things is safe or dangerous. The rule has also been applied to the question whether certain conduct of a person was careful or careless. And it has been applied to other questions as to conduct; as whether it was cautious, dangerous, 'in the line of duty,' necessary, negligent, proper, prudent, reasonable, professionally skillful, safe, usual or unusual, and whether such conduct constituted good management or omitted anything. The exclusion is subject to the proviso that the material facts can be placed before the jury."

And to the same effect is section 7747 of Thompson on Negligence: "It may be stated as a general rule that, if the facts of any particular inquiry can be so placed before the jury that, as men of ordinary intelligence, they can fully understand the matter and draw the proper inferences and conclusions therefrom, the opinions and conclusions of a witness, whether an expert or nonexpert, should not be received. In conformity with this rule a witness will not be allowed to state his opinion as to whether an act was carefully or negligently done, or whether the injured party was acting within the line of his duty at the time of receiving an injury, nor as to the safety of a particular appliance or place of work, where the same can be described and easily understood, nor as to whether a highway was safe, or defective or dangerous, at the place where an accident happened, nor what cause or occasion the witness saw for the accident, nor as to matters relating the sufficiency of a highway, as this is, in general, a question of fact merely, and not of science or skill. In

like manner, where the question was as to whether the plaintiff had been guilty of contributory negligence, it was held improper to permit the plaintiff to testify as to what he thought about the danger of doing what he did."

This evidence of Murray's upon this question was extraneous matter, and its admission should have been refused. With conditions of easy description and reproduction before the jury, and where the material facts can be placed before the jury, no room is left for expert or other opinion evidence. Every material fact in this case could easily be placed before the jury, and was placed before the jury. Under the facts of this case there was no place for even opinion testimony of the highest character, much less of the character here introduced. Judge Thompson, in a long note to section 7747, supra, has collected all the cases, and further notice of them need not here be taken.

But going a step further. This evidence could have been introduced but for the one purpose, i. e., that the jury might infer negligence, because this platform did not have its railings adjusted as other railway companies had adjusted their railings upon elevated platforms.

In the case of Dougherty v. Rapid Transit Company, 128 Mo., loc. cit. 37, 30 S. W. 317, 49 Am. St. Rep. 536, the court had under consideration the following part of an instruction: "And the jury are further instructed that if the defendant provided and used such platform steps to enable the passengers to alight as were ordinarily provided for similar cars on similar roads, then in that respect it has satisfied the requirements of the law."

Judge Robinson, in discussing the matter, said: "The faulty portion of the instruction cannot be justified upon any theory of law; it practically declares that if the platform steps used by defendant at the place and time in question were such as 'were ordinarily provided for similar cars on similar roads,' without regard to the question as to whether the appliance was reasonably safe, dangerous, or otherwise, then plaintiff cannot recover. The action of the lower court in promptly repudiating its error is highly commendable. It is not necessary to set out the evidence or consider the other points made. This error alone justified the court's action. The issue was not what platform steps are ordinarily provided for similar cars on similar roads, but whether the platform steps of this particular road at the time when plaintiff was injured were in a safe condition. The defendant cannot excuse itself from the obligation to furnish its passengers with reasonably safe appliances for getting in or out of its cars by showing that the appliances it had adopted had been adopted and used by other railroads engaged in a similar work. No amount of elaboration

would make the point any plainer or the error in giving the instruction any less."

And so in the case at bar, the question is whether or not there was negligence in having the railing in question where it was, and not how other companies placed their railings. These other companies might have been negligent—a collateral matter wholly foreign to the case on trial.

So, too, Judge Gantt, in a case discussing the location of a railing at an elevated station, *Barth v. Ry.*, 142 Mo., loc. cit. 555, 44 S. W. 783, said: "What is a reasonable distance is a question of fact for the jury under the evidence in this case. It was not essential to the plaintiff's recovery that she should prove what space ordinarily is left between the cars and railing by other similar companies. Elevated railroads are comparatively new in this country, and plaintiff might be at a loss to establish a custom; but if defendant had shown, which it did not, that this was the usual distance allowed by other roads of like character, this would not have prevented the jury finding that it was negligence in this case. The mere facts that other roads had been equally negligent could not be a defense to the action. *Dougherty v. Rapid Trans. Ry.*, 128 Mo. 33, 30 S. W. 317, 49 Am. St. Rep. 536, and cases cited."

Then we say that if proof that a railing is placed as other railroads have usually placed the same does not relieve the defendant of the charge of negligence, as is held *supra*, and rightly held, then, placing the shoe upon the other foot, proof that other railroads have usually placed their railing differently does not convict the defendant of negligence. It is well said by Judge Gantt: "What is a reasonable distance is a question of fact for the jury *under the evidence in this cause.*" The italicizing of the words quoted is our act. It is peculiarly the province of the jury to pronounce negligence or no negligence under the facts of this case, when all facts can be clearly presented to the jury. We conclude that there was error in admitting this evidence.

3. Defendant makes divers thrusts at plaintiff's instruction No. 1. Among other things, it charges that undue prominence is given in the instruction to the fact that plaintiff had a transfer ticket. The instruction is one which states certain facts, and concludes with the statement that if the jury found those facts it would find that the plaintiff was a passenger under the law. One of the facts to be found and somewhat emphasized in the instruction is, the plaintiff had a transfer ticket and intended to surrender the same in payment of his fare. The instruction is much longer than necessary. Nor was it necessary to have said anything about the transfer ticket, although the evidence showed he had one. When the car stopped to receive passengers, as it did, and when the plaintiff accepted the invitation thus extended by the company in stopping the car, by

starting to board the same, as he said he did, then he was as fully a passenger as he would have been had he possessed a thousand tickets. Cash in his pocket was the same as a transfer ticket, yet we would not instruct that a jury should find that he had cash in his pocket. Nor was there any good reason for mentioning the matter of a transfer ticket. But we hardly think there was error in the instruction as given; at least, not prejudicial error.

Instruction No. 2 for plaintiff given by the court of its own motion is criticised, but we think unjustly so. It would serve no good purpose to reproduce the entire instruction, which at length covers the negligence charged in the petition. The only part to which any objection is at all tenable is found in the first two paragraphs. This might be misleading as to the degree of care required of defendant in the construction of its platform. The quantum of care for receiving and carrying a passenger is properly outlined, but following that is the question of the negligent construction of the railing on the platform. A jury might get the idea that the same degree of care was required of defendant in the construction of its platform and railing as in receiving on the car and the carrying of the passenger. As to this the law does not so read. The platform doctrine is fully discussed in 4 Elliott on Railroads, § 1590, which reads: "A railroad company is under duty to exercise ordinary and reasonable care to so construct and maintain station buildings, or depots and appurtenances, that they shall be safe for use by passengers. The duty respecting the construction and maintenance of station buildings is not so rigorous as that imposed upon railroad carriers in relation to roadbeds, tracks, cars, appliances, and the like. Some of the cases seem to lose sight of the difference between the duty respecting station buildings and that respecting means and modes of conveyances, but the well-reasoned cases recognize the distinction, and affirm that a railroad company that exercises ordinary care in constructing and maintaining station buildings and appurtenances in a reasonably safe condition for use is not guilty of negligence. There is really no valid reason why a railroad company should be held to a higher degree of care in maintaining its station buildings than that to which an individual owner of buildings used for ordinary business purposes is held. The reasoning of the cases which laid the foundation for the strict American doctrine as to the degree of care required of carriers using steam as a motive power cannot, it is obvious, have any application to buildings and structures prepared for the use of travelers. Modes and means of conveyances employed by railroad companies do require 'powerful and dangerous agencies,' but buildings and structures in themselves neither require the employment

of 'dangerous and powerful agencies' nor possess unusual elements of danger. The duty to exercise ordinary care to maintain station buildings and appurtenances in a reasonably safe condition extends to platforms, approaches, urinals, and the like." Nor is the railing here involved an appliance, but, on the other hand, is a part and parcel of the platform. Yet we think the first clause of the instruction is not so likely to be confounded with the second clause as to make it misleading, and defendant could have obviated all trouble by asking an instruction outlining the rule of law as to the degree of care required in the construction of platforms.

4. It is next urged that there was error in refusing instructions C, E, and F, offered by defendant. Of these instructions, C, as worded, was properly refused. Instruction F contained, although in shorter form, the idea expressed in instruction E. Instruction E reads: "The court instructs the jury that the plaintiff had no right to get upon or attempt to go upon the car in question after it had started and while it was in motion, and if he did so he thereby assumed all risk of danger caused thereby; and if you believe and find from the evidence that after the car had started, and while it was in motion, plaintiff attempted to get upon the car, and was struck or thrown down and injured by the motion of the car, then you are instructed that his injuries, if any, were caused by his own fault and negligence, and you must find your verdict for the defendant." There is evidence in behalf of defendant to the effect that, when this car started, the plaintiff was some three feet from it and did not have hold of it, and that he attempted to board it after it was in motion. The evidence of the conductor and some others tended to show this fact. This instruction was based upon that evidence, and was one of defendant's theories of defense. This theory was not squarely presented in any instruction given, and was a theory under the evidence which should have been presented to the jury. The court erred in refusing the instruction. Whilst in all cases and as a general proposition this instruction might not be good, and probably would not be good, but under the facts of this case, with the railing in plain view, it is good.

5. Defendant also contends that its demurrer to the evidence should have been sustained. To this we cannot assent. We have set out the evidence quite fully, because of this contention. We are of opinion that there is sufficient evidence to carry this case to the jury for the plaintiff. This contention will be overruled.

6. That Baum was a competent juror, and that the court transgressed the bonds of judicial discretion in sustaining a challenge for cause, we have no question. That such

action tended to give the plaintiff the benefit of four peremptory challenges, when in law he is only entitled to three, must be conceded, but whether defendant suffered injury thereby is another question. If this matter stood alone under our cases, we would not say the judgment should be reversed, but, when taken with other errors hereinabove pointed out, we think the cause should be reversed and remanded, to be retried in accordance with the views herein expressed, and it is so ordered.

LAMM, P. J., and VALLIANT, J., concur in toto. WOODSON, J., concurs in result, and in all the opinion except what is said as to the competency of the juror.

WELLMAN v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 1.
March 31, 1909.)

1. APPEAL AND ERROR (§ 1001*)—VERDICT—CONCLUSIVENESS.

A verdict supported by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

2. CARRIERS (§ 320*)—INJURIES TO PASSENGERS—EVIDENCE.

Evidence, in an action against a carrier for injuries to a passenger while attempting to board a street car by the sudden starting of the car, held to require the submission of the case to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1315; Dec. Dig. § 320.*]

3. CARRIERS (§ 287*)—STREET RAILROADS—PASSENGERS.

Where a person, while exercising reasonable care, was injured while boarding a street car by the sudden starting of the car, and the servants in charge of the car failed to exercise the highest practical degree of care in starting the car, the street railway company was liable for the injuries sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1119; Dec. Dig. § 287.*]

4. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

The giving of an abstract instruction is not ground for reversal, where the instructions, when read together, could not have worked prejudicially to the party complaining.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

5. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

Where, in an action for personal injuries, the court charged that the jury should not allow plaintiff any sum for any injury due to any other cause than the accident complained of, an instruction that the jury in assessing the damages should take into consideration plaintiff's age and condition, the physical injuries inflicted, bodily and mental pain suffered, and any damages which would in the future reasonably result to her as the direct result of the injuries, was not erroneous as authorizing the jury in assessing damages to take into consideration plaintiff's prior diseased condition.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 548; Dec. Dig. § 216.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. TRIAL (§ 133*)—ARGUMENT OF COUNSEL—ACTION OF COURT.

The misconduct of counsel for plaintiff in stating to the jury, as to the statement of a third person in an application for a continuance that "this paper representative" of the third person was filed in the case as an affidavit for continuance, and inquiring who the third person was who was not present for cross-examination, was not ground for reversal, where the court stopped counsel and admonished him that his language was improper, and where counsel withdrew the statement and asked the jury not to consider it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

7. EVIDENCE (§ 471*)—OPINION EVIDENCE—EFFECT OF BLOWS.

Where the court, jury, and counsel knew that witnesses were testifying as to the case on trial, the action of the court in permitting witnesses to express opinions as to the effect of blows on the body, without confining them to the case under consideration, was not erroneous.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2150; Dec. Dig. § 471.*]

8. APPEAL AND ERROR (§ 699*)—INSTRUCTIONS—BILL OF EXCEPTIONS.

An instruction not incorporated in the bill of exceptions cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2928; Dec. Dig. § 699.*]

9. DAMAGES (§ 185*)—PERSONAL INJURIES—EVIDENCE.

Where the evidence of personal injuries rests largely in the mind and conscience of the person injured, the court must closely scrutinize all phases of the claims; and where the record shows that the jury misunderstood the evidence or ignored the same, or did not give effect to the greater weight thereof, or returned a verdict for an excessive amount, the court must correct the error.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 502; Dec. Dig. § 185.*]

10. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Plaintiff, while attempting to board a street car suddenly starting, was injured by the conductor pulling her against the end of the slowly moving car. She sought to show that the injuries caused female trouble. There was evidence that she had suffered from similar trouble prior to the accident, and her evidence that she had fully recovered therefrom prior to the accident was contradicted. *Held*, that a verdict for \$7,000 was excessive, and would be reduced to \$2,500.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 376; Dec. Dig. § 132.*]

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by Ada Wellman against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

This suit was begun in the circuit court of Jackson county by the plaintiff against the defendant to recover the sum of \$15,000 damages for alleged injuries received by her, caused through the alleged negligence of defendant by prematurely starting one of its cars while she was in the act of boarding the same for the purpose of becoming a passenger thereon. The trial resulted in a ver-

dict and judgment for the plaintiff in the sum of \$7,000. From that judgment defendant duly appealed to this court.

The petition, omitting formal parts, upon which the case was tried, reads as follows:

"Plaintiff, for her cause of action against defendant, says that now and at all of the times hereinafter mentioned defendant was a corporation duly organized and existing according to law and engaged as a common carrier of passengers for hire, operating lines of street railway in and upon the streets of Kansas City, Mo., and vicinity. Among its said lines is and was at all of the times herein referred to a line called the 'Vine Street Line,' running upon Woodland avenue from a point north of Thirty-Ninth street to Forty-Third street, all being public streets in Kansas City, Mo. On October 30, 1904, plaintiff attempted to board one of defendant's south-bound cars on said Vine street line at Thirty-Ninth street and Woodland avenue for the purpose of taking passage thereon, said car being stopped at that point for the purpose of receiving and discharging passengers. While plaintiff was in the act of getting upon said car, and while she was in a position of peril, all of which was known or by the exercise of due care should have been known to defendant, defendant negligently started said car, and plaintiff was, by the negligent starting of said car, and by the negligent act of defendant's conductor in trying to catch plaintiff as the result of said negligent starting of said car, thrown against parts of said car, and to the ground, and greatly injured. As the result of said negligence plaintiff received a severe shock to her nerves and nervous system, her legs were bruised, cut, and injured from below her knees to her ankles; her back and shoulders were bruised, sprained, and injured; her left side was bruised and injured; there was a rupture or breaking of some part of the abdominal wall; and she received severe internal injuries, particularly in the pelvic region, causing her to have peritonitis, and causing an adhesion of parts of her uterus, ovaries, and fallopian tubes to each other and to the bowels and pelvic and abdominal walls; causing the ovaries to be enlarged and made sore, producing abscesses therein and about the fallopian tubes; causing prolapsus and retroflexion of the uterus; causing her pains in said affected parts, and in her head, back, shoulder, and legs. Said injuries are permanent, and plaintiff has suffered and will continue to suffer therefrom great bodily pain and mental anguish. By reason of said injuries plaintiff has been rendered an invalid, and she will continue to be such as long as she lives, her ability to bear children has been destroyed, and her period of life has been greatly shortened. Plaintiff has been confined to her bed, and will be further confined to her bed, as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the result of said injuries. When plaintiff is able to get about she is only able to do so with great difficulty, and she has to limp, as the result of her injuries. As the result of said injuries, plaintiff has become and will continue to be afflicted with leucorrhœa. Plaintiff says that by reason of said injuries she has been damaged in the sum of \$15,000; wherefore, plaintiff prays judgment against said defendant for said sum of \$15,000 and costs of suit."

The answer contains a general denial and a plea of contributory negligence.

Plaintiff's evidence tended to show that on October 30, 1904, defendant was operating a street railway system in Kansas City, Mo.; among its lines was the Vine street electric line, which in a part of its course ran north and south along Woodland avenue from a point north of Thirty-Third street to Forty-Third street on the south. The numbered streets in Kansas City run east and west. Woodland avenue runs north and south. That on the day in question plaintiff attempted to take passage on a south-bound car at Thirty-Ninth street. She had stood near the usual stopping place at the intersection of said streets while the car was approaching from about Thirty-Third street and until it reached Thirty-Ninth street. As the car reached Thirty-Ninth street it stopped and discharged several passengers. The car was stopped so that the front end was even with the plaintiff. It was necessary for her to go to the rear of the car to get upon the same. Up to this point the testimony of the plaintiff and defendant is substantially the same. There were only four witnesses who testified with reference to the accident, three of whom claimed to have seen the accident. The plaintiff was the only witness on her own behalf on this issue. The plaintiff testified that, as soon as the car came to a stop, she immediately started to the rear and reached there before the last passenger had alighted, and while the car was still standing she attempted to get upon it, the car started, and she was thrown off of her balance; the conductor attempted to catch her, and in so doing jerked her toward him to keep her from falling. As the result of the starting of the car and this act of the conductor, she was thrown against parts of the car and to the ground, causing her to be bruised about her shoulder and hip, producing sharp, cutting pains in the left side of her abdomen, scraping her legs, and causing her to fall in a heap.

Plaintiff also introduced evidence tending to prove the allegations of the petition regarding the injuries she sustained in consequence of the accident, and that they were of a serious character: "Q. Now, did you ever have any sickness prior to the troubles that you now complain of? A. Yes. Q. Were you ever in the hospital? A. Yes, sir. Q. What hospital? A. The Women's and Children's Hospital. Q. When was that? A.

That was in 1903, I think in July of 1903. Q. What was the trouble then? Tell the jury what the difficulty was? A. Well, at the birth of one of my children I had received a laceration, and I had gone there to have that repaired. Q. You went there to have it— A. Have it repaired. Q. Have it treated? A. Have some stitches taken. Q. Was that the result of the birth of your second or third child, or the first child? A. The first child. Q. These lacerations had remained there for a number of years, then? A. Yes, sir. Q. What year had your second and third child— Were they dead at that time? A. Yes, sir. Q. How? A. Yes, sir. Q. When did you have the third birth? A. I believe in the summer of 1903 or 1902. Q. 1902? A. Yes, sir. Q. Had you convalesced and gotten up from the sickness of that. A. Yes, sir. Q. Did the child die in childbirth? A. No, sir. Q. What was the trouble with the child? A. Negligence on the part of the nurse. Q. How old was it when it died? A. About six weeks old. Q. Did any complication set in in reference to the birth of that child? A. No, sir. Q. Who was the doctor that took that child from you? A. Dr. J. E. Donaldson. Q. Now, in the following July, as I understand you, you went to the Women's and Children's Hospital? A. Yes, sir. Q. And was there operated on for a lacerated womb trouble? A. Yes, sir. Q. How long were you in the hospital? A. I think about three weeks. Q. Then did you return to your home? A. Yes, sir. Q. What was the condition of your health and your general condition after you got out of the hospital and had convalesced from the operation that you had gone through? A. Why, I was well. Q. Did you work after that? Did you get out and sew, do your household work? A. Yes, sir. Q. Did you have any servants to assist you in your household duties? A. No, sir. Q. You then had one child? A. Yes, sir. Q. Your family consisted of your husband, your child, and yourself? A. Yes, sir. Q. Did you have any trouble—any trouble with your ovaries or anything of that kind during any of your life up to the time that that condition developed after this accident? A. No, sir."

To maintain the issues upon its part, defendant offered the following witnesses, whose testimony follows their respective names:

Emil Duffen testified that he was the conductor in charge of defendant's car at the time and place of alleged injury to plaintiff, and was working as an extra man on said date. He worked on other lines as well as on the one where the accident occurred. His number on the day of accident was 722, and the name of his motorman was George Butler. The day of alleged accident was Sunday, October 30, 1904. He said they stopped at the junction of Thirty-Ninth and Woodland avenue, to let off some women and children as passengers. "Q. After these women and children that you speak of had gotten off the car, what, if anything, did you do

towards starting the car up? A. Why, when they got off I gave the motorman two bells to go ahead. Q. At the time you gave the motorman two bells to go ahead, state whether or not there was any one there at the steps of the car in sight, standing there to get on the car? A. No, sir. I saw no one. Q. Now, after starting your car up, did you see any one there? A. Why, just as I started, the car started; yes, sir. Q. Who did you see there then? A. Why, a lady. Q. What, if anything, did she do? A. Why, she came rushing towards the car as if she wanted to get on. Q. What did you do then? A. I drew up and gave the motorman a bell to stop. Q. And what did she do, if anything, before the car stopped? A. Why, as well as I can recollect, she grabbed hold of the rear end of the car like, and kind of walked a step or two along with the car as it moved. Q. After you started up the car, did it afterwards come to a stop? A. Yes, sir. Q. How far did it run from the time—about how far did it run from the time, that you started the car up until— A. About five or six feet, I should judge. Q. Then what happened? A. Why, the motorman stopped, and this lady got on the car and rode out to the end of the line. Q. Now, I will ask you while your car was stopped there, before you had started up at all, if this lady was standing there close to the step and stepped up onto the step with one foot, and then the car started up, and you tried to catch her and pull her onto the car, but that she fell down and off, and fell down or sat down or squatted down there in the street? A. No, sir. Q. Now, after she got on the car and you started up the car then, and went on out to the end of the line, do you know where she got off? A. Why, she got off at the end of the line. Q. I will ask you if at any time on the car she complained to you of being hurt in any way? A. No, sir. Q. Did you take her name at the time? A. No, sir. Q. I will ask you if you remember what part of the car she sat in after getting in the car? A. Why, she sat in the rear end, I think. Q. And, when she got off of the car, which way did she go in getting off of the car? A. She went to the front end to get off, the south end there then. Q. What, if any, complaint did she make to you on the car? A. No, sir; she did not make any complaint. Q. State whether or not she complained to you about being hurt by your car starting up too quick? A. No, sir."

Cross-examination:

Witness did not have a personal recollection as to which side of the street his car stopped on at time of accident. "Q. You don't remember now which side it stopped on, do you? A. No, sir; I do not. Q. Very well. Now, you say that this lady came rushing towards you from the front end of the car? A. Yes, sir. Q. Now, in order that I may get the matter straight in my own mind so we'll all understand it, you were looking

south—you must have been looking south? A. Yes, sir. Q. To see her coming from the south— She was coming from a southerly direction, was she not? A. Yes, sir. Q. Was she on the sidewalk or on the street? A. Why, she was on the street. Q. Your car was going south? A. Yes, sir. Q. How far was she from your car— I mean now west of your car; she was on the west side of your car, wasn't she? A. Yes, sir. Q. How far west? A. Why, I couldn't say; it seemed to me like she was as near up as she could get to the car. Q. To the car? A. Yes, sir. Q. You could see her running towards you from the pavement, if you were on the back vestibule of the car, and she was coming along the car in this way (indicating), and you were back here? How could you see her unless you looked out this way (indicating)? You must have looked out to see if all the passengers were on; isn't that a fact? A. Yes, sir; I looked outside. Q. That is the usual method, isn't it? A. Yes, sir. Q. And you do that before you start your car, don't you. A. Yes, sir. Q. Now, if you looked out and saw this woman coming before you started your car, why did you start your car? A. Why, when the passengers got off I looked right out in the street, and there was no one there to get on at the usual place where passengers stand when they want to get on; there was no one there to get on. Q. That is your answer, is it? A. Yes, sir; when I looked out and the car started there was no one there to get on. * * * Q. And you helped the passenger get on the car? A. Yes, sir. Q. She made no complaint to you? A. No, sir. Q. It is an incident that occurs almost daily in the operation of this system, isn't it? A. Yes, sir. Q. You don't report those things, do you? A. Why, if they make any complaint, sometimes we do. Q. She had not made any complaint about it; you say she did not talk to you? A. No; no, sir. Q. Then, what were you reporting about, now? Just tell us? A. Why, I was called down to the claim department. They asked me to make out a report. Q. Of what? A. Well, after I was subpoenaed about this matter here, this incident which occurred up there. Q. After you were subpoenaed to take your deposition, did you then make that report, or before it? A. After."

George G. Butler testified that he was the motorman in charge of car at the time of alleged accident. He said plaintiff got on his car on Sunday, October 30, 1904, at Thirty-Ninth and Woodland avenue, and that the car was going south. It was about 11 o'clock in the forenoon. He said they stopped on the north side of Thirty-Ninth street with the rear end of the car. "Q. When your car stopped there, did you see the plaintiff in this case? Did you see her when the car stopped, or soon after it stopped? A. Yes, sir; when the car stopped, I noticed a lady standing just at the front end of the car, like. Q. How was your car arranged with reference to

the entrance to the vestibule from the street, the front end of it, at that time? Could a person get in from the west side? A. No, sir. Q. The entrance was on the east side of the car? A. Yes, sir. Q. At the front end? A. Yes, sir. Q. Now, do you know how you came to start your car up when you did from that point? A. I got a signal from the conductor; got two bells to go ahead. Q. And did you start your car up then? A. Yes, sir. Q. Did you afterwards receive any further signal? A. Yes, sir; just after I started the car I got a signal to stop, and the car had probably gone three or four or five feet. Q. What did you do then with reference to stopping, after you started? A. I stopped the car immediately as soon as I got the signal. Q. How far did your car run altogether from the time it started up till it stopped? A. Oh, from three to five feet; not over four or five feet—just started. Q. Now, after seeing this lady at the front end of the car, when did you see her next? A. I noticed her when I got to the end of the line—Forty-Third street. Q. I am not speaking about after starting up—after you stopped your car, didn't you? A. Yes, sir. Q. Well, what did you do then, after you stopped the car? A. Well, I noticed—I just looked around to see what was wrong, and she was getting up the steps into the vestibule, in the rear vestibule. Q. Now, when you got this signal to stop, did you see anybody else or get any signal from anybody else at that time? A. There was a man standing about 15 feet in front of the car, right at the edge of the sidewalk, right at the edge of where the curbing is, and he threw up his hand and I stopped my car and looked around then to see what was the matter. Q. Who was that man? A. His name was Sullivan. Q. Do you remember his first name? A. Charlie, I think, is his name. Q. Now, after you saw that, you looked around then, and where do you say that she was then? A. She was just getting up, coming up the steps into the vestibule when I looked around. Q. How soon did you look after you got your car to a stop? A. Just as soon as the car stopped I looked around to see what the trouble was, if there was any. Q. State whether or not there was any other passengers on the car at that time? A. There was no one in the car at the time; no, sir; no passengers. Q. State whether or not from there to the end of the line anybody got on or off the car? A. There was no one got off the car or on the car. Q. State whether or not you made any stops from there to the end of the line? A. No, sir; did not make any stops. Q. Now, when you got to the end of the line, or while you were going to the end of the line, did you notice where this lady was in the car—what part of the car she sat in? A. Not till after I got to the end of the line and started back through the car. Q. Now, what did you do, what did you do after you got to the end of the line, and after stopping

your car, what was the next thing that you did? A. Why, I took the controller handles and the air lever off and started—and the sand punches—and started back to the rear end of the car with them, to change ends. Q. And did you see the plaintiff then? A. Yes, sir; after I got out in the car I noticed her. Q. Where was she then? A. She was sitting on the short horizontal seat in the rear end of the car, and just after I got up in the car she got out. Q. What, if anything, was said as you went through the car? A. Well, she turned around to the conductor and was saying something to him; I could not hear what she said, and I got up pretty close to her, and she turned around to me and said, I think that she said, 'You saw me,' or something, and I told her if she wanted to chew the rag she would have to hunt some person else. I saw that she was angry, and it was too pretty a morning to fuss with anybody. Q. Now, which end of the car, then, did she go to? After she went from that place, where did she go to? A. She went to the south end of the car, what had been the front end of the car. Q. Did she get off then or did she remain there, or what did she do? A. No, sir; I went on out into the vestibule about my work, and she went to the south end of the car, and then came back to the north end of the car, and looked at my badge number, and then she started back through the car again, and got off at the south end of the car. Q. Now, when she got off the—or when she turned to the south end of the car the first time or the second time, state whether or not on either occasion you followed her to the south end of the car? A. No, sir; I was attending to my work in the vestibule, in the north vestibule. Q. I will ask you if at any time, either in the car or in the vestibule, or anywhere there in the car, you made such motions with your foot as though you were going to kick her? A. No, sir."

On cross-examination witness testified as follows:

"Q. You saw the woman standing there, did you, as you came up to Thirty-Ninth street? A. Yes, sir; I noticed her standing there as I came up, as the car stopped. Q. She had the appearance of a person who wanted to take your car, did she? A. No, sir; I did not; never thought of anything of that kind. Q. Why didn't you? What was there about her attitude of standing there waiting for the car on the west side of the street, which would be the natural side? Why weren't you aware of the fact that she wanted to take your car? What was she doing that made you think she did not want to take it? A. Well, I was not paying much attention to her, and I had a bell to stop at Thirty-Ninth street, and I stopped at the regular place, and I was not paying much attention to her, and I noticed her standing there as the car stopped. Q. Well, and as the car stopped you saw her start

for the other end, didn't you? A. No, sir. Q. Well, she did go toward the south end, didn't she? A. No, sir; not that I know of; she was a-standing at the south end of the car at the time. Q. Well, what did she do when your car stopped? A. She just stepped back and went toward the north end of the car. Q. How did she go toward the north end of the car—I got confused myself in the directions? A. Yes, sir; that is what I thought. No, she just stepped back; I didn't pay any attention to her; she just stepped back and started north. Q. Started north? A. Yes, sir. Q. Well, that was toward the place— A. Where she would get on, yes, sir. Q. Get on? A. Yes, sir. Q. Well, she acted then as though she was about to take the car, didn't she? A. She didn't give me any idea that she wanted the car. I didn't know whether she wanted to cross the street behind the car or what. I didn't know what her intentions were. Q. You don't know whether she wanted to cross the street? A. Yes, sir; I didn't know her, and didn't know that she wanted the car; no, sir."

Witness said there was nothing that attracted his attention at the time of the alleged accident. "Q. You carried thousands of people? A. Yes, sir. Q. Very well; now you say just as the car came to a stop you saw her getting on your car; you looked back and saw her getting on? A. No, sir. Q. Then I misunderstood your testimony. I thought you said that as you came to a stop you looked back and you saw the woman getting on the platform? A. No, I said she was at the front end of the car. Q. I mean afterwards, after you had gone four or five feet and got another bell. Now you stopped at Thirty-Ninth street. Then you started up, and here Sullivan gives you the signal to stop, something wrong, this man standing on the side of the street; you get a bell from the conductor to stop; you stopped, didn't you? A. I stopped when I got a bell. Q. And you looked back, didn't you? A. Yes, sir. Q. Then you saw her getting on the platform, didn't you? A. No, sir, I saw her getting on the steps. Q. On the steps, just as soon as you stopped? A. Yes, sir. Q. Very well. So we get along that far. So there wasn't anything in that incident that attracted your attention very much, was there? A. No, sir."

Witness said he knew Sullivan, who had been formerly in the employ of defendant. He had formerly been a conductor on defendant's road.

Defendant filed an application for a continuance of the cause because of the absence of Charles Sullivan, one of its witnesses, and stated therein what he would testify to if present.

Upon the election of counsel for plaintiff that Sullivan's testimony might be read to the jury, the court overruled the application for a continuance.

Sullivan's testimony was as follows:

"Q. Mr. Sullivan, I wish you would state what you know in regard to this trouble. A. I was standing on the corner of Thirty-Ninth and Woodland in front of a little grocery store; I was waiting for a car to take it to town; while I was standing there a car came from the north and stopped; several passengers got off, and the conductor then gave two bells to go ahead; about this time a woman who was standing somewhere near the center of the car on the ground started toward the rear end and took hold of the handhold of the car and attempted to board it; the conductor warned her, and at the same time rang the bell for the car to stop; the car came to a stop, and the conductor assisted her on and he then went on; the lady acted and looked very mad. Q. I will get you to state if she fell down? A. No, sir; she did not. Q. Do you know who this lady was? A. Some one in the grocery store said her name was Mrs. Wellman."

This was all the testimony in respect to what occurred at the time and place of alleged accident.

Defendant also introduced several witnesses whose testimony tended to show that plaintiff was sickly and diseased at the time of and prior to the time of her alleged injury; and, among others, were Dr. G. H. Donaldson and his son, Dr. J. E. Donaldson. The former testified as follows:

"Q. I will ask you if you were at any time called in consultation with your son, J. E., to see Mrs. Wellman, the plaintiff in this case? A. I was; he asked me to go with him. Q. When was that, Doctor? A. I think that was about in May, as well as I can remember, about 1903, I guess. Q. What condition was she in at that time? A. She was in a very nervous neurotic condition. Q. Was she in bed, or where? A. She was in the bed. Q. What examination did you make of her, Doctor, at that time? A. I made just a physical examination. I did not make any digital examination of the uterine appendages or anything of that kind, but just over the abdomen, the general pulse and tongue, and in a general way. Q. What was the seat of her troubles at that time? A. Seemed to be in the uterine appendages, the ovary or uterus, and so on. Q. When, if at any time, did you see her after that? A. Never saw her except at the hospital the day she was operated on. Q. Did you then make an examination or see her condition? A. Yes, sir. Q. What was her condition then? A. She had a lacerated cervix and also peritoneum, and a congested, large congested flabby womb. Q. What was its position, Doctor? A. It was prolapsed; it was prolapsed. Q. What do you mean by that? A. That in common parlance would be falling of the womb; done that on account of its heft, you know, dragging it down. Q. Was it out of position at

that time? Could you tell in any other respect whether it was retroverted or not? A. I do not recall of retroversion or antiversion or anything of the kind; I do not recall anything. Q. But it was large and flabby? A. Yes, sir. Q. And you say congested. What do you mean, Doctor, by that? A. Why, it was large and full of blood, and made it heavy, you know, so that when she got on her feet it dragged down and pulled. Q. You speak about the cervix being lacerated; is that the mouth of the womb? A. Yes, sir; that is the neck of the womb; cervix would be the neck. Q. And what, if any, effect does that have on a person? A. Oh, it makes them nervous, and in a general way it breaks them down, becomes physically dilapidated and exhausted. Q. What was her general physical condition at that time, Doctor? A. She was in— She was a wreck. Q. She was a wreck? A. Yes, sir. Q. Now you speak about something else being torn there, Doctor? A. The peritoneum; that is, to make it plain, the section from the vagina down towards the anus, and that part of the integument there between lacerated, torn down there; that is what we call the peritoneum. That was lacerated. Q. And that part of the neck of the womb being lacerated, how could that be caused, Doctor? A. Why, I presume it would be caused by delivering of child and confinement."

On cross-examination witness said plaintiff, on account of giving birth to children, etc., was not a very sturdy type of woman, and would be more susceptible to injuries than a rugged person. He said the tear was an old one and may have been there five years. He said this frequently occurs in giving birth to children, and when torn should be sewed up. He said complications follow that are sometimes very serious. He said the operation performed upon plaintiff was a successful one.

Dr. J. E. Donaldson testified that he saw plaintiff and treated her in May, 1903. He visited her frequently before the operation in 1903. "Q. Now, what did you visit her and treat her for in May, 1903? A. Well, I think, as near as I can remember, at that time she was suffering from a nervous neurotic condition, and which I believed was caused from the condition of her female genital organs. Q. Did you make an examination of her pelvic organs or any of them at that time? A. I don't know just exactly when it was. I examined her several times; I don't know whether just— Q. What was the condition as you found them? A. Well, she had a lacerated cervix, a tear on either side of the cervix, the mouth of the womb, and also a badly torn peritoneum. Q. Were there any effects from that, doctor, which she appeared to be suffering from? A. Why, I thought that that had a good deal to do with her nervous condition at that time; the reason I recommended her going to the hospital

and having it repaired. Q. Was she at this time that you saw her, in May, was she in bed or sitting up? A. She was in bed. Q. Were there some times, doctor, there during that period that you visited her twice a day? A. I could not answer that now; I don't know. Q. You called your father, did you, in consultation at that time? A. Yes, sir. Q. Over her case? A. Yes, sir. Q. What was the matter with her then, from the 4th of August up to the time she went to the hospital? A. Why, she was in a very nervous neurotic condition, and was suffering a good deal from pain and inflammatory condition of the female organs. Q. Where was the seat of all that trouble that she was suffering from at that time? A. I don't know what you are trying to get at. Q. Where was the suffering, if she suffered, where was the pain? A. Why, she had more or less pain and tenderness over the abdomen, over the genital organs." He then advised her to go to the hospital. "Q. Now, at the time the operation was performed, could you tell us what the conditions of her genital organs was then? A. Well, there was a laceration, a tear on either side of the cervix or mouth of the womb, and there was also quite an extensive tear on the peritoneum of the outside portion of the vagina, and left the female organs without their normal supports, and with a constant irritation to the nervous system. Q. What was the position and condition of the womb—uterus? A. Well, naturally being irritated that way, it would be inflamed and congested. Q. Do you remember whether it was prolapsed or not? A. Yes, sir; there was some prolapsus all right. Q. Was there any tenderness about the abdomen and the parts? A. Yes, sir; there naturally would be when there is an inflammatory process going on."

On cross-examination witness said he thought it was best to have these tears sewed up, as they tended to create a nervous condition, and complication of all characters might result. He said it frequently happens to women who have children. He thought the operation at the hospital was a success. She was delivered of her last child in 1902.

At the close of plaintiff's case, and again at the close of all of the testimony in the case, counsel for defendant asked an instruction in the nature of a demurrer to the evidence, both of which the court refused, and defendant duly excepted.

Thereupon counsel for plaintiff asked, and the court gave, in her behalf, the following instructions:

"(1) The court instructs the jury that if you believe from the evidence that the defendant on October 30, 1904, was operating the car mentioned in the evidence, for the purpose of carrying passengers for hire, and that on said day it stopped said car at or near the corner of Thirty-Ninth street and Woodland avenue, in Kansas City, Mo., for

the purpose of taking on or discharging passengers, and that while said car was so stopped plaintiff was standing at such stopping point, and thereupon immediately exercised reasonable expedition to get upon said car, and that while she was in the act of getting upon said car it was started forward by defendant before plaintiff could, by the exercise of reasonable expedition and reasonable care on her part, have gotten safely upon said car, and that the conductor of said car saw, or by the exercise of the highest practical degree of care ought to have seen, said plaintiff while she was attempting to get on said car (if she was); and if you further believe that by the starting of said car (if it was started) said plaintiff was thrown off her balance, and that defendant's conductor in charge of said car jerked plaintiff toward him on the car in attempting to keep her from falling to the ground (if she was), and that she was thereby caused to fall against parts of said car and to the ground; and if you further believe that prudent men engaged in the street railway business, in the exercise of the highest practicable degree of care, would not have started said car forward under such circumstances—then the defendant was guilty of negligence; and if you believe that said plaintiff was, as the direct result of such negligence (if any), thrown against parts of said car and to the ground, and was thereby injured, then your finding should be for the plaintiff, provided you further believe that plaintiff was in the exercise of reasonable care, at the time.

"(2) By the term 'reasonable care' as used in these instructions is meant such care as would be used by an ordinarily prudent person under the same or similar circumstances.

"(3) It is the duty of a carrier of passengers to exercise the highest degree of care that can reasonably be expected of prudent men engaged in that line of business to carry its passengers safely, and a failure on the part of such carrier to use such care is negligence on its part. A passenger is required to use such care as would be used by an ordinarily prudent person under the same or similar circumstances, and the failure on the part of a passenger to use such care is negligence on his or her part.

"(4) If you find for the plaintiff, you will, in assessing her damages, take into consideration her age and condition, the physical injuries inflicted (if any), the bodily and mental pain suffered (if any), and any and all such damages (if any) of the kind and character mentioned, which will in the future reasonably result to her as the direct result of said injuries (if any), not to exceed in all the sum of \$15,000."

To which action of the court in giving said instructions, and each of them, defendant then and there at the time duly excepted.

At the request of the defendant the court instructed the jury as follows:

"(3) The court instructs the jury that if you find and believe from the evidence that the whole or any part of the present physical condition of the plaintiff, complained of in this case, is due to any other cause than being thrown or falling off of the car of defendant, then you are instructed that, for such whole or part of such condition not due to or the result of being so thrown or falling from said car, she cannot recover for in this case.

"(4) The court instructs the jury that if, after the car had started forward and while it was in motion, plaintiff attempted to get upon said car, and was injured thereby, she cannot recover in this case, and your verdict must be for the defendant.

"(5) The court instructs the jury that the burden of proof is on the plaintiff to establish her case by the preponderance of the evidence, and by a preponderance of the evidence is meant the greater weight of the credible testimony.

"(6) The court instructs the jury that the plaintiff is a competent witness in her own behalf, and you must consider her testimony in making up your verdict; but in determining what weight and value you will give her testimony, you may take into consideration, with all the other facts and circumstances in evidence before you, the fact that she is the plaintiff testifying in her own behalf and her interest in the result of the suit. Whatever statements, if any, that she may have made against her own interest, must be regarded as true; what she may say in her own favor is to be taken to be true or false when taken into consideration with all the other facts and circumstances detailed in evidence before you."

Guthrie & Smith, Boyle & Howell, and J. K. Stickney, for appellant. John H. Lucas and R. T. Ralley & Son, for respondent.

WOODSON, J. (after stating the facts as above). 1. While counsel for appellant asked an instruction in the nature of a demurrer to respondent's evidence, and renewed that offer again at the close of all of the testimony in the case, both of which were by the court refused, yet that action of the court is not called to our attention for review, either in appellant's brief or argument; but notwithstanding that omission, we have carefully read the entire evidence of the case, as preserved in the record; and, if it were within our province to weigh the evidence and to judge of the credibility of the witnesses from the face of this record, we would have no hesitancy in holding that it preponderates in favor of the appellant; but that is not within our province, nor have we the opportunity to see the witnesses who testified in the case, nor to observe their demeanor upon the witness stand and their manner of testifying, as the jury and trial judge had, which placed them in a more favorable position to judge

of the credibility of the witnesses and the weight to be given to their testimony than we have. *Brecker v. Fillingham*, 209 Mo. 578, 108 S. W. 41. We are therefore of the opinion that there was no error on the part of the trial court in refusing to give the demurrers to the evidence.

2. Counsel for appellant insists that the first instruction given by the court for respondent is erroneous, for the reason that it is misleading, indefinite, and uncertain. In our judgment, that insistence is untenable. That instruction in a clear and concise manner tells the jury that if they find the facts therein stated to be true, then they would find for respondent. A similar instruction was approved by this court in the case of *Devoy v. St. Louis Transit Co.*, 192 Mo., loc. cit. 206, 207, 91 S. W. 140.

3. Counsel for appellant contends that instruction numbered 3 given by the court on behalf of respondent is erroneous, in that it is simply a statement of an abstract proposition of law, and failed to tell the jury what facts were necessary to constitute the plaintiff a passenger. While it is not good practice to give instructions to the jury which are legal abstractions, yet it has not been suggested in what possible manner the giving of that instruction could have worked injury to appellant, nor have we been able to conceive any such. It was the duty of the jury to read all of the instructions given together, and when so read, and especially with instruction numbered 1 given for respondent, it cannot be seen in what possible manner it could have worked prejudicially to the rights of appellant. *Harrington v. City of Sedalia*, 98 Mo. 583, 12 S. W. 342. We, therefore, hold there was no error in giving that instruction.

4. It is also contended by counsel for appellant that instruction numbered 4 given on behalf of respondent, relating to the measure of damages, is erroneous for the reason assigned, that it authorizes the jury in assessing her damages to take into consideration her physical condition, which would include the prior diseased condition of her genital organs. This instruction does not contain the vice suggested by counsel. It was clearly the duty of the jury in assessing respondent's damages to take into consideration "her age and condition" at the time of the trial, and "the physical injuries inflicted, if any," etc. And when that instruction is read in connection with No. 1 given on behalf of appellant, which told the jury that they should not allow her any sum for any injury "due to any other cause than being thrown or falling off of the car of defendant," we are unable to see in what manner the jury could have allowed her for any of the prior injuries suggested by counsel for appellant.

5. It is next insisted that this judgment should be reversed because of improper remarks made by counsel for respondent in the argument of the case to the jury. The record discloses that Gen. Boyle, counsel for plain-

tiff, in making his closing address to the jury, took the application for a continuance made by defendant in this cause, which said application for continuance contained the statement of what Charlie Sullivan would testify to if he was present, and shook it in the face of the jury in a contemptuous, sneering manner, and stated, "This paper representative of Charles Sullivan which was filed in this case is an affidavit for continuance. Who is this Charles Sullivan? Who knows this Charles Sullivan? Why is he not here for cross-examination?" Whereupon, and upon the objections and exceptions of counsel for defendant to the said language of Gen. Boyle, the court stopped him and admonished him that his language was improper. There can be no doubt but what that language of Gen. Boyle was improper, but this court would not be warranted in reversing this judgment upon that ground, especially since the record discloses the fact that the court stopped him and admonished him that his language was improper. In addition to that, Gen. Boyle withdrew the statement and asked the court to instruct the jury not to consider it, which the court did. Too frequently, in the heat of argument before a jury, improper remarks are indulged in by counsel on each side of the cause. Counsel should be more careful in that regard, and confine their remarks to the record, and refrain from improper argument.

6. Counsel for appellant contends that during the examination of Drs. Palmer and Hyde, on behalf of respondent, they were permitted, over his objection, "to express opinions as to the effect of the blows upon the abdomen, without being confined to the case under consideration, and without offering to connect the matter, by offering to show subsequently a state of facts to which such testimony could have applied." That objection is without merit. The court, jury, and counsel all understood and knew the witnesses were testifying regarding the case on trial, and none other, and that the blows had reference to those received by respondent by being thrown against the end of the car by the conductor.

7. Appellant's counsel contends that the action of the court in giving the following instruction was improper and erroneous: "If the injury may have resulted from one or two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show, with reasonable certainty, that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture, the plaintiff must fall in his action." He states his objection thereto in the following language: "Under the foregoing authorities, the above instruction numbered 4, given at the instance of plaintiff, not only failed to state the law properly, but turned the jury loose, and gave it a roving commission, to assess future damages, without any evidence on which to

base it, as heretofore shown. The verdict returned is conclusive evidence in support of above contention." There is evidently some mistake surrounding this contention. We have searched this record in vain for that instruction. If it was asked by counsel for either party, or if given by the court of its own motion, this record wholly fails to disclose that fact. Not only that, but, judging from the character of the instruction itself as it appears upon its face, we are unable to comprehend why counsel for respondent should ask it on behalf of their client. If it was asked at all, it is more probable that counsel for appellant asked it, and failed to preserve it in the record; but however that may be, it is useless to prosecute these surmises and probabilities further, for the reason that we have no authority to pass judgment upon the instruction, because it was not incorporated in the bill of exceptions.

8. The final insistence of counsel for appellant is that the verdict of the jury was excessive, and that the judgment should be reversed for that reason. It is their contention that, assuming that the respondent was entitled to recover under the evidence, yet the amount of the verdict "is so outrageously excessive, unjust, and oppressive as to shock the conscience of any reasonable person, and must have been brought about by passion or prejudice, or a misunderstanding of the legal effect of the testimony on the part of the jury in respect to plaintiff's alleged injuries." No reasonable person can read this voluminous record without coming to the conclusion that prior to the date of the injuries complained of respondent had been sick and diseased in and about the pelvic regions, involving the uterus, peritoneum, cervix, and fallopian tubes, as well as their connecting parts. The evidence is also equally conclusive that the neurotic troubles she then suffered from were due to and directly traceable to that diseased condition of those parts of her person. It is true she testified that the operation performed upon her was successful, and that she had completely recovered from all of those previous troubles prior to the infliction of the injuries sued for. She also introduced other testimony in corroboration thereof, which tended to prove her recovery. But, upon the other hand, there was much convincing testimony introduced by appellant which was contradictory of her testimony in that regard, and which tended strongly to show that she had not fully recovered from her previous ailments at the time she claims she received the injuries complained of in this case. That conflicting testimony presented a question of fact for the jury's determination; yet when we consider the fact that the evidence of such injuries rests largely in the mind and conscience of the injured party, and the difficulty with which they may be disproved,

under the most favorable circumstances, if the party is simulating (of which there is much evidence in this record), it then becomes the duty of the courts to scrutinize all phases of such claims; and where the record discloses the fact that the jury misunderstood the evidence, or ignored the same, or did not give effect to the greater weight thereof bearing upon a particular question, or returned a verdict for an excessive amount, then it becomes the plain duty of the court to step in and correct the wrong or injustice done thereby. And when we read this record and consider the cause of respondent's injury, the similarity of her former condition and troubles to her present condition and complaints, taken in connection with the size of the verdict, we are fully convinced that the verdict was excessive and out of proportion to the injuries she received. When we recall the manner of her injury, what caused it, the conductor pulling her against the end of the slowly moving car, which moved only four to six feet, and in her own language, "I just come down in a heap on my feet, just all in a bunch, so to speak," then, in our judgment, that alone would not have caused the serious injuries she claims to have received in consequence thereof, nor warrant a verdict for \$7,000.

The judgment is excessive, and it will be reversed and the cause remanded, without respondent will within 10 days from and after this date enter a remittitur of \$3,500 upon the judgment. If the remittitur is entered within that time, then the judgment will be affirmed. All concur.

CLARK et al. v. KANSAS CITY, ST. L. & C. R. CO.

(Supreme Court of Missouri, Division No. 1. March 31, 1909. Rehearing Denied April 18, 1909.)

1. LIMITATION OF ACTIONS (§ 5*)—STATUTES—CONSTRUCTION.

Rev. St. 1899, c. 48, art. 2 (Ann. St. 1906, pp. 2345-2365), relating to limitations in personal actions, provides (section 4285) that, in case of a nonsuit, plaintiff may commence a new action from time to time within one year after the nonsuit. Section 4292 provides that the provisions of the chapter shall not extend to any action which is otherwise limited by any statute, but such action shall be brought within the time limited by such statute. *Held*, that as chapter 17 (pages 1637-1658), relating to damages for torts, carries its own statute of limitations, section 4285 does not apply to actions brought thereunder.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 5.*]

2. CONSTITUTIONAL LAW (§ 191*) — RETROSPECTIVE STATUTES.

The laws forbidden by Const. art. 2, § 15 (Ann. St. 1906, p. 137), prohibiting the passing of laws retrospective in operation, are laws impairing existing vested civil rights, and,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as there is no vested right in a particular mode of procedure or civil remedy, the prohibition does not apply to a statute limiting the time within which actions may be brought, and embracing actions already instituted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 534; Dec. Dig. § 191.*]

3. STATUTES (§ 267*)—CONSTRUCTION—RETROSPECTIVE OPERATION.

The general rule that statutes will be construed to be prospective in operation does not apply to statutes affecting procedure or a legal remedy.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 350-359; Dec. Dig. § 267.*]

4. STATUTES (§ 181*)—CONSTRUCTION—OFFICE OF COURTS.

Courts cannot by construing a statute substitute their ideas of legislative intent for that unmistakably held by the Legislature and unmistakably expressed in legislative words, and must not interpret where there is no need of it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259; Dec. Dig. § 181.*]

5. LIMITATION OF ACTIONS (§ 6*)—STATUTES—CONSTRUCTION—"SHALL HAVE BEEN COMMENCED."

Rev. St. 1899, § 2868, repealed by Laws 1905, p. 138 (Ann. St. 1906, p. 1652), provides that if any action under chapter 17 (pages 1637-1658), relating to damages for torts, shall have been commenced within one year after the cause of action shall accrue and plaintiff suffer a nonsuit, etc., he may commence a new action within one year after the nonsuit, etc. *Held*, that the phrase "shall have been commenced" includes pending as well as future actions, especially in view of section 4160 (page 2252), requiring that words and phrases shall be taken in their plain or ordinary and usual sense, and hence, where a death action was commenced within a year after the death and before section 2868 took effect, and a nonsuit was suffered after it was in force, plaintiff was entitled to recommence suit within a year after the nonsuit.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 6.*]

6. DEATH (§ 9*)—ACTIONS—CONSTRUCTION OF STATUTE.

As there was no right of action at common law for a wrongful death, the statute giving such action, being in derogation thereof, must be construed with reasonable strictness.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 11; Dec. Dig. § 9.*]

7. DEATH (§ 31*)—ACTIONS—PARTIES ENTITLED TO SUE.

The action for wrongful death being purely statutory, only such persons can bring it as are designated in the statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 35; Dec. Dig. § 31.*]

8. DEATH (§ 42*)—ACTIONS—NECESSARY PARTIES.

Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637), provides that when a person shall die from an injury resulting from the negligence of a railway employé conducting a train, etc., and shall be an unmarried minor, the corporation in whose service the employé was shall forfeit a sum which may be sued for by the father and mother, if both living, who may join in the suit and shall each have an equal interest in the judgment. *Held*, that the penalty is indivisible, and all of it or none must be sued for, both parents joining prior to judgment, though they are divorced, and decedent

has been in the exclusive custody of the mother, and, if the father refuses to join, the mother cannot recover by making him a coplaintiff against his consent.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 56-58; Dec. Dig. § 42.*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Death action by Emma Clark and another against the Kansas City, St. Louis & Chicago Railroad Company. A demurrer to the petition was sustained, and plaintiffs appeal. Affirmed.

Emma Clark had a son, Charles Ritter (at his death an unmarried minor), by a former divorced husband, Thomas Ritter. Joining her former husband in the suit as a coplaintiff against his consent, she sues for the statutory penalty of \$5,000 for the wrongful death of Charles. Defendant demurred. Cast thereby, plaintiff refused to plead over, and, judgment going against her, she appeals.

Sufficient of the record to determine questions raised will appear in the following statement of the case: (Nota bene: Dates are material.) The petition was filed September 11, 1905. After alleging that plaintiffs had been married, and that Charles Ritter was born to them as lawful issue; that on the 21st day of July, 1904, he was a minor without descendants and had never been married; that on that day he was negligently killed at a street crossing by defendant's servants operating a train (seven specific acts of negligence being set forth)—the petition makes the following substantive allegations at which the demurrer is aimed: "Plaintiff Emma Clark further states: That on the ——— day of August, 1887, at which time said minor was about five months old, she was duly divorced from the bonds of matrimony with said Thomas Ritter by a decree of the circuit court of Marion county, in the state of Illinois, and since that time she has married one Edward H. Clark. That the exclusive care and custody of said minor was given to her by said decree of said Marion circuit court, and she retained the same up to the time of his death. That on the 20th day of September, 1904, plaintiff filed her petition in this court against the defendant for damages for causing the death of said Charles Ritter, in which suit said Thomas Ritter afterwards joined as a coplaintiff. That said suit was transferred to the circuit court of the United States for the Western District of Missouri on the 12th day of October, 1904, and plaintiffs suffered a nonsuit in said cause in said United States court on the 19th day of August, 1905. That said Thomas Ritter has refused to join in this suit, but his name is used herein to assert the rights of this plaintiff Emma Clark, and said Emma Clark hereby offers to indemnify

her complaint against any costs or expenses which may be incurred by him because of the use of his name as complaintiff."

The demurrer follows: "Comes now the defendant, and demurs to the plaintiff's petition for the following reasons, to wit: (1) That there is an improper and unlawful joinder of parties plaintiff. (2) That the petition shows upon its face that Thomas Ritter refuses to be joined as a party plaintiff to this suit, and that the said Thomas Ritter cannot be joined, and is not joined, as a party plaintiff within the meaning of the statutes of Missouri under which this suit is instituted. (3) That the plaintiff Emma Clark alone under the statutes of Missouri cannot maintain this suit. (4) That the petition does not state facts sufficient to constitute a cause of action against this defendant. (5) Because it appears upon the face of the petition that this suit was filed and instituted more than one year from the date of the death of the said Charles Ritter, and that the plaintiff was at the time of the institution of said suit, and is now, barred by the statutes of limitations from bringing any suit on account of the death of the said Charles Ritter."

It is conceded on all sides that the case must ride off on a construction of our statutes. The statutes passing in review follow: Section 2864 (Rev. St. 1899 [Ann. St. 1906, p. 1637]) of the damage act, in its third subdivision, touching the persons who may sue for a wrongful death, provides: "If such deceased be a minor and unmarried, * * * then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor." Section 2868 (Rev. St. 1899 [Ann. St. 1906, p. 1652]) of the damage act reads: "Every action instituted by virtue of the preceding sections of this chapter (chapter 17, devoted to damages for torts) shall be commenced within one year after the cause of such action shall accrue." On April 12, 1905 (Laws 1905, p. 138 [Ann. St. 1906, p. 1652]), the Legislature repealed section 2868, supra, and enacted a new one in lieu thereof, numbered 2868, reading: "Every action instituted by virtue of the preceding sections of this chapter shall be commenced within one year after the cause of such action shall accrue: Provided, that if any action shall have been commenced within the time prescribed in this section, and the plaintiff therein suffer a nonsuit, or, after a verdict for him, the judgment be arrested, or after a judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action, from time to time, within one year after such nonsuit suffered or such judgment arrested or reversed." Absent an emergency clause, the new section went into force under the provisions of our Constitution on June 16, 1905 (Laws 1905, p. 330).

L. A. Laughlin, for appellants. Scarritt, Scarritt & Jones, for respondent.

LAMM, P. J. (after stating the facts as above). 1. There has long existed in our statutes (Rev. St. 1899, c. 48 [Ann. St. 1906, pp. 2335-2365] on Limitations of Actions, art. 2, Personal Actions) a section containing a saving clause in case of a nonsuit, and providing that a plaintiff "may commence a new action from time to time, within one year after such nonsuit suffered" (section 4285). This saving clause was substantially borrowed and used in the new section (2868), supra, now part of chapter 17, on damages and contributions in actions of tort. But in said article 2, c. 48, it is further provided as follows (section 4292): "The provisions of this chapter shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute." Proper construction of the last section precludes the idea that section 4285 applies to actions instituted for damages for torts under the damage act. This because the damage act carries its own special statute of limitations, which must control. Gerren v. Railroad, 60 Mo. 405; Wilson v. Knox Co., 132 Mo. 387, 34 S. W. 45, 477; Davenport v. Hannibal, 120 Mo. 150, 25 S. W. 364; Revelle v. Railroad, 74 Mo. 438; Packard v. Railroad, 181 Mo. 421, 80 S. W. 951, 103 Am. St. Rep. 607. In the latter case it was held that a widow nonsuited within the year might sue again, provided she instituted her suit within a year after the cause of action accrued, not within a year after nonsuit suffered. McQuade v. Railroad, 200 Mo., loc. cit. 157, 98 S. W. 552. It is practically conceded by counsel for appellant that unless section 2868, passed in 1905, applies to the case at bar, then the demurrer is well taken; for up to that time as the law stood there was no saving clause tolling the statute of limitations relating to damage suits grounded on tort, and permitting a nonsuit and the institution of a new suit within one year after the nonsuit. It is conceded, too, that the act of 1905 was passed to remedy the construction put on the damage act by Gerrin v. Railroad, supra.

2. A main proposition argued by counsel for respondent is that the statute of limitations (section 2868, supra) is a bar to the present suit because commenced more than one year after the cause of action accrued. Contra, appellant's counsel argues that the saving clause in section 2868 applies. To that respondent's counsel replies that the statute was not intended to affect suits then pending, but its force is spent on suits to be instituted in the future. If, now, the fact be recalled that the present suit was brought more than a year after the death of Charles Ritter, that the original suit was commenced before the present section 2868 was enacted, and that the nonsuit was suffered on the

19th of August, 1905, and while the new section was in force, we have the whole contention outlined.

Attending to it, we have come to the conclusion that the statute of limitations is no bar. This because:

(a) It cannot be held that the section in hand is violative of section 15, art. 2, Const. (Ann. St. 1906, p. 137), prohibiting the passing of laws retrospective in their operation. This because the retrospective laws forbidden by that instrument are laws impairing existing vested civil rights. The law must take away such vested right, or it must create a new obligation, impose a new duty, or attach a new disability in respect to gone-by transactions, in order to be retrospective and under the constitutional ban. *Gladney v. Sydnor*, 172 Mo. 318, 72 S. W. 554, 60 L. R. A. 880, 95 Am. St. Rep. 517; *Hope Mutual Insurance Co. v. Flynn*, 88 Mo. 483, 90 Am. Dec. 438. There is no vested right in a particular mode of procedure. *Roefeldt v. Railroad*, 180 Mo. 554, 79 S. W. 706. Laws merely affecting civil remedies and modes of procedure are not within the constitutional interdiction. *Golden City v. Hall*, 68 Mo. App. 627; *In re Life Ass'n of America*, 91 Mo. 177, 3 S. W. 833; *Coe v. Ritter*, 86 Mo. 277; *Wellshear v. Kelley*, 69 Mo., loc. cit. 354, 355; *Porter v. Mariner*, 50 Mo. 364; *Haarstick v. Gabriel*, 200 Mo., loc. cit. 244, 98 S. W. 760, et seq.; *O'Bryan v. Allen*, 108 Mo. 227, 18 S. W. 802, 32 Am. St. Rep. 595.

(b) But it is argued by respondent's counsel that the grammatical construction of section 2868 precludes actions instituted before the passage of the law. They point out that a future form of the verb is used in the phrase, "shall have been commenced," and they contend that the amendment of 1905 applies only to actions that "shall have been commenced" after that act took effect. They contend, further, that all legislation must be construed as prospective even where it relates to the remedy, unless the contrary intention appears in the act itself. That there is a presumption running that way.

(1) Attending to the last proposition, we observe that the general rule is that legislation is construed to be prospective; but it will be found in considering the Missouri cases in which that rule is invoked (e. g., *Leete v. Bank*, 115 Mo. 184, 21 S. W. 788) that they do not relate to mere procedure and to legislation merely affecting a legal remedy. In *Lewis' Sutherland Statutory Construction* (2d Ed.) § 674, the general doctrine is stated to be that: "Where statutory relief is prescribed for a cause which is continuous in its nature, as a statute of limitations, or desertion for a certain time as ground for divorce, if the cause continues after the statute goes into effect, the future continuance of the cause may be supplemented by the time it was continuous immediately before the act was passed to con-

stitute the statutory period. No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, *prima facie* it applies to all actions—those which have accrued or are pending and future actions. What was before a subject of equitable relief may be made triable by jury without affecting vested rights. If, before final decision, a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law will stand unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened. If what has been done under the old law is bad or insufficient under that law, it remains so, though it would have been good if done in the same way under the new law. A remedy may be provided for existing rights, and new remedies added to or substituted for those which exist. Every case must to a considerable extent depend on its own circumstances. General words in remedial statutes may be applied in past transactions and pending cases, according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness, and justice." And Mr. Endlich (End. on Inter. Stat.) § 287, puts it this way: "In this country the general rule seems to be, in accordance with the English, that statutes pertaining to the remedy—i. e., such as relate to the course and form of proceedings for the enforcement of a right, but do not affect the substance of the judgment pronounced, and neither directly nor indirectly destroy all remedy whatever for the enforcement of the right—are retrospective, so as to apply to causes of action subsisting at the date of their passage." Id. § 288: "Indeed, much of this kind of legislation is held to apply, not only to existing causes of action, but also to pending proceedings. It is said that an act dealing with procedure only applies, unless the contrary intention is expressed, to all actions falling within its terms, whether commenced before or after the enactment." The doctrine thus announced seems well-bedded in principle. We think it applies to the statute in hand, which in its essence is purely a remedial one; hence no presumption lies that it was intended to operate prospectively only. Being highly remedial, it should be most liberally construed to further its life in advancing the remedy and striking down the mischief aimed at—the need and occasion of the law, the mischief felt, and the object and remedy in view being cardinal elements in statutory interpretation.

(2) Courts have no right, by construction, to substitute their ideas of legislative intent for that unmistakably held by the Legislature and unmistakably expressed in legislative words. "Expressum facit cessare tacitum." We must not interpret where there is no need of it. *McCluskey v. Cromwell*, 11 N. Y., loc. cit. 601, 602. Therefore, if the law says it is to operate only upon cases to be brought thereafter, if it in terms excludes pending cases, then we have nothing to do but to enforce it. Attending to that view, we do not read the statute as contended by counsel for the respondent. Its use of the future form of the verb, "commence," as developed in the phrase "shall have been commenced," in correct usage in the discourse of good writers and speakers, includes the past as well as the future. That phraseology in a statute has been held by the Supreme Court of Connecticut to be "susceptible of both past and future application. They [the words] furnish a convenient form for legislative use when it is desired to give all-inclusive force to a single expression. Therefore, as they may mean future, or past and future, it becomes a question of legislative intent in each statute." *Norris v. Sullivan*, 47 Conn. 474. To the same effect is *People ex rel. v. Board of Education*, 126 App. Div. 414, 110 N. Y. Supp. 769. Counsel for appellant have cited us to 2 Wis. St. 1898, p. 2913, where the Legislature of that state has recognized the idea of past and future meaning in such future forms of the verb, and has enacted a rule of statutory construction to the effect that "the words 'shall have been' include past and future cases." Our own statute on construction (Rev. St. 1899, § 4160 [Ann. St. 1906, p. 2252]) requires that "words and phrases shall be taken in their plain or ordinary and usual sense." With that rule in mind, let us illustrate: If a rule were bulletined on a given Tuesday by the headmaster in charge of teaching grammar in a school, as follows: "No pupil shall be whipped twice for a mistake which shall have been made in parsing"—would any boy in the school take the rule to apply only to future mistakes in parsing? Could he not well plead the rule (with high hope of its allowance) if his mistake and one flogging occurred on the Monday prior and another flogging was threatened on the Wednesday subsequent to the rule for the same mistake? Or if C., a plantation owner, is building barns, and writes his overseer, "Paint all barns red that shall have been commenced," would B., his overseer, take that command to mean that only barns commenced after the order should be painted red? Nay, if a very stickler for grammatical precision—a John Horne Tooke, a Lindley Murray, or a Dr. Marsh—should make a New Year's rule for his self-guidance, viz., "If my reading of any book shall have been commenced, I will finish it," would he construe his own

rule not to include *Anatomy of Melancholy* or the *Decline and Fall* put in reading on the prior Christmas? See *Foley v. Dillon* (Ky.) 105 S. W. 461; *Douglass v. James*, 66 Vt. 21, 28 Atl. 319, 44 Am. St. Rep. 817. We may presume all legislators grammarians but that presumption would not drive us to the conclusion that they meant only future action when they wrote "shall have been commenced."

(3) Moreover, section 2868 refers to "any action" which "shall have been commenced" within the time prescribed within "this section." The time prescribed in "this section" is the same time prescribed in the repealed section—i. e., the old law is continued in force in that regard. It is quite difficult to see why, according to the English used, as got at by correct usage from the grammatical construction employed, pending actions were not included. When the nonsuit was suffered, the statute was in force. It therefore operated on that particular nonsuit, and we are of opinion that plaintiff was entitled to recommence her suit within one year after the nonsuit. That is the reasonable and just view; accordingly we so rule. The demurrer therefore cannot stand on such foot.

8. It is charged in the petition that the mother of Charles was divorced; was awarded the custody of her child born of the marriage with Thomas; that she was bearing the burden of maintaining and educating him; that Thomas refused to join in bringing suit for his negligent death; and that the mother joined him as plaintiff willy nilly. Defendant demurs because of a misjoinder of parties plaintiff appearing on the face of the petition. The next question is: Was it well taken on that score? Although our damage act had existed for a half century with section 2864, supra, in the form quoted, yet this is the first time, so far as counsel's or our own research goes, that the precise point was here to be ruled. It must, therefore, be determined by aid of general principles of law, by construing the statute equitably—that is, in the light of its true intentment—and by parity of reasoning. It is argued by appellant's counsel that Thomas Ritter settled with defendant; hence his refusal to join. We are cited to cases elsewhere holding that one of two persons entitled to jointly share in a statutory penalty or who are jointly interested in the proceeds of a judgment based on such statute may not execute a release barring the other. We doubt not that such doctrine is good law in this jurisdiction. But, at the outset, it is well to keep the case within the channel marked out in the petition. There is no allegation that Thomas settled with defendant or executed a release. Therefore, that phase of appellant's brief must be taken as coloring matter used arguendo by way of hypothesis. A bitter hard case is put by learned counsel in

his brief, viz.: May Thomas, undeserving, having a joint right of action with Emma and an equal share in the amount recovered, as a mere dog in the manger, through caprice, malice, pique, stubbornness, selfishness, or other ignoble reason, refuse to join in the suit, and will the law permit Emma, the deserving mother, to be wronged or tricked out of her rights to the compensation by such refusal? But there is another side to the picture. Why not suppose that Thomas, through scruples of conscience or some motive resting in honor, refused to take part in the contemplated litigation? Is that not a thinkable hypothesis? In determining the hard case put by counsel, it is well to bear the adage in mind that hard cases make bad law—are the quicksands of the law. In our exposition of the statute it has been steadily held that as there was no right of action for a wrongful death at common law at all, and as the statute transmitting such right of action is in derogation of the common law, it must be construed with reasonable strictness. Furthermore, as the right of action is only of statutory origin, the Legislature had the right in creating it to prescribe a preclusive remedy, and nominate those entitled to sue and the terms on which they could sue, and has done so.

In *Barker v. Railroad*, 91 Mo., loc. cit. 94, 14 S. W. 282, it was said: "In statutory actions of this sort, the party suing must bring himself strictly within the statutory requirements necessary to confer the right, and this must appear in the petition. Otherwise, it shows no cause of action." The doctrine so announced is bottomed on the reasoning in *McNamara v. Slavens*, 76 Mo. 329, and in *Coover v. Moore*, 31 Mo. 574—the latter case holding that: "There being thus no general right of recovery open to all persons, representing the estate of the deceased, or interested in his life, only such persons can recover in such time and in such manner as is set forth in these statutes." In *Oates v. Railroad*, 104 Mo., loc. cit. 518, 16 S. W. 488 (24 Am. St. Rep. 348), Black, J., quoted with approval section 413 of 3 Wood's Railway Law, reading: "It is needless to say that actions under these statutes must be brought by the persons designated therein, and within the time and in the manner therein provided. If the statute provides that the action shall be brought by the executor or administrator of the deceased, no other person can maintain an action"—adding his own comment, as follows: "The statute gives the cause of action and points out the persons who may sue, and they, and they alone, can sue, and they must sue within the time prescribed by the statute." See, also, *Barron v. Mining Co.*, 172 Mo. 228, 72 S. W. 534, and *Packard v. Railroad*, 181 Mo. 421, 80 S. W. 951, 103 Am. St. Rep. 607. In *Hennessy v. Bavarian Brew-*

ing Co., 145 Mo., loc. cit. 113, 46 S. W. 967 (41 L. R. A. 385, 68 Am. St. Rep. 554), Marshall, J., speaking to the point with the concurrence of his learned Brethren, said: "Our statute, on which the right alone rests and by which it has been transmitted from the child (i. e., the child killed), vests it expressly in the father and mother eo nomine (who must join in the suit and each have an equal interest in the judgment), or, if either of them be dead, then to the survivor. * * * The fact that the statute is intended to transmit the rights of the deceased child to the father and mother, and that the relation between them as husband and wife does not affect their rights as parents, and the dissolution of the marital relations between them does not dispense with the necessity for joining both in litigation, and that neither can maintain the action alone, and that the remarriage of the wife after the dissolution of her former marital relations makes no difference as to her rights as the mother of deceased, is aptly illustrated by the history of the cases of *Buel v. St. Louis Transfer Co.*, 45 Mo. 562, and *Crockett v. St. Louis Transfer Co.*, 52 Mo. 457." What was said in the *Hennessy Case* was somewhat by way of argument and illustration, therefore is somewhat obiter, but it is obiter of a high order, based on the reasoning of the cases cited, and must be taken as sound exposition when read with other cases and the statute in review, for instance *Senn v. Railroad*, 124 Mo. 621, 28 S. W. 66. Undoubtedly it must be allowed to appellant that we have held that one of two living parents may save the statute of limitations from running by instituting a suit for the death of their child within one year, joining the other parent after the year has run. *Cytron v. Transit Co.*, 205 Mo. 692, 104 S. W. 109. But that holding was leveled at the limitation phrase of the statute and made a liberal application of our statutes relating to amendments—that and no more. What we said in those cases falls much short, in principle, of holding that one living parent could prosecute such suit to a judgment or could join the other as coplaintiff against his will. The Legislature enacting section 2864 of the old damage act knew that divorces might ensue, and that parties entitled to the penalty might refuse to join, and yet in creating a new right of action in parents it put the right to recover in both (if living) and shut its eyes to complications arising by divorce or refusal to join. The many Legislatures coming after that one knew that this court uniformly construed that statute with some strictness as in derogation of the common law, and that, strictly construed, it made no provision for a divorce and none for parents who would not join to recover the death penalty. It would be idle to speculate upon the ground for such legis-

lative omission and silence. For aught that we know, both omission and silence may have been grounded on an allowable legislative reason. As the clear law reads, this defendant must pay in a specified case, to wit, when a father and mother join in the suit prior to judgment and in a specified sum—no more, no less. Shall we write into it by construction an added provision, to wit, that the wrongdoer is not only liable in cases put by the statute itself, but is also liable in any case where one of two parents or one of a family of minors, or (under a late statute) one of two administrators or executors is alone willing to sue for the penalty? Is it the statutory scheme that the wrongdoer should pay to one what the statute ordains should go to both parents, or all the minors? Or must he pay in full what all are not willing to receive? Or, if he is to pay only part, what part shall it be? The statutory penalty is indivisible, and all of it or none must be sued for. *Casey v. Transit Co.*, 205 Mo. 721, 108 S. W. 1146. We cannot well write the law as requested by learned counsel without thereby doing away with the rule of reasonable strict construction, and without writing into the statute provisions not now there. When at common law the assignee of a chose in action could not sue in his own name, common-law courts invented a device to get round that injustice by permitting the assignee to sue in the name of the original party, and, when necessary, indemnify such party against costs. So at common law, "if one of the several owners of a joint interest refuses to join as plaintiff, the common-law procedure, reverting to the device of 'nominal and use plaintiffs,' permitted the other owners to use his name as co-plaintiff." 30 Cyc. p. 107. In our own statute there is a section regulating procedure where an interest is transferred in any action pending and borrowing that idea in a modified form. Rev. St. 1899, § 764 (Ann. St. 1906, p. 743). But our statutory scheme is to require suits to be brought in the name of the real party in interest. If one necessary party will not join as plaintiff, he may under given conditions be made a party defendant. Rev. St. 1899, § 544 (Ann. St. 1906, p. 583).

We think learned counsel has mistaken the source of the power to correct evils, if any, in the statute. He should go to the Legislature, and request that body to enlarge the remedy, and make it flexible and broad enough to include cases within the hardships put by him in the case at bar, and see what the lawmaker says; for it seems sensible that the lawmaker should first write the law, and not we. To us the maxim applies: "Jus dicere et non jus dare."

The judgment is affirmed. All concur.

QUINN v. METROPOLITAN ST. RY. CO.
(Supreme Court of Missouri, Division No. 1.
Feb. 25, 1909. Rehearing Denied March 31,
1909.)

1. CARRIERS (§ 321*)—PASSENGERS—ACTIONS—INSTRUCTIONS—CARE REQUIRED—"HIGHEST"—"UTMOST."

It is usual to use the word "highest" in instructions upon the decree of care required by carriers toward passengers, instead of the word "utmost," and the former word should be used, though there may be but slight difference in their meaning.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1827; Dec. Dig. § 321.*]

2. APPEAL AND ERROR (§ 1067*)—HARMLESS ERROR—INSTRUCTIONS.

Where the court instructed that if plaintiff offered himself as a street car passenger when the car stopped for passengers and defendant did not permit the car to remain standing sufficiently long to allow plaintiff to board it, and while he was in the act of boarding it the car was negligently started and plaintiff was injured, he could recover, it was not prejudicial error to refuse a requested instruction that if the car stopped at the usual place, and while it was standing plaintiff attempted to board it as a passenger, defendant was bound to exercise toward him the utmost care for his safety that a prudent man would have exercised under the circumstances.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1067.*]

3. CARRIERS (§ 348*)—PASSENGERS—INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In a passenger's action for injuries claimed to have been caused by the premature starting of a street car while he was boarding it, where the evidence showed that the car stopped at a usual place and for the usual time, and plaintiff testified that he was waiting for the car and that he heard and understood the signal to start, and another testified that she boarded the car at the rear and had walked through it when the signal to start was given, an instruction was proper, as going to plaintiff's negligence, that, if the car stopped at the usual place a reasonable length of time to enable plaintiff to board it in safety by exercising ordinary care, the jury should find for defendant.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 348.*]

4. CARRIERS (§ 328*)—PASSENGERS—INJURIES—TAKING UP PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Where a street car has stopped for a reasonable time for passengers and gives the signal to start before one attempts to enter, the invitation to enter the car ceases, and one thereafter attempting to enter would be negligent, especially if he heard and understood the signal.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1367-1369; Dec. Dig. § 328.*]

5. CARRIERS (§ 348*)—PASSENGERS—ACTIONS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—APPLICABILITY TO EVIDENCE.

Plaintiff testified that when he fell off a street car he had both feet upon the steps and was holding to the guard rails with both hands, and rode a short distance in that position, until a passenger discovered that her child had not entered the car and began to scream, when plaintiff released his hold with one hand, thinking the woman was going to jump off, and was thrown off by a jerk, but it was not shown that the jerk was unusual under the circumstances,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the car being then crossing other tracks. *Held*, that it was proper to instruct that if plaintiff got on the car and rode some distance in a reasonably safe position, and thereafter let go one of his handholds and fell from the car, the jury should find for defendant.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 348.*]

6. TRIAL (§ 238*)—INSTRUCTIONS—CREDIBILITY OF EVIDENCE—PLAINTIFF'S TESTIMONY.

An instruction that while plaintiff is a competent witness, yet in determining the weight of his testimony the jury should consider his interest, and, while the law presumes that what he says against his interest is true, the jury need not believe his testimony in his own favor, but could treat it as true or false, as they believed it when considered with all the other testimony, was erroneous.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 531-536; Dec. Dig. § 238.*]

7. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT—CREDIBILITY OF WITNESS.

The instruction was prejudicial error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

8. APPEAL AND ERROR (§ 1069*)—HARMLESS ERROR—PREJUDICIAL EFFECT.

Where counsel agreed to permit a witness' testimony to be read in the jury room if all of it was read, and the stenographer read part of it to the jury, when they told him that they had heard enough and excluded him from the jury room, his failure to read the rest of it was not prejudicial error; it not appearing that the jury knew of the agreement that all of the testimony should be read.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1069.*]

9. EXCEPTIONS, BILL OF (§ 7*)—CONTENTS.

Bills of exceptions should show only what actually occurred in court, and what the court stenographer told the court as to what happened in the jury room, where he was sent to read testimony to the jury, should not have been embodied in the bills of exceptions.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Dec. Dig. § 7.*]

10. TRIAL (§ 156*)—DIRECTION OF VERDICT.

The evidence introduced by defendant does not aid plaintiff, and, if there was no evidence to go to the jury a demurrer thereto should have been sustained at the close of plaintiff's evidence, without considering defendant's evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 355; Dec. Dig. § 156.*]

11. CARRIERS (§ 346*)—PASSENGERS—ACTIONS—INJURIES—SUFFICIENCY OF EVIDENCE—CAUSE OF ACCIDENT.

In a passenger's action for injuries sustained in falling off a street car, plaintiff's evidence *held* to show that the accident resulted from plaintiff's voluntary act in letting go his hold on the car.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1401; Dec. Dig. § 346.*]

12. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—DECISION CORRECT ON MERITS.

Where the verdict was correct on the merits, it will not be disturbed for error in instructions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

Appeal from Circuit Court, Jackson County; Jno. G. Park, Judge.

Action by James D. Quinn against the Metropolitan Street Railway Company. From a judgment for defendant, plaintiff appeals. *Affirmed*.

Bird & Pope and T. J. Madden, for appellant. Jno. H. Lucas and Ben F. White, for respondent.

GRAVES, J. Defendant, a street railway corporation, is sued by plaintiff for personal injuries. Trial in the circuit court, before a jury, resulted in a verdict for defendant, upon which judgment was entered. From this judgment, plaintiff in due form appealed. The negligence charged to the defendant is thus couched in the language of the petition:

"That on or about the 29th day of January, A. D. 1908, at about the hour of 8 o'clock p. m. of said day, plaintiff offered himself as a passenger on a west-bound cable train of said defendant at the junction of Ninth, Main, and Delaware streets, in Kansas City, Jackson county, Mo. That said cable train was not permitted to remain standing a reasonably sufficient length of time to enable said plaintiff to board said train, but was carelessly and negligently started forward by said defendant and its conductor and gripman in charge thereof (whose names are unknown to plaintiff) while plaintiff was in the act of boarding said train, and before said plaintiff had had reasonably sufficient time to board said train. That said cable train was also carelessly and negligently started forward without its said conductor and gripman giving plaintiff any warning of the starting of said train, although said defendant, its agents, servants, and employes in charge of said train, knew, or by the exercise of ordinary care should have known, that plaintiff was in the act of boarding said train, and by reason of the said careless and negligent acts of said defendant as aforesaid plaintiff was thrown and dragged or caused to fall from said train with great force and violence to the street and pavement."

Severe injuries were alleged to have been received, including injuries to the nervous system, brain, back, spine, hip, right side, eyes, arms, shoulders, "and internal injuries, the exact nature of which are unknown to plaintiff." In other words, injuries, both unknown and known, were charged, and in quantity evidently sufficient in number and in quality, sufficient in seriousness, to justify the damages asked in the amount of \$5,000.

The answer was a general denial and a plea of contributory negligence. Reply was in the conventional form for such an answer.

The plaintiff complains of the action of the trial court in refusing an instruction asked by him, and in giving several asked by

defendant, as well as some given by the court of its own motion. He also urges as error the fact that the trial court erred in permitting the stenographer to read his notes to the jury.

Defendant contends that there was no error in these regards, but urges that even if there were errors thus committed, yet the evidence shows that plaintiff was not entitled to recover, and the verdict is for the right party and should not be disturbed.

1. Plaintiff's instruction which was refused, and of which complaint is made, is in this language: "If you find and believe from the evidence that the cable car in question came to a standstill at the usual stopping place at the junction where passengers were let off and on, that while said car was standing the plaintiff attempted to board the same with the intention of becoming a passenger thereon, then you are instructed that the defendant was bound to exercise towards him the utmost care and skill for his safety that prudent men would have exercised while engaged in the same business under the same and similar circumstances." As an abstract statement of the law, this instruction may be correct, but we do not so say. It uses the word "utmost" instead of the word "highest," as is usually used in instructions defining the measure of care required, but there may be but slight difference in the two words. The latter has the approval of the courts, and should be used. Considering this act of the court alone, i. e., the refusal of this instruction, when considered with the instructions given, we would not denominate it further than error, but not necessarily reversible error. By the first instruction for plaintiff the learned trial court had told the jury in effect that if the plaintiff had offered himself as a passenger on the car in question whilst the same was stopped for that purpose, and that defendant had not permitted the car to remain standing for a sufficient time to allow plaintiff to board the same, and further that, whilst he was in the act of boarding the same, said car was negligently and carelessly started, and the plaintiff was thereby injured, then the finding should be for the plaintiff. This instruction given for the plaintiff made it imperative to find for him under a given state of facts. It does not include the abstraction as to defendant's duties to its passengers, but it does say that, if the jury found certain things, it must find for the plaintiff. These certain things were (1) acts upon his part which in law made him a passenger, and (2) acts upon the part of the defendant which, if found, evidenced a failure to perform the high duty required of a carrier to its passenger. With this instruction given, imperative and absolute as it is, the plaintiff lost nothing by the refusal of the abstract declaration contained in the one refused. The refusal of this instruction, when considered with those given, was not re-

versible error, to say the least. The case of *Orcutt v. Century Building Company*, 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929, is cited as authority. In that case we did discuss the duties of carriers to passengers, and we did announce that the highest degree of care was required, and we did reverse the case because the court had refused to give an instruction upon the degree of care required, and, as we think, properly so, in that case. But there the situation was different. In that case the defendant was claiming that the plaintiff was a mere licensee, and therefore was only entitled to ordinary care; but the plaintiff was contending that he was a passenger, and thereby entitled to the degree of care required in cases where such relation of passenger and carrier exists. In that case the court adopted the defendant's theory and instructed only on the use of ordinary care. In that we said the court was wrong. In that case the refusal of the plaintiff's instruction for the highest degree of care, and the giving of the defendant's instruction for only ordinary care, evinced the fact that the court tried the case on the wrong theory, i. e., that plaintiff was a mere licensee and not a passenger. No such condition appears in this case. Standing alone, the refusal of this instruction should not reverse the case.

2. Nor is there error in the giving of instruction 9D for the defendant. The instruction reads: "The court instructs the jury that if you find and believe from the evidence that the car upon which the plaintiff boarded, or attempted to board, stopped at the usual stopping place, where plaintiff claims to have been injured, a reasonable length of time to enable plaintiff to board the same in safety by the exercise of ordinary care on his part, then you will find your verdict for the defendant." Under all the evidence, this was a usual stopping place. Under all the testimony, the car stopped. Plaintiff says he was waiting for it before it came, but was talking to a friend in the meantime. One of the plaintiff's witnesses says she boarded the car at the rear end and had walked through the car to the front end and was seating herself when the signal to start the car was given. If she could do that, why could not plaintiff? Nor is it disputed that the signal to start the car was given prior to the start. Plaintiff says he heard it and understood it. The cars were not crowded, according to all the evidence. By "cars," we mean the grip car and the trailer which followed, for this was a cable train composed of the two cars. This instruction, whilst not mentioning the term, goes to the contributory negligence of the plaintiff in not using reasonable care and expedition in boarding the train whilst it was there standing for the receipt of passengers. He says he was there beforehand, and no express evidence shows that the car did not stop for the usual time. There is ex-

press evidence that it did stop the usual time for cars at that place, and this from plaintiff's witnesses. Under the facts disclosed, this instruction was proper. When a car has been stopped for the receipt of passengers for a reasonable time, and then the signal to start is given before a person attempts to enter, then the invitation to enter is closed. Without some kind of notice prior to the signal to start, street railways are not required to anticipate that parties at or near its stopping place are intending to become passengers. And, if the signal to start is given prior to any attempt to enter the car, the party must heed the signal, and especially so if he knows the meaning, as did the plaintiff. The giving of the signal to start is evidence of the fact that the invitation to enter has been closed, and an attempt to enter the car after such signal and after it started would be contributory negligence.

3. Nor can we say there was error in giving instruction 8D for the defendant. This instruction reads: "The court instructs the jury that if you find and believe from the evidence that plaintiff got upon the car in question before the car started, or while it was in motion, and rode upon said car some distance with each hand holding to the guard rail in a reasonably safe position and place upon said car, and that thereafter he let go of one of said guard rails and fell from the car, your verdict will be for the defendant." The plaintiff admits that he had both feet upon the steps of the car and both hands holding the guard rails on the car, in which position he rode a short distance, until a lady passenger discovered that her six year old son had not entered the car and began to scream. He says he thought she was going to jump off of the car and told her not to jump, but about the same time released the hold he had with one of his hands, and by a jerk was thrown off. Had he held to the position he occupied, no trouble would have ensued. Such is the import of his testimony, although not in express language. The release of his hold upon the car was not occasioned by the defendant, for at the time the boy was safely upon the sidewalk of the street. It was occasioned by the acts of the woman, for which the evidence does not convict the defendant. The car was crossing other tracks in another street, and the alleged jerk is not shown to be out of the usual for the place and the surroundings, when the character of the train is considered. The giving of this instruction was not error.

4. Instruction 11D given by the court for the defendant is urged as error, and in this we think there is force in the objection. The instruction reads: "The court instructs the jury that while the plaintiff is a competent witness in this case, and you should consider his testimony in arriving at your verdict, yet in determining what weight and credibility you will give to his testimony

you should consider his interest in the result of the trial, and that he is the plaintiff testifying in his own behalf. Whatever he may have said against his interest the law presumes to be true, because against his interest; but whatever he may have said in his own behalf you are not obliged to believe, but you may treat the same as true or false, just as you believe it true or false, when considered in connection with all the testimony in the case." This form of an instruction has been especially condemned by this court, and we think rightfully. *Zander v. Transit Company*, 206 Mo. 445, 108 S. W. 1006, and cases cited. Nor will it do to say that the giving of such an instruction does not work prejudice.

5. The other objection to an instruction given by the court does not seem to us at all tenable, and not one to which we should give space in an opinion. Nor is the objection as to the stenographer good, for it appears from the record thus: "While the jury were deliberating upon the verdict, the jury sent word to the court that it desired to have read to it the testimony of plaintiff. Mr. Loomis, attorney for defendant, stated that he was willing to have the stenographic notes read to the jury. One of the counsel for plaintiff said he was willing to have that done, but wanted all of it read. During the noon recess of a case then on trial, the court sent the official stenographer, Darius A. Brown, Esq., into the jury room with instructions to read said stenographic notes. Some time during the afternoon the jury returned a verdict and were discharged. Afterwards the official stenographer reported to the court that before he had finished reading his stenographic notes the jury stopped him, saying, 'We have heard enough; that is all we want,' and excluded him from the jury room." Under this narration in the bill of exceptions it appears that both parties agreed to the stenographer reading all of his notes upon the testimony of the plaintiff. By this agreement the stenographer entered and read. His presence there was by consent. What the jury did with him thereafter was not at the suggestion of the defendant, nor does it appear that the jury was apprised of the full agreement, so as to make it misconduct upon their part. We hardly think this unsolicited act upon the part of the jury should be held prejudicial error. But, further, the bill of exceptions goes beyond the limit. Such bill should only show what actually occurred in court, and not what may have been reported to the court. Such part should be excluded.

6. This brings us to the critical question in this case. Defendant urges that upon the whole record the verdict is right. This requires both an inquiry as to the pleadings and the evidence. That the petition charges specific acts of negligence cannot be questioned. The extent and character of the

charge is, however, for consideration. An analysis of these charges and an application of the evidence deduced by plaintiff's witnesses will solve this question. We say this because the evidence introduced by defendant does not aid the plaintiff. In other words, if the case was wrongfully submitted to the jury, the demurrer to the testimony should have been sustained at the close of plaintiff's case. *Matz v. Mo. Pac. Ry. Co.* (not yet officially reported) 117 S. W. 584.

As to the evidence, the record shows that the plaintiff was waiting for this car, but talking to a friend, a young man from the stockyards. His witnesses say that the car stopped the usual length of time at that place. The car was a west-bound car on Ninth street, but went out on Summit street. The stopping place was the junction of Main and Delaware streets in Kansas City, too well known to the jurisprudence of this state and the reported cases to need further comment. Just how many got off of the car does not appear, but it does appear that the cars were not crowded, and that only four parties were taking passage, including the plaintiff. It does appear that one of these parties, who, like plaintiff, was there awaiting the car, did get on the coach from the rear end, and, walking clear through the car to the front end, was in the act of seating herself when the signal to start was given. It does appear that two of the prospective passengers were a woman and her six year old son, who had come in on a car from another direction. This lady had some baskets of groceries, and she herself got on the car on the platform thereof. She was recognized by the other lady, who, instead of seating herself, started to open the front door of the coach for her when the car started. At that moment it was discovered that the little boy had not gotten on the car, and the mother evidently made some demonstrations. Plaintiff says that the little boy was trying to board the car after it started, and he pushed him back, fearing that he would fall under the wheels. Plaintiff finally admitted that he got both feet upon the steps of the car and was holding with both hands, when the mother of the boy, as he thought, was going to attempt to get off of the moving car. He rode in this position from the junction sidewalk and stopping place, practically half across Delaware street, and was thrown down by an accelerated forward movement of the car, if such it could be called under the evidence. Plaintiff reiterates a description of the manner of his fall several times, but the following from his cross-examination fairly states his views of the matter:

"Q. Now, Mr. Quinn, I am trying to get at this fact. I understood you to say that you got on the car, and was standing on the step of the car with both feet on the lower step, with your right hand ahold of one railing, the front railing, and your left hand

ahold of the other; that after the car started you got into that position. Now, can you understand me? A. It moved up onto Delaware street; the front end of the car was right up to the tracks on Delaware street. Q. Now, Mr. Quinn, the front end of which car had got up to the tracks, the rear car or the front car? A. The rear car. Q. The rear car had got up to the tracks on Delaware street? A. Yes, sir. Q. Now, Mr. Quinn, what did you do then? A. Why, this lady was in front of me, and I thought she was going to get off, and the man rang the bell. Q. Who rang the bell? Mr. Bird: I submit, if the court please, he ought not to interrupt this witness. The Court: He was not going to interrupt the witness; he just asked him who rang the bell. (To which action and ruling of the court the plaintiff at the time duly excepted.) Q. Who rang the bell? A. Some man that was standing in front on the platform, on the far side. Q. Rang the bell? A. Rang the bell. Q. Then what was done? A. And this lady came over. Q. From where? A. Over towards me, and I thought she was going to get off. Q. Well, what did she do? A. And she came over, and it seemed I let go of this hand to let her off—the left hand. Q. Let go of which hand? A. The left hand. Q. Let go of your left hand, yes, that is the hand you had hold of the railing of the body of the car? A. Yes, then the car, it seemed like, it fastened onto the rope, and jerked us right across the street; that is the time I fell. Q. Then you fell off? A. Yes, sir. Q. Did she try to get off? A. I don't know."

He also says that, although this lady was standing in front of him, yet no one touched him. His language is: "How far did you ride on the car? A. From—What do you mean? Q. From the time you got on, until you fell off. The Court. How far did you fall off from the place where the car started? A. I fell off about halfway across Delaware street. Q. You rode from the place where you got on to about halfway across Delaware street. A. Yes, sir. Q. That is correct, is it? A. Yes, sir. Q. Well, where were you riding during that time? A. I was on the step of the car. Q. Sir? A. I was on the step of the car. Q. You were standing on the step of the car? A. Yes, sir. Q. All that time? A. Yes. Q. And had hold of the hand rail in front of you all that time? A. Yes, sir. Q. Well, clear up to the time that you fell off, Mr. Quinn, there was nobody touched you or interfered with you at all, was there? A. No, this lady was in front of me. Q. Well, I asked you, Mr. Quinn, if anybody touched you, or interfered with you at all? A. No, sir. Q. Did not? A. No, sir."

That plaintiff had notice of the starting of this car before it started, he concedes. This admission eliminates that charge of negligence. The evidence for plaintiff, as before stated, shows that the car stopped the usual time. The evidence also shows that plaintiff

had gotten to a reasonable place of safety before he fell. He was upon the car with both feet upon the step and both hands holding to the rails, from which he could have easily reached the platform, but for his own act later, the voluntary release of his handhold, and this from a cause which is not chargeable to defendant.

Nor does the testimony show any such unusual lurch or jerk of the car as would be denominated negligence. We all know that as the grip becomes more firmly attached to the cable there will be an increase of the speed, and that cable cars are not free from lurches thus produced. There should have been some evidence upon this point showing an unusual and negligent running of this car, to say the least. It must also be borne in mind that the cable train was crossing these tracks in Delaware street, which of itself would produce some disturbance. But after all, this evidence tends to show that the accident was the result of plaintiff's own voluntary act, which act of his was superinduced by an independent cause. We do not think that plaintiff made a case on the evidence adduced by his witnesses. The defendant's evidence tended to show that he was not on the car, but fell in an attempt to place the little boy on board the moving train. We mention this to show that the evidence of defendant did not aid plaintiff's case. Our discussion has been confined to plaintiff's evidence. The woman said she was not attempting to leave the car, but was trying to stop the car so that the child might get aboard. The signal was given and the car stopped about the time it crossed Delaware street. The plaintiff and the child both boarded the car and proceeded west. No complaint was made by plaintiff at the time as to any injury or as to the treatment of him by defendant's employes. Upon the whole, we think the verdict found was the only one which could have been found by the jury, and we will not disturb it for the error above pointed out.

The judgment will be affirmed. All concur.

STEVENS et al. v. FITZPATRICK et al.
(Supreme Court of Missouri, Division No. 1.
March 31, 1909.)

1. JUDGMENT (§ 122*)—DEFAULT—ENTRY—NECESSITY OF REQUEST.

If there was no reply to a cross-bill, so that defendants were entitled to have it taken as confessed, they should have asked for entry of a default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 222; Dec. Dig. § 122.*]

2. QUIETING TITLE (§ 39*)—DEFENSES—PLEADING.

In an action to quiet title, an allegation in a cross-bill that the land belonged to W. at his death and descended to his heirs, and that defendant was a bona fide purchaser from another without notice of adverse claims, would

not support a judgment for defendant, she not having connected her grantor with W.'s title or alleged a valuable consideration paid by her to her grantor.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 80; Dec. Dig. § 39.*]

3. PLEADING (§ 79*)—ANSWER—CONTENTS.

Under Rev. St. 1899, § 604 (Ann. St. 1903, p. 631), requiring the answer to contain a general or specific denial and a statement of any new matter constituting a defense or counterclaim, defendant is entitled to but one answer, which must contain all his matter of defense and counterclaim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 160; Dec. Dig. § 79.*]

4. QUIETING TITLE (§ 40*)—PLEADING—REPLY.

In an action to quiet title, the answer denied that the petition stated facts sufficient to divest defendant's title to land theretofore conveyed to her by D., and plaintiff replied by a general denial, and thereafter defendant filed a cross-bill alleging her purchase from D., and the trial was had as if all the issues were joined. *Held*, that the reply was properly treated as answering the cross-bill.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 81; Dec. Dig. § 40.*]

5. VENDOR AND PURCHASER (§ 235*)—BONA FIDE PURCHASER—CONSIDERATION—NECESSITY.

Payment of consideration is essential to entitle one to protection as a bona fide purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 568; Dec. Dig. § 235.*]

6. QUIETING TITLE (§ 52*)—JUDGMENT—REQUISITES—CONFORMITY TO PLEADING.

Where, in an action to quiet title, defendant's cross-bill was insufficient to support a recovery and was not supported by evidence, and its averments were covered by the general findings for plaintiff, there was no error in not mentioning it in final decree.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 102; Dec. Dig. § 52.*]

7. PARTIES (§ 6*)—REAL PARTIES IN INTEREST—ACTIONS FOR LAND.

Plaintiff was the real party in interest so as to entitle her to bring an action to quiet title to land which her husband had contracted, during his lifetime, to sell to another, and for which part of the consideration was paid, though the sale was never consummated; she being interested in the payment of the balance of the purchase money, as well as in the complete performance of the contract of sale.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 7; Dec. Dig. § 6.*]

8. ACTION (§ 48*)—JOINDER OF ACTIONS—SAME TRANSACTION.

A count alleged that plaintiff's husband purchased and paid for land, but that title was taken in the name of his father, under whom defendants claim, and that thereafter the father executed a deed to plaintiff's husband, which was lost; and the second count, in addition to those facts, alleged a contract of sale of the land by plaintiff's husband to defendant corporation, and prayed that the lost deed be restored and title adjudged in plaintiff. *Held* that, if the counts stated two causes of action, they arose out of the same transaction, and hence were properly joined under Rev. St. 1899, § 598 (Ann. St. 1903, p. 619).

[Ed. Note.—For other cases, see Action, Cent. Dig. § 490; Dec. Dig. § 48.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

9. PARTIES (§ 92*)—DEFENDANTS—MISJOINDER—MODE OF OBJECTION.

An objection to two counts for misjoinder of defendants should be made by special demurrer, as authorized by Rev. St. 1899, § 598 (Ann. St. 1906, p. 624), and not by motion to elect on which count plaintiff would stand.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 150, 151; Dec. Dig. § 92.*]

10. QUIETING TITLE (§ 30*)—PARTIES—DEFENDANTS—JOINDER.

In an action to quiet title and restore a lost deed to land claimed to have been purchased and paid for by plaintiff's husband, and deeded to his father, through whom defendants claim, and to have been thereafter deeded to plaintiff's husband by an unrecorded lost deed, a corporation to which her husband had contracted to sell the land was properly joined as a defendant, it being interested in the subject-matter of the action and being willing to consummate its contract to purchase.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 65, 66; Dec. Dig. § 30.*]

11. TRUSTS (§ 1*)—"EXPRESS TRUSTS."

Express trusts arise by agreement between the parties expressing the particular trust intended.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2611-2613.]

12. TRUSTS (§ 62*)—"IMPLIED TRUSTS"—NATURE.

Implied trusts arise by an implied agreement between the parties as to the trust intended.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 88; Dec. Dig. § 62.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3436, 3437.]

13. TRUSTS (§ 62*)—"RESULTING TRUSTS"—NATURE.

Resulting trusts do not depend upon an agreement between the parties, but arise by operation of law from their acts; the law implying a trust where honesty and fair dealing require that the property be considered as held in trust, as where the purchase money is paid by one person and title taken in the name of another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 88; Dec. Dig. § 62.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6188-6192.]

14. TRUSTS (§ 81*)—RESULTING TRUSTS—PAYMENT OF CONSIDERATION FOR CONVEYANCE BY ANOTHER.

Where one purchased and paid for land, but, for convenience, had it conveyed to his father, the latter held the land in trust for his son.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 117; Dec. Dig. § 81.*]

15. TRUSTS (§ 88*)—RESULTING TRUST—EVIDENCE TO ESTABLISH—PAROL EVIDENCE.

The death of one in whose name title is taken to land purchased and paid for by another does not prevent the latter from showing by parol the trust relationship.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 130; Dec. Dig. § 88.*]

16. TRUSTS (§ 89*)—RESULTING TRUSTS—EVIDENCE TO ESTABLISH—WEIGHT—PAYMENT.

The death of the one in whose name title was taken to land purchased and paid for by another makes it necessary for the court to

use greater care in weighing the evidence of the trust relation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 134; Dec. Dig. § 89.*]

17. LOST INSTRUMENTS (§ 7*)—RESTORATION—PLEADING—DELIVERY.

In an action to restore a lost deed and quiet title in plaintiff, etc., it was sufficient to allege that defendant executed and delivered the alleged lost deed to plaintiff, since to specify the manner and form of the delivery, whether made by defendant personally or through another, would be to plead evidence.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 16; Dec. Dig. § 7.*]

18. QUIETING TITLE (§ 44*)—PROCEEDINGS—EVIDENCE.

In an action to quiet title in plaintiff to land claimed to have been purchased and paid for by her husband, and title taken in the name of defendant's ancestor for convenience, proof of facts showing the resulting trust, and that plaintiff's husband had been in possession for 21 years, was sufficient, without showing that plaintiff was in possession when the action was begun.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 91; Dec. Dig. § 44.*]

19. VENDOR AND PURCHASER (§ 191*)—THE RELATION—PURCHASER'S POSSESSION.

Where a corporation was in possession of land under a contract of sale from plaintiff's husband, its possession was that of his heirs and devisees.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 393; Dec. Dig. § 191.*]

20. TRUSTS (§ 89*)—RESULTING TRUSTS—EVIDENCE TO ESTABLISH—SUFFICIENCY.

In order to enforce a resulting trust in land which plaintiff claimed to have purchased and paid for, title to which was taken in another's name, plaintiff must prove his case by a high standard of evidence.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 137; Dec. Dig. § 89.*]

21. LOST INSTRUMENTS (§ 8*)—RESTORATION—SUFFICIENCY OF EVIDENCE.

One seeking to restore an alleged lost deed must prove his case by a high standard of proof.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. § 8.*]

22. TRUSTS (§ 89*)—RESULTING TRUSTS—ENFORCEMENT—SUFFICIENCY OF EVIDENCE.

In a suit to quiet title and enforce a trust in land claimed to have been purchased and paid for by plaintiff's husband, but for convenience deeded to his father, through whom defendants claimed, evidence held to show beyond a reasonable doubt the purchase and conveyance of the land in the manner alleged.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134, 135; Dec. Dig. § 89.*]

23. LOST INSTRUMENTS (§ 8*)—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

In an action to restore a lost deed, claimed to have been executed by defendants' ancestor to plaintiff's husband, to land which the former held in trust for the latter, evidence held to prove plaintiff's case beyond a reasonable doubt.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. § 8.*]

Appeal from Circuit Court, Clay County:
J. W. Alexander, Judge.

Action by Ellen S. Stevens and others

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

against Fannie D. Stevens, O. H. Stevens, and another. From a judgment for plaintiff, the defendants named appeal. **Affirmed.**

Scarritt, Scarritt & Jones, for appellants.
Frank Titus, for appellees.

VALLIANT, J. This suit involves the title to about 17 acres of land in Clay county, just across the river from Kansas City, being E. $\frac{1}{4}$, S. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$, Sec. 23, T. 50, R. 33. According to the petition, the land was purchased in 1881 by Edward A. Stevens and paid for by him, but at his request and for his convenience the title was taken in the name of his father, William Stevens. William Stevens died in 1896; Edward died in 1902. The plaintiff Ellen is the widow of Edward, the executrix of his will and his devisee; the other plaintiffs are his heirs; the defendants (except, of course, the North Kansas City Development Company, a corporation) are heirs of William. The plaintiffs, other than Ellen, are also heirs of William. Edward in his lifetime made a contract of sale of the land to the defendant corporation, the development company, and part of the consideration was paid, but he died before the sale was consummated. The main question in the case is, did the land belong to Edward or to his father, William?

The petition is in two counts. The first is under section 650, to adjudge and quiet title; the second is in equity, to restore an alleged lost deed from William to Edward. In the first count, in addition to the allegations that the land was bought and paid for by Edward and the title taken for convenience in the name of his father, William, it is alleged that afterwards William and his wife made and executed a deed, duly acknowledged, conveying the land to Edward, but that that deed was never recorded and is now lost; also that Edward in his lifetime, and the plaintiff Ellen since his death, have been in adverse possession of the land for more than 10 years. The second count contained substantially the same averments as the first, with the addition of the statement of the contract of sale to the defendant corporation, with a prayer to have the lost deed restored and the defendants divested of their apparent record title and the plaintiff Ellen invested with title.

Defendants O. H. Stevens and Fannie Stevens, his wife, who are the appellants in this court, filed their answer, in which they aver that this suit is not instituted or being prosecuted in the name of the real party in interest, because prior to his death Edward had sold whatever interest he had in the land to one Shaffer, and that the defendant, the North Kansas City Development Company, at the time of the institution of this suit, was and for a long time had been in adverse possession of the premises, and

that Shaffer when he bought had notice that the title was in the heirs of William Stevens, deceased. The answer also pleads that the plaintiffs' claim is barred by the statute of limitations and by laches, and there are specific denials of several statements in the petition about which there was really no dispute at the trial, to wit, that plaintiff Ellen was not the widow or executrix or devisee of Edward, or the other plaintiffs his heirs, etc. The answer of the North Kansas City Development Company set up the contract of sale from Edward to Shaffer, the payment of \$1,000 of the purchase money at the date of the contract, and \$4,000 paid later, and the balance to be paid still later; that Shaffer really made the contract for the corporation, and afterwards assigned it to them; that thereafter the long illness and subsequent death of Edward Stevens prevented the fulfillment of the contract on his part, and it remains to be executed.

Defendant Fannie D. Stevens and her husband, the appellant herein, also filed a cross-bill, in which they set up that she was a bona fide purchaser without notice of the adverse claims of any of the parties to this suit of an undivided two-thirds of one-fifth of the land in suit under a warranty deed from one Jacob Davis, and prays a sale of the land for partition. None of the facts constituting that transaction are stated.

The testimony in the case leaves really no ground to question the truth of the statements in the plaintiffs' petition. The testimony shows that the source of the title was a sale of a 40-acre tract for taxes in 1881, which sale was attended by Henry A. Smith and Edward Stevens, each having a purpose to buy the land advertised for sale. They were acquainted with each other, and on meeting there, each disclosing to the other his purpose, Mr. Stevens saying that he was interested in the east half of the 40, it was agreed between them that Mr. Smith should purchase, take the sheriff's deed, and afterwards convey the east half to Edward Stevens. That agreement was carried out; Edward Stevens paid to Mr. Smith the amount agreed on between them for the 20 acres he was to have, which was one-half the purchase price, with costs, etc., added, and requested the deed to be made in the name of his father as grantee, and that was done. That was the testimony of Mr. Smith, and there was none to the contrary. The testimony tended to show that after the purchase Edward Stevens rented the land and held exclusive possession through his tenants from that date, 1881, to the date of the contract of sale to Shaffer for the defendant corporation, January 8, 1902, when the latter went into possession under Edward and has held it ever since, awaiting the consummation of the contract.

The testimony is also quite satisfactory

that in 1889, or about that date, the father, William Stevens, joined by his wife, executed a deed conveying the title to Edward. The testimony on this point is, first, that of an attorney for a railroad company which wanted to obtain a right of way through the land, and he negotiated with Edward for the purchase of such right. The record title then stood in the name of William Stevens, and the attorney knew that fact. The deed for the right of way, as submitted to the attorney for the railroad, was signed by William Stevens and wife; the names of the grantors were not written in the caption of the deed, but the space was left blank. The attorney came to the office of Edward with the deed in that condition to consummate the sale; there he met Edward and William Stevens, his father. The witness was asked to state what Edward said at that time, but on objection of defendant the court ruled that the statements of Edward were not admissible; that the witness should state what occurred. Whereupon the witness testified that Edward went to his safe, and, in the presence of his father and witness, took out a deed and showed it to witness; it was a deed for this land from William Stevens and wife to Edward, dated in 1889 (the more exact date witness did not remember), and duly acknowledged, but not recorded. Edward then asked witness if he preferred to have him (Edward) and his wife also join in the deed as grantors, but witness said he did not care to have them do so, whereupon Edward filled the blank in the caption of the deed with the names of William and his wife, and witness gave Edward a check for the money and took the deed. This witness a few years afterwards saw the deed again, in 1895 or 1896. As attorney for another railroad company he at that time had occasion to examine it, and did so. It was then in the possession of Edward Stevens. A son of Edward Stevens testified that he had seen the deed many times, and he specified two occasions when he read it. He described it as a deed for this land to his father executed by his grandfather and grandmother and duly acknowledged. He knew the signatures of both his grandfather and grandmother, and recognized their signatures on this deed. The last time he saw the deed he put it in his father's safe. Since his father's death he had searched for it, but could not find it. The testimony on that point was practically undisputed.

The testimony also showed that plaintiff Ellen was the widow of Edward, and that by his will she was the sole devisee of all his real estate while she remained his widow, and at her death or marriage it was to go to their two children, who are plaintiffs. One of whom has deeded his interest to his mother.

The testimony for defendant tended to

show that during the period plaintiffs claim that Edward was in possession of the land through tenants some of the leases were made in the name of William, and that a lawsuit with one of the tenants about rent was instituted in the name of William. But on cross-examination of the witnesses they said that Edward transacted the business and signed William's name; that he conducted the lawsuit and settled it.

Defendant also introduced in evidence a deed from William Stevens and wife to John Seaville, September 6, 1881, to 3 acres of the original 20, also the deed for the right of way to the railroad company mentioned in plaintiffs' testimony, and a deed from defendants O. H. Stevens and his wife, Fannie, to Jacob Davis for an undivided two-thirds of O. H. Stevens' interest in the land in question, dated November 3, 1902, and a warranty deed two days later in date from Jacob Davis conveying back the same interest to Fannie. The consideration named in the deed from O. H. Stevens and wife to Davis is \$3,000, that named in the deed from Davis back to the wife of O. H. is \$4,000.

The court found all the issues in favor of the plaintiffs, and decreed that the lost deed from William Stevens and wife to Edward be restored, and that defendants be divested of their record title as heirs of William Stevens, and the plaintiff Ellen, as executrix of the will of Edward, be invested with the same, and that upon the payment to her by the defendant the North Kansas City Development Company of \$2,784, with 6 per cent. interest from March 1, 1903, plaintiff Ellen execute to that corporation, or to any one whom it may designate for that purpose, a good and sufficient deed, the money to be paid within 30 days on tender by her of such deed, and if not then paid plaintiff Ellen is not bound to make a deed and the contract for the sale shall become null and void. Then followed judgment for costs in favor of plaintiffs against defendants except the defendant corporation, and judgment for costs in favor of the corporation against the plaintiffs.

1. There are some points made by appellants that we will notice before taking up the case on its merits. It is said that appellants' cross-bill is ignored in the final judgment; that, there being no reply to it, it stands confessed. The answer of appellants was filed November 7, 1904, a reply, general denial, was filed November 18, 1904, the cross-bill in February, 1905. The abstract of the record says that a demurrer to the cross-bill was filed March 7, 1905, and overruled on same day. The demurrer is not set out in the abstract, and we do not know on what grounds it was based, nor does the abstract show that a reply was filed after the demurrer was overruled. But the cross-bill is set out in full in the abstract, and if we assume that there was no reply to it,

and that appellants were entitled to have had its averments taken as confessed, then they ought to have asked the court for an entry of default against the plaintiffs, which they omitted to do. But there are really no statements of facts in the cross-bill upon which any judgment in the appellants' favor could have been founded. After statements to the effect that the land belonged to William Stevens at his death, and a statement as to who are his heirs, the cross-bill continues: "The said Fannie D. Stevens further avers that she is a bona fide purchaser from Jacob Davis of Jackson county, Mo., by lawful deed of warranty, and without notice of any adverse claims of any of the parties hereto, or that may hereafter be parties to this cause, and that she is a co-owner of said lands." According to the averments in the cross-bill, the title descended to the heirs of William Stevens, yet there is no statement to connect her alleged grantor with that title, and there is no statement that she paid a valuable consideration for the deed.

If the demurrer had been based on the ground that the cross-bill did not state facts sufficient to constitute a cause of action, it should have been sustained. Under our Code pleading, a defendant is entitled to but one answer, and that one must contain all his matters of defense and counterclaim. Section 604, Rev. St. 1899 (Ann. St. 1906, p. 631). At the time appellants filed this cross-bill they already had an elaborate answer on file, in which, after denials and statements in effect showing a one-fifth interest in O. H. Stevens, her husband, as heir of William, it concluded with a denial that plaintiffs' petition states facts sufficient to justify the divesting of her title to her share of the "land conveyed to her long before the institution of this suit by Jacob Davis, by deed, said deed being duly recorded," etc. That is all that that answer contains bearing on the Davis title. To that answer there was a reply, general denial. The cause went to trial as if all the issues were joined, and was so treated by court and counsel, doubtless construing plaintiffs' reply as covering the after-filed cross-bill, and that was proper. Appellant introduced evidence to sustain their cross-bill, though their evidence fell short. The only evidence they offered was a deed from appellant O. H. Stevens for two-thirds of one-fifth of the land to Davis, and a deed from Davis straightway back to the wife of O. H. for the same interest. There was no offer to prove that even one cent had been paid for either deed. Even if the cross-bill had stated a case calling for relief, the proof failed to sustain it. The averments of the cross-bill were covered in the general finding of the issues in favor of the plaintiff. The court did not err in making no further mention of it in the final decree.

2. There is nothing in appellant's point that the suit is not prosecuted in the name of

the real party in interest. It is true the North Kansas City Development Company is interested in the decree the plaintiffs are seeking to obtain, but it is also true that the plaintiffs are interested not only in the balance of the purchase money to be paid on the consummation of the contract of sale, but in the faithful performance by them of the contract which Edward in his lifetime made, and which they in good conscience are bound to fulfill.

3. There was a motion to require the plaintiffs to elect upon which of the two counts in their petition they would stand: First, because it did not appear that both causes of action arose out of the same transaction, therefore, under section 593, Rev. St. 1899, could not be united; second, the parties interested in the alleged lost deed are not interested in the sale of Edward Stevens to the North Kansas City Development Company. The court overruled the motion, and exception was saved. Although the petition is divided into two counts, yet it may be questioned if it really states but one cause of action; the second count contains all that there is in the first, and differs from it only in the fact that it contains the averments concerning the contract for sale to the defendant corporation. But if it be considered two causes of action, they grow out of the same transaction.

The second ground of the motion, to wit, that the defendants other than the corporation are not interested in the matter of the alleged contract of sale by Edward to the corporation, is in the nature of an objection for misjoinder of parties, and, if there is any merit in it, it ought to have been presented in the way of a special demurrer. Section 593, Rev. St. 1899 (Ann. St. 1906, p. 624). But the plaintiffs were justified under the rules of good pleading in making the defendant corporation a party to this suit. That corporation, by virtue of its contract with the plaintiffs' testator and ancestor, had an interest in the subject-matter of this suit, had a right to take part in the litigation to obtain a restitution of the alleged lost deed. There was no independent conflict between the plaintiffs and the defendant corporation; the pleadings of both show that no cause of action had arisen between them, because both were willing as far as they could to carry out the contract made with Edward Stevens in his lifetime. The court did not err in overruling that motion.

4. Appellants contend that the petition does not state facts sufficient to constitute a case of resulting trust. There are three kinds of trusts mentioned by name in the lawbooks, express, implied, and resulting. Express trusts are created by agreement between the parties expressing the particular trust intended; implied trusts arise also by agreement, but when the words used in the agreement leave it to implication, rather than express specification, as to the trusts

intended; but resulting trusts are those which arise from the acts of the parties by operation of law. The party to be charged as trustee may never have agreed to the trust, and may have really intended to resist it; yet if his acts have been such as are in honesty and fair dealing consistent only with a purpose to hold the property in trust, a trust will result by operation of law. "They are sometimes called presumptive trusts, because the law presumes them to be intended by the parties from the nature and character of their transactions with each other, although the general foundation of this kind of trusts is the natural equity that arises when parties do certain things. Thus, if one pays the purchase money of an estate, and takes the title deed in the name of another, in the absence of all evidence of intention, the law presumes a trust, from the natural equity that he who pays the money for property ought to enjoy the beneficial interest. The statute of frauds does not affect the creation of those trusts, for the reason that, where there is no evidence of intention, it would not be expected that a declaration in writing, properly signed, would be made or could be produced." Perry on Trusts (5th Ed.) § 124.

There are other conditions than the one just suggested where a trust will result by operation of law, one of which is where a person intrusted with money of another buys property and takes title in his own name; but for the purpose of our present inquiry it is sufficient to say, in the language of the text-writer just quoted, "if one pays the purchase money of an estate, and takes the title deed in the name of another, in the absence of all evidence of intention, the law presumes a trust." The petition in this case states facts to constitute a resulting trust under that definition.

It is argued that the petition does not undertake to show any reason why Edward Stevens, a lawyer and a man of wealth, should have conducted this transaction in his father's name. Since both Edward and his father are dead, the plaintiffs could not know what the motive was, and hence they could neither allege nor prove it. The death of the party in whose name the title is taken does not prevent proof of the case by parol evidence, though, of course, it is a fact rendering it necessary for the chancellor to be more careful than otherwise in weighing the evidence. Perry on Trusts, § 138.

It is also said that the petition does not state that William Stevens in person delivered the alleged lost deed to Edward, or that it was delivered by the hand of any one else by order of William. The petition states that William executed and delivered the deed, and that is all that was necessary; all, in fact, that the rules of good pleading per-

mitted, for to go on to specify the manner and form under which the delivery was made would be to plead evidence. The petition was sufficient.

5. Appellants' remaining point relates to the sufficiency of the evidence to sustain the allegations of the petition. There is little for us to say on that point, because we think the evidence entirely sustains the chancellor's findings. Appellants say that a vital allegation in plaintiffs' petition is that they were in possession of the land when the suit was instituted. There is an allegation of that kind in the petition, in connection with other averments going to show continuous possession and acts of ownership by Edward Stevens after the purchase in 1881; but the averment that the plaintiffs were in actual possession when the suit was begun was not a vital one, because if the averments going to show a condition from which a trust would result by operation of law, and, under that condition, Edward had remained in possession from 1881 to the time of his death in 1902, 21 years, it made out the plaintiffs' case. Besides, the fact on which appellants rely to contradict the averment in the petition that plaintiffs were in possession at the date of filing the suit does not contradict, but really sustains, the averment. The fact on which appellants rely is that the defendant corporation was in actual possession at that date. But the corporation was there under license from Edward under the contract for sale, and its possession was the possession of the heirs and devisee of Edward.

We agree with the learned counsel for appellant in his estimate of the character of evidence that the law requires to establish a case like the one presented in the plaintiffs' petition. This court, in every case where it has had occasion to speak on the point, has held the party asserting such a case to a very high standard of proof, and we have never been satisfied with proof that does not measure up to that standard. We think the plaintiffs in this instance have come fully up to that standard, and have proven their case beyond a reasonable doubt.

The judgment is affirmed. All concur.

HALL v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 1.
March 31, 1909. On Rehearing, April
13, 1909.)

1. RAILROADS (§ 275*)—INJURY TO LICENSEE OR TRESPASSER—AUTHORITY OF BRAKEMAN.

The act of a brakeman in directing plaintiff to get upon a moving car and set the brakes was an act beyond the scope of his authority, and did not change the relation of plaintiff to defendant railroad company from trespasser to that of employee or licensee.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 884; Dec. Dig. § 275.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. RAILROADS (§ 273½*)—INJURY TO TRESPASSER.

A railroad company's duty to a trespasser is only the use of reasonable care not to injure him after discovery of his danger.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 273½.*]

3. NEGLIGENCE (§ 2*)—LIABILITY FOR INJURIES TO LICENSEE OR TRESPASSER.

The rule that "plaintiff should recover if defendant knew or by ordinary care might have known of the peril of plaintiff in time to avoid the accident by the exercise of ordinary care and failed to do so," only applies where defendant has reason to expect persons to be in danger.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 2*]

4. RAILROADS (§ 282*)—INJURY TO TRESPASSER—KNOWLEDGE OF DANGER—QUESTION FOR JURY.

In an action against a railroad company for injuries to a trespassing boy while setting the brakes on a car by direction of a brakeman, evidence as to the brakeman's knowledge of plaintiff's peril and negligence in failing to avoid the accident by stopping another car held to raise a question for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 919; Dec. Dig. § 282.*]

5. RAILROADS (§ 282*)—INJURY TO TRESPASSER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad company for injuries to a trespasser, evidence held to raise a question for the jury whether plaintiff was guilty of such contributory negligence as will bar his recovery.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 919; Dec. Dig. § 282.*]

6. NEGLIGENCE (§ 83*)—CONTRIBUTORY NEGLIGENCE—"HUMANITARIAN DOCTRINE."

The "humanitarian doctrine" presupposes negligence or contributory negligence on the part of the party invoking the rule, and, in its essence, is that, "conceding that I am guilty of negligence in being where I am, yet if you know of my peril in time to save my life or limb, by the exercise of ordinary care on your part, then it is your duty to exercise such care, and a failure to do so renders you liable."

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 115; Dec. Dig. § 83.*]

7. APPEAL AND ERROR (§ 882*)—REVIEW—PERSONS WHO MAY ALLEGE ERROR—CONFLICTING INSTRUCTIONS.

Where the instructions given for plaintiff were correct and those given for defendant were erroneous, defendant is not entitled to complain on review that the instructions were conflicting.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8602; Dec. Dig. § 882.*]

On Rehearing.**8. RAILROADS (§ 282*)—INJURY TO TRESPASSER—NEGLECT OF BRAKEMAN—SUFFICIENCY OF PETITION.**

A petition alleging that, while plaintiff was in a place of peril, "defendant and its said conductor, agents, servants, and employes operating said train," knowing of plaintiff's perilous position, negligently "mismanaged the said engine," etc., causing plaintiff's injury, is sufficiently broad to include the negligence of the brakeman whose acts caused the injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 921; Dec. Dig. § 282.*]

9. RAILROADS (§ 282*)—INJURY TO TRESPASSER—ACTION—INSTRUCTIONS.

In an action against a railroad company for injuries to a trespasser, the court instructed that if "defendant's agents, servants, and employes operating an engine and cars attached thereto saw plaintiff and his peril and danger, and became aware thereof in time by ordinary care to have avoided injuring him, and that defendant's agents, servants, and employes * * * failed to exercise such ordinary care, and negligently ran said engine and cars against the car on which" plaintiff was, then defendant is liable. Held, that the instruction covered the negligence of a brakeman whose act caused the injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 921; Dec. Dig. § 282.*]

Appeal from Circuit Court, Johnson County; W. L. Jarrott, Judge.

Action by Errett Hall, by next friend, against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Martin L. Clardy and R. T. Ralley, for appellant. O. L. Houts, Walter L. Lampkin, and Charles E. Morrow, for respondent.

GRAVES, J. Plaintiff, a boy of 14 years at date of accident, sues by his next friend to recover from defendant damages in the sum of \$25,000 for personal injuries alleged to have been received through the negligence of the defendant in the operation of one of its freight trains. By the petition it is charged that the plaintiff boarded defendant's local freight train No. 122 at Pleasant Hill, Mo., to go to the town of Kingsville, a few miles to the east; that he had theretofore been accustomed and was permitted by defendant's conductors, agents, servants, and employes to board cars and to be carried thereon from one station to another, and assist them in handling freights and switching cars; then with reference to this particular occasion, and the alleged negligence of the defendant, the petition says:

"That on the 22d day of September, 1902, at the said town of Pleasant Hill, plaintiff boarded defendant's local freight train called 'Freight Train No. 122,' with the knowledge and permission of defendant, defendant's conductor, servants, agents, and employes operating the same, as plaintiff had been accustomed to do, as before stated, for the purpose of being carried to the said town of Kingsville, a station on defendant's said line of railway, and assisting in the operation of said train as aforesaid. That after boarding said train as aforesaid, plaintiff was carried thereon to the said town of Strasburg, a station on defendant's line of railway, between the said towns of Pleasant Hill and Kingsville, where said train was stopped and engaged in switching, which became necessary in its operation. That defendant and the said conductor ordered plaintiff to assist in, and ordered one of the brakemen on said train to take plaintiff and do, said switching

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

and that plaintiff thereupon, in obedience to said order and under the direction of said brakeman, boarded one of defendant's freight cars on one of its said tracks and assisted in said switching, and was in a place of peril. That while plaintiff was so engaged on said car, and was in said place of peril, defendant and defendant's said conductor, agents, servants, and employees operating said train, knowing that plaintiff was on said car and in a place of peril, and after they could have known it by the exercise of ordinary care, negligently and unskillfully mismanaged the said engine, cars, and train, and carelessly and negligently, and with great and unusual and unnecessary force and violence, ran said engine and freight cars attached thereto against the said car on which said plaintiff was, by reason of which plaintiff was thrown from said car to the ground, his right leg broken, and his whole body wounded, bruised, and permanently injured, so that he has been rendered unable to labor, and has suffered and will continue to suffer during his life great bodily pain and mental anguish, and was compelled to and did expend and obligate himself to pay the sum of five hundred dollars for medicine and medical attendance."

That answer was, first, a general denial, which was followed by a special plea of contributory negligence couched in this language: "Said defendant, for further defense, states that, if said Errett Hall was injured as charged in the petition, it was by reason of his own wanton, willful, and reckless conduct in unnecessarily, wantonly, recklessly, and willfully climbing upon defendant's train and cars while the same were in motion, without any authority so to do, and while he was a trespasser in so doing. That the injury, if any, to said Hall was occasioned solely by the negligence of his own acts aforesaid, contributing directly to his own injury aforesaid, without any fault on the part of this defendant."

Reply, a general denial. Verdict and judgment for plaintiff in the sum of \$6,000, from which, after the necessary but futile motions for new trial and in arrest of judgment had been passed upon, the defendant brings the case here by appeal.

The accident occurred September 22, 1902, at the town of Strasburg, as stated in the petition. At this town the defendant has three tracks, i. e., the main track and a north and south switch track. The main track runs to the south of the depot, the south switch track is south of the main track, and the north switch track north of the main track and also north of the depot. In other words, the depot stands between the north switch track and the main track. The east end of the north switch track is further east than that of the south switch track, and both some distance east of the depot. Actual measurements are given by one witness, as follows: The south switch leaves the main

track 93 feet west of the point where the north switch track leaves it; at the widest point the south switch track is 9 feet from the main track, but the north switch track is further because it spreads out to go around the depot; the place of the accident was 15 feet west of the east point of the south switch; from the point of the accident to the first street crossing west was 16 rails or 48 feet; from the east point of the south switch to the window in the depot was 900 feet. These measurements are of but little value, save and except as they go to affect the credibility of the witnesses. There are three street crossings spoken of in the evidence, two to the east of the depot and one to the west. The first to the east runs just east of the depot.

From the evidence it appears that the plaintiff, rather an unruly orphan boy, being raised by his grandparents, had for some years been in the habit of jumping on defendant's freight trains, and in some instances riding from one station to another. He had been frequently notified by the station agent and by his grandfather of the danger of such conduct. He, himself, admits much of this conduct upon his part, and also some of the notices aforesaid. The station agent claims to have not only warned his grandfather, but the city marshal as well. He also claims to have driven plaintiff from the depot on several occasions, and on the morning of the day of the accident says that he notified him to keep away from the depot.

On the day of the accident, shortly before noon, the plaintiff boarded one of defendant's freight trains at Kingsville, his home, and went west to Pleasant Hill. Upon reaching Pleasant Hill he says that he and some other boys were sitting on a flat car in the local freight going east, when the conductor came by and saw them. That the conductor undertook to fix a drawhead in one of the cars, and told the boys that if they expected to ride they had better get down and help fix the drawhead, which they did, then returned to the flat car, upon which plaintiff rode to Strasburg. The train reached Strasburg at about 2:20 p. m., and, as there was an east-bound passenger train due there at 2:32 p. m., the local freight ran in on the south switch track and stopped with the caboose about opposite the depot. The plaintiff's car was several cars ahead of the caboose. When the train stopped, plaintiff got off on the side next to the depot, and there met another boy, William Epple, who lived at Kingsville, and who with his brother had on that morning ridden on the same freight train upon which plaintiff went to Pleasant Hill. The Epple boys got off and remained at Strasburg, the station between Kingsville and Pleasant Hill.

Upon the arrival of his train the conductor got off and gave some directions to the middle or swing brakeman about switch-

ing. One witness says that the conductor said to the brakeman: "A. I heard the conductor say—when he got down on the ground off the steps I was just behind him—he said to the brakeman—I think he said it to the brakeman. He said, 'Take the boys down and do the switching.'" Another said: "Why, when I passed him he says to the brakeman, he says, 'You take the boys and go and do the switching.'" Another put it this way: "Well, I heard some man tell these boys to go down and set up the brakes." William Epple puts it thus: "The conductor told the brakeman to go and take the boys and go and do the switching."

The plaintiff upon this point says: "Q. And then what was done? What did the conductor do? A. Pulled down to the depot, and the conductor came off of the caboose. Q. What did you and the boys do? A. I climbed down off the car. Q. Then did you see the conductor after you got on the ground? A. Yes, sir. Q. What, if anything, did he say? A. He says, 'Take the boys and go down and do the switching.' Q. Who was he speaking to? By Mr. Ralley: I object to that; it is simply calling for the conclusion of the witness. By the Court: State what he said. (To which ruling plaintiff excepted, and saved his exceptions at the time.) Q. Who did he say that to? A. The brakeman. Q. How many brakemen was there? A. Two is all I seen. Q. Two where? A. Standing there. Q. When he said that, what did the brakeman do? A. The brakeman started down the track. Q. How many started? A. Just one. Q. What, if anything, did he say? A. He says, 'Come on, boys.' Q. Which way did he go? A. Down east. Q. Along which track? A. Right down between the south track and main track. Q. How many tracks were there? A. Three. Q. Which track did you say this train pulled in on? A. South switch track. Q. How many boys went along with him down there? A. Just the two. Q. What two? A. Will Epple and I."

It appears that there were several people around the depot, and among them some boys other than the plaintiff and Epple. It also appears from other evidence that the plaintiff's own statement that there were two brakemen present at the time of this talk; and further, that at the time of the talk plaintiff was from 15 to 35 feet away from the conductor. This from evidence introduced by plaintiff. The defendant's version we will state later.

The evidence then discloses that there were some cars on the north switch track (four or five in number) to the north of the depot. Of these cars the west one of the string was loaded with poles upon which to put signboards; that there were orders to put this car in the train to be taken to the next station. It was an ordinary coal car loaded with poles of the character aforesaid. To get this car in the train it became

necessary to cut the train and leave a part standing upon the south switch track. This was done, and the engine with three or four cars was cut loose and pulled out upon the main track past the point of the north switch track, from which place the engine and cars were backed in on the north switch track and coupled to the string of cars above mentioned. After this coupling the cars were all pulled down off of the north switch track, and an attempt made to kick this pole car in on the south switch track, where the caboose and remainder of the train was standing. The train seems to have been made up of from 15 to 20 cars.

The plaintiff describes his movements after the conductor's talk at the depot thus: "A. Went down there and he uncoupled the train, and I climbed on and rode out of the switch and back in the north switch, and I seen they were going to hit the cars hard, and I jumped off until they started up again. Q. And then did you crawl on again on that same car? A. Yes, sir. Q. What, if anything, did he say to you at that time? A. Never said anything; pretty soon he climbed on that car and started down that ladder, and than he said, 'Get off, kid, and catch the next car.' Q. Was that at the time you went down the north track east? A. Yes, sir. Q. That put you before or behind the brakeman? A. Behind. Q. You rode down, how far? A. I rode down to the south switch. Q. To where the south switch left the main track? A. Yes, sir. Q. And what did you do? A. I climbed off and went over to the south side. Q. Which side of the south switch did you stand on? A. Right by the side of it. Q. What did the brakeman do, and what did they do with the car? A. They kicked that car loaded with poles back, and it did not clear; never did get into the clear, and started back slowly, and the brakeman says, 'Kid, get up there and catch that car and set the brake,' and I got up to set the brake, and after I got up and got hold of the brake I seen him signal him to come back. Q. Who? A. The brakeman. Q. What kind of signal did he give? A. He give it this way (indicating). Q. How near was he to you when he gave that signal—about how near? A. About 30 feet. Q. Was there anything between him and you? A. No, sir. Q. Could he see you? A. Yes, sir. By Mr. Ralley: We object to that as a conclusion of the witness. By the Court: Just state where he was. (Objection sustained; to which ruling plaintiff excepted and saved his exceptions at the time.) Q. He gave the signal to come back? A. Yes, sir. Q. Then what happened? A. They came back. Q. What came back? A. Cars and engine. Q. And were they all together? A. Yes, sir. Q. Then what happened? A. Hit the corner of the car I was on. Q. Then what happened? A. Knocked me off and two crossing poles. Q. When the brakeman gave this signal to come back, who did he

give it to? By Mr. Ralley: I object to that as calling for the conclusion of the witness. By the Court: He stood where? Q. Where was the man on the engine when he gave the signals? A. Looking back toward us. Q. How was his head and face and body? A. Turned back west. Q. Where was he with reference to the window, leaning out or not? A. Leaning out. Q. When the signal was given? A. Yes, sir. Q. Window of the cab, I mean? A. Yes, sir. Q. Which way was he looking? A. Looking back at us. Q. Which way was his face turned? A. South. Q. Do you know anything about what kind of lick the cars struck? A. It was hard enough to tear the end out of the coal car. Q. Did it knock you senseless? A. Yes, sir. Q. When you came to, where were you? A. Lying on the ground."

William Epple describes their movements in this manner: "Q. What, if anything was said or done at the platform at that time? A. The conductor told the brakeman to go and take the boys and go and do the switching. Q. Well, then, what did you do? Did the brakeman say anything to you? A. Said, 'Come on, boys, and let's go and do the switching.' Q. Who went with him? A. I and Errett. Q. Which way did you go? A. East. Q. How many brakemen were there? A. One. Q. Where did you go then? When you went east, where did you go? A. How was that? Q. Where did you go? A. Went east to the end of the switch. Q. What did you do? A. With him? Q. Do you remember what you did? A. No, sir, I don't. Q. What is the next thing you remember? A. Riding down out of the switch. Q. On the cars? A. Yes, sir. Q. What kind of cars were they? A. Box cars. Q. What switch was that on? A. North. Q. Well, then, where did the cars and engine go? A. East. Q. What was the purpose of going up on the north switch? A. To pull out this pole car. Q. What was this coal car loaded with? A. Signposts. Q. Then what happened when they pulled down off of the north track on the main track? A. Kicked it back. Q. Kicked what back? A. The coal car. Q. Where did they kick it to? A. On the south. Q. How far back on the switch did it go? A. It didn't quite clear. Q. What was that? A. It didn't quite clear the track. Q. Then what happened? A. Then he knocked the corner off of the coal car? Q. Did you get up on that car? A. Yes, sir. Q. What caused you to get up there? A. The car started back. Q. Did Errett get up on that car? A. Yes, sir. Q. How did he happen to get upon that car? By Mr. Ralley: I object to that; it is merely calling for a conclusion. By the Court: He can state what he saw. Objection sustained. (To which ruling plaintiff excepted, and saved his exceptions at the time.) Q. What did you see him do? A. The brakeman told him to go up and set the brake down. Q. Well, was the car moving when he

got on it? A. Yes, sir. Q. Was it going fast or slow? A. Slow. Q. Where was the engine and cars just before it was struck? A. East of the switch. Q. Could you see anybody in the engine? A. Yes, sir. Q. Which side were they on? A. Right side. Q. What would that be, north or south? A. South side. Q. Describe the position of the man in the engine. A. He had his head and waist out looking back towards us. Q. What direction would that be? A. West. Q. Could you see his face? A. Yes, sir. Q. Which way was it turned? A. Toward us. Q. Where was the brakeman? A. He was down there by us. Q. How far was he from you? A. About 20 or 25 feet. Q. What direction from you? A. East. Q. I will ask you to tell what happened when the car was struck, that you and Errett were on. A. It threw us both off. Q. Did it throw anything else off the car? A. A pole. Q. What was Errett doing when the car struck? A. Putting on the brake. Q. Sir? A. Putting on the brake. Q. Putting on the brake? A. Yes, sir. Q. What end was he on? A. East. Q. Where were you? A. South. Q. Did you notice what the train did after they struck this car—the engine and other cars east of it? A. What they did with it? Q. Yes, sir. A. I don't know. Q. Well, state to the jury how they came back, fast or slow? A. Fast. Q. How was the jar? Describe it to the jury. A. It was awful; came back about 30 miles an hour. By Mr. Ralley: We move to strike that out; he has not shown himself qualified to judge the rate of speed. By the Court: Yes, sir; he would have to show himself qualified. (To which ruling plaintiff excepted, and saved his exceptions at the time.) Q. You may state to the jury whether or not the engine and the cars all came back together? A. Yes, sir. Q. About how many cars were there with the engine at that time? A. Five. Q. What kind of cars were they? A. Box cars. Q. Did you notice, after that, what became of the engine and box cars? A. No, sir."

In this connection it will be well to mention that this witness had given two written statements to the defendant's claim agent, in which he says that he did not hear the conductor's talk at the depot, and did not hear the brakeman tell Hall to set the brakes on the pole car.

Another witness, Haynes, says: "Q. Then what did they do? A. Well, then they run the cars down to get the post car off of the side track, and run it up on the main track, and when they run it up on the main track it looked like they wanted to make a flying switch, but they didn't get it quite far enough up, and then the car commenced moving down east, the car the boy was on, and the brakeman was on the south side of the main track that they was pulling on, and he says to the kid, he says, 'Kid,' he says, 'set that brake,' and then they gave it another

punch to shove it back, and they hit so hard they knocked a piece off the car, and the boy went off, and the posts went with him."

There is considerable evidence for plaintiff tending to show that the engine and all the cars ahead of the pole car were attached when they struck the pole car, and that they struck it with great force. Both cars were considerably damaged by the collision.

For the defendant, the evidence tended to show that the plaintiff and the other boys alighted from the car east of the second crossing east of the depot; that they then were next seen riding on a car on the north switch. The conductor says that he did not see nor converse with any boys at Pleasant Hill; that they repaired no car there; that if a car had been out of repair at Pleasant Hill there was a car repairer there by name of Lane, and the car would have been turned in on the repair track for repairs. In this he is corroborated by all the train crew.

The conductor says that he had no knowledge of plaintiff being on his train, and that he gave him no orders about switching at Strasburg. He says that he did tell the swing brakeman, who had gotten the switching list and order from the agent, to take the boys and do the switching, but says that in the use of the word "boys" he used it in railroad parlance, which meant the brakeman and crew; that he used it in that sense, and had no reference to plaintiff or any other outsider; that he had no knowledge of the fact that plaintiff was in any way assisting in the switching of cars; that at the time of the accident he and the rear brakeman were unloading the local freight. It also appears that there was the full complement of men with this train, i. e., conductor, three brakemen, a fireman, and engineer. It is shown that neither the conductor nor any member of the train crew has any authority to employ outsiders to do any of the train work for the company. Both the engineer and fireman say that they did not know the plaintiff was on the train. They say that the pole car was kicked in on the south track, and that they cut loose from the train the other cars which stood ahead of the pole car whilst on the north track, and aimed to kick them in on the north track. The engineer said that they kept the cars supplied with air brakes next the engine to assist in stopping the train, but did not remember just how many they had with them when they backed on the north switch track for the pole car.

The engineer describes the collision thus: "Q. Then went north? A. Yes, sir; on the house-track switch. Q. Then what did you do? A. Backed in on the north side, and there was several cars in there—I don't know how many—and we coupled them and brought them down on the main line. Q. What car or cars were you after? A. A coal car loaded with crossing signs that was back of some cars that were on the side track.

Q. Do you know how many there were in front of this pole car? A. No, sir; not exactly; probably six or seven. Q. What did you do with them? A. We come out there and kicked the coal car back on the south siding, or started it back on the south switch to our train; the brakeman cut it off and signaled me to go ahead; I went ahead probably three or four car lengths; anyhow, over east of the east end of the north switch; then he gave me the signal to back up, to kick the cars, to kick them back on the north track; the cars that were in there ahead of this coal car—that is, between us and the coal car—and I gave them a little kick, and he gave me the signal to stop, and I applied the air, and the head end of the train stopped. The cars that were going back on the north side run back; I guess they were 10 or 15 feet apart when I saw the dust fly off of the coal car. Q. That far from the locomotive? A. The two parts of the train were probably 10 or 15 feet apart when I seen the dust fly off the coal car, and about that time I saw a boy fall off the car, and I says to the fireman, 'they have knocked a boy off the car,' and we stopped. In the first place, I saw that he didn't get up; seen he must be hurt; he laid there after he fell off; then I gets off the engine and walks back and seen the boy's leg was broken; I was the first man to him."

The fireman says he did not see the boy at all. The engineer further testified that in switching the engineer acted under signals given by the brakeman; that it was the duty of the brakeman, when they kicked in a car, to see that it was in the clear before giving a signal to back up; that in this instance he got the signal to back up and did so, but got a signal to stop and did at once apply the air and brakes and stopped.

Other evidence showed that it was the duty of the swing brakeman, who was a man by name of Boggs in this instance, to get from the station agent the switching list, and then look after the switching of the cars.

The conductor, fireman, engineer, and rear brakeman testified in person at the trial. As to the other two, statements of their evidence were read by counsel. Their statements are:

"It is agreed by and between counsel for both plaintiff and defendant that the following statement may be read to the jury as the evidence of H. M. Boggs, which said statement was read to the jury, and was in words and figures as follows, to wit:

"That he put the plaintiff, Errett Hall, off the train a short time before the accident complained of, and told him to keep away from said train; that said plaintiff, without the knowledge and consent and against the protest of said Boggs, got upon defendant's box car at the time of his injury, and was there without any authority or invitation or direction from any of the train crew;

that neither the conductor nor any of the other train crew, either directly or indirectly, authorized, directed, or requested said Hall to get upon said defendant's train of cars, or to perform any other duty or service connected with said train.'

"It is further agreed by and between counsel for both plaintiff and defendant that the following statement may be read to the jury as the evidence of Louise Buske, which said statement was read to the jury, and was in words and figures as follows, to wit:

"That he was at the east end of the switch at the time of the accident; that neither he nor any of the other brakemen or train crew authorized or directed said plaintiff to get upon the car where he was injured, or to perform any other service connected with said train."

One matter of dispute was whether the car which struck the pole was attached to the engine or the string of cars next to the engine, or whether it and others had been cut loose from the train, and was separated therefrom at the time of the collision. For the defendant, this testimony tends to show that the pole car was first cut loose from the train, and then the others belonging on the north switch track; for the plaintiff, contra. A number of photographs of the track and depot situation were in evidence.

The court refused a peremptory instruction for defendant, both at the close of the plaintiff's case, and at the close of the whole case.

For the plaintiff, the court instructed thus:

"(1) The court instructs the jury that if you should find and believe from the evidence that Errett Hall was on one of the defendant's freight cars on its tracks in Strasburg and engaged in setting the brake on said car, and while so engaged he became and was in a place of danger, and that defendant's agents, servants, and employes in charge of and operating and managing an engine and cars attached thereto saw the said Errett Hall and his said peril and danger and became aware thereof in time, by the exercise of ordinary care, to have avoided injuring him, and that the defendant's said agents, servants, and employes in charge of said engine and cars attached thereto failed to exercise such ordinary care, and negligently ran said engine and cars against the car upon which the said Errett Hall was, with great and unusual force and violence, and by reason thereof the said Errett Hall was thrown from said car to the ground and injured, then you should find for the plaintiff, although you may believe from the evidence that plaintiff, Errett Hall, was guilty of negligence in going upon said car and attempting to set said brake, and was a trespasser, unless the jury should further find from the evidence that after he became aware of his own peril, or by the exercise of ordinary care might have become aware of

his peril, he could have, by the exercise of ordinary care, avoided the injury."

"(3) By ordinary care is meant such care as an ordinarily careful and prudent person would exercise under the same or similar circumstances. Negligence is the failure to exercise ordinary care.

"If you find that Errett Hall was a boy of immature age, and had not the capacity of an adult, and that he exercised such care as ought reasonably to have been expected of one of his age and capacity, then he is not guilty of contributory negligence.

"(4) If the jury find for the plaintiff, in estimating his damages, they will take into consideration not only his age, the physical injury inflicted, and the bodily pain and mental anguish endured, but also any and all damages, if any, which it appears from the evidence will reasonably result to him from his injury in the future, not to exceed in all the sum of \$25,000."

For the defendant, the court gave the following instructions:

"(1) The court instructs the jury that, under pleadings and evidence in this cause, the plaintiff, Errett Hall, at the time and place of accident, was not a passenger upon defendant's train or cars, and was not an employe of said defendant; on the contrary, at the time and place of accident aforesaid, said plaintiff, Errett Hall, had no legal right to be upon said car, and was a trespasser thereon, and the jury, in disposing of the case, should try it accordingly.

"(2) Even if the jury believe from evidence that the conductor told this brakeman to take the boys and do the switching, and the brakeman to whom the remarks were addressed went with plaintiff and directed him to get upon the car from which he was thrown, yet this conferred no authority upon plaintiff to get upon said car, and in getting upon the same to set the brake, if he did attempt to do so, he was a trespasser, without any authority to be there, and it is your duty to dispose of the case accordingly.

"(3) If the jury believe from the evidence that defendant's engineer kicked the cars back on the north switch, which struck the one on which plaintiff climbed and undertook to set the brake, and that plaintiff thereafter got upon said car, from which he was thrown, then was thrown, then he is not entitled to recover in this cause, regardless of all other facts.

"(4) Even if the jury should find and believe from the evidence that plaintiff, Errett Hall, was upon defendant's pole car, attempting to set a brake, with the knowledge and consent or on the invitation of one of defendant's servants, yet he assumed the risk in being thus located, and is not entitled to recover, unless he got upon said car while locomotive was still attached to the cars which came in on the north track, and

that the engineer in charge thereof actually saw him upon said car and had good reason to believe at the time that the cars upon said north track could not pass said pole car without striking same.

"(5) Before the plaintiff can recover herein, the jury must find and believe, from the greater weight of all the evidence, not only that the engineer in charge of the train actually saw plaintiff on the car of poles, when he backed or kicked the cars onto the north track which struck the one upon which plaintiff was stationed, but that said engineer at the time knew said car upon which plaintiff was stationed was so close to the north track that it was bound to be struck by the cars so backed or kicked on to said north track. Unless the jury so find, your verdict must be for defendant, regardless of all other facts in the case.

"(6) Unless the jury believe from the greater weight of the evidence that defendant's engineer, when he kicked or pushed the cars onto the north track, actually knew that the pole car was so close to said north track as that the cars so kicked or pushed onto said north track would strike the same, then the plaintiff is not entitled to recover herein, even if said engineer did actually see the plaintiff, Errett Hall, stationed on said pole car.

"(7) Before the jury can find for plaintiff, you must find and believe from the greater weight of the evidence: First. That defendant's locomotive was attached to the cars sent in on the north switch, immediately before the collision. Second. That the pole car from which plaintiff fell was known by the engineer, at the time he was pushing back the cars onto the north track, while still attached, to be so close to said cars on the north track that they were bound to strike same. Third. That the engineer in charge of said train, while his locomotive was still attached to the said north cars, actually knew plaintiff, Errett Hall, was upon said pole car, and that the latter was too close to the north track at said time for said cars on the north track to pass without colliding with said pole car. Unless the jury find from the evidence all three of the propositions aforesaid in favor of said plaintiff, your verdict must be for defendant, regardless of all other facts in case.

"(8) The court instructs the jury that defendant has read in evidence a statement as to what the testimony of brakemen Boggs and Buske would be if they were present in person and had testified in this cause. In arriving at your verdict, you will consider the statement of said witnesses as though they had been personally present and had testified in court to the facts set in said statement.

"(9) While the plaintiff, Errett Hall, is a competent witness to testify in his own behalf, yet the jury, in determining what

weight, if any, they will give to his testimony, have a right to consider his interest in the result of this litigation, and what he has testified to against his interest is to be taken as true, and what he has testified to in his own favor is to be given only such weight as the jury, under all circumstances in the case, deem it entitled to.

"(10) The jury are the sole judges of the credibility of the witnesses and of the weight to be given their testimony. In arriving at your verdict, it is your duty to take into consideration all the facts and circumstances detailed in evidence—the interest, if any, which the witnesses testifying have in the result of litigation; their means of information, as well as their conduct upon the stand—and if you believe from the evidence that any witness has knowingly or willfully sworn falsely to any material fact in the case, then you are at liberty to disregard the whole or any part of the testimony of such witness.

"(11) The court instructs the jury that, in arriving at a verdict in this case, they must exclude from their consideration the evidence of the witness Alcorn, drawn out in cross-examination, in which he swore it was the duty of defendant's brakeman to see that the car mentioned in evidence as the 'pole car' or 'coal car' was in the clear before giving a signal to the engineer or person in charge of defendant's engine."

And, for the defendant, the court refused to give the following:

"(a) If the jury believe from the evidence that an ordinarily prudent person possessing the intelligence and experience in regard to the operation of trains which plaintiff possessed at the time of accident could have learned, before getting upon the pole car, that it was too close to the north track for cars kicked in thereon to pass by said pole car without colliding with same, then he is not entitled to recover herein, regardless of all other facts.

"(b) If the jury believe from the evidence in this case that, at the time plaintiff attempted to get upon the pole car, it was so close to the north track as to prevent cars being moved west on said north track without colliding with the pole car, and that said fact was open and apparent to one of plaintiff's age and intelligence, then said act upon his part constituted such negligence as to preclude him from recovering in this case, and under such circumstances your finding must be for defendant, irrespective of any other facts in the case."

We have made this statement perhaps fuller than necessary, but defendant insists upon its demurrer, and thus the necessity for a full statement.

1. Counsel with much zeal discuss the question of liability in this case. For defendant, it is urged that no case has been made for the jury. With equal force, counsel for plaintiff urges contra. To read the brief

of counsel for plaintiff, one would think that it would be useless expenditure of time to investigate the question of liability, so apparent is there liability to their mind. On the other hand, reading from counsel's brief and argument for the defendant, you would be impressed with the idea that even a cursory examination of the record discloses no case made for the plaintiff, and a further examination would be at a great waste of labor. But wiping away the zealous presentations by the respective able counsel, and going to the cold record before us, we are brought to a realization that the question is an exceedingly close one, not to be brushed aside either one way or the other without outlining the facts in detail. We have given a full statement, that the relative acts of the parties might fully appear, but much of it may be cast aside before we reach the crucial point. Thus it is a disputed question whether defendant's conductor knew of plaintiff's being on the train from Pleasant Hill to Strasburg; but taking plaintiff's version of it (as we must in determining the question whether a demurrer to the testimony should have been sustained), yet we think all this has but little bearing on the ultimate issue in the case. At most, this testimony simply shows that plaintiff was permitted to ride on the train in consideration of his having assisted in repairing a car at Pleasant Hill. As to how far he was to ride, or where on the train he was to ride, does not appear, except by inference, and this inference is that he was to ride on the flat car, where plaintiff said the conductor found himself and some other boys. Singular to say, these other boys drop out of sight entirely in this case after the incident in Pleasant Hill was over. The relation of plaintiff to defendant on the trip from Pleasant Hill to Strasburg is immaterial, because no injury resulted to plaintiff by reason of that relationship, or by reason of being at the place the conductor permitted him to ride. We must go to the occurrences at Strasburg to determine the status which plaintiff bore toward the defendant. There plaintiff left the position occupied by him from Pleasant Hill to Strasburg, and a new alignment is made. Plaintiff there gets off the train some three or four cars ahead of the caboose, and goes north toward the main track and west towards the depot where he met young Epple, who, with himself and a brother of Epple's, had beat their way from Kingsville to Strasburg that morning. What became of his fellow passengers, three Holden boys, from Pleasant Hill down, does not appear. Plaintiff then says that when he got within 15 or 20 feet of the conductor, who had gotten off of the caboose, he heard the conductor say to the middle brakeman, "Take the boys and go do the switching." This remark, he says, was addressed to the middle brakeman; that at the time there were two brakemen and some four or five other boys near the conductor.

Epple says there were eight or ten boys. This number did not include plaintiff and Epple. This testimony, standing alone, is of but little value. It does not show that either plaintiff or Epple were included in the direction given by the conductor. As we gather it, both plaintiff and Epple were further from the conductor than the brakeman and the other four or five boys. If we are to apply these remarks at all to parties outside of railroad employees, they could with more propriety be applied to the other boys than to plaintiff, so that to this point we have but little tending to fix the status of plaintiff towards the defendant. The brakeman was to the west of these boys at the time of this remark, as we gather it from the evidence.

From this point on, the plaintiff either makes or does not make his case. Plaintiff's testimony is that one of the two brakemen started east, and said, "Come on, boys." We are left to infer that these remarks were addressed to plaintiff and Epple, so far as plaintiff's individual testimony is concerned; but Epple fills up the gap by saying that the remarks were addressed to them. At any rate these two boys followed, but seem to have done little toward switching until the accident. Plaintiff claims to have set a brake before the train was first cut on the south track and to have loosened a brake on one of the cars on the north track. The plaintiff's evidence made it appear that these boys were there, whatever they were doing.

Going now to the last link in the chain, we find plaintiff and Epple on the south side of the south switch track in a place of safety. The pole car is "kicked back" on the south switch track; it begins to move slowly toward the east. The car was to the west of the point of the south switch track, and this was 93 feet west of the point of the north switch track. Thus far, to get positions. The middle brakeman, after the pole car had been "kicked" in on the south switch, and the engine and other cars pulled up east of the north switch track, opened this north switch so as to allow the other cars to be pushed or "kicked back" on that track. He then went across to the south side of the main track to give signals. Epple says he was 30 feet to the east of him, but it is not explained how he was only 30 feet to the east if he came directly across from the north switch, which was 93 feet east of the south switch. Plaintiff himself says he walked right across from the north switch to the south side of the main track, but he also said in chief he was 30 feet east of him when he gave the signal. On cross-examination, when pressed, he said he didn't know how far east of him the brakeman was at the time. The car started to move slowly eastward, and he and other witnesses say the brakeman told him to get up and set the brake, which he attempted to do. We take it that under all the facts of this case his status

as to defendant is fixed by this order. This evidence shows that the brakeman knew the place occupied by plaintiff, but does it show that the brakeman knew that the car had reached a point where a collision would occur at the time he gave the signal to the engineer to back up? At this juncture it becomes necessary to determine the relation which plaintiff bore to the company. The case was tried on the theory that he was a trespasser. Instructions for both sides so read, and the humanitarian doctrine alone is invoked. Both sides having adopted that theory below, we might proceed here upon the same theory with propriety, and without determining the exact status of plaintiff, and would do so but for the fact that plaintiff's counsel now urge in the brief that he was not a trespasser, and therefore defendant was really favored by the theory upon which the case was tried.

We are of opinion that the plaintiff was a trespasser, and the defendant's liability, if any there be, must be gauged by the care required of it as to trespassers. The evidence shows that there was a conductor in charge of this train, and that neither the conductor nor any other train employé was authorized to employ or direct persons to perform work for the defendant. There is nothing in the record to show any such powers or duties. The act of the brakeman in directing plaintiff to get upon the moving car to set a brake was an act beyond the scope of his authority. *Snyder v. Railroad*, 60 Mo. 413; *Sherman v. Railroad*, 72 Mo. 62, 37 Am. Rep. 423; *Milton v. Railroad*, 193 Mo., loc. cit. 57, 91 S. W. 949, 4 L. R. A. (N. S.) 282. If the direction was without authority, it was not such as would make the plaintiff a licensee of the defendant. A license could only be granted by some authorized act of the defendant, or by acquiescence of defendant for a length of time.

The status of plaintiff being fixed as that of a trespasser, the only duty owing to him by the defendant was to use reasonable care not to injure him after he was discovered and known to be in a place of imminent danger or peril. In some of the cases applying the humanitarian rule it is stated that "if defendant knew, or by the exercise of ordinary care might have known, of the imminent peril of deceased in time to have averted the accident by the use or exercise of ordinary care and caution upon its part, and did not do so, then the plaintiff is entitled to recover." But this broad rule does not apply to this case. In this case it is incumbent upon the plaintiff to show that defendant or its agents actually knew that plaintiff was in a dangerous place. The rule that a defendant might have known of the dangerous position of a party by the exercise of ordinary care only applies to such cases where the defendant has a reason and right to expect persons to be in danger, as at a public crossing, or on a portion of track

habitually used by the public, or such other similar conditions. In all other cases the plaintiff fails unless actual knowledge is shown. As shown by his instructions, the plaintiff in this case understood the law as do we, for the first instruction requires actual knowledge of the dangerous position. Does the evidence so show? We shall take the engineer and brakeman separately.

The positive statement of the engineer is that he never saw the boy until after he had fallen to the ground. For the plaintiff, the evidence shows that the engineer was on the south side of the cab leaning out and looking west toward where the pole car stood, taking signals from this brakeman, who stood on the ground to the south of the main track. Two things must be shown to convict the engineer: (1) That he saw plaintiff upon this car; and (2) that he knew the car was in position to be struck by the cars in his train when he backed them to the west, and with this knowledge proceeded to bring about the collision, and not only destroy his master's property, but injure the plaintiff. No sane man believes he did this. The plaintiff's whole case as to the engineer rests upon the theory that he was facing west toward where this car was, taking signals from the brakeman. He had no reason to expect a trespasser upon any car. He had no reason to look further than to the signals of the brakeman. Under the evidence it was his duty to watch the brakeman for signals, and in this very case the necessity of the engineer watching the brakeman who gives the signals, rather than the cars or trucks, is fully demonstrated, for it appears that the brakeman finally discovered danger and had to give another signal to stop. Defendant explains the inability to stop by showing that the cars for the north track had been cut loose from the engine, and whilst the engineer stopped the other cars and his engine attached thereto he could not stop these cars. As to whether this was a fact was disputed by plaintiff's evidence. It is also shown that there were a number of box cars between his engine and the pole car, and it is not shown that in his position he could even see the track upon which he was running. He might have had his face in the direction of plaintiff, and no doubt did, because he was taking signals from the brakeman, which required him to look in the direction of plaintiff; but this does not show that he saw the plaintiff, or saw and knew that the pole car was not in the clear. The evidence is not sufficient to convict the engineer, nor the defendant for the alleged negligence of the engineer.

Now as to the brakeman. His position is different from that of the engineer. Under the evidence he was the man who directed and controlled the acts of the engineer. Upon his signals the engineer moved. He was

the man in charge of this work under the record evidence. Under plaintiff's evidence the car had not cleared the main track in the effort to "kick" it in on the south track. Under the evidence it was moving eastward. As to how far it would have to move to occasion a collision with cars going in upon the north switch track is not apparent, but that it did move to such a point is apparent. The evidence for plaintiff shows that the brakeman did know that plaintiff was on that car, and did know that it was moving eastward, and that it either was in, or might soon reach, a place where a collision would be inevitable. Without evidence the court knows that it was the duty of this brakeman, having charge of the switching, to see that this car was in the clear before giving orders for other cars to be "kicked" or pushed back in that direction. This was a duty to his master. But extended discussion of this question is unnecessary. As above stated, the brakeman knew the boy was on the car, and knew the car was moving in the direction from which the other cars were to come upon his signal. The distance was evidently short. These facts alone render the position of a boy of plaintiff's age a perilous one, conditioned upon the movement of the car and the boy's ability to mount it and apply the brakes. Under the plaintiff's evidence all this was apparent to the brakeman. The boy was in a perilous position from the time he attempted to mount the car to the moment of the accident, and this was known to the brakeman. As to the brakeman, the evidence is sufficient to take the case to the jury. He should have seen that the car had been stopped in a safe position before giving his signal.

2. It is next contended that the plaintiff was guilty of contributory negligence in going upon and remaining upon the pole car. It is said that he had been jumping cars for some five years, and was perfectly familiar with switching movements; that he was 15 years old, lacking 8 months, and should have seen the peril he was in and protected himself by jumping off the car when he could have seen that it was in a position to be struck. It is true that the evidence showed the boy to have jumped and ridden upon moving cars for a long time prior to the accident. It is also true that the evidence discloses his age to be nearer 15 than 14 years. All this we grant, but can it be said that there was such contributory negligence as to take the case from the jury in a case wherein contributory negligence would be an effective defense? When he boarded the car it was under the direction of an experienced man, and presumably such experienced man would not have directed the act if it amounted to negligence as a matter of law. But to the facts. The car was moving slowly, and the boy got on it. We can't say that was so negligent as

to take the question from the jury, even if contributory negligence were a matter of defense in the case. When on, he was attempting to set the brakes and stop the car; and if, in such act, his mind was diverted from the exact position of the car, we can hardly denominate that negligence as a matter of law. Again, in going there he had a right to rely upon the brakeman not giving a signal until the proper time. The evidence also shows that the engine and cars were backed up at a very rapid rate of speed. Under all these facts it was a question for the jury to say whether or not plaintiff was guilty of such contributory negligence as would bar a recovery, if, in fact, a question of contributory negligence is in this case at all, which question we reach later.

We conclude, therefore, that the demurrer to the testimony was properly overruled.

3. Connected with the foregoing and closely allied thereto is another contention of defendant, to the effect that the court refused to give instruction "a" and "b" as by it requested. These two instructions submit the question of the alleged contributory negligence of the plaintiff in getting upon the car. To our mind, the theory upon which this case was tried upon both sides fully answers this contention. That theory was that plaintiff was a trespasser and had no right to be where he was, and that if he recovered at all it was upon the humanitarian rule. The petition is drawn upon the humanitarian doctrine. The plaintiff's case is put to the jury upon that idea and none other. The humanitarian doctrine presupposes negligence or contributory negligence upon the part of the party invoking the rule. That doctrine in its essence is that, "Conceding that I am guilty of negligence in being where I am, yet if you know of my peril in time to save my life or limb, by the exercise of ordinary care on your part, then it is your duty to exercise such care, and a failure to so do renders you liable." In this case there was no error in refusing these instructions.

4. It is next urged that plaintiff's instruction No. 1, supra, is in a measure conflicting with Nos. 4 to 7, inclusive, given for defendant. This is true. Plaintiff's instruction permits the jury to consider the negligence of all the defendant's employes then engaged in the operation of the engine and cars, whilst the four instructions mentioned limits it to the negligence of the engineer alone. The plaintiff's instructions permitted a recovery upon the negligence of the employes or either of them. Plaintiff's instruction, we think, was well enough, following, as it did, the petition. Defendant's instruction Nos. 4 to 7 were erroneous in undertaking to limit the right of recovery to the negligence of the engineer alone. In such case, the error was committed in defendant's favor in this matter. In *Christian v. Insurance*

Co., 143 Mo., loc. cit. 468, 45 S. W. 269, Sherwood, J., said: "A long while ago it was decided in this state that a party cannot complain of errors in an instruction given at his own instance. *Flowers v. Helm*, 29 Mo. 324. This ruling was thought indisputably good law for many years. Later on, however, in *Bluedorn v. Railroad*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615, a brand new doctrine was proclaimed, to wit: That if the instructions of a plaintiff in a damage suit were all right and regular, but one asked by and given for defendant was erroneous and in conflict with the correct instructions of plaintiff, and the latter recovered, that this conflict, on the appeal of defendant, would necessitate the reversal of the judgment. * * * In other words, that self-invited error was ground for reversal. But this heresy was not long-lived; it received its coup de grace in *Baker v. Railroad*, 122 Mo. 533, 26 S. W. 20. So that having held plaintiff's instruction 7 is free from error, it must needs follow that if defendant's instruction 2 is in conflict therewith, it must be erroneous, and, if so, defendant takes nothing by reason of such conflict."

It should not be overlooked that this swing brakeman was the man controlling the movements of the engine and the cars in the yard. Under the plaintiff's instruction, the jury could have well found for the plaintiff on the negligence of this brakeman.

Other points made have been examined, but these are the only ones we deem necessary to mention in further detail.

The judgment is affirmed. All concur.

On Rehearing.

It is earnestly insisted in the motion for rehearing that the negligence of the brakeman was never submitted to the jury, and that therefore the issue found by this court as vital to defendant's case is an entire new theory injected here for the first time. And it is further insisted that the petition does not count upon the negligence of the brakeman. If either of these contentions were well founded, there would be error in the opinion, but they are not as we read the petition and the instructions.

In the first place, the petition, after stating that plaintiff was placed in a place of danger by the direction of the brakeman, then proceeds: "That while plaintiff was so engaged on said car, and was in said place of peril, defendant and defendant's said conductor, agents, servants, and employes operating said train, knowing that plaintiff was on said car and in a place of peril, and after they could have known it by the exercise of ordinary care, negligently and unskillfully mismanaged the said engine, cars, and train, and carelessly and negligently, and with great and unusual and unnecessary force and violence, ran said engine, and freight cars attached thereto, against the said car on which said plaintiff was, by reason of which," etc.

This petition is certainly broad enough to include the brakeman. It includes in its allegations not only all the agents and employes of defendant, but the defendant itself, the language being, "defendant and defendant's said conductor, agents, servants, and employes operating said train." It does not stop here, but it avers that "they" (referring to the clause above, which included defendant and all of its employes) "negligently and unskillfully mismanaged the said engine, cars, and train, and carelessly and negligently * * * ran said engine and freight cars attached thereto against the said car on which plaintiff was," etc.

So that it is apparent that a fair construction of this petition leads to the inevitable conclusion that it charges the injury to plaintiff to have been occasioned by the negligence of the brakeman, as well as by the negligence of the engineer and other employes. Then, going for a minute to the evidence, it is there shown that the middle brakeman was the vice principal so far as the switching of cars was concerned. Under the evidence, this peculiar duty was to get the switch list from the station agent and proceed to do the switching. Whilst so doing, the engineer acted under his orders and signals. When he signaled to the engineer to come, he came, and when he signaled to him to go, he went. He was in fact the party, at that time, managing and "operating" that train, or portion of the train. He was in charge of and operating that train in the doing of this work. This, under the testimony, was his duty.

Now, was this negligence submitted to the jury? We think so. Instruction No. 1 for the plaintiff, among other things, says: "That defendant's agents, servants, and employes in charge of and operating and managing an engine and cars attached thereto saw the said Errett Hall and his said peril and danger, and became aware thereof in time, by the exercise of ordinary care, to have avoided injuring him, and that the defendant's said agents, servants, and employes in charge of said engine and cars attached thereto failed to exercise such ordinary care, and negligently ran said engine and cars against the car upon which said Errett Hall was," etc. When this is read in connection with the portion of the petition above quoted, it will be seen that the instruction covers the negligent acts of the same persons as is covered in the petition. It covers the acts of all agents and employes engaged in operating the train at the time, and certainly covers the negligence, if any, of the brakeman, who, under the evidence, was in fact the controlling spirit of the operation of the train at the time.

The negligence of this particular employe was not only pleaded, but submitted. In the original opinion we discuss fully the effect of the giving of an erroneous instruction for the defendant, when a proper one had been given for the plaintiff, and will not reiterate here.

Under the facts, had defendant asked and the court refused an instruction limiting the liability to the negligence of the brakeman, the defendant would have been in condition to complain.

Other points made are sufficiently answered in the original opinion.

Motion for rehearing overruled. All concur.

GARRETT v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1. March 31, 1909.)

1. EVIDENCE (§ 219*)—ADMISSIONS.

That a party induced a witness by threats of a criminal prosecution to return to the state and testify is not admissible as an admission of such party, since it does not show an attempt to improperly influence the witness or his testimony, in the absence of any proof indicating an evil purpose on the part of the party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 763; Dec. Dig. § 219.*]

2. WITNESSES (§ 309*)—IMPEACHMENT—EVIDENCE.

In an action against a street railway company for the death of a person, ejected from the car by the conductor for failure to pay fare, the fact that the conductor, testifying for the company, refused to testify at the coroner's inquest, on advice of the company's attorney, on the ground that his testimony might incriminate him, was inadmissible to impeach him.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 309.*]

3. WITNESSES (§ 393*)—IMPEACHMENT—INCONSISTENT STATEMENTS.

The testimony given by a witness at the coroner's inquest is admissible to impeach him, when he subsequently testifies in a court regarding the same matter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1254; Dec. Dig. § 393.*]

4. WITNESSES (§ 305*)—PRIVILEGE—WAIVER.

A witness cannot be compelled to testify at a coroner's inquest where he believes that his testimony will incriminate him; but he may waive his constitutional right, which is a personal privilege, and testify on all matters relevant to the case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1063, 1057; Dec. Dig. § 305.*]

5. CARRIERS (§ 304*)—INJURIES TO PASSENGERS—CARE REQUIRED.

One who boards a street car with no intent to pay fare, and who does not pay fare when requested by the conductor, and who refuses to leave the car on the demand of the conductor, is a trespasser, and the street railway company owes to him only the duty of not unnecessarily and intentionally injuring him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1447, 1450; Dec. Dig. § 304.*]

6. CARRIERS (§ 381*)—INJURIES TO PASSENGER—ACTION—EVIDENCE.

One suing a street railway company for the death of a person ejected from a car by the conductor thereof, and basing his right to recover on the ground that decedent was a passenger and criminally assaulted by the conductor, must show not only that decedent was assaulted and

killed by the conductor, but that he was a passenger.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 381.*]

7. CARRIERS (§ 370*)—PASSENGERS—INJURIES—LIABILITY.

Where, on the refusal of a passenger to pay fare when demanded by the conductor, a fight ensued, which was brought on by the passenger or voluntarily entered into by him during which the passenger was thrown or fell from the car and received injuries causing his death, the carrier was not liable for the acts of the conductor.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 370.*]

8. DEATH (§ 14*)—ACTION FOR DEATH—STATUTES.

To authorize a recovery under Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637), authorizing recovery for the death of a person from the negligence or "criminal intent" of any servant in charge of trains, etc., the evidence must show a criminal intent, followed by criminal conduct resulting in the fatal injury.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 14.*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Annie Garrett against the St. Louis Transit Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The plaintiff filed this suit in the circuit court of the city of St. Louis on April 8, 1904, against the defendant, for the recovery of \$5,000 damages for the alleged wrongful killing of her husband, John Garrett, on the 28th day of March, 1904, by one of defendant's conductors, in charge of a car on the Olive street line, while attempting to eject Garrett for the alleged failure to pay his fare. The petition was in three counts, and a trial was had thereon before the court and a jury, which resulted in a verdict and judgment for defendant; and, the court refusing a new trial, the cause was brought here by the plaintiff for review.

The first count of the amended petition was as follows:

"That on the 28th day of March, 1904, the plaintiff's said husband, John Garrett, entered and was received by the defendants as a passenger on an east-bound car of the defendants on the said Olive street, at Beaumont street, on their said line of street railroad; that while the plaintiff's said husband was riding on said car on the rear platform thereof, and while said car was running at a rapid rate of speed on the said Olive street, between Jefferson avenue and Twenty-Third street, the defendants' conductor, in charge of their said car, and whilst running, conducting, and managing said car as the agent, servant, and employé of the defendants, wrongfully and forcibly attempted to eject the plaintiff's husband from said car, and in so doing caused the plaintiff's said husband to fall from said car while said car was in rapid motion, and to strike the street with

great force and violence, whereby the plaintiff's said husband sustained injuries from which he died in the said city of St. Louis on the 13th day of March, 1904, and within six (6) months prior to the commencement of this action; that said acts of the defendants' said conductor in attempting to eject the plaintiff's said husband from said car, and in causing him to fall therefrom, were done negligently and with criminal intent, and that the injuries sustained by the plaintiff's said husband, and from which he died as aforesaid, resulted from, and were occasioned by, said negligence and criminal intent of the defendants' said agent, servant, and employé, to wit, the conductor aforesaid, whilst running, conducting, and managing the defendants' said car; and that by reason of the death of the plaintiff's said husband, caused as aforesaid, an action has accrued to the plaintiff to sue for and recover from the defendants the sum of five thousand dollars (\$5,000)." Wherefore, the plaintiff prays judgment, etc.

The second count is the same as the first, with the exception that it charges that the wrongful acts complained of and which resulted in the death of plaintiff's husband were done negligently. The third count is also the same as the first, with the exception that it charges that the wrongful acts of the conductor of defendants which resulted in the death of plaintiff's husband were done with criminal intent.

The answer of defendant, St. Louis Transit Company, omitting formal parts, is as follows:

"Now comes the St. Louis Transit Company, and answers the three counts of plaintiff's petition as follows:

"This defendant denies each and every allegation in each and every count contained.

"This defendant, further answering each and every count, states that John Garrett boarded the street car mentioned in each count, and refused to pay a fare thereon, and after riding some blocks insisted upon leaving said car without paying fare, and while said car was in motion, by reason of which insistence of his he sustained the injuries, if any, mentioned in each count of plaintiff's petition.

"This defendant, further answering each and every count of plaintiff's petition, stated that John Garrett, mentioned in each count thereof, boarded a street car and attempted to pull the conductor off said car while it was in motion, and while struggling with the conductor, and when about to succeed in pulling him off the car, a person unknown to this defendant kicked said Garrett and caused him to release his hold upon said conductor and fall to the ground, whereby he received the injuries, if any, alleged in each count of the plaintiff's petition.

"Wherefore, having fully answered, this defendant asks to be discharged with its costs."

The answer of the defendant United Railways Company of St. Louis is a general denial.

Plaintiff's evidence tended to prove that at the time of the injury and death of John Garrett he and plaintiff were husband and wife, and that he died of the injuries received, at the City Hospital, in the city of St. Louis, on March 30, 1904.

On the 23th of the same month, about 6 o'clock p. m., John Garrett boarded an east-bound Olive street car at Beaumont street, and stood on the steps of the rear platform of the car. What occurred after the car reached Jefferson and Olive streets, the point where the injury occurred, is well told in the language of plaintiff's witnesses, as substantially stated in appellant's abstract of the record, which is as follows:

Direct examination:

Mrs. Hannah Williams testified that she was a laundress, living in St. Louis. That she was acquainted with John Garrett. That on March 23, 1904, about 6 p. m., she boarded an east-bound Olive street car at Sarah and Olive streets, intending to get off at Jefferson and Olive streets. When the car reached Beaumont and Olive streets, John Garrett boarded it. When the car reached Jefferson and Olive it stopped on the east side of Jefferson and witness got off. When she came out of the door of the car to get off, Garrett was standing on the rear of the back platform; the conductor was in front of him, with his right hand holding Garrett's left arm. After witness got off car she turned around and saw the car going east. Garrett was standing on the step with his back to the sidewalk. The conductor was in front of him, with his hand on Garrett's shoulder. Garrett was standing about the middle of the first or second step, in front of the upright iron bar, which runs from the middle of the step to the roof of the back platform. His back was to the south, and the conductor was facing him, and right up against him with the iron bar between them. As the car proceeded, witness noticed conductor give Garrett a shove, and Garrett fell backwards to the street, Garrett at the time of the shove having one hand on the upright bar. At the time the conductor shoved Garrett a crowd came out of the car, and some one kicked Garrett, but witness could not tell who it was that kicked. This kick followed the shove. Witness went down to where Garrett was lying; blood was coming out of his mouth. Garrett fell about a half block east of Jefferson avenue, the car going at a rapid speed at the time. Witness went near enough to observe whether or not there was any odor of liquor on Garrett's breath, but did not notice any.

Dr. Meissenbach testified that he was a physician residing in St. Louis. On March 28, 1904, some one came to his office and requested him to go down on the street to see a man. He found a colored man lying with

his head towards the east, his heels towards the west; he was unconscious; blood coming from his nostrils; breathing seemed labored; the eyes did not act alike; he did not respond to any stimulant; was thoroughly unconscious; blood was coming from one ear, and slight bruise on forehead. He was taken to the City Hospital. Witness saw this man next morning at the City Hospital, between 10 and 12 o'clock; he was unconscious, lying in bed with bandages around his head, dark blood coming from nose and mouth. When he saw the man lying in Olive street he examined him to see if he could detect the odor of alcohol, but found no evidences of it, although he smelled the nostrils and breath. The man was lying about one-third of the distance from Jefferson avenue to the next street when witness saw him.

Dr. Nies testified that in March, 1904, he was an interne at the City Hospital; that he recalled John Garrett being brought there; Garrett's skull was fractured on the back of his head; he died about 7 a. m., March 30th. Witness saw nothing other than the fractured skull which could have caused death.

August White testified that he was 13 years of age, and resided at 2627 Olive street, St. Louis, and was a newsboy, and was such in the spring of 1904. Witness boarded the car on which Garrett was riding at Beaumont for the purpose of selling papers. He noticed Garrett get on at Beaumont street. Witness did not notice anything happen before the car left Olive and Jefferson avenue. After the car left Jefferson avenue and had proceeded to about the middle of the block, Garrett was kicked off. Witness saw the kick, but did not notice who gave it. Garrett was standing on the back step of the car when the kick was delivered, and the conductor was standing close to him. After the kick, Garrett fell out into the street. The car did not go very far after Garrett fell. Witness remained on the car until it stopped.

Cross-examination:

Witness did not see Garrett or the conductor have hold of one another; he saw the kick, but did not see who gave it, he being on the north side of the platform selling papers at the time.

Direct examination:

John P. Kridzer testified that he resided in St. Louis, and was a paper ruler by trade. On the evening of March 28, 1904, between 5:30 and 6 p. m., he was standing on the southwest corner of Olive street and Jefferson avenue, looking north; he saw the car on which Garrett was riding coming east. Garrett and the conductor were on the back platform, the conductor standing in front of Garrett. He came toward Garrett with his right arm raised and his index finger out; witness could not hear what words were spoken. The conductor was standing on the west end of the platform and near the south side; the conductor was east of Garrett and facing west. The car stopped

at Olive and Jefferson, and a colored woman got off. The car then proceeded down Olive street at a fast rate of speed, and increased its speed as it proceeded. The conductor went towards Garrett, and the latter moved off towards the edge of the platform; the conductor followed him, and Garrett got down on the step and stopped there about where the iron bar runs up. When the car had proceeded about two-fifths of a block from Jefferson avenue, some one came out and stood next to the conductor; then some one kicked Garrett, and he fell off backwards. Witness could not tell who delivered the kick. At the time of the kick Garrett was standing with the right hand holding the upright iron bar, and the left holding the lapel of the conductor's coat and his right shoulder even with the iron bar; Garrett did not reach down; witness examined Garrett after he fell, and saw the print of the kick on his clothes over the lower part of the stomach.

Redirect examination:

As Garrett moved away from the conductor, the latter followed him, shaking his finger at him. It was still light enough to see when the accident occurred. "Mr. Swarts: I understand there is not objection raised to this copy of the evidence taken at the coroner's inquest, which is not certified to. I desire to offer the testimony of H. D. Crady, taken at the inquest. He was the conductor of that car. (Defendant's counsel object to the offer of the testimony before the coroner as incompetent, immaterial, and irrelevant. The objection was sustained. To which ruling of the court, plaintiff, by her counsel, then and there excepted at the time.)"

Morton Jourdan, called by plaintiff (oath waived). Mr. Jourdan did not know whether or not Mr. Walsh, of the claim department of the St. Louis Transit Company, ever represented that company in inquests before the coroner. He may have done so without his knowledge. Counsel for plaintiff here offer the deposition of H. D. Crady, filed in the case, and offered to read therefrom the following questions and answers: "Q. Do you know your wife wrote a letter of this purport to the company, dated November 6, 1904? 'Mr. Palmer'—who is he? A. Claim agent. Q. A letter as follows: 'Mr. Palmer, St. Louis, Mo.—Dear Sir: I received your letter a few days ago and was very much surprised that you wanted my husband for a witness. It is a wonder you did not keep him there while you had him. How much is his presence at that trial worth to you, and what are you willing to give? I am not sure that he can get off at that time or not, but you name your figure and if it is large enough, I will let you know where you can find him. He is doing very well now and will not come unless there are some inducements. So awaiting your reply, I am, Yours sincerely, Mrs. H. D. Crady.' A. I do not

know whether she did or not. I really never paid much attention to it. Q. Did you instruct her to send such a letter as that? A. No, sir. Q. Did you ever discuss with her the sending of such a letter? A. No, sir. Q. Where were you on the 11th day of November? A. I was here in November. Q. Now, in reply to that, I will ask you if your wife ever received a letter in reply to that letter? A. I think so. Q. Did she turn that letter over to you? A. I think I read it over; yes, sir. Q. Is it not a fact that that letter informed you that you had better give your testimony in this case, or you probably be indicted for manslaughter? A. That letter said something about that. Q. Who was that letter from? A. That letter was from—I forget his name; I never saw any letter from Palmer. I forget the man's name. Q. What position did he hold? A. I think he is under Palmer; Kavanaugh is his name. Q. I will ask you to produce the letter and turn it over to the notary public to be attached to this deposition; will you do it? A. I expect the letter is destroyed. I do not expect it can be done. Q. I want to make the request that you produce it and give it to the notary. A. If I have it I will, and if I have not, I cannot. (Not found; memorandum by notary.) Q. Did the defendants in this case agree to pay you any money for your testimony in this cause? A. No, sir. Q. Did you ever write to your wife and suggest that she write them for money? A. No, sir. Mr. Jourdan: We object, for the reason, if the deposition of the witness is offered, we are entitled, and the jury are entitled, to have it all. We object to selecting out one or two extracts and offering it in that way. Mr. Swarts: As an admission, plaintiff offers this part of Conductor Crady's deposition. The Court: That does not apply to this situation. (Defendant's objection is sustained by the court, to which ruling of the court plaintiff, by her counsel, then and there excepted at the time.)"

Plaintiff there rested her case.

The defendant the United Railways Company interposed a demurrer to the plaintiff's evidence, which was by the court sustained, and judgment went for it accordingly; but as plaintiff failed to appeal therefrom, it will be unnecessary to notice further that company.

The defendant, the transit company, also asked an instruction in the nature of a demurrer to the evidence, telling the jury that plaintiff could not recover on the second count of the petition, which was by the court given, to which action plaintiff duly excepted.

Defendant's testimony was substantially as follows, as appears from appellant's abstract:

Direct examination:

William Hawkins testified that at the time of the accident he was standing on the south side of Olive street, east of Jefferson ave-

nue; witness saw the car on which Garrett was riding coming east on Olive street; Garrett was on the back platform, holding the upright iron bar with one hand and the handhold with the other; the conductor had hold of his shoulder; Garrett looked as though he had started to jump off, when he fell back on the street; there were several people on the rear platform. Witness did not see a lick struck nor a kick, nor did he see conductor shove Garrett; he was looking towards Garrett and the conductor at the time.

Cross-examination:

Witness was standing about 20 or 35 feet from Jefferson avenue; the conductor put his hand on Garrett's shoulder, then rung the bell; the minute Garrett's feet struck the ground the conductor pulled the bell. Witness' idea was that Garrett attempted to jump and struck solidly on his feet, which went out from under him and he fell.

Direct examination:

Ira E. Benson testified that in the latter part of March, 1904, witness was a motorman for the St. Louis Transit Company; he quit that company the last of April, 1904, and at the time of the trial was a plumber. On the day of the accident he was motorman of the car following the one on which Garrett was riding; he noticed Garrett get aboard at either Leffingwell avenue or Beaumont street. Witness' car was following from three or four blocks to two car lengths; he saw the conductor go to Garrett several times before the car reached Jefferson avenue; when the car got to Jefferson it stopped an unusually long time. Witness stopped at the crossing of Jefferson avenue, and the conductor of the car in front held it so long that he rang his gong for him to go ahead; the conductor and Garrett were standing near the edge of the platform; the conductor laid his hand on Garrett's shoulder, but did not strike him; Garrett stopped, facing toward the conductor, at the edge of the platform, within a foot of the steps; the car had gone about 75 feet from Jefferson avenue when this occurred. The conductor was holding the rod with both hands; Garrett had given a jerk, when a passenger on the platform kicked or struck Garrett in the stomach; Garrett then turned loose of the conductor and stepped back. The car went down to Twenty-Third and Olive before it stopped.

Cross-examination:

At the time Garrett was kicked off the car on which he was riding it was going about 20 miles an hour. Before the car on which Garrett was riding left Jefferson avenue the conductor was standing on the platform in front of him, and Garrett was on the step; part of the time the conductor had had hands on Garrett's shoulder, and was talking to him, apparently. As the car started down Olive street Garrett had his left hand on

the rod. When the car had gone about 60 or 65 feet Garrett took his hand off of the rod, the car then going about 15 miles an hour; reached down and grabbed the conductor about the legs; then some one came out and kicked two or three times; while this kicking was being done the conductor struggled to his feet, he having fallen to the platform, and held himself by the rod. Witness was about 75 feet behind Garrett and the conductor when Garrett grabbed the latter's legs.

Defendant offered the deposition of Hugh D. Crady, taken in this case at Ft. Worth, Tex., on behalf of defendants:

Witness testified that he was living in Ft. Worth, Tex.; he was conductor on the car from which Garrett fell. Garrett boarded the car at 2700 or 2800, and refused to pay his fare, and witness told him he would have to pay his fare or get off; Garrett said he was only going a short distance and was not going to pay. Witness told him to do one or the other, and Garrett said he would not get off, whereupon witness took hold of him, and while doing so Garrett told him that if he did not let go of him he would take him off, too, and grabbed witness around the ankles. Witness had hold of the lapel of Garrett's coat with one hand, and the upright iron rod in the center with the other. Witness did not know what happened, but Garrett let go and fell backwards; he did not know whether or not some one kicked Garrett. Witness jumped off of car and went to where Garrett was lying, and left him in charge of a conductor who was laying off. Witness did not attempt to strike or kick Garrett, nor did he see any one else do so; his object in holding to him was that he should pay his fare and not get off in the middle of the block while the car was going. There were several passengers on the back platform at the time.

Cross-examination:

When Garrett got on the car he said he would not pay any fare; he stood on the step, and leaned up against the post in the center; he did not get off of the step. Witness did not make him get off of the car at Jefferson avenue, because he thought that he would pay his fare; as soon as the car left Jefferson avenue he took hold of Garrett, because he thought that he was going to get off of the car; and, besides, witness wanted to collect his fare.

Witness denied in his deposition that he made the following statement to Police Officer Thomas F. Cuddihoe: "Garrett got on my car at Twenty-Seventh and Olive and refused to pay his fare, saying he was only going a short distance, and I told him he would have to get off at Jefferson avenue if he did not pay his fare. He did not get off at Jefferson avenue, and after leaving Jefferson avenue he started to get off the car, and in order to keep the man from falling I caught hold of him—in order to keep him from fall-

ing—in the meantime a citizen was going to get off at Twenty-Third street, and in jarring up against him he knocked him off." Witness admitted that he did make a statement to the officer, but not the above one. He could not tell whether he said to the motorman, G. W. Haase, "Only a man fell off the car." Witness attended the coroner's inquest held over Garrett; he made a statement, but did not suppose that it could be called testifying. He was asked, at the coroner's inquest, and stated the car on which he and Motorman G. W. Haase were running on March 28, 1904, about 6 o'clock p. m.; he was also asked if John Garrett was on the car, and stated that there was a colored man on the car; he did not know his name.

At the taking of the deposition the following questions were asked and answers given, which counsel for defendant omitted to read, but which counsel for plaintiff offered to read as a part of defendant's testimony, and also in rebuttal for the impeachment of Crady's testimony: "Q. Were you asked the following question at the coroner's inquest: 'Will you make a statement to the jury?' A. I was. Q. And to the question, did you make reply as follows: 'I do not care to make a statement to the jury.' A. Yes, sir. Q. Were you asked at the same inquest why you did not care to make a statement? A. I was. Q. And did you reply to that: 'Well, my attorney told me not to.' A. I did. Q. Then were you asked at the same inquest: 'Well, what attorney, the attorney for the transit company?' A. I was. Q. Did you answer that: 'Well, yes, sir.' A. I said for the transit company and for my personal interests, too. Q. Were you asked this question at the same inquest: 'Are you afraid you will incriminate yourself?' A. I was. Q. And did you reply to that question, at the inquest: 'Yes, sir.' A. No, sir."

All of which above set out questions and answers were objected to by counsel for defendant when said deposition was being read at the trial, and the objection sustained by the court, to which action of the court the plaintiff, by her counsel, then and there excepted at the time.

Witness was discharged by the transit company about August 1, 1904, and then left St. Louis and went with his wife to Eddyville, Ky., to visit relatives of his wife; from Eddyville he went to various places, and finally to Ft. Worth, Tex., where he was living with his wife when his deposition was taken. The wife of the witness had forwarded to him one letter which she received from the transit company, and had received one after she came to Ft. Worth; witness did not have the letters with him.

Witness testified that the car, after it left Jefferson avenue, was going about 10 miles an hour; that he stepped off of it while it was going at the same rate as it was when Garrett fell off. Witness did not take hold

of Garrett to push him off, nor did he kick him off.

Redirect examination:

Witness smelt the odor of whisky on Garrett's breath, but could not say that he was under the influence of liquor. Witness appeared to give his deposition in answer to a subpoena, and had not been offered any reward or remuneration of any kind for giving his testimony; that he felt somewhat unfriendly toward defendant.

Defendant rested here.

In rebuttal:

Direct examination:

Thomas F. Cuddihoe testified that on March 28, 1906, and on the day of trial, he was a police officer of the city of St. Louis; to the best of his recollection, the conductor of the car from which Garrett fell stated to him, at the time, that Garrett refused to pay his fare, saying he was only going a short distance, and the conductor told Garrett that he would have to get off at Jefferson avenue, if he did not pay his fare; Garrett did not get off at Jefferson avenue, but afterwards started to get off, and he took hold of him to keep him from falling, and in the meantime a passenger was going to get off at Twenty-Third street, and he thought that this person shoved Garrett off.

Cross-examination:

The conductor told the officer that he did not shove or kick Garrett; that he started to get off in the middle of the block.

Thereupon the plaintiff prayed the court to give the jury the following instructions, to wit:

"The court instructs the jury that if they believe from the evidence that on the 28th day of March, 1904, and at the time of his death on the 30th day of March, 1904, the plaintiff was the lawful wife of John Garrett, and that on said 28th day of March, 1904, the defendant, St. Louis Transit Company, was a carrier of passengers for hire, and used and operated the railroad and car mentioned in the evidence for such purpose; and if the jury further believe from the evidence that the defendant, St. Louis Transit Company, received the said John Garrett as a passenger on said car on said 28th day of March, 1904; and if the jury further believe from the evidence that while the said John Garrett was on said car the defendant's conductor in charge of the said car, whilst running, conducting, and managing said car as the agent, servant, and employé of the defendant, wrongfully and forcibly attempted to eject the plaintiff's said husband from said car, and that the plaintiff's said husband was thereby caused to fall from said car while said car was in rapid motion and to strike the street with great force and violence, and that thereby the plaintiff's said husband sustained injuries from which he died on the 30th day of March, 1904; and if the jury further believe from the evidence that said acts of the defendant's said con-

ductor, in attempting to eject the plaintiff's said husband from said car and causing him to fall therefrom, if the jury so find from the evidence, were done with criminal intent; and unless the jury further believe from the evidence that the plaintiff's said husband was injured by his voluntarily attempting to leave said car, or by an attempt on his part to forcibly pull said conductor from said car—then the verdict of the jury must be in favor of the plaintiff on the third count of her amended petition."

Which instruction the court refused to give; to which action and ruling of the court, in refusing to give said instruction, the plaintiff then and there duly excepted at the time.

And the court of its own motion gave to the jury the following instructions, to wit:

"The court instructs the jury that if they believe from the evidence that on the 28th day of March, 1904, and at the time of his death on the 30th day of March, 1904, the plaintiff was the lawful wife of John Garrett, and that on said 28th day of March, 1904, the defendant, St. Louis Transit Company, was a carrier of passengers for hire, and used and operated the railroad and car mentioned in the evidence for such purpose; and if the jury further believe from the evidence that the defendant, St. Louis Transit Company, received the said John Garrett on said car on said 28th day of March, 1904; and if the jury further believe from the evidence that while the said John Garrett was on said car the defendant's conductor in charge of said car, whilst running, conducting, and managing said car as the agent, servant, and employé of the defendant, wrongfully and forcibly attempted to eject the plaintiff's said husband from said car, and that the plaintiff's said husband was thereby caused to fall from said car while said car was in rapid motion, and to strike the street with great force and violence, and that thereby the plaintiff's said husband sustained injuries from which he died on the 30th day of March, 1904; and if the jury further believe from the evidence that said acts of the defendant's said conductor, in attempting to eject the plaintiff's said husband from said car and causing him to fall therefrom, if the jury so find from the evidence, were done with criminal intent—then the verdict of the jury must be in favor of the plaintiff on the third count of the amended petition."

"(8) If you find from the evidence that plaintiff's husband boarded the car with the intention of not paying his fare, or that when the conductor requested the payment of his fare he refused to pay same, then he was not a passenger in contemplation of law.

"(9) If you find and believe from the evidence that plaintiff's husband was engaged in a scuffle with the conductor, and just immediately before he fell or was pushed from

the car he had hold of the conductor and was attempting to pull the conductor from the car, then the conductor had the right to use such force as was necessary in order to prevent plaintiff's husband from pulling him from the car while it was in motion, and, if plaintiff's husband was injured as the result of the conductor's efforts to save or protect himself, defendant is not liable, and you will find for the defendant.

"(10) If you find that the defendant's conductor in charge of the car had demanded of the plaintiff's husband that he pay his fare and that he refused so to do, and that a scuffle and fight ensued, which was brought on by the plaintiff's husband or voluntarily entered into by plaintiff's husband, and that during such scuffle or fight he was thrown, pushed, or fell from said car and was thereby injured, then this defendant is not liable for the acts of the conductor, and your verdict will be for the defendant. In order to voluntarily enter into a scuffle, one must do so for the purpose of offensive attack. One who engages in a scuffle for the purpose of defending himself cannot be said to do so voluntarily."

"(12) Before the plaintiff can recover in this case, she must establish an act of criminal conduct upon the part of the defendant's conductor by a preponderance of the testimony. This burden is imposed upon the plaintiff by law, and, in determining the facts, you should be governed by this instruction. By 'preponderance of the testimony' is meant by a greater weight of the testimony and to your reasonable satisfaction.

"In this connection you are instructed that if the plaintiff has failed to show said act of criminal conduct upon the part of the conductor, then your verdict will be for the defendant."

To the giving of which instructions, and each of them, the plaintiff then and there duly excepted at the time.

The court at the instance of the plaintiff gave the following instruction:

"(a) By the expression 'criminal intent' as used in this instruction is meant a reckless disregard for and a willful and intentional indifference to the direct consequences which an act may have on the life or limb of another."

And the court at the instance of the defendant, St. Louis Transit Company, gave to the jury the following instructions, to wit:

"The court instructs the jury that if they believe from the evidence that John Garrett, at the time and place mentioned in the evidence, of his own accord, jumped or fell from defendant's car, then your verdict shall be for the defendant.

"The court instructs the jury that if they believe from the evidence that John Garrett, at the time and place mentioned in the evidence, attempted, by throwing his arms around the knees of the conductor in charge

of said car, to pull said conductor off of said car, and that the conductor resisted and defended himself against such attempt, and during and as a result of said resistance plaintiff's husband fell or was pushed from said car, then your verdict shall be for the defendant; provided you further believe from the evidence that the conductor used only such force in defending himself as the circumstances seem to warrant.

"The court instructs the jury that if they believe from the evidence that John Garrett, at the time and place mentioned in the evidence, was kicked or shoved from the car in question by some person unknown, standing on the back platform of said car, other than the conductor, and that prior to said act of kicking the conductor had no knowledge or intimation that the same would be done, and if they further believe from the evidence that the conductor in no way aided or abetted or caused said kicking to be done, then your verdict shall be for the defendant.

"(4) The court instructs the jury that, under the law and all the evidence, plaintiff is not entitled to recover against the defendant, St. Louis Transit Company, under the first count in the petition, and your verdict as to that count will be for that defendant."

"(11) You are the sole judges of the credibility of the witnesses, and of the weight and value to be given to their testimony. And in this connection you are instructed that you have a right to take into consideration the appearance and conduct of the witnesses upon the stand while testifying, their interest in the result of the case, their feeling for or against either of the parties to the litigation, the probability or improbability of their statements, their positions at the time of the accident, and their ability to see and to know what was going on; and you are instructed in this connection that, if you believe that any witness has willfully sworn falsely to any material fact, you are at liberty to disregard any portion or all of the testimony of such witness."

To the giving of which instructions, and each of them, the plaintiff then and there duly excepted at the time.

As before stated, the jury found for defendant, and from the judgment entered therein the plaintiff duly appealed.

The assignment of errors is as follows:

"(1) The court erred in excluding competent and legal evidence offered by the plaintiff.

"(2) The court erred in giving improper instructions to the jury."

Lyon & Swarts and Dwight D. Currie, for appellant. Boyle & Priest and G. T. Priest, for appellee.

WOODSON, J. (after stating the facts as above). 1. The first error assigned by counsel for appellant regards the action of the trial court in excluding from the jury that

part of the deposition of H. D. Crady, taken in Ft. Worth, Tex., which relates to a letter he testified his wife received from one of the claim agents of defendant, written in reply to her letter written to Mr. Palmer, before mentioned, which is as follows:

"Mr. Palmer, St. Louis, Missouri—Dear Sir: I received your letter a few days ago and was very much surprised that you wanted my husband for a witness. It is a wonder you did not keep him there while you had him. How much is his presence at the trial worth to you, and what are you willing to give him? I am not sure he can get off at that time or not, but you name your figure and if large enough, I will let you know where you can find him. He is doing very well now and will not come unless there are some inducements. So awaiting your reply, I am, Yours," etc.

The letter from the claim agent, in reply to Mrs. Crady's letter, had been either lost or destroyed, and for that reason was not attached to and made a part of said deposition; but he testified that the substance of that letter was that if he, Crady, did not give his testimony in the case, he would probably be indicted for manslaughter.

Counsel for appellant contends that the letter written by the claim agent of respondent in reply to the letter of Mrs. Crady to Mr. Palmer was the admission of a threat made by the company of a prosecution of Hugh Crady for manslaughter if he did not appear and testify in this case. In support of that contention, counsel rely upon the cases of *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14, and *Cruikshank v. Gordon*, 48 Hun, 308, 1 N. Y. Supp. 443. The former case held that letters written by or at the instigation of a party to an action to third persons warning them not to aid the other party or testify in the action or urging them to testify to a particular state of facts were in the nature of admissions by conduct, and were admissible in evidence. The latter case is to the same effect.

In our judgment, the letters referred to in those cases were properly admitted in evidence, but in the case at bar there is no pretense that the letter written by the claim agent warned Crady not to aid plaintiff or testify in her behalf, or to testify to any particular state of facts, as was true in the cases before mentioned. In fact, Crady testified that he was offered no money to testify, nor did he say the respondent desired or wished him to do or not to do anything which was improper, legally or morally. According to his testimony, the extent of the threat was simply to induce him through fear to return to the state and testify as a witness in the case. In the absence of any testimony indicating an evil purpose on the part of the claim agent in writing the letter, the court would not be warranted in presuming his motives were sinister or improper; but, upon the contrary, we must presume his inten-

tions were good. While neither the law nor good citizenship indorse that means of procuring the attendance of witnesses upon courts of justice, yet that fact alone should not brand the writer of the letter and his principal as trying improperly to influence the witness or his testimony. We are therefore of the opinion that the court rightfully excluded the testimony.

2. It is next insisted by counsel for appellant that the trial court erred in excluding from the jury certain questions and answers contained in the deposition of H. D. Crady, the conductor, with whom Garrett had the difficulty, and which resulted in his death.

Defendant had read his deposition to the jury, wherein he testified that deceased boarded his car and refused to pay his fare; that when the car reached Jefferson avenue he told him he must pay his fare or leave the car, and that he refused to do either; that he took hold of him, and while doing so Garrett told him that if he did not let him go he would take him off too, and grabbed him, Crady, around the ankles; and that while in that position he was holding onto Garrett's coat with one hand and to an upright iron rod with the other; and that while so holding Garrett let go his ankles and fell back in the street and was injured, but that he did not know what caused him to fall.

The questions and answers were offered for the purpose of impeaching Crady, and are as follows: "Q. Were you asked the following questions at the coroner's inquest: 'Will you make a statement to the jury?' A. I was. Q. And to the question did you make a reply as follows: 'I do not care to make a statement to the jury?' A. Yes, sir. Q. Were you asked at the same inquest why you did not care to make a statement? A. I was. Q. And did you reply to that: 'Well, my attorney told me not to?' A. I did. Q. Then were you asked at the same inquest: 'Well, what attorney, the attorney of the transit company?' A. I was. Q. Did you answer that: 'Well, yes, sir.' A. I said for the transit company and for my personal interests, too. Q. Were you asked this question at the same inquest: 'Are you afraid you will incriminate yourself?' A. I was. Q. And did you reply to that question at the inquest: 'Yes, sir?' A. No, sir."

Counsel for respondent contend that the action of the court in excluding that testimony was proper, and rely upon the case of *Masterson v. Transit Co.*, 204 Mo. 507, 103 S. W. 48, as supporting their contention. In that case this court in banc, speaking through Valliant, J., page 523 of 204 Mo., page 53 of 103 S. W., used this language:

"The motorman was a witness for defendant, and gave his account of the accident. On cross-examination he was asked if he had testified at the coroner's inquest, and he answered, 'No.' 'Were you present at the inquest?' A. Yes.' The counsel for plaintiffs then produced and showed to the court what

purported to be a transcript of the evidence taken at the coroner's inquest, in which it appeared that this motorman was sworn as a witness, and had in answer to question stated his name, residence, and business; he was then asked to state all about running over this boy, whereupon he said: 'I don't care to testify; I might incriminate myself.' The court on objection of defendant ruled that that statement should not go to the jury. That is assigned for error.

"The court's ruling on that point was correct. The statement of the witness that he had not testified at the coroner's inquest was substantially true, and, as the witness evidently understood it, it was entirely true. Plaintiffs were not entitled to have the jury in this case draw an inference to the prejudice of the defendant from the fact that the motorman through caution, or timidity for his own sake, would decline to testify before the coroner. He had just gone through the distressing experience of having killed a child, and though he may have been entirely conscious of having done everything in his power to prevent it, yet the distressing fact remained; the law did not compel him to speak, and he declined to do so, but that was his personal affair, with which the defendant had nothing to do.

"The contention of plaintiffs is that the evidence was competent as tending to impeach the witness. The inference they would draw is that, if he had not been afraid of incriminating himself, he would have told a different story at the coroner's inquest from that which he told at this trial, and the fact that he declined for that reason to testify puts him under the suspicion of carrying a guilty conscience, and authorizes the jury to discredit his testimony. The right of the motorman to refuse to testify under the circumstances stated was a personal right of such high importance that it is expressly guarded in the Constitution itself. It is there given absolutely and unequivocally, yet we are now asked to declare that it is a right which the citizen will exercise at his peril, the peril of being branded with suspicion, the peril of having it brought up against him to impeach himself if he should ever assert his innocence. Such a ruling would be a gross impairment of the constitutional right, because it would burden it with a dangerous consequence. Not only is this right given in the Constitution, but the General Assembly in dealing with another feature of the same subject has shown its high appreciation of it. In section 2637, Rev. St. 1809 (Ann. St. 1906, p. 1566), the right of an accused person to testify in his own behalf is given; but to guard the person from suspicion for failing to avail himself of that right that section is immediately followed by one which expressly forbids an invidious inference to be drawn from that fact, and forbids any reference to it being made by court or counsel. The courts have no right to

brand as criminal or suspicious an act which the law unconditionally and unequivocally authorized to be done.

"In the brief of counsel for plaintiffs several authorities are cited as supporting their contention, but as we understand those cases there is only one that sustains the position; that is, *Commonwealth v. Smith*, 163 Mass. 411, 40 N. E. 189. In that case the defendant, an alderman, was indicted for engaging in a conspiracy to solicit bribes in connection with his official duties. On the trial the defendant was a witness in his own behalf, and testified in effect that he was innocent of the charge; on cross-examination, over his objection, the trial court required him to answer whether he did not refuse to testify before the grand jury on the ground that he might incriminate himself. The Supreme Court of Massachusetts held that that was not error. But in discussing the subject that court pointed out a peculiarity of the law of that state which is quite different from the law of Missouri. The court said: 'In this commonwealth, the cross-examination (of a defendant) is not restricted to matters inquired of in chief. He may be cross-examined like other witnesses. He may be questioned as to all incriminating circumstances, and he must answer all such questions as are relevant to the subject of the charge against him. Whatever he has said or done, or omitted to say or do, which is relevant, may be inquired into.' Even if our law did not, as it does, limit the cross-examination of a defendant in a criminal case to the matters in relation to which he had testified to in chief, we would not say that a man who had only availed himself of a high personal privilege which the Constitution had given him was for that reason to be stigmatized with suspicion of guilt or have it brought up to discredit him as a witness when he avails himself of the right given him by law to testify in his own behalf. We must not interpret this provision of our Constitution as if it was designed to protect the guilty, nor should we presume that one who avails himself of it is hiding his guilt. The object of the law is to protect the innocent, and the law still covers the man with the presumption of innocence, even when he refuses to give testimony that might be turned against himself.

"The trial court committed no error when it refused to allow this evidence to go to the jury to impeach the motorman as a witness."

There can be no question but what that case is directly in point, and fully supports the action of the circuit court in excluding the testimony in question; but in my judgment that case is supported by neither reason nor authority. The authorities are uniform on both sides of the Atlantic in holding that the testimony given by a witness before the coroner's inquest is admissible in evidence for the purpose of contradicting and impeaching such witness when he sub-

sequently testifies in another court regarding the same matter. 30 Am. & Eng. Enc. of Law, 1108; State v. Gatlin, 170 Mo., loc. cit. 371, 70 S. W. 885; Mulville v. Ins. Co., 19 Mont., loc. cit. 101, 47 Pac. 650; Wren's Adm'r v. Railroad (Ky.) 20 S. W. 715; N. Y. P. & N. v. Kellam, 83 Va. 851, 3 S. E. 703; Maxwell v. Wilmington City Ry., 1 Marv. (Del.) 205, 40 Atl. 945; Ice Machine Co. v. Klefer, 134 Ill., loc. cit. 493, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; Knight Templars v. Crayton, 209 Ill. 563, 70 N. E. 1066; Cox v. C. & N. W. Ry., 92 Ill. App., loc. cit. 19; Bartlett v. Lewis, 12 O. B. N. S. 249, loc. cit. 263; 3 Wigmore on Evidence, § 2268; Sullivan v. Jefferson Ave. Ry., 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167.

Clearly, Crady could not have been compelled to have testified before the coroner if he considered his testimony would incriminate him. Masterson v. Transit Co., supra; Counselman v. Hitchcock, 142 U. S., loc. cit. 562 to 586, 12 Sup. Ct. 195, 35 L. Ed. 1110. The latter case is an able review of all of the authorities treating this subject.

But the law is equally well settled that the witness may waive this constitutional right and testify freely and fully upon any and all matters relevant to the case. 3 Wigmore on Evidence, p. 3132, § 2268, and cases cited. That privilege is personal to the witness, and cannot be exercised for him by any other person, even though his testimony amounted to a confession of guilt to the most heinous crime known to the law. That being true of necessity, and all of the authorities so hold, that the witness may be called to the witness stand and interrogated before the coroner upon any and all elements of the case under investigation, and neither the witness nor his counsel have a right to object to his being called, or to object to the asking of such questions; but if he does not wish to answer them, then he has a perfect legal right to refuse to do so. That refusal, according to reason and all of the authorities, guarantees to the witness all of his constitutional rights to decline to give testimony against himself. So it must logically follow that, when a witness goes upon the witness stand and testifies or declines to testify, that testimony and conduct become public property, and may and should be used to contradict and impeach him whenever he subsequently takes the stand and testifies and conducts himself differently from what he did before the coroner, even though his subsequent testimony is given in a case in which he is on trial for his life or liberty, with the limitation only that under sections 2637 and 2638, Rev. St. 1899 (Ann. St. p. 2052), he cannot be interrogated regarding any matter to which he did not testify in chief, but he may be lawfully interrogated upon cross-examination regarding all things he testified about in chief, however self-incriminating his answers may be, even to the extent of asking him if he did not testify

differently before the coroner or other court. Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80; State v. Mounce, 106 Mo. 227, 17 S. W. 226; State v. Avery, 118 Mo. 475, 21 S. W. 193; State v. Porter, 75 Mo. 171; State v. Turner, 76 Mo. 350.

Under the rules of evidence above enunciated, I think Crady's testimony and conduct before the coroner's jury were clearly admissible in evidence in this case, to which he was not a party, for the purpose of contradicting and impeaching him as a witness in the case at bar, wherein he testified fully and freely. To my mind it is an anomalous rule of law that will prevent any one from interposing the personal privilege of a witness to answer questions which might incriminate him, yet will permit a party to successfully object to the introduction of such testimony of such witness given upon a former occasion for the purpose of impeaching him. But, however unreasonable that rule may appear, it has been definitely settled in this state by the opinion of this court in banc, in the case of Masterson v. Transit Co., supra, and I therefore respectfully bow to the majority opinion.

3. Counsel for appellant challenges the correctness of instruction No. 8 given by the court of its own motion. The objection lodged against the instruction is that it "was not justified by any of the issues in the case, and could have no other effect than to confuse the jury by injecting into the case an immaterial issue." We are unable to yield our assent to that proposition, for the reason that the petition charged Garrett was a passenger upon the car in which the encounter complained of occurred, and appellant tried her case upon the theory that he was a passenger upon that car, and that the conductor criminally assaulted him and threw him therefrom, thereby killing him. In other words, appellant's case was tried upon the theory that Garrett was a passenger upon the car, and that the respondent owed him that high degree of care to safely carry him that a public carrier owes to a passenger, and that it grossly violated that duty by criminally assaulting and killing her husband. Before appellant could recover on the petition in this case, it was absolutely necessary for her to show, not only that her husband was assaulted and killed by the conductor, but also that he was a passenger upon the car, from which relation sprang the duty respondent owed her husband, and which she alleges it violated. Now, if Garrett boarded the car with no intention of paying his fare, and did not do so when requested by the conductor, and refused to leave the car when notified to do so, then he was not a passenger upon the car, but was a trespasser, pure and simple, and the respondent owed him no duty whatever as a passenger, but only owed him such duty as the law imposes upon every one, and that is not to unnecessarily and intentionally in-

jure him. If as a matter of fact Garrett was a trespasser upon the car, which there was an abundance of evidence tending to show, and if he was criminally assaulted and killed by the conductor, then the petition should have been drawn upon that theory, and not upon the theory that he was a passenger. The respective rights and duties of passenger and carrier are so radically different from those of a trespasser and assaulter that the evidence establishing the one would be a total variance from the other; and if, as before suggested, Garrett was a trespasser and not a passenger upon the car at the time in question, then appellant totally failed to make out her case, and she was not entitled to recover, as stated in said instruction No. 8. In our opinion the instruction was proper, and the court did not err in giving it.

4. It is next insisted by counsel for appellant that instruction No. 10 given by the court of its own motion was erroneous. In effect, it told the jury that if Garrett was the aggressor and started the fight with defendant's conductor, and during such fight was thrown or pushed off of the car, the defendant was not liable. A similar instruction to the one under consideration came before this court in the case of *O'Brien v. Transit Co.*, 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592. The only material difference between the facts of that case and this is that in the former it was conceded O'Brien was a passenger, and the evidence showed that the difficulty which occurred started on the car, but O'Brien was shot after he and the conductor reached the street; while in the case at bar there was a very serious question as to whether or not Garrett was a passenger. There was absolutely no evidence of that fact, except the presumption to be drawn from the fact that he was upon the car at the time the trouble between him and the conductor began; and in this case the trouble occurred upon the car, which resulted in Garrett being thrown therefrom. The facts of this case are much stronger in favor of respondent than they were in that case, and the mere fact that the shooting which occurred in that case took place on the street in pursuance of and as a continuation of the trouble that began on the car does not differentiate it in principle from this case, where the trouble began on the car, and from which Garrett was kicked or thrown.

In discussing the instruction in that case, this court, speaking through Vaillant, J., on page 269 of 185 Mo., page 941 of 84 S. W. (105 Am. St. Rep. 592), used this language: "But whilst care on the part of the carrier for the safety and kind treatment of the passenger is required, yet so also is required care on the part of the passenger for his own safety and decent behavior. If the passenger assaults the conductor, the latter

has a right to defend himself; and if in a personal combat between the passenger and the conductor, brought on by the passenger's wrongful assault, the latter is injured, the carrier is not liable. If, as the defendant's evidence tended to prove, O'Brien struck the conductor and then seized him and dragged him off the car to the sidewalk, it was then an affair between man and man, and the defendant was not liable for what happened on the sidewalk."

That case again came before this court, and is reported in 212 Mo. 59, 110 S. W. 705. On the latter appeal the correctness of the former rulings was challenged, and, after a careful reconsideration of the questions involved, this court affirmed those rulings. While the published report of the case through some oversight does not disclose the fact, yet the case was transferred to court in banc on the dissent of Vaillant, J., who dissented as to a question of evidence which was not involved in the former appeal. The court in banc adopted the divisional opinion, and thereby affirmed the former opinion also. That being true, we must set this question at rest and rule this objection against appellant.

5. It is finally insisted by counsel for appellant that instruction No. 12 given by the court of its own motion was erroneous. It, in substance, told the jury that the burden was on the appellant to show that the act of the conductor in ejecting Garrett from the car was "an act of criminal conduct." The statute under which this suit was brought uses the words "original intent." Section 2864, Rev. St. 1899 (Ann. St. 1906, p. 1637). Counsel for appellant criticises this instruction because, as they say, there is a vast difference in doing a thing with criminal intent and simply intending to do that thing. Clearly, that is true, but before a recovery can be had under that section, not only must the intent exist, but the criminal conduct must follow which resulted in the injury. There is no merit in this contention.

Finding no error in the record, the judgment is affirmed. All concur, except as to remarks made regarding the *Masterson Case*, in which they do not concur.

MACDONALD v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 1.
March 31, 1909. Rehearing Denied
April 13, 1909.)

1. APPEAL AND ERROR (§ 585*)—RECORD—ABSTRACT—ADDITIONAL ABSTRACT—NECESSITY.

Where the answer contained in the abstract was a general denial, and appellee filed no counter or additional abstract, she cannot contend that the trial answer contained a plea of contributory negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2586, 2591; Dec. Dig. § 585.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR.

Whether the answer filed below contained a plea of contributory negligence is immaterial on appeal, where that issue was not submitted to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1039.*]

3. EVIDENCE (§ 570*)—OPINION EVIDENCE—WEIGHT.

The testimony of physicians is merely advisory, and the jury can give it credence or not as it seems reasonable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2395; Dec. Dig. § 570.*]

4. CARRIERS (§ 320*)—PASSENGERS—ACTIONS—JURY QUESTION—CAUSE OF DEATH.

In an action for the death of a street railway passenger by being thrown against a stove by the derailment of the car, whether defendant's death was proximately caused by the injuries sustained *held* for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

5. CARRIERS (§ 305*)—PASSENGERS—INJURIES—PROXIMATE CAUSE.

If a street car passenger's death was directly caused by being thrown against a stove in the car by a derailment, recovery could be had therefor, even though he had also suffered from rheumatism, etc., provided he would not have died when he did if he had not been thrown against the stove.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 305.*]

6. CARRIERS (§ 314*)—PASSENGERS—ACTIONS—PLEADING—NEGLECT.

In action for injury to a passenger, plaintiff may plead negligence generally, and rely upon the doctrine of *res ipsa loquitur*, and allegations that decedent's death was caused by the sudden derailment of the car because of the negligent condition of the appliances or the negligent management of the car by the employees only charged negligence generally, and did not allege any particular acts of negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 314.*]

7. CARRIERS (§ 316*)—PASSENGERS—NEGLECT—RES IPSA LOQUITUR.

Where decedent was injured by being thrown against the stove by the sudden derailment of a street car, in an action for his death plaintiff could assume that the derailment was caused by negligence, and if the company did not show its want of negligence, or that the accident was caused by an independent cause, it would be conclusively presumed that the accident was caused by its negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1288; Dec. Dig. § 316.*]

8. APPEAL AND ERROR (§ 173*)—REVIEW—THEORY BELOW.

Where the case was tried below on the theory that defendant conceded its negligence, which all of the instructions assumed, it cannot deny its negligence for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

9. NEGLIGENCE (§ 58*)—PROXIMATE CAUSE.

While an action will not lie for a negligent injury which could not possibly have been foreseen, it is not essential that the very injury complained of could not have been foreseen by exercising reasonable prudence, but the wrongdoer is liable if the injury was a

natural and probable consequence of the negligent act, whether it could have been foreseen or not.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 71; Dec. Dig. § 58.*]

10. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an action for a passenger's death by heart disease, claimed to have been caused by being thrown against a stove in a street car derailment, where there was no substantial evidence that heart disease could not, by any possibility, have been anticipated as a result of such an injury, an instruction negating defendant's liability if such an injury could not have been foreseen was not required.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

11. EVIDENCE (§ 363*)—DOCUMENTARY EVIDENCE—MEDICAL BOOKS.

Medical books cannot be read to the jury as independent evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1516-1519; Dec. Dig. § 363.*]

12. EVIDENCE (§ 558*)—EXPERT WITNESSES—CROSS-EXAMINATION.

Where, in a personal injury action, medical witnesses based their testimony on their knowledge derived from books as well as from experience, counsel, on cross-examination, could frame their questions by reading from medical authorities and ask the witness whether he agreed with the author, the court having cautioned the jury that what was read from the books was not evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2377, 2379; Dec. Dig. § 558.*]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by Mary MacDonald against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. L. Cooper and Karnes, New & Krauthoff, for appellant. John H. Lucas and Chas. A. Loomis, for appellee.

LAMM, P. J. Defendant appeals from a judgment in plaintiff's favor for \$5,000. She is the widow of John L. MacDonald, injured while a passenger on defendant's car on defendant's cable road, October 26, 1902, while running round a curve. In about eight months and a half afterwards he died. There is no question but that he was injured, and by defendant's negligence. Plaintiff's theory is that such injuries caused his death; defendant's is *contra*. The trial was long. The issues were threshed out below closely and with ability. The briefs take a wide range. The instructions were many. However laborious a task, we shall undertake to condense the voluminous record without omitting vital matter.

After allegations immaterial to any question made here, the petition alleges:

"That in rounding said curve the car aforesaid in which the said John L. MacDonald was riding came to a sudden and violent stop, which was caused either by the negligent and careless condition in which

the appliances used by said defendant for going around said curve were allowed to remain, or by the negligent and careless manner in which the gripman discharged his duty in managing and controlling said car; but it was either one or the other, or both, as plaintiff believes and alleges, and she is ignorant whether it was the one or the other. By said sudden and violent stoppage of said car, said John L. MacDonald was thrown violently forward and down, by which he was greatly injured, and which injuries so received by him caused his death, which occurred on the 13th day of July, 1903."

The abstracted answer is a general denial. Plaintiff contends the trial answer had a plea of contributory negligence, but she files no counter or additional abstract. Not only so, but no issue of contributory negligence was submitted to the jury, and that feature, on any view of the case, is by-matter.

Save on the medical testimony, there is little or no dispute about the facts. The case made is this:

Judge MacDonald was between 65 and 66 years old when he died. He came to Kansas City from St. Paul, Minn. In St. Paul (as in Kansas City) his profession was that of a lawyer in full practice, though he had served in Congress and on the bench. The winter before moving from St. Paul, he was bothered with lumbago. Lumbago is an ailment of a rheumatic kind, indicated by pain in the small of the back. The occasion of his change from St. Paul to Kansas City was, primarily, to find a milder climate to rid himself of lumbago or prevent its becoming chronic, if lurking; secondly, to better his business outlook. With these ends in view, he visited the South, seeking a location in Louisiana, Texas, and Arkansas. About a year prior, he had gone to Hot Springs and spent a few days at the baths there. In his exploring trip South, he again visited Hot Springs and took a few baths. This was in 1897, and in the fall of that year he settled in Kansas City. From that time until his injury, five years later, he was apparently free from lumbago or any other rheumatic trouble. He is described in the record as leading an active life, as being "a rugged, strong man," an "industrious man," weighing about 180 pounds, about 5 feet 10 inches in height, "broad-shouldered," "muscular," of an "athletic type," temperate, with a good appetite but restraining it, "a vigorous, strong man," "a very temperate man," "a well man," positive, but of a jolly turn and a hard worker. This, up to the time of his injury.

On the 26th of October, 1902 (in prime health to all appearances), he, with his wife, Mary, was returning from church. Suddenly, while his car was going without check, at presumably ordinary speed, around a curve, the grip car in the train was thrown

from the track, the "trailer" on which he was riding was partly derailed, its front end thrown from the track, and he was violently projected ahead two or three feet, sidewise, against the immovable framework of the car stove. The cause of all this is left quite dark. One witness, speaking of the suddenness and force of the stop, said it was the same as if the car "had struck a house"; another (after the accident) saw a broken rail. Judge MacDonald was on a seat running lengthwise of the car, with the stove on his side. He evidently was thrown against it with whatever force would be given him from the momentum of a car having the speed of that one; and the force is described by the inflamed but pardonable metaphor of one witness as the same as if he was "shot out of a cannon." Just what parts of his body struck the framework of the stove is not entirely clear. The visible sign of the blow was in the neighborhood of the left ear and side of the face, and covered a place the size of your hand. Other parts of his left shoulder and chest, evidently affected by the blow, must be got at by his pains ensuing at once and those developing hard on his injuries. That he was badly hurt is put beyond all question. Being in a dazed condition, presently, on recovering, he complained of his shoulder, neck, and head. He was assisted out of the car and into a nearby drug store.

One witness, helping him from the car to the drug store, noticed he put his hand to the left side of his chest, and we may say, in passing, that this involuntary and significant motion of putting his hand to his chest was noticed by his friends as time went on. Failing to reach his family physician from that drug store, he was helped to another. There he communicated with him, and then was assisted home. The record shows him apparently unable to walk without assistance. For two or three weeks he was confined to his bed under his physician's care. Hot appliances were put to his neck, shoulder, and head, and medicine administered to relieve his pain.

It would serve no useful or obvious purpose to go over the long history of his case. There was testimony put in by plaintiff strongly tending to prove that, from being a well man at the time of his injury, he became at once a sick man and continued a sick man until he died. Although he soon recovered from the visible wound in his head, yet he continued to have pain in his neck, shoulder, and chest. He could not bear or wear a suspender on his left shoulder after that. He could not put on his overcoat without help, and generally wore it with his left arm out of its sleeve. He lost appetite, his sleep was broken, he had "less vim and snap," became less assertive in his views, and from that day his physical strength declined. The witnesses describe him as "growing gradually weaker,"

he looked "haggard," he seemed "worried and worn out," and was easily exhausted by physical effort. He never again walked with the springing and rising step he had before. His weight, beginning with that time, gradually fell off, and he had that in his countenance, gait, and demeanor making him a marked man to his near friends and acquaintances—some of them physicians of excellent standing. Some four weeks after his injury he began to go down town to his business office, but went later and came home earlier than was his wont. He complained of oppression in his breathing, and, when walking with an acquaintance, he not infrequently took hold of his arm because of shortness of breath or pain in his heart. He could no longer lie down with comfort, and his barber shaved him seated bolt upright. His partner testified that he may have tried two or three cases after he returned to the office, but that he was unable to work as he formerly had done, and arranged to postpone his cases. From the time of his injury to the following May, solicitous about his heart, he had himself examined time and again for heart trouble; at any rate, such medical examinations were directed to examination of cardiac conditions. Until in May, his family physician was unable to trace his chest pains to heart trouble, and by ear or stethoscope could find no sign of abnormal conditions there; but in the spring his condition, theretofore growing gradually worse and worse, developed into spells or paroxysms of pain in his chest. It was then found by experimenting that these spells of pain yielded to a medicine (amyl nitrite) deemed by the faculty to be somewhat of a specific as a temporary relief in certain phases of angina pectoris, and it was concluded by his family physician that his heart was out of order. In these spells of agony his countenance became ashen gray in color, and drops of perspiration gathered and ran down his face. As time went on, they became more severe and frequent, until he died suddenly in one of them on the 13th of July, 1903.

The tendency of the expert testimony on behalf of the plaintiff was to show that he suffered from angina pectoris. That is not a disease, speaking with scientific precision, but it is a horrible strangling pain in the chest, affecting its victim with a sense of impending dissolution, and originating in discrepancies in the heart, its arteries and valves, and the walls of those arteries, whether main or subsidiary, and the pain runs up through the left shoulder and down the left arm to the fingers of the left hand. We take it, the words "angina pectoris," though defined literally as "a strangling pain in the chest," are as near a definition as the faculty can give of diseased cardiac conditions leading up to the pain itself. At all events, the term is used in the broad sense of a disease.

Plaintiff put in proof from competent physicians tending to show that angina pectoris, or the diseased condition of the heart and its appurtenant arteries and valves to which the pain so named attaches, in at least some of its phases, could naturally be caused by shock and injury, and that it might be reasonably expected to gradually develop from small beginnings until it finally progressed far enough to carry its victim off. The term "shock," as used medically, is defined by one scientific gentleman on the stand to be "an unusual injury that a person may sustain that depresses nerve centers and lowers away vitality very extensively." Lumbago is said by plaintiff's experts to not be the phase of rheumatism affecting the heart. Heart trouble is said by them to arise now and then from inflammatory rheumatism, and decedent at no time had that.

Defendant put on medical experts, profoundly skilled in heart diseases, who took an opposite view from that entertained by the learned scientific witnesses of plaintiff, and gave the jury different advice.

There are one or two hundred pages of this expert testimony, in which lawyers and doctors vie in a battle of wits with each other in an analysis exhibiting wide and keen research in the mysterious realm of heart diseases. It covers every phase of angina pectoris, which seems to be a most insidious and deadly trouble, sometimes existing without discoverable cause, sometimes referable to lead poisoning, rheumatism, gout, etc., thickening the walls of the main and subsidiary arteries at the heart or irritating its valves, sometimes an incident to old age or intemperance, and which may originate from shock and traumatism. The testimony is laden with a luxuriant medical terminology quite useless for the administration of justice, and we have contented ourselves with shortly giving the tendency of it in everyday speech.

In seeking to disturb plaintiff's judgment, defendant's learned counsel insist that reversible error got into the case below in the giving and refusal of instructions and in ruling on the admission of testimony. Among those refused were two demurrers, one at the close of plaintiff's and the other of the whole case. There is a ground of reversal stated as follows: "The court erred in permitting counsel for plaintiff to read the contents of medical books to, and in the presence and hearing of, the jury." Further, it is insisted that the court erred in commenting upon the evidence during the progress of the trial.

Any other facts necessary to develop and decide material questions made will appear in the body of the opinion.

1. The first proposition argued is that the demurrers should have been sustained, for that there was no evidence that the death of Judge MacDonald was directly or proximately caused by the injuries sustained in

the accident. But counsel argue ill, we think, in that behalf. Their argument is built up, for example, on the views that deceased went about his labors after his injury, that physicians were unable for several months to determine the existence of heart trouble, that angina pectoris can arise from so many and different independent causes (even from undiscoverable ones) that to predicate it of his injury is mere conjecture, furnishing no legal basis for the judgment. Other suggestions along that line are offered, but the foregoing will do for our purposes.

Evidently the fact that Judge MacDonald returned, in a crippled way, to his avocation could not be conclusive. It was a circumstance, but one for the jury. The heroism of facing one's fate in civil life like a soldier does his in war, and performing one's duty as best he can until the end comes, is not inseparable from a prior injury eventually ending one's life. Labor, under such conditions, is referable to grit and courage, or the lack of these, to temperament, duty. If he had done no work at all after his injury, that fact alone would not have made a case for plaintiff, nor did his doing it destroy her case.

Nor do we have to go to physicians to find that medical science has not developed to the point where a doctor, however wise, can tell to a certainty whether a disease exists in the heart for one, two, three, or four months after an injury, or that such insidious diseases not uncommonly quite baffle diagnosis. It must be borne in mind, too, that doctors' theories under oath on the witness stand are merely advisory in character. Juries can take or leave that advice on the condition only that it seems reasonable or not to them; and, because doctors disagree, it is not valid reasoning to say that juries should also disagree, or should take the advice of one set as against that of another, or should throw to the winds their common sense, and, with minds littered up with conflicting medical advice, be unable to come to any agreement whatever, even as sailors, tossed to and fro by contrary winds, reach no harbor.

In *Sorenson v. R. R.* (C. C.) 36 Fed. 166, plaintiff's intestate in September, 1883, jumped from a train at the instance of the conductor, and thereby suffered severe bruises. He soon began to "droop and fall," and in September, a year later, died. There was in that case, as in this, a suggestion that heart and aortic troubles existed prior to the injury. Physicians testified on both sides, and Mr. Justice Brewer, speaking to the point, said: "Where medical witnesses disagree in opinion and theories, the undisputed history of the case is often the most satisfactory and controlling fact. In this case such history fully justifies the verdict. * * * Soon after this accident he began to droop and fall, and so continued falling, with a short and slight change for the better in the spring of 1884, until his death, in

September, 1884. Such a fact is significant, and upholds the verdict. I know that post hoc is not always propter hoc, but, where the propter hoc is uncertain, the post hoc may often be decisive."

So, in a very late case (*Sharp v. R. R.* [not yet officially reported] 111 S. W. 1154), there is language in point, viz.: "If a man, well to-day, is badly injured, and from that time on sickens (with symptoms referable to his injury), and, languishing, finally dies, a disagreement among doctors as to the name of the disease on him at the moment of dissolution does not create a condition from which it can be said that a verdict one way or the other is merely guesswork; * * * for, if there had been no physicians testifying as experts and the jury had been without medical advice, yet plaintiff's lay evidence showed a cause for Sharp's pain and suffering, and his visible approach to the grave in the steps he took, commencing at the place and time of his injury and ending there, are rational deductions within the right of a jury in applying common sense to facts. The expert medical testimony was merely advisory, and, because the advice given to the jury by the opinions of the doctors differed, that presents no case for our interference."

In the case at bar there was substantial testimony that Judge MacDonald came to old age hale and hearty. On a certain day in October he is thrown against the framework of a stove and struck a tremendous blow. The mere visible sign of his injury at the time was not great, but it would be dealing only with the surface of things to stop with that visible sign. The controlling fact in the case (deducible from its history) is that, traceable to that injury, he was never again a well man, and that, traceable to that same injury, after a rally at the start, he went steadily downhill to his grave. A blow such as he received was shown to be a probable cause of angina pectoris. As we see it, there is no link out in the chain of the evidence upon which the jury could rationally base their conclusion that the injury caused his death. Independent causes were suggested and conflicting theories were developed before the jury. It was for them to say which theory was the most reasonable. See *Seckinger v. Mfg. Co.*, 129 Mo. 590, 31 S. W. 957; *Fetter v. Fidelity & Casualty Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560.

In the latter case it was finely said by Valliant, J.: "The genius of our law does not claim for it infallibility; it recognizes that there is an element of uncertainty that enters into every forensic contest, which human wisdom cannot always make certain, and its aim is to come as close to the right as the means at hand will permit. Under our system of jurisprudence the jury is the tribunal to which questions of this kind are submitted for determination, and, with all

their human liability to err, we have never yet discovered any better tribunal for the trial of questions of fact, even where highly scientific propositions are involved. Science itself appeals to common sense for its recognition."

That the demurrers were not well taken under the facts here may be deduced from a line of other cases cited by respondent's counsel. *Hanlon v. R. R.*, 104 Mo. 381, 16 S. W. 233; *Walsh v. R. R.*, 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; *Beauchamp v. Saginaw*, 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30; *Railroad v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Railroad v. Kemp*, 61 Md. 74.

2. Among the instructions given for the plaintiff was the following (No. 4): "The jury are instructed that if they believe from the evidence that the death of John L. MacDonald was directly caused by being thrown against the stove on defendant's car, then your verdict should be for the plaintiff, notwithstanding that you may further believe from the evidence that he had suffered from lumbago or rheumatism, provided that the jury further find that said MacDonald would not have died at the time, under the circumstances and in the manner he did die, had it not been for being thrown against said stove, if you find he was so thrown."

Evidence was admitted, over defendant's objection, laying a foundation for that instruction, and it is contended the evidence was improperly put in, and that the instruction is not good law. In other words, defendant contends that a cause of action cannot be maintained for an injury "hastening" death. The rule is well established that an actionable wrong is committed under our damage act where circumstances exist outlined in the instruction criticised. For instance, *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 621, 95 S. W. 851, 852, was heard in banc. In that case a new trial had been granted because of error in giving an instruction based precisely on defendant's above theory. In reviewing that ruling, our Brother Graves, with the approval of all his brethren, said: "This instruction was clearly wrong, and should not have been given. * * * Citing *Fetter v. Fidelity & Casualty Co.*, supra. In granting a new trial upon this point, the trial court was right, and, were it not for other propositions, its judgment should be affirmed."

Referring to the *Fetter* Case, it will be seen that the court approved an instruction with the following clause: "Provided, that the jury further find that said Fetter would not have died at the time, under the circumstances, and in the manner he did die, had it not been for the accidental rupture of the kidney." That proviso is the identical one objected to in instruction 4 in the case at bar. The *Fetter* Case follows the reasoning of *Freeman v. Accident Ass'n*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, and in that case it was well said: "An injury

which might naturally produce death in a person of a certain temperament or state of health is a cause of his death if he died by reason of it, even if he would not have died if his temperament or previous health had been different. And this is as well, when death comes through the medium of a disease directly induced by the injury, as when the injury immediately interrupts the vital processes."

We are cited to *Jackson v. R. R.*, 87 Mo. 422, 56 Am. Rep. 460, and *Gray v. MacDonald*, 28 Mo. App. 477, as holding a contrary doctrine, but those cases must be strictly read in the light of the particular facts there held in judgment. In the *Jackson* Case a man, mortally wounded by an officer making his arrest, was taken on board defendant's train for transportation to Arkansas. The carrier was sued on the theory that such transportation was wrongful, and that such wrong hastened his impending death. In the case at bar, we are not called upon to either criticise or follow that case in its ruling that "hastening" is not "causing" within the meaning of the damage act. The jury were told there to find against defendant if the act complained of resulted in "causing or hastening his death."

The theory of that holding has its root in the phraseology of the damage act (Rev. St. 1899, § 2865 [Ann. St. 1906, p. 1644]), transmitting a right of action, viz., "Whenever the death of a person shall be caused, by a wrongful act, neglect or default of another," under limitations prescribed. In *Gray v. MacDonald*, supra, one of the facts dealt with was that, after decedent was wounded by a mortal shot by another, the defendant hit him with his fist. A careful reading of both of those cases shows that the point now up was not the turning one, nor are we called upon in this case to determine whether hastening is causing a death within the reasonable construction of the damage act, because in this case the instruction criticised put it to the jury to find that the injury "directly caused" the death of Judge MacDonald. If it were necessary to follow or reject the ruling in the *Jackson* Case, I should greatly doubt the soundness of the construction there put upon the statute. It seems to me too narrow. For instance, if A. shoots and mortally wounds B., so that B. would not instantly die but would linger, languish, and finally die, does the damage act mean that C. may thereafter blow out B.'s brains with a pistol bullet and escape civil liability for damage because he merely hastened the death? Did not C. cause the death of B. within the reasonable intentment of that statute? If A. and B. contribute to the death of C., did each one not cause the death within its purview? *Bragg v. Met. St. Ry. Co.*, 192 Mo., loc. cit. 359, 91 S. W. 527. If C. is sick nigh unto death with a mortal disease, and D., while in that condition, wrongfully injures him so that he dies shortly, did D. not cause that particular

death within the clear purview of that statute? We ask these questions but leave them unanswered, the case not calling for it.

We rule the point against the defendant.

3. It is argued in a brief, filed after submission, that plaintiff's instructions erroneously enlarged the issues in the pleadings, and permitted recovery without proof of the particular negligence specified in the petition. Plaintiff introduced testimony tending to show that the train while en route, in rounding a curve, came to an instantaneous stop and was derailed, throwing its passengers this way and that. It can hardly be contended that defendant should (or did usually) stop its trains in that fashion. It was not plaintiff's duty to plead, point out, or prove specific acts of negligence resulting in this astonishing stop. We have held that, if plaintiff pleads the specific acts of negligence leading up to the injury of a passenger, such pleading is tantamount to an admission that he knows the causes of the accident, and, knowing and pleading them, he must prove them and limit his right to recovery to such proof. On the other hand, it is well-recognized doctrine that it is good pleading to plead negligence in passenger cases generally and rely upon the doctrine of *res ipsa loquitur*. We are of opinion that the petition in this case does not plead specific negligence, as that term is used in the books. It could not say much less than it did. It is no more specific than the allegations of the petition in *Ohlanda v. Transit Co.* (not yet officially reported) 112 S. W. 249, and the charge there was held to be general. The gravamen of the charge is the violent stoppage of the car, and that is said to have resulted from the general negligent and careless condition in which the appliances used by defendant were allowed to remain, or in the negligent manner in which the car was managed. Plaintiff averred that she did not know which it was, but that it was one or the other, or both. Taken by or large, it would seem the charge was general, that plaintiff had pleaded no matter showing her knowledge, and that she had the right to assume that the violent stop was negligent, without putting in proof of what caused it. Trains of cars in charge of human agencies do not stop in that way in and of themselves. Such stop is naturally referable to the human agency in charge of train, track, or motive power. Therefore, as a carrier is under a duty to carry its passengers safely, it should explain its conduct in throwing them hither and yon as if shot out of a catapult. If it did not explain that conduct by proof showing its own high diligence and care, or by showing the intervention of some independent cause, it must be conclusively presumed guilty of negligence, for it has failed to rebut the *prima facie* presumption of negligence arising from the unusual and violent stop. *Dougherty v. R. R.*, 81 Mo., loc. cit. 329, 51 Am. Rep. 239;

Coudy v. R. R., 85 Mo. 85, 86; *Lemon v. Chanslor*, 68 Mo. 354, 30 Am. Rep. 799 et seq., and cases cited; *Clark v. R. R.*, 127 Mo., loc. cit. 208, 29 S. W. 1013 et seq.

We rule the point against defendant, and put our ruling on the ground that from end to end the case was tried on the theory that defendant, for all practical purposes, conceded its negligence. Its own instructions inferentially assumed it, as did plaintiff's. In a brief of well nigh 100 pages, in which learned counsel present point after point with discriminating vigor and learning, the point now up was not made. As said, it gets into the case in a brief filed after the hearing at our bar, and we must hold that such issue is a new one, and not in accord with the theory on which the case was tried and determined below and briefed in this court. Such shift of position is bad on appeal.

4. Defendant was allowed 13 instructions as prayed, and another in modified form. It was refused 7. We shall not cumber the record with the instructions on either side. Those for the plaintiff were short, plain, and direct. We see no fault in any of them. They proceed on the theory that if his car came to a sudden stop, which sudden stop defendant could have prevented by the exercise of a high degree of skill, diligence, and foresight, and if by said sudden stop Judge MacDonald was thrown forward and received injuries from which he died, then the jury should find for plaintiff. In another instruction, the jury were told that such sudden stop was negligent, unless it was unavoidable and could not have been prevented by the exercise of a defined high degree of care. The fourth we have set out.

In defendant's given instructions, the jury were told that if the exact cause of Judge MacDonald's death was unknown or had not been satisfactorily shown, then their verdict must be for defendant. In another, they were told that the mere fact of decedent's injury gives plaintiff no right to sue; that before they can find for her they must find from the evidence that his death was directly and proximately caused by the negligence of defendant. In another, they were told that even though he was a passenger and was injured by the negligence of defendant, still they could not find for plaintiff "unless his subsequent death was the natural and probable result" of such negligence. In another, the burden was put upon plaintiff to prove by a preponderance of the evidence that defendant was negligent and that such negligence injured decedent, and that his subsequent death was directly and proximately caused and produced by such negligence. In another, they were told that if his death may have resulted from the injuries, and may have resulted from other causes, not produced by the accident, then the verdict should be for defendant, unless the plaintiff

has proven with reasonable certainty by the greater weight of the evidence, to the jury's satisfaction, that his death was actually caused and produced by his injuries received in the accident. In another, the term "proximate cause" was elaborately defined, and the jury were told that it meant a cause which "in a natural and continuous sequence, unbroken by an intervening cause, produces the injury, and without which the result would not have happened, and it is not enough that the injury is the natural sequence of the negligence, it must be also the probable sequence." In another, they were told that defendant was not the insurer of the safety of deceased, and was not required to exercise a degree of care or foresight not reasonably practicable, etc. In another, they were still further instructed that defendant was not liable for every negligent act, although injury ensued. The negligent act must be the proximate cause of the injury, which, in turn, must also be the natural and probable result of the act. In another, they were instructed that if the injury was merely the result of an accident, no matter how produced, other than by the negligence of defendant's servants in charge of the car, then their verdict should be for defendant. (The last instruction was too favorable to defendant.) They were further instructed on the credibility of witnesses, and that the burden of proof was on plaintiff throughout the entire trial to show that defendant's negligence was the direct and proximate cause of the injury. Further, they were instructed on the meaning of the term "a preponderance of the evidence," and were finally told that the case must be decided the same as if between two persons of equal standing in the community; that it must be determined on the evidence alone and the instructions given by the court; that the instructions read by the attorneys were the court's instructions.

The instructions refused for defendant were in some particulars covered by those given at its instance, but there is a series of refused instructions declaring that the jury must find for the defendant unless there was such connection between the negligent acts of defendant and the death of decedent "as to bring it within the reasonable contemplation of the defendant that such death would naturally and probably result" from the negligence. Changes are rung on this idea in other instructions. One is that the jury must find that MacDonald's death "was such as a reasonable prudent person would anticipate would be the likely and probable result" of such acts of the defendant. The central idea in these refused instructions is that, if the peculiar result (in this case, the death of Judge MacDonald from heart disease) could not have been anticipated by defendant, the finding should be for defendant.

It may be said, generally, that if an unheard-of result is produced by an act of negligence quite outside the experience of man-

kind, and which could by no possibility have been foreseen, then an action will not lie for that result. But this case did not require instructions based on any such theory. This, because there was no substantial evidence showing it outside of the experience of mankind that heart disease should result from a shock and injury like that happening to decedent, or that such heart disease should result fatally.

Again, waiving that view, a good rule is: "The liability of a person charged with negligence does not depend on the question whether, with the exercise of reasonable prudence, he could or ought to have foreseen the very injury complained of; but he may be held liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission." *Fishburn v. R. R.*, 127 Iowa, loc. cit. 492, 103 N. W. 481 et seq., and many cases cited; *Dean v. R. R.*, 199 Mo., loc. cit. 411, 97 S. W. 910; *Foley v. McMahon*, 114 Mo. App., loc. cit. 448, 90 S. W. 113; *Hoepper v. Southern Hotel Co.*, 142 Mo., loc. cit. 388, 44 S. W. 257; *Graney v. R. R.*, 140 Mo., loc. cit. 98, 41 S. W. 246, 38 L. R. A. 633; *Miller v. R. R.*, 90 Mo., loc. cit. 394, 2 S. W. 439; *Harrison v. Electric Light Co.*, 195 Mo., loc. cit. 629, 93 S. W. 951, 7 L. R. A. (N. S.) 293; *Lawrence v. Ice Co.*, 119 Mo. App., loc. cit. 331, 332, 93 S. W. 897; *Brady v. R. R.*, 206 Mo., loc. cit. 537, 102 S. W. 978, 105 S. W. 1195; *Zeis v. Brewing Ass'n*, 205 Mo., loc. cit. 651, 104 S. W. 99.

We find no fault with rulings on instructions.

5. In framing questions on the cross-examination of experts, counsel held in hand medical books and formulated questions from their language. The books were not read to the jury, but the jury could see that the examiner read from them. This method of cross-examination was objected to. The court, over objections, permitted plaintiff's counsel to adopt the scientific terminology of the author and put propositions to the witnesses obviously asserted by him, but repeatedly cautioned the jury that what was read from the book was not evidence and the jury should pay no attention to it; that the only thing they could consider was the evidence that fell from the lips of the witness along the line of verifying the propositions put by the examiner. Samples of these cautionary instructions are as follows: The Court: "The jury will not give any more weight to anything Mr. Karnes reads from the books than they would to any other questions Mr. Karnes asks, unless the witness answers questions in the affirmative, thereby making it evidence in the case. * * * It is the answers of this witness, gentlemen of the jury, that is evidence in this case, and not the questions."

Error is assigned on this phase of the trial, but the point is without soundness. It has been said that it is within the discretion of

the court to permit medical books to be read to the jury (*State v. Soper*, 148 Mo., loc. cit. 235, 236, 49 S. W. 1007), but undoubtedly the better and generally accepted doctrine is that the contents of such books are not admissible as independent evidence (17 Cyc. 421; *Union Pac. R. R. Co. v. Yates*, 79 Fed., loc. cit. 587, 25 O. C. A. 103, 40 L. R. A. 553 et seq.). Judge Thayer in the last case puts the grounds of exclusion on, first, such evidence is not delivered under oath; second, there is no chance of cross-examining the author; third, medicine is not an exact science; doctors disagree; medical theories are subject to frequent modification and change.

But while not independent evidence—and the question is a vexed one—yet there is a legitimate use of such books, at least, on cross-examination, where the testimony has taken wide range and where skilled witnesses, testifying as experts, base their testimony on their knowledge derived from books as well as experience, as in this case. Here, defendant's counsel had notified some of his witnesses that he was appealing to, and asking his doctors to draw from, their medical knowledge running back, say, 2,000 years, and which could only be preserved, if at all, in book form from the days when Socrates ordered a cock sacrificed to Esculapius, the god of medicine, and Hippocrates and Galen practiced physic in Greece and Italy. Under such circumstances, we see no reason why counsel could not frame a proposition in medical science in the exact language of the author, and ask the witness whether he agreed to it, so long as this was done under the due guard of the cautionary instructions given by the court. Such is the doctrine of a most learned and exhaustive note on section 440, *Greenleaf on Ev.* (15th Ed.) p. 579, where it is said: "Moreover, it is a proper method of cross-examination, in order to test the learning of a witness who testifies as an expert, to refer to books of approved authority upon the subjects under investigation, and question him in regard to them."

Mr. Justice Scott, in *Conn. Mut. Life Ins. Co. v. Ellis*, 89 Ill., loc. cit. 519, gives that proposition the indorsement of his strong pen, though stating that the rule is liable to abuse, and great care should be taken to prevent such abuse. He there says: "Assuming to be familiar with standard works that treat of delirium tremens, it was not unfair to the witness to call his attention to the definitions given in the books of that particular disease, and asking him whether he concurred in the definitions. How could the knowledge of the witness, of such subjects, be more fully tested? That is, in no just sense, reading books to the jury as evidence, or for the purpose of contradicting the witness." To the same effect is *Hess v. Lowery*, 122 Ind., loc. cit. 233, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. Rep. 355 et seq.

In *State v. Woods*, 53 N. H., loc. cit. 494, 495, Sargent, C. J., speaking to the point, said: "As to Dr. Ferguson's cross-examination, we see no reason for any objection to it. He had stated, as well he might, on direct examination, his knowledge of a particular subject, not from any experience or actual observation, but from what he had derived merely from reading and studying medical authorities. Then he was cross-examined as to that general reading, not by putting in the books, but by inquiries whether, in his general reading, he had not found particular theories laid down conflicting with the theory he had advanced as the result of his reading. *Collier v. Simpson*, 5 Car. & Payne, 73, goes further than the present case. There Tindal, C. J., in speaking of a medical expert, says: 'I think you may ask the witness whether in the course of his reading he has found this laid down.' And that was upon direct examination. The Chief Justice further says: 'I do not think that the books themselves can be read, but I do not see any objection to your asking Sir Henry Halford (the witness, who was the president of the College of Physicians) his judgment and the grounds of it, which may be in some degree founded on books, as a part of his general knowledge.'"

We rule the point against defendant.

Other assignments of error are made and discussed. For example, it is contended that the court made comments prejudicial to the defendant in the progress of the case. We have considered these assignments one by one, but find no soundness in any of them, and shall not prolong the opinion by discussing them.

Our conclusion is that the case was well tried, and that the judgment should stand. It is, accordingly, so ordered. Let it be affirmed. All concur.

CHICAGO, B. & Q. RY. CO. v. GILDER-SLEEVE.

(Supreme Court of Missouri. Feb. 13, 1909.)

1. COURTS (§ 142*)—JURISDICTION.

The circuit court of the city of St. Louis, like all other circuit courts in the state, is, to all intents and purposes, a court of general jurisdiction.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 142.*]

2. CONSTITUTIONAL LAW (§ 52*)—POWER TO PUNISH CONTEMPT—LEGISLATIVE POWERS.

The right of punishment for contempt is inherent in every court having common-law powers, and such courts cannot be shorn of that power by the legislative branch of the state government.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 84; Dec. Dig. § 52.*]

3. CONSTITUTIONAL LAW (§ 52*)—POWER TO PUNISH FOR CONTEMPT—JURISDICTION—LEGISLATIVE POWERS.

The circuit courts being created by Const. art. 6, § 22 (Ann. St. 1906, p. 234), and having

inherent power to punish by contempt, which cannot be taken away by the Legislature, Rev. St. 1890, § 1617 (Ann. St. 1906, p. 1199), prohibiting courts from punishing contempts by fine exceeding \$50 or by imprisonment for more than 10 days, violates Const. 1875, art. 3 (Ann. St. 1906, p. 172), providing that the powers of government shall be divided into three distinct departments, the legislative, executive, and judicial, and that no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 84; Dec. Dig. § 52.*]

Lamm, Woodson, and Graves, JJ., dissenting.

In Banc. Case Certified from St. Louis Court of Appeals.

Edward J. Gildersleeve was sentenced by the circuit court of the City of St. Louis for contempt in violating a decree of injunction rendered in an action against him by the Chicago, Burlington & Quincy Railway Company, and appealed to the St. Louis Court of Appeals. Cause certified to the Supreme Court. Judgment of circuit court affirmed.

Chester H. Krum, for appellant. Robert & Robert, for respondent.

GANTT, J. This cause has been certified to this court by the St. Louis Court of Appeals for the reason that a constitutional question, to wit, the validity of section 1617 of the Revised Statutes of Missouri of 1890 (Ann. St. 1906, p. 1199), is necessarily involved in the judgment rendered by the circuit court of the city of St. Louis. It appears from the abstract of the record that the appellant, Edward J. Gildersleeve, had been enjoined on the 12th day of July, 1903, by the circuit court of the city of St. Louis from buying, selling, dealing in, or soliciting the purchase or sale of any mileage passenger tickets or any part thereof, or the return coupon thereof or any part thereof, or any excursion passenger ticket or any part thereof, at that time or thereafter issued or sold, or which might thereafter be issued or sold, by the plaintiff for passage over its railroad, or issued by any other railroad for use over plaintiff's road, or any part thereof where such ticket was sold, or where it appeared upon such ticket, coupon, or return ticket that the same was issued or sold, below the regular schedule rate under a contract with the original purchaser entered upon the said ticket and signed by such original purchaser that such ticket was non-transferable and void in the hands of any other person than the original purchaser, and also from soliciting, aiding, and encouraging or procuring any person other than the original purchaser of such ticket to use or attempt to use the same for passage on any train or trains of the plaintiff; and that afterwards a citation had issued out of the said circuit court on the 1st day

of October, 1904, against the said defendant, Edward J. Gildersleeve, commanding him to appear before said court and show cause why he should not be adjudged guilty of contempt for violating the order of injunction issued as aforesaid. It appears that said citation had been duly served upon the said Gildersleeve on the 1st day of October, 1904, and the said matter coming on for hearing on the 19th of October, 1904, and the court having heard the evidence and duly considered the same, adjudged the said Gildersleeve guilty of contempt, in that he had violated the said injunctive order, and by its judgment adjudged that he be committed to and imprisoned in the common jail in the city of St. Louis for a period of 15 days from the 29th day of October, 1904, to the 13th day of November, 1904, and that he pay the costs of the said proceedings. Within four days the said Gildersleeve filed his motion for a new trial, which was overruled, and he excepted and appealed to the St. Louis Court of Appeals, and that court has certified the same to this court.

Two other cases, to wit, Chicago & Alton Railway Co. v. Gildersleeve, 118 S. W. 96, and Chicago, Burlington & Quincy Railway Co. v. Gildersleeve, 118 S. W. 97, were submitted along with this case and involve the same question. In the Chicago & Alton Case the fine imposed for the contempt was \$300, and in the Chicago, Burlington & Quincy Railway Case the sentence was 30 days in jail.

1. But one question is raised on these appeals by the defendant, to wit, that the circuit court in each of said cases exceeded its lawful powers as defined by section 1617, Rev. St. Mo. 1890, which is in these words: "Punishment for contempt may be by fine or imprisonment in the jail of the county where the court may be sitting or both, in the discretion of the court; but the fine in no case shall exceed the sum of fifty dollars, nor the imprisonment ten days; and where any person shall be committed to prison for the non-payment of any such fine, he shall be discharged at the expiration of thirty days." If this is a valid constitutional enactment, it is obvious that the judgment must be reversed. If, on the other hand, the Legislature exceeded its constitutional powers in abridging and impairing the power of the circuit court to punish contempts of its judgments and decrees, then the judgments must be affirmed.

The learned counsel for the appellant, Gildersleeve, goes to the root of the matter by insisting that the circuit court of this state has not and never had any inherent common-law jurisdiction, but is subject to legislative control, and its powers are such, and such only, as the Legislature shall see fit to prescribe.

Article 3 of the Constitution of Missouri of 1875 (Ann. St. 1906, p. 172) provides:

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"The powers of the government shall be divided into three distinct departments, the legislative, executive and judicial, each of which shall be confided to a separate magistracy, and no person or collection of persons charged with the exercise of powers properly belonging to one of those departments shall exercise any power properly belonging to either of the others, except in instances in this Constitution expressly directed or permitted."

Article 6, § 22 (Ann. St. 1906, p. 234), creating circuit courts, is as follows: "Circuit Courts, Jurisdiction and Terms. The circuit court shall have jurisdiction over all criminal cases not otherwise provided for by law; exclusive original jurisdiction in all civil cases not otherwise provided for; and such concurrent jurisdiction with and appellate jurisdiction from inferior tribunals and justices of the peace as is or may be provided by law. It shall hold its terms at such times and places in each county as may be by law directed; but at least two terms shall be held every year in each county."

Article 6, § 27 (Ann. St. 1906, p. 236), creating the circuit court of the city of St. Louis, is as follows: "Circuit Court of St. Louis County, Jurisdiction of Court of Appeals. The circuit court of St. Louis county shall be composed of five judges and such additional number as the General Assembly may from time to time provide. Each of such judges shall sit separately for the trial of causes and the transaction of business in special term. The judges of said circuit court may sit in general term for the purpose of making rules of court and for the transaction of such other business as may be provided by law at such time as they may determine, but shall have no power to review any order, decision or proceeding of the court in special term."

The circuit court of the city of St. Louis, like all other circuit courts in the state, is to all intents and purposes a court of general jurisdiction, and has been so often adjudged to be such that it would be a waste of time to cite decisions to that effect. As late as *Ex parte Clark*, 203 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389, this court in banc said: "In the second place, division 2, is in very fact, as its name indicates, but a division of the circuit court of that city, and hence, to all intents and purposes, a court of general jurisdiction. The mere fact that in matters of detail, in the administration of justice, certain criminal cases are assigned to it, and that such assignment is heavy enough to occupy, peradventure, its whole time, does not lop off or dim its power as a constitutional court—a circuit court proceeding according to the course of the common law."

In view of the articles and sections above quoted from the Constitution itself, it is too plain for argument that the circuit court is created, not by the Legislature, but by the

Constitution. We all agree, I take it, that the right of punishment for contempt is inherent in every constitutional court having common-law powers, and that such courts cannot be shorn of that power by the legislative branch of our state government. As was said by McKean, C. J., in *Respublica v. Oswald*, 1 Dall. (U. S.) 319, 1 L. Ed. 155: "Not only my Brethren and myself, but likewise all the judges of England, think that without this power no court could possibly exist—nay, that no contempt could, indeed, be committed against us, we would be so truly contemptible. The law upon this subject is of immemorial antiquity, and there is not any period when it can be said to have ceased or discontinued."

The Supreme Court of Indiana, in *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224, most aptly stated the doctrine on this subject in these words: "Courts of justice possess powers which are not given by legislation, and which no legislation can take from them. Judicial powers exist only in the courts; it cannot live elsewhere. *Underwood v. McDuffee*, 15 Mich. 361, 93 Am. Dec. 194; *Chandler v. Nash*, 5 Mich. 409; *Shoulitz v. McPheeters*, 79 Ind. 373. There are inherent powers resident in all courts of superior jurisdiction. These powers spring not from legislation, but from the nature and constitution of the tribunals themselves. *U. S. v. Hudson*, 7 Cranch, 32, 3 L. Ed. 239; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29. The judiciary is a coordinate department of the government, and is not a mere subordinate branch, dependent for existence and power upon the legislative will. Purely judicial powers, inherent in courts as of the essence of their existence, are not the creatures of legislation, and these powers are inalienable and indestructible. Among the inherent powers of a court of superior jurisdiction is that of maintaining its dignity, securing obedience to its process and rules, protecting its officers and jurors from indignity and wrong, rebuking interference with the conduct of business, and punishing unseemly behavior. This power is essential to the existence of the court. * * * There is no doubt that the power to punish for contempt is an inherent one, for independent of legislation it exists and has always existed in the courts of England and America. It is in truth impossible to conceive a superior court as existing without such a power."

In *Hawkins v. State*, 125 Ind. 570, 25 N. E. 818, the court said: "When a court is created by the Legislature, under the Constitution all the powers essential to the existence of the tribunal and the due exercise of its powers at once vest in it from the Constitution. Among the powers which vest in a constitutional court, such as our circuit courts, is that of maintaining its existence and dignity by punishing those who assume to treat it with contempt. This power, as

has been often held, is an inherent one, and exists independently of statute. The Legislature cannot take away from a constitutional court the power to punish for contempt, since that would make the judiciary subservient to the legislative department and violate the provision which secures the independence of the different departments of government. The Legislature may, within limits, regulate the procedures, but it cannot by any regulation abridge or fetter the inherent power itself."

In *State ex inf. v. Shepherd*, 177 Mo., loc. cit. 234, 76 S. W. 88 (99 Am. St. Rep. 624), this court, in discussing section 1616, Rev. St. 1899 (Ann. St. 1906, p. 1199), said: "If the Legislature had power to abridge or impair the power of this court to punish for contempt, then the defendant in this case could not be held liable; but if the Legislature had no such power, then the section of the statutes quoted is unconstitutional and not binding upon the court. It has already been pointed out in paragraph 2 of this opinion that the power of this court to punish contempts is inherent, and that statutes which attempt to confer such power have always been treated as conferring no new power, but as simply declaratory of the common-law power that already belonged to every court of record. The law is well settled, both in England and America, that the Legislature has no power to take away, abridge, impair, limit, or regulate the power of courts of record to punish contempts. *Rapalje on Contempts*, § 11; 7 Am. & Eng. Ency. of Law (2d Ed.) p. 83; *Arnold v. Commonwealth*, 80 Ky. 300, 44 Am. Rep. 480; *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650; *State v. Morrill*, 18 Ark. 384; *People v. Wilson*, 64 Ill. 195, 18 Am. Rep. 528; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *Worland v. State*, 82 Ind. 49; *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; *Holman v. State*, 105 Ind. 513, 5 N. E. 556; *Matter of Shortridge*, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78; *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071; *Hawes v. State*, 46 Neb. 149, 64 N. W. 699; *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 Am. St. Rep. 691."

In commenting upon the *Shepherd* Case, among other things, it was said: "This court (in that case) in effect ruled that a constitutional court may go to the common law for its inherent power to punish all contempts recognized as such at the common law. And to the extent that the statute clipped such power it was unconstitutional. That holding was right. But that case did not hold any judgment and hence is no authority for the proposition that those parts of the statute declarative of the common law were invalid as unconstitutional."

As this whole question was so exhaustively discussed and treated in *State ex inf. v. Shep-*

herd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624, we deem it entirely unnecessary to again enter upon the field of argument and authority to maintain the power of a constitutional court, such as the circuit court, to punish contempts. Indeed, as to this general power, we do not understand that there is any difference of opinion among us upon the main proposition. But some of our Brethren, while holding that the right of punishment for contempt is inherent in every constitutional court in the very nature of things, and that such courts cannot be shorn of that right by the legislative branch of the government, are of the opinion that the Legislature may make what they term reasonable rules regulating the discretion of constitutional courts in administering punishment for contempt. This question was also considered by this court in *State ex inf. v. Shepherd*, and it was there said: "In *Wyatt v. People*, 17 Colo. 261, 28 Pac. 964, the court said: 'Though the Legislature cannot take away from the courts created by the Constitution the power to punish contempts, reasonable regulations by that body touching the exercise of this power will be regarded,' but this, it must be observed, leaves it to the courts to decide whether or not the regulations that may be prescribed are reasonable, and also proceeds upon lines of comity between the courts and the Legislature, and not upon any recognition of the absolute right of the Legislature to enact such regulations. In addition to this, it is now well-settled law in this as well as in other states that the courts have nothing to do with the policy or reasonableness of a law, those being legislative and not judicial questions. So that, if it be conceded that the Legislature had any power to regulate the exercise of the inherent power of the court to punish contempts, the court could not refuse to obey the law because it deemed the regulations unreasonable. However, it is a contradiction of terms to say the power to punish is inherent, but that the Legislature may regulate the exercise. As the Supreme Court of the United States said in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, the power to 'regulate' includes the power to say in what cases the right shall be exercised. It is worthy of observation that in only the states of Georgia and Louisiana is power given, by the Constitution of the state, to the Legislature to limit the power of the court to punish for contempt. In all the other states the better opinion is that, where the court is a creature of the Constitution, the inherent power to punish contempt cannot be shorn, abridged, limited, or regulated. This is the only logical view to take, because by the Constitution (article 3) the powers of government are distributed between legislative, executive, and judicial departments, and it is expressly provided that 'No person, or collection of persons, charged with the exercise of powers properly belonging to one of these

departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted.' And nowhere in the Constitution is the Legislature given any power to meddle with the inherent power of the courts."

While our Brethren cite numerous cases in which the courts of last resort in our sister states have announced the rule of comity for which they contend, and in which those courts have recognized a certain amount of legislative control over the subject of contempt of courts, in view of the provision in our own Constitution, which makes the judicial power of this state coördinate with that of the legislative department, and forbids either to encroach upon the powers of the other, it seems to us that the conclusion reached on this subject in *State ex inf. v. Shepherd*, supra, is not only logical but unanswerable, and it is from no want of respect to the Legislature that this court maintains the power which the people in the organic law have conferred upon it. The Constitution is the supreme law for the Legislature and the court alike, and in declaring any act of the Legislature unconstitutional this court does not proceed upon any theory of superiority over the Legislature, but simply adjudges that it will follow the organic law, which creates both the Legislature and the court, and is alike binding upon each. In regard to the act of Congress restricting the power of the courts of the United States in the punishment of contempts, and intended to deprive them of the authority to treat outdoor publications of any character as such (4 Stat. 487, c. 99, approved March 2, 1831), it was said in *U. S. v. Holmes*, 1 Wall. Jr. 1, Fed. Cas. No. 15,383 by Mr. Justice Baldwin, that this act of Congress was the limitation upon his powers to punish contempts; but of this decision it must be remembered that the judicial power of the United States is vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish. Const. U. S. art. 3, § 1. The Supreme Court was created by the Constitution; the district and circuit courts by act of Congress. When the latter were established and vested with certain judicial powers, the authority to punish contempts attached as an incident. 2 Story on Constitution, § 1774. But deriving their existence from Congress, it follows that their power to punish contempts is under its control. The difference between a constitutional court, such as our circuit court, and a purely statutory court, as the Circuit and District Courts of the United States, is at once obvious. *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205.

Much stress is laid upon the provision that unless this court shall recognize the provision of the statute upon which the defendant relies in this case as constitutional, then the power of the court to punish for con-

tempt is unlimited. A fear is expressed that the courts will exercise that power in an arbitrary and oppressive manner. This contention is not new. In *Neel v. State*, 9 Ark. 263 (50 Am. Dec. 209), Mr. Justice Scott responded to this proposition as follows: "The right to punish for contempts, in a summary manner, has been long admitted as inherent in all courts of justice and in legislative assemblies, founded upon great principles, which are coeval, and must be coexistent, with the administration of justice in every country—the power of self-protection. And it is only where this right has been claimed to a greater extent than this, and the foundation sought to be laid for extensive classes of contempts, not legitimately and necessarily sustained by these great principles, that it has been contested. It is a branch of the common law brought from the mother country and sanctioned by our Constitution. The discretion involved in the power is necessarily, in a great measure, arbitrary and undefinable, and yet the experience of ages has demonstrated that it is compatible with civil liberty and auxiliary to the purest ends of justice and to the proper exercise of the legislative functions, especially when these functions are exerted by a legislative assembly." Chief Justice Watkins in *Cossart v. State*, 14 Ark. 541, said: "The power of punishing, summarily and upon its own motion, contempts, offered to its dignity and lawful authority, is one inherent in every court of judicature. The offense is against the court itself; and if the tribunal have no power to punish in such cases, in order to protect itself against insult, it becomes contemptible, and powerless also in fulfillment of its important and responsible duties for the public good. It is no argument that the power is arbitrary, though, indeed, settled by precedents or limited by them as rules for the future guidance of the courts. While experience proves that the discretion, however arbitrary, has never been liable to any serious abuse, it would be a sufficient answer to say that the power is a necessary one, and must be lodged somewhere. And it is properly confided to the tribunal against whose authority or dignity the offense is committed."

And so in *U. S. v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259, it was held that: "Certain implied powers must necessarily result to our courts of justice from the nature of their constitution. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others, and so far our courts, no doubt, possesses powers not immediately derived from statute."

Our conclusion is that the Legislature, in prohibiting the courts from imposing a fine in any case which should exceed \$50, and in limiting the imprisonment for contempt to 10 days, exceeded its constitutional powers, and therefore such limitations were uncon-

stitutional and void, and that the judgment of the circuit court in this case was not in excess of its jurisdiction, and must be, and is, affirmed.

VALLIANT, C. J., and BURGESS and FOX, JJ., concur. LAMM, WOODSON, and GRAVES, JJ., dissent, and express their views in the opinion by LAMM, J.

LAMM, J. (dissenting). Prepared on assignment as a principal opinion, it failed to receive the concurrence of a majority of my Brethren, and the case was re-assigned to my learned Brother GANTT. Something of substance, I think, is to be said against the conclusion reached by him, which justifies re-submitting this opinion as a dissenting one.

Gildersleeve was sentenced by the circuit court of St. Louis to the common jail for 80 days as the result of a trial in a contempt proceeding. The citation was issued in a civil suit then pending. He was charged with an "out of doors" or constructive contempt in violating a preliminary order of injunction issued by said court, and which injunction forbade the sale of certain kinds of railroad tickets as a ticket broker or "scalper." On appeal to the St. Louis Court of Appeals, the cause was transferred to this court on a constitutional point arising on the whole case, viz.: By Rev. St. 1899, § 1617 (Ann. St. 1906, p. 1199), in providing for the punishment of contemnors (found guilty under preceding sections) by fine or imprisonment in the county jail, or both, in the discretion of the court, it is ordained as follows: "But the fine in no case shall exceed the sum of \$50 nor the imprisonment 10 days. * * *"

It will be seen at a glance that if that statute be a valid and constitutional limitation on the power of a circuit court in Missouri, then the judgment appealed from, being in excess of the power of the court, is bad. To the contrary, if the statute be unconstitutional in that regard, and if the circuit court could go to the common law for the limitation, if any, on its power in meting out punishment, as it did go, then (the merits not being here for review) the conviction is well enough.

It is not deemed useful to enter upon a general exposition of the reasons underlying the right to punish contemnors. That field is a fruitful and inviting one for judicial exploration and eloquence, and, we may add, dicta. It has been explored more than once by this court, and much has been written, e. g., in *Ex parte Crenshaw*, 80 Mo. 447, in *State ex inf. v. Shepherd*, 177 Mo. 206, 76 S. W. 79, 99 Am. St. Rep. 624, in *State ex rel. v. Bland et al.*, 189 Mo. 197, 88 S. W. 28, in *Re Clark*, 208 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389, and in other cases.

The philosophy lying at the root of the right of a court of justice to punish contempts is well stated by Judge Dade to be (*Commonwealth v. Dandridge*, 2 Va. Cas.

409) that: "In this country we know no privileges but such as exist for the public good; many such privileges we have; from those which appertain to the Legislature itself even down to such as belong to the lowest executive officer. Those which surround the administration of justice belong to the same order. Courts, their officers and process, are shielded from invasion and insult, not from imaginary sanctity in the institutions themselves, or the persons of those who compose them (as in the political and ecclesiastical establishments of another hemisphere), but solely for the purpose of giving them due weight and authority, and to enable those who administer them to discharge their functions with impartiality, fidelity, and effect. This is the true test of every privilege not granted by statute, and in the spirit of every one (not merely private) which is so secured. The political character of the judiciary, and the tendency of the duties which are devolved upon it, renders it necessary to invest it with a considerable share of these privileges. It is confessedly the weakest branch of all governments, wielding neither wealth, force, nor patronage. Its duties consist in adjusting and settling the contested rights of individuals, in controlling their turbulence, and punishing their crimes. These duties are often of a severe and rigorous character, and they are generally to be discharged in almost immediate contact with those on whom they act; their exercise will frequently elicit the angry passions, or excite unworthy and sinister attempts to bias or avert their operation, and where there is little real power and no patronage a certain degree of external dignity may have been considered necessary to supersede a too frequent resort to the actual powers of the courts."

In *Respublica v. Oswald*, 1 Dall. (U. S.) 319, 1 L. Ed. 155, Chief Justice McKean, in delivering the judgment of the court, said to Oswald (brought to bar): "Some doubts were suggested whether even a contempt of the court was punishable by attachment; but not only my Brethren and myself, but likewise all the judges of England, think that without this power no court could possibly exist. Nay, that no contempt could indeed be committed against us, we should be so truly contemptible. The law upon the subject is of immemorial antiquity, and there is not any period when it can be said to have ceased or discontinued. On this point, therefore, we entertain no doubt."

Indeed, so manifest is it that the stream of justice must be kept pure from contamination at its source, and that the judge of a court, jurors, witnesses, and officers should be shielded from the humiliation of insult, the terror of violence, or itching desires or sinister attempts to improperly influence the one or the other, that the majesty of the administration of law should find its prototype in the gravity and dignity of a courtroom free from the belittlement of contemptuous inde-

corum, and that trials should be conducted, and the decrees, orders, and judgments of the courts of a free people should be carried into execution, without molestation or interference, unawed by power, unfrightened by intimidation, unemasculated and unperverted by corruption. We say all these things are so manifest that it has become accepted doctrine everywhere that the right of punishment for contempt is inherent in every constitutional court having common-law powers, in the very nature of things, and that such courts cannot be shorn of that right by the legislative branch of the government. It is an inalienable right in a court, of the very essence of its being, one that it may not ignore or allow to be clipped away if it would. These are hornbook propositions, asserted by all text-writers, laid down by all courts, and worthy of all acceptance by intelligent men as of course, hence need no citation of authority to sustain them at this day.

But the question presented here is different and deeper. It is this: May the lawmaker make a rule reasonably regulating the discretion of constitutional courts in administering punishment for contempt? Attending to that question, it may be said that legislation of that character is believed to exist in every state in the Union, and finds a place in the acts of Congress and in those of the British Parliament. The federal act owes its origin to an early Missouri event of historical significance. Judge Peck, presiding in the District Court of the United States for the District of Missouri, in 1828, decided an important land case. Mr. Lawless, an attorney in the case, published a criticism of the opinion, not impugning the motives or charging corruption upon the judge, but discussing the correctness of his decision and pointing out its errors. This publication was treated by Judge Peck as a libel, and its author was punished for contempt of court. Mr. Lawless, not content, took the matter to the House of Representatives. Judge Peck was impeached, subsequently tried in the Senate, and acquitted by a vote of 21 to 22. The public discussion of the law and nature of contempts, incident to the trial, doubtless led to the passage of the federal act placing a limit on the power to punish for contempt (*State v. Morrill*, 16 Ark., loc. cit. 405, 406). Whether the same event and the public discussion arising thereon moved the General Assembly of our state to adopt a statutory regulation, we do not know. But, as it was enacted in 1835 (1 Rev. St. 1835, pp. 160, 161), presumably it owed its origin to that source. Doubtless, too, the legislation of the older states may be similarly traced, and that of the newer ones was borrowed from the older.

The idea dominating that character of legislation is (to borrow the quaint and pointed phrase of Coke) that the punishment of a citizen shall not be measured "by the crooked cord of the discretion of the judges," but shall be "measured by the golden metewand

of the law"—the obsolete word, "metewand," meaning, we take it, a statutory footrule, yardstick, or measuring rod. In this connection it may not be amiss to recall Lord Camden's oft-quoted, sour, yet keen and graphic characterization of uncontrolled judicial discretion when Chief Justice of the Court of Common Pleas in the trial of *Hindson and Kersey*, viz.: "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable." See editor's note to *Proceedings against R. Thompson*, 8 Howell's State Trials, 58. Speaking to a point somewhat kindred, Judge Taft, in *City of Detroit v. Detroit City R. Co.* (C. C.) 54 Fed. 1, 19, says that, where "influences of a personal nature are present, we must presume a human weakness in all judges to prevent injustice from the frailty of the few."

In determining the question of the unconstitutionality of the statute under review, care should be taken to steadily keep in mind the precept that our Legislature has power to legislate upon any subject not forbidden by express provision of, or by inexorable implication in, the Constitution. Care should be taken to see to it that another cardinal principle is obeyed, viz., that courts, from high regard for legislative wisdom and out of comity to the lawmaker, will not declare a statute unconstitutional unless it be put beyond reasonable doubt that it is so; but will solve all doubts in favor of the law, and never strike it down if it can be sustained by any recognized canon of interpretation.

Some veneration, some efficacy withal, is due the statute in hand because of its age. It has been the law of Missouri for three-fourths of a century. During that time Missouri grew from a pioneer state into a great commonwealth; during that time a civil war was waged, the passions of men were lashed into a crest of fury, but through it all its courts of justice, under that statutory limitation of power, deserved and preserved the respect of the citizen and their own self-respect; during that time it was not thought necessary to the public weal that the judiciary should be free to exercise unlimited and unregulated power to punish by their fiat, summarily, without jury, without change of venue, and (in some cases) without right of appeal, a citizen for contempt by an unlimited fine or an unlimited jail sentence. To the contrary, they accepted the statute as a reasonable limitation, and the joints of the machine of checks and counterchecks, under the three coördinate branches of state government, worked without jar or friction.

Because of a tendency in some courts to comment upon the doubtful propriety and legality of legislative enactments limiting the power of constitutional courts to punish for

contempt, at least three states have put in their organic law a provision granting such power to the Legislature, to wit, Georgia, Louisiana, and lately, Virginia. In other states no such constitutional grant of power is given lawmakers and yet despite that fact a reasonable regulation—one showing no legislative intent to deny or cripple the inherent power of the courts, and one not attaining that bad end—has been quite uniformly sustained either out of comity or because of legislative right. See authorities, *infra*.

No doubt is entertained of the legislative power to regulate where the court in question is the creature of the Legislature and not of the Constitution. This doctrine has been applied to the act of Congress regulating punishment for contempts in federal courts. *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205. Their powers and duties are held to depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction; but when the court whose acts are in question is itself the creature of the Constitution, then the better doctrine, as said heretofore, is that as such constitutional court it sprang into existence full armed with all the constitutional powers of a court of justice, one of which is the right to punish for contempt, and that this right in its essence cannot be taken away by the lawmaking power. However broad the logic of the ruling in the *Shepherd Case*, *supra*, that is what is decided by it.

It is contended, in effect, that the *Shepherd Case* declared the whole body of statutory enactments regulating contempt in courts of record unconstitutional and void. That is no new contention. It was made once before in this court in *Re Clark*, *supra*. In answer to that large and drastic proposition, it was there said: "We may digress far enough to point out that it is insisted by him (the circuit attorney) that the scope, effect and purpose of *State ex inf. v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624, was to strike down as unconstitutional the whole body of the written law on the subject of contempts. Rev. St. 1899, § 1616 et seq. But we do not so read that case. The statute (section 1616) enumerates certain forms of contempt, and provides that in their punishment courts have power to punish the acts enumerated, 'and no other.' The contempt charged in the *Shepherd Case* did not come within those enumerated by that statute. The precise question held in judgment in that case, therefore, was this: Was the statute preclusive, or had this court as a creation of the Constitution the inherent power at common law, of which it may not be shorn by statute, to punish as at common law for contempts known to the common law but on which the statute is silent? The broad language used in the case, measured by recognized canons of construction, must be read in the light of the case and facts held in judgment. This court, in effect, ruled

that a constitutional court may go to the common law for its inherent power to punish all contempts, recognized as such at the common law; and to the extent that the statute clipped such power, it was unconstitutional. That holding was right, but that case did not hold in judgment, and hence is no authority for the proposition that those parts of the statute declarative of the common law were invalid as unconstitutional."

In *Koerner v. Car Co.*, 209 Mo. 156, 107 S. W. 481, 17 L. R. A. (N. S.) 292, it was pointed out by Gantt, C. J., that the rule for determining what is actually decided in a case is laid down in 2 Lewis' *Sutherland*, *Statutory Construction* (2d Ed.) § 486, where that author says: "The maxim of *stare decisis* applies only to decisions on points arising and decided in causes; it has been held not to extend to reasoning, illustrations, and references in opinions. The precedent includes the conclusions only upon questions which the case contained, and which were decided. 'The members of a court,' says Downey, C. J., 'often agree in a decision, but differ decidedly as to the reasons or principles by which their minds have been led to a common conclusion. It is therefore the conclusion only, and not the process by which it has been reached, which is the decision of the court, and which has the force of precedent in other cases.' The reasoning adopted, the analogies and illustrations presented in real or supposed cases, in an opinion, may be used as argument in other cases, but not as authority. In these the whole court may concur, or they may not. So of the principle concurred in, and laid down as governing the point in judgment, so far as it goes or seems to go beyond the case under consideration."

Applying those principles to the *Shepherd Case*, it will be seen that the proposition held in judgment was not that all the statutes regulating procedure in contempt were unconstitutional, but that the schedule of acts which go to constitute contempt under the statute did not cover the whole ground; that that part of the statute declaring the acts scheduled in the law "and no other" should be deemed contempts was unconstitutional and void, and that the Supreme Court could go to the common law to ascertain other acts constituting contempt, and punish for those acts as at common law. So construed, the *Shepherd Case* has been approved twice since, and is in line with the great weight of authority elsewhere.

There seems to be an impression abroad that, if we sustain the statute on contempts limiting the quantum of punishment, it will result that courts of equity and law will be shorn of their power to specifically enforce their rules, orders, judgments, and decrees rendered necessary in rounding out justice. To illustrate: A. is ordered to deposit valuable securities in court or turn them over to a receiver, or not to negotiate given negotiable instruments pending a suit affecting

them. A. refuses to obey the order, rule, or judgment. In that condition of things, it has been said that A. would willingly pay a small fine of \$50 or be subjected to a short term of incarceration of 10 days in the county jail rather than obey the order of the court. But the statutes in hand contemplate no such absurd results. In the original act, after enumerating the different grounds of contempt in one section, after providing for their punishment in another, after providing in another that contempts committed in the immediate view and presence of the court may be punished summarily, and that in other cases the parties charged shall be notified of the accusation and have a reasonable time to make a defense, and after making other provisions, the act sets forth (section 61, p. 161, 1 Rev. St. Mo. 1835) that: "Nothing contained in the preceding sections shall be construed to extend to any proceeding against parties or officers, as for contempt, for the purpose of enforcing any civil right or remedy." That section has been brought forward as live law, and is now section 1620, Rev. St. 1899 (Ann. St. 1906, p. 1200).

It will thus be seen that the Legislature wisely left an unimpaired and unfettered power in courts to enforce civil remedies and rights where the rules, orders, judgments, and decrees of the court made in that behalf are contumaciously disobeyed, by imprisonment until obeyed. That is the interpretation placed upon the statute by this court in *Ex parte Crenshaw*, supra. Not only so, but by section 1621, Rev. St. 1899, as by the original act regulating contempts, it is provided that notwithstanding the punishment for contempt by the court, if the act constituting the contempt be indictable, the party charged may be indicted and punished, the court being required to take into consideration, in punishing under the indictment, the punishment before inflicted.

We look in vain, then, into the statute for any legislative intent to impair the dignity of courts of justice or to strip them of their inherent constitutional power to punish for contempt, except on the point rightly decided in the *Shepherd Case*. Our statutes, therefore, if unconstitutional in other respects, must be held so only because they put limitation on the amount of punishment that may be administered by a court for direct or constructive contempt. Are they unconstitutional in those particulars? We think not. This is so, because:

The general doctrine seems to be that: "A statute which limits the amount of the fine, or term of imprisonment which the courts may impose, does not deprive them of their power to enforce affirmatively their orders or to enforce any decree, whether affirmative or otherwise, which may be passed upon the final hearing of a cause." *Rapalje on Contempts*, § 11.

State v. Morrill, 16 Ark. 384, is a soundly reasoned case sustaining the inherent com-

mon-law right of a constitutional court to punish for contempt for acts outside of those enumerated in the statute, yet (as we see it) graciously conceding the legislative power to put reasonable bounds to the amount of the punishment. Suppose, for instance, says the court, that the General Assembly were to repeal the act regulating contempts, would any lawyer seriously contend that the courts were thereby deprived of their power to punish contempt? That question as put was held to answer itself, and the court proceeded to say that "the Legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the Constitution."

In accord with that pronouncement, the Supreme Court of Indiana held "that the Legislature may regulate the practice in proceedings against persons for an alleged contempt." *Cheadle v. State*, 110 Ind., loc. cit. 309, 11 N. E. 430 (59 Am. Rep. 199).

The language of that learned court in *Hawkins v. State*, 125 Ind. 570, 25 N. E. 818, should be construed as in accord with the guarded expression just quoted. That language is: "The Legislature may, within limits, regulate the proceedings (in contempt), but it cannot by any regulation abridge or fetter the inherent power itself."

In *Wyatt v. People*, 17 Colo., loc. cit. 261, 28 Pac. 964, the law was stated to be that: "Though the Legislature cannot take away from the courts created by the Constitution the power to punish contempts, reasonable regulations by that body touching the exercise of this power will be regarded as binding."

In *Mahoney v. State*, 33 Ind. App., loc. cit. 658, 659, 72 N. E. 153 (104 Am. St. Rep. 276). It was held that: "While it is not necessary to look after any statute to ascertain whether a particular act does or does not constitute contempt, still the Legislature may, within limits, regulate the procedure in such cases."

In *State ex rel. v. Miesen*, 98 Minn., loc. cit. 20, 108 N. W. 513, it was held that: "While the Legislature cannot take away from courts created by the Constitution the inherent right to punish contempts, yet it may regulate within reasonable limits the exercise of the power."

In *Carter v. Commonwealth*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310, it was held: "That the power to punish for contempts may be regulated by the Legislature, but cannot be destroyed or so far diminished as to be ineffectual." In that case the Legislature required a jury trial, which provision the court held void. In treating of the phrase "inherent power," it was said: "This language does not mean, and has never meant, that these powers are held superior to legislative control. It did not mean that at common law."

It will be observed that the Virginia court holds that the phrase "inherent power" did not mean at common law a power entirely

beyond legislative control. This is of significance, because the principal opinion in this case treats the power (because inherent) as entirely beyond, and independent of, such control. In this connection it is suggestive to note that in the mother country, the ancient seat of the common law, it has been assumed that the power is not an arbitrary and unregulated one. Statutes have been passed by the British Parliament from time to time regulating the subject-matter of contempts, and (within bounds) these statutes seem to be enforced by the English judiciary (In re Maria Annie Davies, 21 L. R. Q. B. Div. 236).

It must not be overlooked either that if it be conceded, by way of hypothesis, that the power to punish was unbridled at common law and that the lawmaking power could not regulate it a whit, then we come face to face with the proposition that it is not the whole body of the common law that was adopted in this state, but only that portion of it not repugnant or inconsistent with the Constitution of the United States or of this state, "or the statute law in force for the time being." Rev. St. 1899, § 4151 (Ann. St. 1906, p. 2250).

On the last head, I do not hesitate to say that the unregulated, arbitrary, whimsical power to fine or imprison for contempt, a power that will not brook a mere temperate and reasonable control, is contrary to the genius of our institutions and the policy of our Constitution and statutes.

In *Arnold v. Commonwealth*, 80 Ky., loc. cit. 302 (44 Am. Rep. 490), it was said: "While the right to punish is with the court, we are not prepared to say that it is not subject in some degree to legislative control, but, on the contrary, we are inclined to adjudge that a mere arbitrary discretion on the part of the judge may be limited; but an attempt by legislation to deprive the courts of the inherent power of protection against assaults and indignities would be disregarded."

In *State v. Frew*, 24 W. Va., loc. cit. 458 (49 Am. Rep. 257), it is said, after a most exhaustive review of the authorities: "Therefore courts will tolerate the regulation of the power, so that the Legislature does not by such regulation substantially destroy the efficiency of the court. The courts must have just enough power, and will exercise it for their own protection, and they want and demand no more. Whether or not the Legislature in its regulation has left sufficient power for the purpose, the court, which is called to exercise it, must be the sole judge, unless its judgment may be reviewed, and in that case the court of last resort would be the exclusive judge."

In other cases it has been cautiously held that the power to regulate within reasonable bounds to the extent that the regulation does not touch to the quick the dignity of courts and cripple the exercise of judicial functions was well enough. In other cases regulating

statutes have been enforced, as of course, under the doctrine of comity, and to beat down all apparent judicial antagonism to the fair and reasonable exercise of legislative power. For example, In re Ida Louisa Pierce, 44 Wis. 411; *Batchelder v. Moore*, 42 Cal. 412; *Ex parte Edwards*, 11 Fla. 174; In the Matter of Millington, 24 Kan. 214; *People ex rel. v. Grant et al.*, 47 Hun, 604; *People ex rel. v. Jacobs*, 66 N. Y. 8; *Latimer v. Barmore*, 81 Mich. 592, 46 N. W. 1; *Sloman v. Reilly*, 95 Mich. 264, 54 N. W. 869; *Ex parte David Schenck*, 65 N. C. 353; *Cole v. Egan*, 52 Conn. 219; *State v. Rust*, 2 Tenn. Ch. 181; *Ex parte Kearby*, 35 Tex. Cr. R. 581, 34 S. W. 635. See, also, *Ex parte Crenshaw*, supra.

So delicate is the subject of contempt that courts have been unable to hold an even and uniform voice in dealing with it. Cases may be found that apparently repudiate any legislative approach toward the control of the exercise of the power of punishment, however reasonable it be.

But the doctrine of Chief Justice John Marshall in the great case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, is invoked to sustain the dogma that the power to regulate includes and concedes the power to destroy. It is argued, as I grasp it, that if the Legislature of Missouri be once conceded the power to regulate the punishment of contempt, thereby the power is conceded to destroy every vestige of such punishment and to strip courts bare of a right inherent to their office. I trust to never be found wanting in unstinted admiration and exalted respect for that illustrious Chief Justice whose governmental doctrines, as expounded in his opinions, I was taught to accept with reverence even from my youth up. But it seems plain that what was said by him in the *Gibbons* Case must be read in the light of the case held in judgment. It dealt with federal power and sovereignty as over against state power and state sovereignty, and it held the preclusive power to be in Congress to regulate the coasting trade and commerce generally. It must be remembered that the sole right "to regulate" in those particulars was conferred by the federal Constitution on the Congress, and it was ruled that it was taken out of the domain of state legislation. In the evolution of his great argument against a conflict of state and federal power, even then threatening civil war, he ruled that the federal power was preclusive, and that the hand of state regulation through state laws must be lifted. I take it that it was to the glory of that august tribunal to assert the right to be in Congress in those particulars. But what has that doctrine to do with the power dealt with here? Our Constitution does not grant to courts the preclusive power to regulate themselves as they see fit, including the right to fine and imprison in any sum or for any term for contempt. On the other hand, the public pol-

icy of this state in the legislative interpretation put upon our Constitution has been to regulate courts in many ways, and those regulations have been uniformly obeyed when reasonable. For example, in sections 863 and 1569, Rev. St. 1899 (Ann. St. 1906, pp. 807, 1185), this court is told what kind of briefs we may require in cases appealed here. In section 806 (page 709) our conduct, or, more strictly, our discretion, is regulated, and we are told that we "shall summarily hear and determine all appeals from orders refusing to revoke, modify or change an interlocutory order appointing a receiver," and we are ordered to advance such case on our docket. So in the Laws of 1907, p. 120, § 1a, we are told that when a municipality has undertaken to regulate the charges of public service corporations, and when the reasonableness of those charges are brought in question in an injunction suit and the judgment is appealed, we must speedily hear and determine such cause and must give it precedence over other civil cases. In section 855 (page 805) our docket is arranged for us by law, and we are required to advance certain cases for hearing. Sections 865, 866 (pages 812, 815), regulate our discretion in rendering judgments. In section 871 (page 821) the kind of opinions we shall hand down is regulated. They must be in writing, and must show which of the judges delivers them, who concurs, and who dissents. By section 872 we are obliged to make a "statement of the case," and (observe) it is to be a statement "that may be understood." By section 874, we are stripped of the power to require bonds for costs. Are all these statutes, and many others that might be named, unconstitutional because they impinge on the ancient common-law discretion of a full-fledged common-law court?

To sum up: From an examination of many cases, well reasoned and well bedded in principle, the following propositions lying between two extremes may be deduced as sound doctrine:

(a) First. A constitutional court of common-law power may not be shorn of the right to punish for contempt by a statutory enactment. That power, in its essence, is ingrained in such a court, and becomes a part of its very being.

(b) Second. Either as a matter of comity, or of right, the lawmaker may (within reason) somewhat regulate that power so that an arbitrary judicial discretion may not run riot, rampant, and wanton. And herein it must be kept in mind that a judge on the bench is, after all, but a human being, and has frailties inseparable from humanity. Therefore, when called to punish for contempt, it not infrequently happens that he is smarting under such sense of personal humiliation, indignation, or other master emotion that at least a mote of prejudice may be assumed as in his eye.

(c) Third. The statute under review is a reasonable regulation, in nowise hostile to the inherent power to punish for contempt.

(d) That the power to regulate does not in all cases nor in this case mean the power to destroy. To regulate a court is not to destroy it.

Finally, let us look at the effect of holding that the arbitrary power of punishment cannot be gently limited (or, if the phrase be preferred, gently tempered) by legislative enactment in a constitutional court. The Constitution does not limit it. Among other things, it provides (article 3, § 1 [Ann. St. 1906, p. 212]): "That the judicial power of the state as to matters of law and equity * * * shall be vested in a Supreme Court, * * * circuit courts, criminal courts, probate courts, county courts and municipal corporation courts." All the aforesaid courts are constitutional courts, and, therefore, not the creature of mere statute. In some of such constitutional courts there is no requirement of law that the individuals acting as judges should be learned in the law. They are taken from unprofessional ranks. Their legal judgment is not rendered sure, steady, and staid by a study and comprehension of the principles of jurisprudence. Is it not a startling proposition to announce that the citizens of this state are subject to an unbridled power in all such tribunals to summarily fine them in any sum, however large, and imprison them for any term, however long, for contempt? And yet to that complexion we must come if we go to the extreme of holding that a constitutional court may not be controlled by some known, fixed, and reasonable rule of written law on the matter.

It is my opinion that the courts of Missouri need no such show of autocratic power; that they, in the future as in the past, may more surely build their dignity and usefulness solidly on the intelligent respect of the good citizen, the wise lawmaker, and a serene and even administration of justice, seeking (in Lord Mansfield's phrase) "noble ends by noble means," than build it on a show of wielding an uncontrollable power to fine and imprison.

The judgment should be reversed, and the cause remanded for further proceedings below.

WOODSON and GRAVES, JJ., concur in these views.

CHICAGO & A. RY. CO. v. GILDER-SLEEVE.

(Supreme Court of Missouri. April 13, 1909.)

In Banc. Case Transferred from St. Louis Court of Appeals.

Edward J. Gildersleeve was fined by the circuit court of St. Louis for contempt of court in violating a decree of injunction rendered in an action against him by the Chicago & Alton

Railway Company, and appealed to the St. Louis Court of Appeals. Cause transferred to Supreme Court. Judgment of circuit court affirmed.

Chester H. Krum, for appellant. Johnson & Richards, for respondent.

GANTT, J. Edward J. Gildersleeve, appellant, was fined \$300 by the circuit court of St. Louis for contempt of court in violating a decree of injunction by said court. From that judgment he appealed to the St. Louis Court of Appeals, and that court transferred the cause to this court on a constitutional point, to wit, that section 1617, Rev. St. 1899 (Ann. St. 1903, p. 1199), was unconstitutional. For the reasons assigned in *Chicago, Burlington & Quincy Ry. Co. v. Edward J. Gildersleeve* (in the opinion handed down this day) 118 S. W. 86, the judgment of the circuit court is affirmed.

VALLIANT, C. J., and BURGESS and FOX, JJ., concur. **LAMM, WOODSON, and GRAVES, JJ.,** dissent in an opinion by **LAMM, J.**

CHICAGO, B. & Q. RY. CO. v. GILDERSLEEVE.

(Supreme Court of Missouri. April 13, 1909.)

In Banc. Case Transferred from St. Louis Court of Appeals.

Edward J. Gildersleeve was sentenced by the circuit court of St. Louis for contempt in violating a decree of injunction rendered in an action against him by the Chicago, Burlington & Quincy Railway Company, and appealed to the St. Louis Court of Appeals. Cause transferred to Supreme Court. Judgment of circuit court affirmed.

See, also, 118 S. W. 86.

C. H. Krum, for appellant. Robert & Robert, for respondent.

GANTT, J. The appellant, Gildersleeve, was sentenced by the circuit court of St. Louis to jail for 30 days for a contempt of court in violating a decree of injunction in said court. From that judgment he appealed to the St. Louis Court of Appeals, and that court transferred the cause to this court on a constitutional point, to wit, that section 1617, Rev. St. 1899 (Ann. St. 1903, p. 1199), was unconstitutional. For the reasons assigned in *Chicago, Burlington & Quincy Ry. Co. v. Gildersleeve* (in an opinion handed down this day) 118 S. W. 86, the judgment of the circuit court is affirmed.

VALLIANT, C. J., and BURGESS and FOX, JJ., concur. **LAMM, WOODSON, and GRAVES, JJ.,** dissent in an opinion by **LAMM, J.**

STATE ex rel. ASHTON v. IMEL, Probate Judge.

(Kansas City Court of Appeals. Missouri. March 29, 1909.)

COURTS (§ 231*)—COURT OF APPEALS—JURISDICTION—AMOUNT IN CONTROVERSY.

The Court of Appeals has no jurisdiction of an appeal from an order sustaining a demurrer to the alternative writ of mandamus, issued on the relation of an executrix having in her hands as such an estate largely in excess of \$4,500, and directing the probate court to allow an appeal from its order appointing an

administrator pendente lite; the amount involved being in excess of its jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 231.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Mandamus by the State, on the relation of Lucinda B. Ashton, against John F. Imel, Probate Judge, to compel respondent to allow an appeal from an order. From an order sustaining a demurrer to the writ, relator appeals. Cause certified to the Supreme Court.

Fulkerson, Graham & Smith, for appellant. Rusk & Stringfellow and Chas. C. Crow, for respondent.

PER CURIAM. The circuit court of Buchanan county issued an alternative writ of mandamus against the probate court of that county, directing that court to allow an appeal from its order appointing an administrator pendente lite. Respondent demurred to the writ, which demurrer was sustained, and relator appealed to this court.

It appears that Thomas Ashton died in Buchanan county, leaving a will which was duly filed and admitted to probate. Lucinda B. Ashton, widow of the deceased, was named as executrix in the will and duly qualified. Afterwards Annie E. Penfield, who is child and heir of deceased, instituted an action in the circuit court of Buchanan county contesting such will, in which Lucinda B. Ashton was made a party. Annie E. Penfield filed a motion in the probate court setting forth these facts and asked for the appointment of an administrator pendente lite. On hearing such motion it was sustained, and John L. Zeidler was duly appointed administrator pendente lite. Mrs. Ashton thereupon made application for an appeal from the order of appointment, which application was refused. Whereupon Mrs. Ashton, as relator herein, applied for a writ of mandamus against the probate court, and the alternative writ was issued and demurred to as above stated.

It appears that the estate in the hands of Mrs. Ashton as executrix of the will is largely in excess of \$4,500, the limit of the jurisdiction of this court. The effect of the order appointing an administrator pendente lite is to take from the possession of Mrs. Ashton the effects of the estate and turn them over to such administrator. It is, in effect, a contest for the possession of property of value largely in excess of our jurisdiction. There were two writs of prohibition issued by this court against the judge of the circuit court of Buchanan county involving a controversy over the same estate and practically between the same parties (*State ex rel. Annie E. Penfield v. C. A. Mosman, Judge*, 115 S. W. 1041, and *State ex rel. John L. Zeidler v. C. A. Mosman, Judge*,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and Lucinda B. Ashton, 115 S. W. 1042 decided February 1, 1909), in which we held we had no jurisdiction and certified the cases to the Supreme Court.

It seems that the same reason exists to certify this case, and it is accordingly ordered.

GLENNON v. GATES.

(Kansas City Court of Appeals. Missouri.
March 29, 1909.)

MUNICIPAL CORPORATIONS (§ 330*)—STREET PAVING—SELECTION OF MATERIALS.

Where there are several kinds of vitrified bricks equally well suited to use for paving, the selection by the board of public works of the bricks of a particular manufacturer, thereby cutting off all opportunities for the manufacturer of other kinds of vitrified bricks to submit bids, as provided by the city charter, is illegal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 854, 855; Dec. Dig. § 330.*]

Appeal from Circuit Court, Jackson County; T. J. Seehorn, Judge.

Action by James G. Glennon against Jemuel C. Gates. From a judgment for defendant, plaintiff appeals. Affirmed.

Johnson & Lucas, for appellant. Henry N. Ess, for respondent.

ELLISON, J. This is an action to enforce a special tax bill as a lien against defendant's property. The result of the trial was to declare the bill to be void, and plaintiff has brought the case here.

The bill was issued for street paving in Kansas City, Mo. The charter of that city makes provision for the recommendation by the board of public works of several kinds of pavement to be used in paving, which may be ordered by the proper authority of the city. It further provides that the majority of property owners may select from this recommendation the particular kind of paving they desire; but, if the property owners fail to make the selection, then the board of public works shall select and designate the kind. In this case the board recommended the following: "Vitrified brick as manufactured by the Kansas City Vitrified Brick Company, the Diamond Brick Company, the Pittsburg (Kan.) Vitrified Brick Company, or any other vitrified brick equally as good as those named." But the property owners failed to exercise their choice, and the board thereupon made this order: "The board of public works selects Pittsburg (Kan.) vitrified paving brick as the material with which to pave the within-named alley, and fixes the price not to exceed \$1.70 per square yard."

The case was tried on an agreed statement of facts, wherein it was stated that: "At the time the written recommendation made by

the board of public works to the common council of Kansas City to have this alley paved as a business alley, and at the time of the passage and approval of the ordinance for paving this alley copied herein, and at the time of the making of the contract pursuant to which the tax bill sued on was issued, vitrified brick as manufactured by the Diamond Brick & Tile Company, the Kansas City Vitrified Brick Company, and Pittsburg (Kan.) Vitrified Brick Company were in use in Kansas City as paving brick, and they all complied substantially in every respect with the details in brick pavements as copied in this statement, and there were other vitrified brick which complied with substantially and were in substantial accordance with all the specifications and details set out in this statement." And it was further stated on part of plaintiff that: "No person, firm, or corporation, during the year 1901, in Pittsburg, Kan., manufactured and sold vitrified brick as described in the recommendation of the board of public works and in the ordinance in evidence except the Pittsburg (Kan.) Vitrified Brick Company, manufacturer of the brick selected and used in paving the alley under the contract in evidence." The instruction asked by plaintiff and refused was as follows: "The court declares the law to be that if there was but one plant for the manufacture of Pittsburg vitrified brick at Pittsburg, Kan., and that was the plant from which the brick designated by the board of public works came, then the board had the right under the testimony to designate such brick for the paving of said street, and the finding will be for the plaintiff."

It appears by the foregoing that, while there were several kinds of vitrified brick of equal durability and equally well suited in every way for paving, yet the board of public works selected one of these absolutely, and thereby cut off all opportunity for the owners of the other kinds to submit bids, and destroyed the competition which the charter vouchsafes to the property owner by requiring a public letting to the best bidder. Vitrified paving brick of equal quality and suitability is conceded by the agreed statement to be a material manufactured by a number of different persons or corporations; and to allow a public body which, in effect, is exercising the right to take private property for public use, to select a favorite from among these would be an inexcusable and gross injustice, and would be in the face of the decisions of the Supreme Court in the cases of *Curtice v. Schmidt*, 202 Mo. 703, 721-725, 101 S. W. 61, of *Swift v. St. Louis*, 180 Mo. 80, 95, 79 S. W. 172, and of *Shoenberg v. Field*, 95 Mo. App. 241, 68 S. W. 945, as well as of the Supreme Courts of other states. Where some desirable article for public use is patented, or held in monopoly by one person, it has been decided that, in order to avoid de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

prising a municipality of the benefit of such article, it may be prescribed as the article to be used; but that is a monopoly made either by the patent or by reason of there being but the one kind of material, while in the case before us there are several equal kinds in the hands of as many independent owners and the monopoly of the one kind is made, not by patent or single ownership, but by the order of the board of public works. We decided the exact question which is presented here in *Shoenberg v. Field*, supra, and so did the Supreme Court of Kansas in *National Surety Co. v. Hydraulic Pressed Brick Co.*, 73 Kan. 196, 84 Pac. 1030.

We are cited by plaintiff to the decision in *Construction Co. v. Coal Co.*, 205 Mo. 49, 103 S. W. 93, which we think has no bearing on the question, and in which it is expressly stated that the rule in the foregoing cases is not touched upon. The expression cited in that case, at page 69 of 205 Mo., and page 98 of 103 S. W., is that: "The board of public works selected American bituminous rock, and neither of the vitrified brick mentioned. In adopting American bituminous rock, it merely designated a material." That is to say, if in the case at bar the board of public works had selected vitrified brick of standard quality, it would merely have selected the kind of material for the paving; but when it selected the material, and in addition named the particular party who should furnish it, it violated the law. The argument advanced in plaintiff's behalf, as applied to this case, has not impressed us with its soundness.

The judgment is affirmed. All concur.

KELLERMAN CONTRACTING CO. v. CHICAGO HOUSE WRECKING CO.

(St. Louis Court of Appeals. Missouri. April 6, 1909. Rehearing Denied April 20, 1909.)

1. CONTRACTS (§ 169*)—CONSTRUCTION—EXPLAINING AMBIGUITY.

The circumstances under which a contract is made, the situation of the parties, and the facts of which they were cognizant at the time may be resorted to if the writing is ambiguous.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 752; Dec. Dig. § 169.*]

2. SALES (§ 150*)—REMOVAL OF PROPERTY—IMPLIED CONTRACT.

A bare contract of sale does not imply a promise by the buyer to remove the property from the seller's premises or other locality where it happens to be.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 350; Dec. Dig. § 150.*]

3. SALES (§ 150*)—DELIVERY AND ACCEPTANCE—REMOVAL OF PROPERTY.

A sale binds the buyer to accept the property when tendered under the contract; and delivery and acceptance pass the title with the burden of ownership, which will include, under some circumstances, the removal of the property.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 350; Dec. Dig. § 150.*]

4. SALES (§ 85*)—CONSTRUCTION OF CONTRACTS—REMOVAL OF PROPERTY.

By its concession the German government was bound to remove its buildings and constructions from the site and grounds of the Louisiana Purchase Exposition, and clean the place and restore it to its original condition as far as practicable. Pursuant to its contract with plaintiff contracting company, the latter was to have the buildings which it built, and was to wreck and remove them. Plaintiff sold the buildings to defendant wrecking company by a written contract, whereby the latter merely accepted a proposition of sale for a certain price, payment to be made when the property was delivered. Held, that defendant did not thereby agree to clear the site of all material as plaintiff was bound to do.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 236; Dec. Dig. § 85.*]

5. EVIDENCE (§ 441*)—CONSTRUCTION—PRELIMINARY AGREEMENTS—MERGER.

Such a provision could not be imported into the written contract by virtue of a prior oral promise.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.*]

6. SALES (§ 85*)—CONSTRUCTION AND OPERATION OF CONTRACTS—DUTY TO REMOVE PROPERTY.

The buildings and material composing them being turned over to defendant and accepted, it was incumbent on it to take the property away, but this duty was a consequence of the contract, and not a term of or undertaking in it, and was imposed by law as an incident of ownership, and not as a part of the agreement, which related solely to a sale.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 236; Dec. Dig. § 85.*]

7. SALES (§ 369*)—FAILURE TO REMOVE PROPERTY—REMEDY OF SELLER.

The remedy for a buyer's failure to perform his duty imposed by law to remove the property sold sounds in tort in the nature of the common-law remedy of trespass on the case, though this does not mean that the tort may not be waived, and action maintained on an implied assumpsit.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1063; Dec. Dig. § 369.*]

8. PLEADING (§ 49*)—PETITION—CHARACTER OF ACTION—HOW DETERMINED.

The character of an action is determined from the express averments of the petition.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 108; Dec. Dig. § 49.*]

9. JUDGMENT (§ 249*)—CONFORMITY TO PLEADINGS.

If redress ex delicto is desired, there must be no averment of an express promise.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 435; Dec. Dig. § 249.*]

10. PLEADING (§ 49*)—PETITION—THEORY OF ACTION.

A petition in two counts against a wrecking company on a written contract of sale of buildings for failure to remove rubbish alleged as a matter of inducement an ordinance of the city of St. Louis granting the right to use Forest Park to the Louisiana Purchase Exposition Company, and providing for clearing the park after the exposition closed. It then alleged a contract between the exposition company and the German government and between such government and plaintiff to remove structures and material according to the contract between the city and exposition company and between the German government and plaintiff, and a breach thereof. The second count was like the first,

except in alleging that defendant agreed to remove the structures, rubbish, and debris within a reasonable time. *Held*, that the petition declared on the written agreement, and adopted the theory that defendant thereby undertook to clear away the buildings and bring the site back into a state of nature as the German government and plaintiff had agreed to do.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 108; Dec. Dig. § 49.*]

11. JUDGMENT (§ 250*) — CONFORMITY TO PLEADINGS.

Plaintiff must recover, if at all, on the contract alleged.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 436; Dec. Dig. § 250.*]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by the Kellerman Contracting Company against the Chicago House Wrecking Company for failure to remove buildings sold to defendant. From a judgment for plaintiff, defendant appeals. Reversed.

Nagle & Kirby, for appellant. A. B. Chandler and Rowell & Ferriss, for respondent.

GOODE, J. The parties entered into the following contract: "St. Louis, 2-7-05. Kellerman Contracting Company, 418 Roe Building, City. Gentleman: We accept your proposition of \$600 for the German House, also the Restaurant and all material therein, excepting such as belongs to the German Commission, and certain plumbing. This is free of all incumbrances, liens, etc. Payment to be made for the above property when same is delivered to us. Yours truly, Chicago House Wrecking Company. A. Harris, Pres. Accepted: Kellerman Contracting Company. Wm. Lehr, Secr." The buildings mentioned in the contract were constructed by the German government in that portion of Forest Park in the city of St. Louis which was the site of the Louisiana Purchase Exposition. The municipal government of St. Louis had granted to the exposition company the privilege of using Forest Park for an exposition on condition that all structures erected in the park and property used in connection with the exposition should be removed from the park within six months after the close of the Fair. The contract between the exposition company and the state of Germany granting the latter a concession to erect the buildings mentioned bound the German government to remove the buildings and all constructions from the site and grounds of the exposition in 60 days after the Fair closed, clear and clean the place, and restore the same to its original condition as far as practicable. The German government let the contract for the construction of the buildings to plaintiff, and provided in the contract the buildings should be wrecked and removed from the premises on or before January 31, 1905; further agreeing all the wrecked property should belong to plaintiff.

It will be seen by the agreement quoted, supra, plaintiff sold the two buildings and all the materials therein, except parts belonging to the German commission and plumbing material, to defendant on February 7, 1905. The buildings were delivered to defendant March 28, 1905, and the evidence showed two months would be a reasonable time in which to wreck them and remove the material. Defendant commenced wrecking work in July, and continued it until September or October. The buildings were composed of wood, plaster, and staff, and, after they were demolished, defendant took out such material as it deemed valuable, but left the ground littered with staff, lath, broken lumber, and other rubbish. The exposition company notified plaintiff to restore the site to its original condition, and on November 2, 1905, plaintiff made written demand of defendant to do this work, saying the buildings had been sold with the understanding defendant was to wreck them and put the place in the shape it was in before the buildings were erected. Defendant did not remove the rubbish, and, in consequence of its alleged default in this regard, plaintiff removed it at an expense of over \$800, as the court found. This action was instituted to recover reimbursement for that outlay, the petition declaring in two counts on the contract between plaintiff and defendant, which we have copied. As matter of inducement an ordinance of the city of St. Louis granting the right to use the park to the exposition company and providing the company should clear the park of all structures, rubbish, and debris after the exposition closed, and the contracts between the exposition company and the German government and between said government and the plaintiffs to the same effect, were all pleaded in the petition, which then avers in the first count defendant agreed in its contract with plaintiff to tear down and remove all said structures and all material of any kind and nature in a good and workmanlike manner from and out of said park and within the time the buildings were to be removed according to the contract between the city and the exposition company and between the German government and this plaintiff, further alleging a breach of the agreement. The second count of the petition is like the first, except in alleging defendant agreed to remove the structures, rubbish, and debris within a reasonable time. Oral evidence was admitted, over the objection of defendant, of a conversation between plaintiff's secretary and the defendant's president at the time the written contract of February 7th was made, in which the former told the latter the buildings must be wrecked by January 31, or February 1, 1905, but plaintiff could not get possession of them then.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The secretary testified nothing was said between the two about the removal of the rubbish. It should be stated that defendant objected to the introduction in evidence of any of the contracts except the one in suit. Judgment having been entered in favor of plaintiff for the amount it had paid out for clearing away the rubbish left by defendant, this appeal was taken.

Plaintiff's theory is, in legal effect, that defendant stepped into its shoes as regards the obligation of plaintiff's agreement with the German government to remove the material from the site of the buildings, and restore the same to the condition it was in before they were erected. But, so far as its express terms go, the contract between these parties is simply one for the sale of the two buildings and the material composing them, with certain exceptions. An agreement of the effect plaintiff insists on cannot be introduced into the contract by virtue of an oral promise made anterior to it; for this would be to ingraft a verbal stipulation on an obligation in writing. *Tracy v. Iron Works*, 104 Mo. 183, 16 S. W. 203. The circumstances under which the contract was made, the situation of the parties, and the facts of which they were cognizant at the time might be resorted to in interpreting the writing if it was ambiguous. But in our opinion it is not; and, moreover, reference to those matters dehors the instrument could not possibly import into it the promise or agreement defendant alleged in the petition, namely, to clear the site of the buildings so it would look like it did before they were erected. *Greaves v. Ashlin*, 3 Camp. *426.

Plaintiff's counsel say, if the instrument must be construed from its four corners, such a construction of it involves an agreement to remove all the material from the site, because the law carries such an agreement into every contract for the sale of a chattel as part of the buyer's obligation, and the buildings were treated as chattels. *Davis v. Emery*, 61 Me. 140, 14 Am. Rep. 553. We know of no legal principle or authority nor have we been referred to any which reads into and makes part of a bare contract for the sale of personal property a promise by the vendee to remove it from the premises of the seller or other locality where it happens to be. The sale of a chattel binds the buyer to accept it when tendered to him under the terms of the contract, and delivery and acceptance pass the title to him with the burdens of ownership, which will include, under some circumstances, the removal of the property. When the buildings and material composing them were turned over to defendant and accepted, we think it was incumbent on defendant to take the property away, but this duty was a consequence of the contract of sale, and not a term of or undertaking in it. The duty was imposed by

law as an incident of ownership, and not as a part of the agreement the parties made, which related solely to a sale. The remedy for failure to perform said duty sounds in tort in the nature of the common-law remedy of trespass on the case, but we do not say the tort might not be waived and an action maintained on an implied assumpsit. *Bliss*, Code Pleadings (4th Ed.) § 153 et seq.; *Pomerooy*, Code Remedies (4th Ed.) § 458 et seq.; *Crane v. Murray*, 106 Mo. App. 697, 80 S. W. 280. In either form of action the question would arise whether the duty was to plaintiff or to the city as owner of the site, and which could seek redress against defendant. We think the authorities cited by plaintiff, as far as they are pertinent, dealt with instances where there was either an express agreement to remove the thing sold, as in *Davis v. Emery*, supra, or with actions in tort, or perchance on a fictitious assumpsit implied by law in consequence of the tort. *Diblee v. Corbett*, 9 Abb. Pr. (N. Y.) 200; *Dayton v. Roland*, 1 Daly (N. Y.) 446; *Furstenburg v. Fawcett*, 61 Md. 184; *Story, Sales*, 835; *Benjamin, Sales*, § 700. We have not found any discussion of the question of procedure in such cases in opinions or text-writers. The character of an action is determined from the averments of the petition, and it is sometimes difficult to say whether the pleader has declared on an express contract or has merely pleaded one as matter of inducement and sought relief for a tort. The rule is that, if redress ex delicto is desired, there must be no averment of a direct promise. 21 Ency. Pl. & Pr. 913. Beyond doubt the present petition declares on the written agreement entered into by the parties, and adopts the theory that defendant undertook thereby to clear away the buildings, and bring the site back to a state of nature.

As plaintiff must recover, if at all, on the contract alleged, and as none such was proved, the judgment will be reversed and the cause remanded. *Clements v. Yeates*, 69 Mo. 623; *Cole v. Armour*, 154 Mo. 333, 55 S. W. 476; *Laclede Const. Co. v. Iron Works*, 169 Mo. 137, 154, 69 S. W. 384. All concur.

PARSONS et al. v. LOUISVILLE & N. R. CO.
(Kansas City Court of Appeals. Missouri.
March 29, 1909.)

1. TRIAL (§ 156*)—DEMURRER TO EVIDENCE—EFFECT.

The court, in ruling on a demurrer to plaintiff's evidence, must consider the evidence in a light most favorable to him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 355; Dec. Dig. § 156.*]

2. CARRIERS (§ 104*)—DELAY IN TRANSPORTATION—EVIDENCE.

Where, in an action against a carrier for negligent delay in transporting perishable freight, it was agreed that the freight should have arrived on April 28th, and the evidence of plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiff showed that it did not arrive until five days later, while the evidence of the carrier fixed the arrival of the freight at April 28th, the verdict for plaintiff established an unreasonable delay authorizing a recovery, provided such delay was the result of the negligence pleaded in the petition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 444-447; Dec. Dig. § 104.*]

3. CARRIERS (§ 136*)—CHANGING ROUTE OF SHIPMENT—NEGLIGENCE.

The act of a carrier in changing the route of shipment from that stated in the contract is not negligence per se; but proof of the change, without good cause, coupled with proof of unusual delay causing damage to the freight, is evidence of negligence sufficient to raise an issue of fact.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 596; Dec. Dig. § 136.*]

4. CARRIERS (§ 105*)—NEGLIGENT DELAY IN TRANSPORTATION—MEASURE OF DAMAGE.

The measure of damages for the negligent delay in the transportation of perishable freight is the difference between the market value of the freight when delivered and the market value of the same when it should have been delivered had no unreasonable delay occurred, provided the petition in an action therefor warrants it, and does not specifically plead elements of damage, in which case the recovery is restricted to the elements alleged.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 451; Dec. Dig. § 105.*]

5. CARRIERS (§ 106*)—NEGLIGENT DELAY OF PERISHABLE FREIGHT—DAMAGES—PETITION INSTRUCTIONS.

Where the petition, in an action against a carrier for negligent delay in the transportation of tomatoes, alleged that good tomatoes were depreciated in value a specified sum per crate by the decline in the market, that a specified number of crates were spoiled, and that plaintiff incurred expense in sorting the same, and the evidence showed a greater damage to a specified number of crates than that pleaded, an instruction directing the jury to assess the damages at the difference between the market value of the tomatoes when delivered and the market value of the same when they would have been delivered had no unreasonable delay occurred was erroneous because it enlarged the cause of action pleaded.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 448; Dec. Dig. § 106.*]

Appeal from Circuit Court, Jackson County; Walter A. Powell, Judge.

Action by M. J. Parsons and another, partners doing business under the firm name of the Parsons-Applegate Company, against the Louisville & Nashville Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Wash Adams and Chas. B. Adams, for appellant. Joseph Johnson and Paxton & Rose, for respondents.

JOHNSON, J. Action against a common carrier, brought by the consignee and owner of a car load of tomatoes to recover damages for an unreasonable delay in the transportation, alleged to have been caused by the negligence of defendant. The cause is here on the appeal of defendant from a judgment against it of \$600.

Material facts disclosed by the evidence of plaintiffs are as follows: Plaintiffs are partners engaged in dealing in fruits and vegetables in Kansas City, under the firm name of Parsons-Applegate Company. They bought a car load of tomatoes in Jacksonville, Fla., which was received by the Seaboard Air Line Railroad Company on April 21, 1906, for transportation from Jacksonville to Kansas City. A through bill of lading was issued on that date, in which plaintiffs were named as consignees, and the route of the shipment was specified as "via L. & N. and Frisco," which meant that the initial carrier, the Seaboard Air Line, would haul the car to Montgomery, and there deliver it to defendant, the Louisville & Nashville Railroad Company, for transportation to Birmingham, Ala., and delivery at that place to the St. Louis & San Francisco Railway Company (commonly called "the Frisco"). The latter company was to transport the car to Kansas City. The property was to be carried as perishable freight, and the evidence shows that the Frisco has the shortest line of railroad between Birmingham and Kansas City, and operates fast trains for the carriage of such freight. Further, it appears from the evidence of plaintiffs that had the car in question been transported within a reasonable time over the route specified, it would have arrived in Kansas City on April 28th, and the tomatoes would have come into the possession of the consignees in first-class condition for the market. On and after April 28th, the day the car should have reached its destination, plaintiffs made daily inquiries at the Frisco station in Kansas City to ascertain if the car had arrived. They also telephoned to the stations of other railroads that handled freight from the southeast, but did not think to telephone to the Rock Island station, as they did not know that freight from Florida might be brought in over the St. Louis line of that company. About noon of May 3d plaintiffs received a telephone message from the Rock Island that the car was on its unloading track. They immediately unloaded the car, and found the tomatoes overripe and damaged. The car contained 472 crates, which could have been sold on the market April 28th at \$4 per crate. Between that date and May 3d, the market for tomatoes of that class, in good condition, declined 75 cents per crate. It was found that all the crates contained spoiled tomatoes, and it was necessary to sort over the whole shipment. The expense of sorting them was \$50. The spoiled tomatoes, amounting to 50 crates, were a total loss, and the remainder of the shipment suffered a depreciation of 75 cents per crate from the decline in the market.

It is conceded that, instead of delivering the car to the Frisco at Birmingham, de-

defendant hauled it over its own line to East St. Louis, and there delivered it to a terminal railroad, which hauled it to St. Louis and delivered it to the Rock Island. This was a longer route by 93 miles than the Frisco, and involved a change of roads at St. Louis, which the evidence, in the light most favorable to plaintiffs, shows is likely to consume much time, especially when the yards at this important center are in a congested condition. The evidence of defendant is to the effect that the car arrived in Kansas City at about 6 o'clock p. m. April 28th; that it was sent to the unloading track at 7 o'clock the next morning; that plaintiffs were notified by telephone between 2 and 4 o'clock in the afternoon that the car was ready to be unloaded, the slight delay in giving notice being caused by an error in the billing in the name of one of the plaintiffs. Further, the witnesses for defendant state that the transportation was accomplished in a reasonable time, and in 9 hours less than would have been consumed had the shipment been sent over the Frisco. In explanation of this statement it is asserted that a delay of 13 hours would have been encountered at Birmingham on account of the fact that the fast train on the Frisco was not scheduled to leave until 13 hours after the arrival of the car at Birmingham. The allegations of the petition of particular concern to us in the present inquiry are as follows: "That said defendant, in violation of said instructions, did not carry said tomatoes to Birmingham, and there deliver the same to the Frisco Railroad Company, as directed, but on the contrary, in violation of said shipping instructions, and without the knowledge or consent of the plaintiffs, the defendant diverted said car from the route aforesaid, and carried same around by Nashville, Tenn., Evansville, Ind., and St. Louis, Mo., and at St. Louis said car was delivered to the Rock Island Railroad Company, and hauled by it to Kansas City. That it required 5 days longer to carry said car over said last-named route than it would have required to carry the same over the route directed by plaintiffs, so that said car, instead of arriving in Kansas City on the 28th day of April, 1905, did not, in fact, arrive until May 3, 1905. That said delay was caused by the wrongful and neglectful act of the defendant in failing and refusing to follow the shipping instructions of plaintiffs aforesaid, and in diverting said car as aforesaid. That said load of tomatoes consisted of 486 crates. That tomatoes in Kansas City on the 25th day of April, 1905, were worth in the market the sum of \$4 per crate. That on May 3, 1905, the market had declined, so that the market value of tomatoes on said day was \$3.25. That on account of the delay in the transportation of said tomatoes, caused by the diversion aforesaid, said tomatoes had, many of them, rotted

and spoiled, so that over 50 crates of said tomatoes, of the value of \$200, were wholly lost to plaintiffs, and plaintiffs were put to great trouble and expense in sorting the spoiled from the good tomatoes, which said trouble and expense amounts to \$50, so that plaintiffs allege that by reason of the premises they have sustained damage in the sum of \$614.50." The answer is a general denial.

At the request of plaintiffs the court instructed the jury "that, if you find from the evidence that the defendant changed the routing of the car of tomatoes consigned to plaintiffs without the consent or knowledge of plaintiffs, and, instead of transferring said car to the St. Louis & San Francisco Railroad Company at Birmingham, transported said car by its own line to St. Louis, and there transferred it to the Rock Island, which carried said car to Kansas City, Mo., and because of said change in the routing there was an unreasonable delay in the delivery of said car load of tomatoes to plaintiffs, and because of said delay said tomatoes were damaged in quality, and the market price of the same declined, then you will find for the plaintiffs, and assess their damages at the difference between the market value of said car load of tomatoes when delivered to plaintiffs and the market value of the same when they would have been delivered to plaintiffs had no such unreasonable delay occurred, not exceeding the sum of \$614.50, with interest at the rate of 6 per cent. per annum upon the total amount of said damages from the date of the demand upon defendant for the same."

It is argued by defendant that a verdict in its favor should have been directed peremptorily. We do not think the question of whether the relation of defendant to the shipment, at the time of its delivery to plaintiffs, was that of carrier or warehouseman is of any importance in the solution of the questions raised by the demurrer to the evidence. The evidence of plaintiffs tends to show an unreasonable delay in the transportation, not in the giving of notice after the car arrived. The evidence of defendant tends to show no delay in the transportation, and the giving of notice within a reasonable time. In this position of the parties the subjects of the giving of notice and of the reasonableness of the time in which the notice was given were not treated or submitted to the jury as issues of fact, but the primary and dominant issues presented by the pleadings and evidence were whether or not an unreasonable time had been consumed in the transportation from Birmingham, and if it had, was the delay due to negligence of defendant in diverting the car from the route specified in the contract? Considering the evidence in the light most favorable to plaintiffs, a position we must occupy in ruling on the demurrer to the evidence, a strong inference arises that there was an unreason-

able delay in the transportation. Indeed, the witnesses for both parties agree that the car should have arrived in Kansas City on April 28th. The controverted fact is the date of its arrival. The evidence of plaintiffs supports the conclusion that the date in question was May 3d. That of defendant fixes it at April 28th. The evidence of each party being substantial, an issue of fact was raised for the jury to solve, which, if decided in favor of plaintiffs—as it was—would demonstrate beyond peradventure that an unreasonable delay of 5 days had occurred in the transportation. We must assume this to be the fact, and our next inquiry is to ascertain if the evidence of plaintiffs will authorize a reasonable inference that the unreasonable delay was the direct result of the negligence pleaded in the petition. The gravamen of the action is negligence of defendant involved in the act of diverting the car at Birmingham. The act of changing the route of a shipment from that stated in the contract is not negligence per se. Things may happen in the course of transportation that make a diversion necessary.

But it is not even suggested by defendant that after the car left Jacksonville anything occurred to call for a change in its route, and the evidence of plaintiffs leads reasonably to the conclusion that defendant diverted the car to a longer and slower line for no better reason than to obtain for itself the benefit of a longer haul. Further, it appears that the unusual delay was the result of the diversion, and was the proximate cause of the injury to the property. These facts made out a case to go to the jury. While it is true that proof alone of an unreasonable delay will not support an inference of negligence, it is well settled that such proof, when buttressed by evidence of circumstances which even slightly tend to show a negligent origin of the delay, will warrant such inference. *Gilbert v. Railway*, 132 Mo. App. 697, 112 S. W. 1002, and cases cited. The act of changing, without good cause, the route of the car to a longer and slower line, when coupled with proof of unreasonable delay, is evidence of negligence sufficient to raise an issue of fact. We are not overlooking the testimony of defendant's witnesses to the effect that the line it selected, though longer, maintained a service that would bring the car to its destination in a shorter time than the route prescribed in the contract. But that evidence is not conclusive, and could serve only as an evidentiary defense to the proof of plaintiffs. No error was committed in the refusal to sustain the demurrer to the evidence.

The instruction given at the request of plaintiffs is erroneous in the measure of damages submitted. Three elements of damage are specifically alleged in the petition, viz., first, that the good tomatoes were depreciated in value 75 cents per crate, by a decline in

the market; second, that 50 crates were spoiled; and, third, that expense of \$50 was incurred in sorting. The instruction does not mention these elements, but directs the jury to assess the damages "at the difference between the market value of said car load of tomatoes when delivered to plaintiffs and the market value of the same when they would have been delivered to plaintiffs had no such unreasonable delay occurred." This is the correct rule for the assessment of damages to personal property negligently injured by a carrier in the course of transportation, where the allegations of the petition will warrant its application. But in cases such as the one in hand, where the elements of damage are specifically pleaded, the recovery must be restricted in the instructions to the elements alleged. The rule stated in the instruction does not include the item of the expense of sorting and, therefore, the verdict cannot be said to include that item. The remaining two items alleged in the petition aggregate \$527, viz.:

50 crates spoiled at \$4 per crate.....	\$200 00
436 " depreciated 75¢ by decline	
in market.....	327 00
	<hr/> \$527 00

There is evidence tending to show greater damage to the 436 crates than that pleaded, and the conclusion cannot be escaped that the jury assessed more damages on that score than were claimed. It is clear the instruction enlarged the scope of the cause of action pleaded, and that the error was prejudicial. In other respects the case was fairly tried, but for the error noted, the judgment must be reversed and the cause remanded. All concur.

SESSINGHAUS v. KNOCHE.

(St. Louis Court of Appeals. Missouri. April 6, 1909.)

1. LANDLORD AND TENANT (§ 116*)—"TENANCY FROM MONTH TO MONTH"—NOTICE OF INTENTION TO TERMINATE—NECESSITY FOR.

Under Rev. St. 1899, § 4110 (Ann. St. 1906, p. 2234), declaring an agreement for the occupation of a house or other building in a city not made in writing to be a "tenancy from month to month," and providing that either party may terminate the same on one month's notice of intention to do so, a tenant from month to month who vacates without giving one month's notice is liable for the rent for the succeeding month.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 396; Dec. Dig. § 116.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 6907-6908.]

2. TRIAL (§ 199*)—INSTRUCTIONS—LEGAL EFFECT OF FACTS.

There is no error in the court declaring the legal effect of uncontroverted facts.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 199.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. APPEAL AND ERROR (§ 1066*) — REVIEW — HARMLESS ERROR—INSTRUCTIONS.

As under Rev. St. 1899, § 4123 (Ann. St. 1906, p. 2239), it is essential in attachment proceedings for rent that the jury find defendant liable for the rent, the mere fact that the court referred in its instruction to the rent for the month following the vacation of the premises was not prejudicial error as submitting a question touching the merits of the cause of action, and not simply the grounds of attachment, where it conclusively appears that the only rent owed by defendant was for that month, and that it accrued because of defendant's failure to terminate the tenancy by giving the statutory notice, though generally speaking it would be well for the court to instruct the jury to find whether the rent was due within one year after the institution of the suit.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1066.*]

4. JUDGMENT (§ 655*) — CONCLUSIVENESS — JUDGMENT ON PLEA IN ABATEMENT.

An investigation of the matter of rent and the tenant's liability therefor on a plea in abatement to an attachment for rent is not res judicata of such matters on the subsequent trial of the principal cause on the merits.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 655.*]

5. LANDLORD AND TENANT (§ 229*)—ATTACHMENT FOR RENT—DEMAND—NECESSITY FOR.

Under Rev. St. 1899, § 4123 (Ann. St. 1906, p. 2239), authorizing an attachment for rent when due and unpaid after demand, and providing that, if the tenant is absent from the premises, demand may be made on the person occupying the same, the fact that the landlord called at the premises with the intention of demanding the rent and found them wholly unoccupied, is not equivalent to a demand on the tenant, or, in his absence, on the person occupying the premises, and is insufficient to render the mere default in payment a ground for attachment.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 229.*]

6. APPEAL AND ERROR (§ 854*) — REVIEW — HARMLESS ERROR—ATTACHMENT PROCEEDINGS.

A verdict sustaining an attachment on each ground alleged should be upheld, though error interposed as to one ground, where the other grounds are sustained by the evidence, and were properly submitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3410; Dec. Dig. § 854.*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Attachment proceedings for rent by Bertha C. Sessinghaus against Theodore O. Knoche. There was a verdict for plaintiff, and, from an order setting the same aside and granting a new trial, plaintiff appeals. Reversed and remanded, with directions.

See, also, 127 Mo. App. 300, 105 S. W. 283.

H. H. Oberschelp, for appellant. B. B. Brewer, for respondent.

NORTONI, J. This is a suit in attachment for rent. The case comes here on plaintiff's appeal. It appears the plaintiff recovered in the circuit court; that is, the jury found a verdict affirming all of the grounds for attachment alleged in the affidavit. Upon hearing the motion for new trial, how-

ever, the court set this verdict aside for the reason it was of the opinion there was error in the instructions given at the instance of the plaintiff. From this order setting aside the verdict of the jury, plaintiff prosecutes the appeal.

It appears that by an oral agreement plaintiff let a hotel building in the city of St. Louis to the defendant at the agreed rental of \$100 per month, to be paid on the 1st day of each month. The defendant occupied the same and paid rent for a time, and finally, on the 20th day of December, vacated the premises, and removed his property therefrom without having terminated his tenancy by giving 30 days' notice as required by the statute. The installment of rent due on the 1st day of January thereafter not having been paid, plaintiff instituted this attachment suit on January 5th for the \$100 rent due January 1st for that month. It conclusively appears that the rent for January was due and unpaid at the time of the institution of the suit, and that the plaintiff, having called at the premises to make demand therefor, was unable to do so for the reason the premises were vacant and unoccupied.

There are several grounds of attachment set forth in the affidavit, only two of which are material, however, at the present time. These are the fourth and fifth. The fourth ground for attachment alleges that the defendant was liable to plaintiff for the rent for the month of January for the premises mentioned, whether then due or not, and that defendant had removed his property from said rented premises within 30 days previous to January 5th. The fifth ground alleged is that the said rent was due and unpaid; that said defendant at the time, January 5th, was absent from said premises; that plaintiff's agent had visited the said premises to demand the rent due, and found said premises vacant and no one occupying the same. The court instructed the jury on all of the grounds for the attachment alleged in the affidavit. What directions were therein given touching the grounds of attachment other than the fourth and fifth are immaterial here. The instructions in that respect were entirely proper. The court set the verdict aside, however, for the reason that in its opinion it had trespassed upon the merits of the controversy in the instruction submitting the fourth and fifth grounds of attachment. Touching these grounds, the court instructed that if the jury found from the evidence, fourth, that the defendant was liable to plaintiff for the rent for the month of January for the premises mentioned in the evidence, whether then due or not, and that defendant had removed his property from said rented premises within 30 days previous to said January 5th, then their verdict should be for the plaintiff; and, fifth, that if the jury found from the evidence

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said rent was due and unpaid, that said defendant, at the time the suit was brought, January 5th, was absent from said premises, that plaintiff's agent had visited said premises to demand said rent then due, and found the premises vacant and no one occupying the same, the jury should find for the plaintiff on that ground. In its instruction No. 2 the court directed that the jury were not to determine, and that its decision should in no wise affect, the question whether or not plaintiff is entitled to recover from defendant the rent for the month of January, but that the matter submitted to the jury was solely whether any one or more of the reasons alleged by plaintiff as grounds for bringing suit by attachment were true. By plaintiff's instruction No. 5, the court directed the jury that the evidence showed the tenancy was from month to month, and that the only way defendant could terminate the tenancy and end his liability for rent was to give the plaintiff or her agent written notice of his intention to terminate the tenancy 30 days previous to the time the month expired.

The court assigned the following reasons for setting aside the verdict: First, that the first instruction, defining the grounds of attachment, submitted to the jury the question of whether the defendant was liable to the plaintiff for rent for the month of January, whether then due or not; and, second, whether said rent was due and unpaid, and plaintiff's agent had visited the premises to demand the rent and found them vacant and unoccupied. So much of the instruction referred to was declared to be error for the reason it submitted questions touching the merits of the plaintiff's cause of action, and not simply on the grounds of attachment. The court said the instruction in that respect was also inconsistent with instruction No. 2, which directed the jury that its verdict should in no wise affect the question whether or not the plaintiff is entitled to recover from the defendant the rent for the month of January, but that the matter submitted related solely to whether one or more of the grounds alleged by the plaintiff for attachment were valid. The court also declared that it erred in the fifth instruction given on behalf of the plaintiff, for the reason that it submitted the question of defendant's liability for rent to the jury, and was also inconsistent with instruction No. 2. In so far as instruction No. 5 is concerned, it certainly declared the law, for the evidence of defendant himself is to the effect that he rented the premises by a verbal agreement for no definite period, and agreed to pay the rent of \$100 on the 1st of each month in advance. It appears, too, he quit the possession and vacated the premises December 20th without having given plaintiff notice to that effect and without her knowledge or consent. Our statute (section 4110, Rev. St. 1899 [section 4110, Mo. Ann. St. 1906]) declares all agree-

ments for the occupation of houses, tenements, or other buildings in cities not made in writing, to be tenancies from month to month, and that either party may terminate such tenancy by giving the other party one month's notice in writing of his intention to terminate the same. It is abundantly settled under this statute that a tenant from month to month, who, without the consent of the landlord, vacates the premises without giving one month's notice to the landlord of his intention to terminate the tenancy, will remain liable for the rent of such premises for the month succeeding. *Buck v. Lewis*, 46 Mo. App. 227. Where it conclusively appears, as in this case, and, in fact, is conceded by all concerned, that the tenancy was from month to month, and without the consent of or notice to the landlord the premises are vacated by the tenant, there is certainly no error in the court declaring the legal effect of such uncontroverted facts as a matter of law. It is true this matter touched upon the merits of the controversy which was to be thereafter determined in the principal suit on the merits.

However, our statute under the landlord and tenant act (section 4123, Rev. St. 1899 [section 4123, Mo. Ann. St. 1906]), concerning attachments for rent, seems to commingle the matter pertaining to the defendant's liability on the merits of the case with the grounds of attachment specified therein. It is difficult, indeed, to discern how the court could submit the two grounds of attachment referred to without treating to some extent with the merits of the controversy to be determined in the principal suit on the merits. That statute, in so far as pertinent here, is as follows: "Any person who shall be liable to pay rent, whether the same be due or not * * * If the rent be due within one year thereafter, shall be liable to attachment for such rent, in the following instances: * * * third, when he has, within thirty days, removed his property from the leased or rented premises; * * * sixth, when the rent is due and unpaid after demand thereof: provided if such tenant be absent from such leased premises, demand may be made on the person occupying the same." Now, it appears from this section, first, that no attachment is authorized unless it be in a case where the party attached is liable to pay the rent. It is immaterial whether the rent is due or not, if it appears the defendant is liable therefor. It is certainly essential, however, for the jury to find a liability on the part of the defendant to pay the rent before it can sustain the allegations in attachment, for the whole matter depends in the first instance upon the liability of the defendant to pay the rent. If defendant is liable to pay the rent, and it will become due within one year thereafter, it is sufficient on this score, whether the same is then due or not. In view of the fact that it is essential for the jury to find

the defendant liable for the rent, we are persuaded that the mere fact the court referred to the rent for January in the instruction was not prejudicial error. It conclusively appears that the only rent owing by defendant to the plaintiff was that for the month of January following the vacation of the premises, and this accrued because of the defendant's failure to terminate the tenancy in the manner required by giving statutory notice.

Generally speaking, it would be well for the court to instruct the jury to find whether the rent was due within one year after the institution of the suit. The omission of this matter in the present instance is certainly immaterial, for it conclusively appears the rent was due January 1st, or five days before the attachment was sued out. It will be observed the instruction referred to did not submit to the jury the question as to whether the rent for January was due. It, in fact, referred the question of defendant's liability therefor, whether due or not, to the jury, and directed them to determine the question of liability whether the rent was then due or not. It appears from this that the question of liability, and not the question of the amount thereof, was referred for the consideration of the jury. So much of the instruction as related to this question directed that if the defendant was found to be liable for the rent in January, and had removed his property from the rented premises within 30 days previous to the institution of the suit, then the attachment should be sustained. As stated, the matter of liability referred to in a measure touches upon the merits of the controversy which should be determined thereafter in the principal suit. However this may be, the statute giving the remedy by attachment is responsible for this commingling of issues, if they be so commingled. Aside from this, instruction No. 2 told the jury the question as to whether the plaintiff was entitled to recover the rent for January was not then submitted for consideration, and that the jury was to deal with the matter of liability only to the extent of determining the grounds of attachment. The mere fact that the jury may find on the plea in abatement that the defendant is liable to respond on the merits of the cause does not operate a substantial impairment of the defendant's rights thereafter, for the law is well established to the effect that a judgment on matters in issue on the plea in abatement in an attachment suit does not become *res adjudicata* as to such matters on the trial of the principal cause on the merits. *Garrett v. Greenwell*, 92 Mo. 120, 4 S. W. 441. An investigation of the matter of rent and of the defendant's liability therefor on a plea in abatement will not be treated as *res adjudicata* on the subsequent trial on the merits, for the reason the statute itself introduces the matter of liability for the rent as a constituent element of the right to an at-

tachment. *Dawson v. Quillen*, 48 Mo. App. 118, 121.

Under the sixth ground mentioned in section 4123, Rev. St. 1899 (section 4123, Mo. Ann. St. 1906), plaintiff is authorized to attach a defendant who is liable for the rent within one year thereafter when the rent is due and unpaid after demand thereof. In connection with this ground, the statute further provides that, if such tenant be absent from such leased premises, demand may be made on the person occupying the same. Now, the affidavit in attachment, proceeding on this ground of attachment, recites that the rent was due and unpaid on January 5th; that the defendant was absent from the premises; that plaintiff's agent had visited the premises, seeking to demand such rent then due, and found the premises vacant and unoccupied. In the instruction given the court directed the jury that it might sustain the attachment on this ground if it found the rent was due and unpaid at the time the suit was brought, on January 5th, and that the defendant was absent from the premises, and the plaintiff's agent, upon visiting the premises to demand the rent from him, found the premises vacant and unoccupied. That is to say, both the affidavit for attachment and the instruction pertaining to the sixth ground mentioned proceeded upon the theory that, if plaintiff visited the premises and found no one there upon whom to make the demand, this fact was equivalent to a demand for the rent. We believe this to be error. The sixth specification of the statute authorized the attachment for the rent due and unpaid after demand, and then points out that the demand may be made on another person occupying the same, provided the attachment debtor is absent therefrom. The statute contemplates a demand upon some one, the attachment debtor if he is present, and, if he is absent from the premises, it may be made upon another person who occupies the same. *Raney v. Thomas*, 94 Mo. App. 315, 68 S. W. 103. This no doubt proceeds upon the theory that the person occupying in the absence of the attachment debtor would probably be some member of his family or one in his employ, or some one in privity with him in some manner, probably a subtenant. However, it is unnecessary to speculate on the intention of the Legislature in this behalf. It is sufficient here to say that the statute does not make a visit by the plaintiff to the premises with the intention to make a demand when they are wholly unoccupied by any person equivalent to a demand upon the defendant, or, in his absence, upon some other person occupying the same. We are of the opinion had the attachment been sustained on this ground only, without demand upon the defendant or another person occupying the premises, the verdict should have been set aside for the reason the visit of plaintiff's agent to the unoccupied premises for the purpose of making a demand on

defendant for the rent was insufficient to render the mere default in payment a ground for attachment.

Be this as it may, we are of opinion that the court erred in setting aside the verdict for the reason it expressly sustained the attachment on each and every other ground therefor assigned in the affidavit. In all the affidavit for attachment alleged five grounds therefor. The verdict of the jury sustained the attachment on each and every ground alleged. The evidence is ample to support all of those other than the last mentioned. All of the grounds for attachment, other than that the rent was due and unpaid after demand, were properly submitted by the instructions. Under these circumstances the verdict should be sustained on the grounds which are valid, even though error interposed with respect to the one ground last referred to. *Eisenhart v. Cabanne*, 16 Mo. App. 531; *Tucker v. Frederick*, 28 Mo. 574, 75 Am. Dec. 189; *Garrouette v. White*, 92 Mo. 237, 241, 4 S. W. 681. The court should have disregarded the error referred to and entered judgment on the verdict sustaining such grounds only as were properly submitted by instruction and sustained by the evidence.

The order granting a new trial will be reversed, and the cause remanded to the trial court, with directions to reinstate the verdict sustaining the attachment on such grounds as are valid and proceed accordingly. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

FREASIER et al. v. HARRISON et al.
(St. Louis Court of Appeals. Missouri. April 6, 1909. Rehearing Denied April 20, 1909.)

1. APPEAL AND ERROR (§ 959*) — REVIEW — TRIAL AMENDMENT—DISCRETION OF COURT.

An amendment to pleadings after a referee's report had been filed, and when the argument of exceptions thereto was to occur was in the discretion of the court, and its refusal to permit it cannot be reversed unless it allowed the adverse parties to succeed on a technical point which might have been determined against them without prejudice to their substantial rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3830; Dec. Dig. § 959.*]

2. PLEADING (§ 258*) — ANSWER — TRIAL AMENDMENT.

In an action on a building contractor's bond, where the answer alleged that certain installments of the price were not paid until after they were due, and that the final one never was paid, the court properly denied a trial amendment alleging that each payment was made after due, the effect of which was to state no other defense than the one first pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 765; Dec. Dig. § 258.*]

Appeal from St. Louis Circuit Court; Robt. M. Foster and Virgil Rule, Judges.

Action by Joseph L. Freasier and others

against Frank Harrison, E. R. Darlington, and others. Judgment for plaintiffs, and Darlington and others appeal. Affirmed.

Wm. L. Bohnenkamp, for appellants. Thos. H. Sprinkle, for respondents.

GOODE, J. Defendants Darlington and Hoffman were sureties for Harrison on a bond executed by the latter to secure the performance of a contract to erect for plaintiffs a double two-story flat building in the city of St. Louis, complete the job by January 15, 1903, and protect plaintiffs from demands and liens of laborers and materialmen. Plaintiffs allege they were damaged by Harrison's failure to erect the building in a skillful and workmanlike manner in some particulars, complete it in the agreed time, and turn it over to them free from liens. Harrison was a codefendant; but as he is no party to the appeal, which was taken only by the sureties, we are not concerned with his answer. The sureties admitted the execution of the bond, but alleged plaintiffs failed to comply on their part, setting out certain breaches, none of which are important, except supposed deviations from the contract in paying installments of the purchase price.

As a point of practice is raised in respect of the refusal of the court to permit an amendment of the portion of the answer which related to the payments, we will copy that part, introducing into it the proposed interlineations and indicating them by italics: "Defendants state that plaintiffs failed to make the payments according to the terms of said contract, in that plaintiffs failed on each house to make the payments at the period *and in the amounts* specified in said contract; that when the first floor joists were laid a payment of eight hundred dollars (\$800.00) was due, but that payment was not made until long after it was due; that when the second floor joists were laid \$1,100 was due, but was not paid until long after due; that the payment of \$1,100 which was due when the gravel roof was on was not paid when due, but withheld for a long time thereafter; that \$300 was due when the building was ready for plastering, and that this amount was not paid until long after due; that \$1,250 was due when the plastering was finished, and that plaintiffs delayed payment of this amount on each building; *that all the payments made by plaintiffs were in different amounts and made at a different period from that specified in the contract*; that when each building was completed a payment of \$2,800 was due, which plaintiffs refused to pay and have never made payment to defendant Harrison; that defendants Darlington and Hoffman were not notified of these changes of the time of payment, and did not consent or agree to the delay upon the part of plaintiffs in making payment according to the contract,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as the work progressed." The case was referred to a referee to report on all the issues of law and fact, and, after his report had been filed, exceptions taken, and when the argument of the exceptions was to occur, defendants requested leave to amend their answer by interlining the italicized words, and the court refused the request. The amendment was asked for, because, as originally filed, the answer made defense as to this matter solely on the ground that the intermediate installments of the purchase price were not paid until after they were due, and the final one never was paid. The evidence regarding when the several payments occurred was contradictory, plaintiff Joseph Freasier testifying they were made slightly in advance of their maturity, and Harrison that they were delayed in every instance. The finding of the referee was as follows on this issue: "The plaintiffs made the payments to the defendant Harrison as the work progressed substantially at the times and in the manner called for in the contract, except the last payment, which was withheld. The first and second payments on the west building were made under peculiar circumstances. The first payment was to be made under the contract, when the first floor joists were laid, and the second payment was to be made when the second floor joists were laid. The stone masons on the buildings failed to put in the center row of posts or pillars, upon which the first floor joists were to be supported, and the joists, for this reason, were put in without any supports. The plaintiffs claim, for this reason, that the first payment was made before it was due—that the joists were not properly laid until the girder was under them. For the same reason plaintiffs contend that the second payment was made ahead of time. The payments by plaintiffs were usually a little more than the contract called for at the time they were made. At times these payments would amount to a few hundred dollars more than was due according to plaintiffs' contention; but, according to the contentions of the defendants, plaintiffs were always behind in their payments. Defendants in their brief, especially the defendants Darlington and Hoffman, contend these advance payments by plaintiffs avoided the bond, but there is no issue of that character made by the pleadings. Said defendants in their answer make complaint that the plaintiffs failed to make the payments as they became due. No charge is made in the pleadings that they made the payments in advance without the consent of the sureties on the bond. No disadvantage arose from the act of plaintiffs in making these payments in the manner they were made, nor were the defendants Harrison, Darlington, and Hoffman injured or prejudiced in any manner thereby."

The referee having found the payments were usually a little more than the contract

called for at the time they were made, and having ruled defendants had averred nothing in their answer about plaintiffs having paid before the installments were due, and without the consent of the sureties, but, on the contrary, had averred plaintiffs failed to pay as the installments became due, defendants sought to amend so as to adapt the answer to the referee's finding that the payments were made in advance instead of in arrear, and yet retain the original defense of default by plaintiffs, contending either deviation from the contract would exonerate them from liability as sureties. The only question it is necessary to determine is whether the refusal to allow the amendment is reversible error. At this stage of the case the court in its discretion might or might not permit the answer to be amended, and its decision cannot be reversed unless, under all the circumstances, it allowed plaintiffs to succeed on a technical point which might have been determined against them without prejudice to their substantial rights and in aid of the justice of the cause. *Henderson v. Henderson*, 55 Mo. 534; *Ensworth v. Barton*, 87 Mo. 622; *Joyce v. Growney*, 154 Mo. 253, 55 S. W. 466. It is manifest there was no abuse of discretion in the present instance for this reason if for no other: As the answer would read if amended, it set up no other defense regarding the payments except that they were made after due. It is true the italicized language says they were made in different amounts and at different periods from those specified in the contract; but, as this language was interlined among specific averments that each payment was made after due, the effect is to state a defense based on plaintiffs' failure to pay the successive installments when they were due—the defense first pleaded.

The judgment in favor of plaintiffs was according to the report of the referee in every respect except a trifling item, and, as it cannot be assailed unless the amendment should have been permitted, we order it affirmed.

NORTON, J., concurs. REYNOLDS, P. J., not sitting.

JONES et al. v. PLUMMER.

(St. Louis Court of Appeals, Missouri. April 6, 1909.)

1. WORDS AND PHRASES—"MACADAMIZING."

According to the Standard Dictionary, to "macadamize" is "to cover or pave, as a path or roadway, with small broken stone, on either a soft or a hard substratum." Judicially speaking, the word "macadamizing" has a fixed and definite meaning, and refers not only to the kind of material to be used in covering the street or road, but also to the manner in which it is to be laid. It means to cover a street or

road by a process introduced by Macadam, which consists of the use of small stones of a uniform size, consolidated and levelled by heavy rollers.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4264.]

2. MUNICIPAL CORPORATIONS (§ 414*)—STREET IMPROVEMENTS.

Rev. St. § 5858, as amended (Ann. St. 1906, p. 2963), provides that on repairs of macadamizing the street shall be divided into sections, the cost in each section to be assessed on the lots fronting on either side of the section. *Held* that, the mere employment of the word "macadamizing" not essentially involving the idea of constructing a new stone foundation therefor, where the macadamizing on a stone foundation, permitted to remain intact, was completely removed and relaid, it was reconstructed within the statute, and not merely repaired, and hence a division of the street into sections was not necessary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1017; Dec. Dig. § 414.*]

3. MUNICIPAL CORPORATIONS (§ 444*) — STREET IMPROVEMENTS.

Under Ann. St. 1906, § 5859, providing that contracts for street paving, etc., shall be let to the lowest bidder on plans and specifications filed therefor with the city clerk by the city engineer, it is an essential prerequisite to a valid assessment that the plans and specifications be on file when the contract is let.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1064; Dec. Dig. § 444.*]

4. MUNICIPAL CORPORATIONS (§ 538*)—STREET IMPROVEMENTS.

In the absence of evidence to the contrary, the presumption obtains that plans and specifications for street paving, etc., were on file with the city clerk when the contract was let, as required by Ann. St. 1906, § 5859, and the burden is on one seeking to restrain the enforcement of tax bills issued in payment for the work to remove the presumption.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 538.*]

5. MUNICIPAL CORPORATIONS (§ 538*)—STREET IMPROVEMENTS.

In an action to restrain the enforcement of tax bills issued for street paving, testimony of plaintiff's attorney that he asked the city clerk for the plans and specifications of the work, and was told that none were on file, was insufficient to show that they were not on file at the time of letting the contract, as required by Ann. St. 1906, § 5859, the resolution declaring the improvement proper referring to them as though then on file, and it not appearing when witness asked for them.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 538.*]

6. TRIAL (§ 105*)—EQUITY CASE—HEARSAY EVIDENCE.

In an equity case, the court may disregard hearsay evidence, though it was admitted without objection.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 105.*]

7. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding of the trial court on conflicting evidence will be sustained on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from Circuit Court, Greene County. Bill by George H. Jones and others against E. Plummer. From a judgment dismissing the bill, plaintiffs appeal. *Affirmed*.

J. P. McCammon and L. M. Haydon, for appellants. W. D. Tatlow and Barbour & McDavid, for respondent.

NORTONI, J. This is a suit in equity seeking to enjoin the enforcement of certain special tax bills issued against the property of the various plaintiffs by the council of the city of Springfield. Upon a hearing the court denied the relief and dismissed the bill. Plaintiffs prosecute the appeal. The special tax bills were issued in payment for the reconstruction of the macadamizing on Jefferson street. Plaintiffs seek to enjoin their enforcement, first, on the ground that the taxes therein evidenced are invalid, for the reason the levy was made for reconstructing the macadamizing mentioned, when, in truth and in fact, the street was only repaired. All of the proceedings had in the city council pertain to reconstructing the macadamizing on Jefferson street; that is to say, the resolution declaring the same necessary and the ordinances pertaining to the matter treat the improvement as reconstruction, and the taxes are assessed in accordance with the statute for such reconstruction. The same statute (section 5858, Rev. St. 1899 [Ann. St. 1906, p. 2962]), however, provides that the city council shall have power to repair the macadamizing on any street and assess the same against the adjoining properties as therein indicated. In cases of repair to macadamizing on a street, however, the same statute requires the street to be divided into sections, a section being the distance from the center of one cross or intersecting street to the center of the next cross or intersecting street, and the cost in each section shall be assessed on the lots or tracts of land fronting on either side of that section. It appears the street was not so divided into sections, and it is therefore argued that, as the improvement was a repair rather than a reconstruction, the tax bills should be enjoined for the reason in proceedings in invitum the statutory requirements in respect to all precedent matters must be strictly complied with. It appears from the evidence that Jefferson street was constructed in 1902. At this time a stone foundation of about eight or ten inches in depth was securely laid. On top of this there were several inches of macadam. That is to say, several inches of gravel, wetted and smoothly rolled, was placed on this foundation, bringing the same to a level of the grade of the street. By user the gravel or macadamizing had been worn out. The gravel had nearly all disappeared. The street was in this condition at the time the city council passed the resolution declaring it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

necessary to reconstruct the macadamizing thereof. This resolution, after so declaring, proceeds to direct that the street should first be cleared of all dirt, vegetable, and perishable matter, after which the same should be thoroughly spiked up and loosened, the surface of the street to be thoroughly harrowed and raked, lumps thereon to be taken out and depressions filled, so that the surface should be practically smooth and parallel with the grade of the street. It then provides that, after this is done, a layer of the best quality of river gravel shall be laid thereon, thoroughly wetted and rolled smooth, which shall be of sufficient depth on top of the foundation to bring the street to a level with the true grade thereof. It is required that no gravel shall be employed the diameter of which exceeds $2\frac{1}{2}$ inches. It appears the street was thus remacadamized in accordance with this resolution.

The argument that the improvement was a repair rather than a reconstruction of the macadamizing proceeds from the fact that the stone foundation which was laid in the street in the improvement of 1902 was left intact, and not disturbed in the present improvement. That is to say, the coat of macadam provided for and placed upon the street in the present improvement was placed on the old foundation after removing all of the former coat thereof without rebuilding the foundation. It does appear that in a few places where the stone foundation was slightly sunken the same was brought to a level by filling in with such gravel as exceeded the dimensions to be used in macadamizing. Now this argument, when interpreted in the light of our statute on the subject, involves the idea that there must be a stone foundation under the macadamizing in order to render the work done macadamizing. Such is a false premise. The Standard Dictionary says to "macadamize" is "to cover or pave, as a path or roadway, with small broken stone, on either a soft or a hard substratum." It appears from this the layer of small stones may be either on a hard or soft foundation. Certainly the mere employment of the word "macadamizing" does not essentially involve the idea of constructing a new stone foundation therefor. Judicially speaking, "the word 'macadamizing' has a fixed and definite meaning and refers not only to the kind of material to be used in covering the street or road, but also the manner in which it is to be laid. It means to cover a street or road by a process introduced by Macadam which consists of the use of small stones of a uniform size, consolidated and levelled by heavy rollers." *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082, 1083. (The italics are ours.) It appears, then, that, even though the old foundation in the street was not reconstructed, the macadamizing thereon, being completely removed and relaid, was reconstructed within the meaning of the law. The city of Springfield is a city of the third class. Section 5858, Rev.

St. 1899 (Ann. St. 1906, p. 2962), is parcel of its charter. This section empowers such cities, among other things, to pass ordinances to "reconstruct any macadamizing" on any of its streets, etc., and to pay the cost of macadamizing such streets by levying special assessments on all lots or tracts of land fronting or abutting on either side of such streets. This section confers complete authority upon the city to reconstruct the macadamizing on any of its streets and to assess the adjoining property for the improvement identically as was done in this case. The ordinances and all of the proceedings in respect of the improvement proceeded upon the theory that the work was that of reconstruction of the macadamizing on Jefferson street. Now, if the macadamizing involved the building of a substratum or foundation to sustain the macadam, then, of course, the work in the present instance would be a repair rather than a reconstruction of the macadamizing. But it appearing that to macadamize is to lay and roll a stratum of small stones on any substratum or foundation, whether soft or hard, the macadamizing alone is completely reconstructed by wholly renewing the same upon a former foundation which was permitted to remain intact.

It is argued the court erred in not sustaining the injunction for the reason it appears the city engineer had omitted to file plans and specifications for the reconstruction work with the city clerk prior to the time of letting the contract to the defendant Plummer. If such fact conclusively appeared in the case, the argument would indeed be persuasive, for the statute (section 5859, p. 2967) provides that the work shall be let to the lowest and best bidder on plans and specifications filed therefor with the city clerk by the city engineer, etc. Now, it is important indeed and essential for such plans and specifications to be on file with the clerk, as directed by the statute. This to the end that bidders may have an opportunity to examine this data for the purpose of intelligent, competitive bidding, all of which is presumed to inure to the benefit of the adjacent owner whose property is to be taxed on account of the improvement. It is an essential prerequisite to the power to make a valid assessment that the plans and specifications referred to should be on file with the city clerk at the time of letting the contract. If they are not thus on file, the tax bills thereafter issued in payment of the work will be invalid. *City of De Soto ex rel. v. Showman*, 100 Mo. App. 323, 73 S. W. 257; *Barber Asphalt, etc., Co. v. O'Brien*, 128 Mo. App. 267, 107 S. W. 25. In the absence of anything appearing to the contrary, the presumption which attends the regularity of official conduct generally obtains to the extent of supplying the fact that such plans and specifications were properly on file with the city clerk. Indeed, it is provided by the statute (section 5859) that the tax bills themselves shall in any action there-

on be prima facie evidence of the regularity of the proceedings for such special assessment, of the validity of the bills, of the doing of the work, and of the furnishing of materials charged therefor, and of the liability of the property to the charge stated in the bills. It is true this is not an action on the tax bills, but, instead, it is one seeking to cancel their apparent obligation and to restrain their enforcement. However this may be, the presumption referred to obtains to the effect that the plans and specifications were on file with the city clerk, and the burden rests upon the plaintiffs here to remove that presumption by introducing competent proof to the contrary. *City of Excelsior Springs ex rel. v. Ettenson*, 120 Mo. App. 215, 98 S. W. 701. There is no evidence whatever in the record tending to prove that the plans and specifications referred to were not on file with the city clerk at the time of letting the contract for the improvement. Mr. McCammon is the only witness who testified touching the matter. All of the evidence to be found in the record thereon is as follows: "I am one of the attorneys in the case, and I went to the city clerk and asked for copies of all the papers on file in his office in relation to this Jefferson street paving in controversy, and particularly asked for the plans and specifications, but was informed there were no plans and specifications on file in his office." Conceding all that is said by Mr. McCammon on this matter to be true, it does not appear therefrom that such plans and specifications were not on file at the time the contract for the improvement was let. In fact, it does not appear at what time the witness called upon the city clerk with respect to the matter mentioned. It may have been at the time of letting the contract, or it may have been long after the improvement was made and the tax bills issued. It is to be inferred that the inquiry was made while the attorney was making an investigation as to the propriety of instituting this suit. At any rate, it is incumbent upon the plaintiffs to show that no plans and specifications were on file with the city clerk at the time the contract was let, and there is nothing in the evidence of Mr. McCammon which tends to prove that fact. They may have been on file then and afterwards lost or mislaid. Aside from this, the witness does not purport to testify from his personal knowledge of the matter, but rather gives evidence to the effect that the city clerk informed him there were no plans and specifications on file in his office. This evidence is the merest hearsay, and although it was introduced at the trial without objection, the case being in equity, it could be properly disregarded by the court, and no doubt was. Aside from the presumption that the plans and specifications were on file with the clerk, the resolution declaring the improvement necessary refers thereto as

though they were as a matter of fact then on file. It is said in the resolution the improvement shall be done in accordance with the plans and specifications and estimates of the city engineer now on file in the office of the city clerk. Of course, this resolution may not be conclusive on the matter. However that may be, it recites that they were on file at that time, which, of course, was some time prior to the date of letting the contract, and, in the absence of evidence to the contrary, it is to be presumed they were on file at the time required by the statute. The evidence introduced on this matter was wholly insufficient to overcome the presumption of law to the contrary.

There is much said pro and con in the evidence on the issue as to whether or not the work of reconstructing the macadamizing was done in accordance with the requirements of the contract. There is abundance of evidence to support a finding either way on the subject. In view of this fact, we defer to the judgment of the trial court thereon.

Finding no reversible error in the record, the judgment will be affirmed. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

JOHNSON v. LUMBER INS. CO. OF NEW YORK.

(St. Louis Court of Appeals. Missouri. April 6, 1909.)

1. INSURANCE (§ 538*) — FIRE INSURANCE — PROOF OF LOSS.

Where a policy specified no particular place where or person to whom proof of loss should be delivered, but merely stipulated that proof should be rendered to insurer in 60 days after loss, proof of loss, executed by insured, and left with an agent possessing power to adjust losses, was received by insurer.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1327; Dec. Dig. § 538.*]

2. INSURANCE (§ 560*)—FIRE INSURANCE—PROOF OF LOSS—OBJECTIONS.

An insurer, dissatisfied with the proof of loss furnished by insured, must notify insured of the objections, and afford him an opportunity to make corrections, provided enough time is left in which proof is to be furnished for notice to be given.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1398-1401; Dec. Dig. § 560.*]

3. INSURANCE (§ 561*) — FIRE INSURANCE — PROOF OF LOSS—OBJECTIONS.

Where the authorized agent of insurer adjusts the loss, makes out and approves the proof of loss, and assures insured that the adjustment is ended, and that the loss will be paid at once, the insurer who omits to inform insured of defects is estopped from asserting that the proof of loss is unsatisfactory.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1408-1409; Dec. Dig. § 561.*]

4. INSURANCE (§ 561*) — FIRE INSURANCE — PROOF OF LOSS — OBJECTIONS.

Insurer, in a policy stipulating for the payment of the loss 60 days after proof of loss,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

never advised insured that proof of loss, prepared by an adjuster appointed by it, and approved by its agent possessing power to adjust losses, was insufficient, and it demanded the performance of acts not authorized by the policy, and without specifying objections to the proof, and later demanded that insured withdraw the proof of loss on pain of being called on to undergo an examination and produce books and papers. The latter demand was not made until more than 60 days after the proof of loss had been turned over to it. The adjuster of the insurer and an agent of insurer might have availed themselves of an examination of insured while adjusting the loss. *Held*, that insurer was estopped from relying on the insufficiency of the proof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1406-1409; Dec. Dig. § 561.*]

5. INSURANCE (§ 548*) — FIRE INSURANCE — PROOF OF LOSS — EXAMINATION OF INSURED.

Where a fire insurance policy is an Illinois contract, Rev. St. 1899, § 7976 (Ann. St. 1906, p. 8792), requiring the examination of insured for the adjustment of a loss to be conducted where the loss occurred, will not be applied.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 548.*]

Appeal from Circuit Court, Montgomery County; Jas. D. Barnett, Judge.

Action by H. W. Johnson against the Lumber Insurance Company of New York. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Plaintiff's action is on an insurance policy, and sues as assignee of the Fullerton-Powell Hardwood Lumber Company, the insured. The policy covered a stock of hardwood lumber at Mt. Vernon, Ill., and ran a year from March 8, 1907. It was issued from the office of W. T. Campbell, who was defendant's general agent in St. Louis for the state of Missouri, with "full power to receive proposals for fire insurance, to fix rates of premium, to countersign, issue and renew policies of insurance, signed by the president and secretary of the above-named company [Lumber Insurance Company of New York] subject to the rules and regulations of said company and such instructions as may from time to time be given by the officers and general agency of said company." He had power likewise to issue policies on property located in eight other states, including Illinois, by obtaining prior authority from the New York agents of defendant, who were styled "Lumber Insurers' General Agency," and the course of business between Campbell and defendant permitted him to adjust losses in the territory. He had adjusted the loss caused by a small fire in the Mt. Vernon yards of the Fullerton-Powell Company three weeks before the large fire which led to this action, and his adjustment was accepted by the company, and the money paid. The policy in suit was originally for \$10,000, but the payment of the first loss reduced it to \$9,907.50. Three other companies carried insurance on the stock, including the Adirondack Fire Insurance

Company. The loss in controversy was by a fire which occurred April 28, 1907, and was supposed to be of incendiary origin, probably set by tramp intruders in a freight car near the yards. Campbell was notified of the fire by the insured; and, as there had been several incendiary fires in Mt. Vernon, he promptly took steps to have the loss ascertained, with a view to paying it and canceling all policies held in the town by companies he represented. An experienced adjuster by the name of Lowe was directed by him to repair to Mt. Vernon and adjust the loss. Lowe went there; met the Fullerton-Powell people; made a full investigation; was furnished all the information he desired; agreed with them regarding the amount of the damage, and prepared a proof of loss which Powell, the vice president of the company, accepted and signed. As this proof was comprehensive, and in the usual form of such documents, it need not be copied. It stated the entire cash value of the hardwood lumber in the yard at the time of the fire was \$24,500, whole loss \$3,593.73, total insurance \$19,815, amount of defendant's insurance \$9,907.50, and amount due the insured under its policy \$1,797.87. The balance of the loss was apportioned among the Adirondack, Eastern, and National Lumber Insurance Companies. Two of them paid in accordance with Lowe's adjustment, but defendant and the Adirondack company did not. The proof of loss was signed May 2d by Powell, who accompanied Lowe to St. Louis, at Campbell's office, and was sent by the latter to the general agency in New York May 4th. Campbell had introduced Lowe to Powell as the man who would adjust the loss for the insurance companies, saying the adjustment would no doubt be satisfactory, the loss settled, and that would be the end of the trouble. After signing the proof Powell asked Campbell if there was anything further to be done, remarking his yard had been closed down since the fire; he had laid off from his duties; his employees were idle and drawing salaries; he had cars of lumber coming in, and wanted the matter absolutely settled and the adjustment ended, so he could resume business. Campbell told him nothing more was required, that the adjustment was complete, and he would get his money, asking whether he wanted to be paid in 60 days, or discount the claim 1 per cent. for cash. Powell, according to his expression, desired to get cleaned up and go ahead with his business, and hence agreed to the discount. In transmitting the proof of loss to the New York agency of the company Campbell wrote he had had the loss adjusted by Lowe, and the reason why, and that he would immediately cancel defendant's policy on the yard. On May 14th, or 10 days later, he received a telegram from the New York office asking him to wire the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Fullerton-Powell people to instruct their Mt. Vernon office to furnish defendant's special agent Lightner certain requested information, as he had been sent there to verify the adjustment. In point of fact this man Lightner had been instructed to take an inventory of the stock of the Fullerton-Powell Company, and on arriving at Mt. Vernon had demanded of the foreman of the yard permission to take an inventory and see the books. The foreman told him the books were not kept there, but at the main headquarters of the company in South Bend, Ind., and as to an inventory it would have to be authorized by the officers of the company. This incident led to the telegram to Campbell, wherein the latter was asked to induce the Fullerton-Powell company to permit Lightner to take an inventory. Campbell communicated with Powell, and persuaded the latter to come to St. Louis and meet Lightner. In a letter of date May 17th defendant's secretary informed Campbell they wanted Lightner to inventory the stock because the adjustment stated the sound values in round numbers, instead of listing the kinds of lumber, and defendant wished Lightner to correct this, and to look over the stock to enable defendant to determine whether it would reinsure the property. When Powell, Lightner, and Campbell met in St. Louis, Powell furnished all the information he could, stating he could only estimate the value of the yard stock at the time of the fire, but could do so within a few hundred dollars. This was two weeks after the fire, and Powell declined Lightner's request to inventory the stock. Nothing more was done until May 27th, when defendant's secretary wrote Campbell, complaining the proof of loss had been prepared carelessly, Lightner refused access to the yard, every impediment thrown in the way of defendant's obtaining information, and that the value of the stock was vastly in excess of what the insured stated in the proof. The letter asked Campbell to procure from the Fullerton-Powell Company an exact statement of the quantity of lumber in the yard at the time of the fire, and the different kinds and grades—in other words, a detailed schedule—also the amount the stock had been increased or decreased in the two weeks succeeding the fire. On the same day Campbell wrote defendant's general agency in New York the other companies which carried policies on the risk had paid the insured, and asked why defendant had not sent a draft for its part, as Powell had agreed to take a discount for cash. The New York office answered the proof of loss was inaccurate, and defendant was awaiting the further information asked for in its letter of the 27th. Campbell then wrote under date of June 6th, saying his letter of the 15th had covered the ground called for in defendant's letter of May 27th; that it was

only fair to look at the matter from the standpoint of the insured, and the request he was asked to prefer would be embarrassing, explaining that Lightner went to Mt. Vernon without notice being given in advance, and as the adjustment had been made, the Fullerton-Powell people were non-plussed, and, moreover, no one but the foreman of the yard was there at the time, further saying Powell had afterwards met Lightner by Campbell's arrangement in St. Louis, and given what information he could regarding the value of the yard stock at the time of the fire, and that, when Campbell made the adjustment of the first loss, he had approximated the value of the stock. On June 11th the secretary wrote Campbell defendant could see no reason why the policy holder should be embarrassed by a request for a sworn statement of the sound value of the stock, and defendant would consider the matter of further insurance after the loss was settled. Campbell testified he could not remember the substance of the conversation he had with Powell in relation to the information defendant requested; could not remember just what happened. On June 20th the New York agency telegraphed Campbell that, unless the Fullerton-Powell people would withdraw the proof of loss, defendant would proceed in accordance with lines 82, 83, and 84 of the policy; i. e., would require the insured to submit to an examination under oath, and produce books and papers to be inspected by the company; that defendant would allow until Saturday night for a withdrawal of the proof. Campbell communicated the substance of this telegram to a man named Kremer in Chicago, whose only connection with the loss, so far as was shown, was this: He was an experienced lumberman, and had settled losses with insurance companies, and so Powell asked him to be present when the adjustment was made. On June 22d Campbell wired the New York office the insured refused to withdraw the proof of loss. On June 28th the New York agency wrote the insured to its address in South Bend, Ind., that defendant demanded an examination of the officers, agents, and employees of the company under the terms of lines 82, 83, 84, and 85 of the policy; also an examination of all books of account, bills, invoices, and other vouchers, and permission to take extracts and copies thereof, designating the place of examination as South Bend, Ind., the date as July 5, 1907, and designating Alpheus H. Favour as the person who would conduct the affair. On July 6th Favour arrived at South Bend, and served a written demand on Powell of the tenor of the letter just mentioned. Powell refused to grant the examination, and his refusal at this time and previously, as defendant asserts, is relied on in defense of.

the present action; defendant insisting it was wronged because a thorough examination would have shown the stock in the yards was so large when the fire occurred that plaintiff was bound, under a term of the policy, to bear part of the loss itself. The clause of the policy supposed to have been violated reads: "(81) The insured, as often as required, shall exhibit to any person designated by this company, all that remains of any property (82) herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and (83) as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies (84) thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall (85) permit extracts and copies thereof to be made." We have recited the substance of all the material facts. The case was submitted to the jury under instructions which need not be recited, a verdict was returned for plaintiff, and defendant took this appeal.

E. S. Wilson, C. R. Ball, and Jno. J. McKelvey, for appellant. Barclay & Fauntleroy and Walter H. Saunders, for respondent.

GOODE, J. (after stating the facts as above). The policy specified no particular place where, or person to whom, the proof of loss should be delivered, but merely said proof should be rendered to the company in 60 days after the fire. Hence, when the proof of loss was executed by Powell, and left with Campbell on May 2d, it was received by the company in the meaning of the policy. *McCullough v. Ins. Co.*, 113 Mo. 606, 614, 21 S. W. 207. The right of the insured to be paid the stipulated indemnity did not accrue until 60 days after the notice, ascertainment, estimate, and satisfactory proof of the loss thereunder (i. e., the policy) had been received by the company. If an insurance company is dissatisfied with the proof of a loss furnished by the insured, he must be notified of the company's objection, and afforded an opportunity to make corrections, if enough is left of the period in which proof is to be furnished for notice to be given. *Probst v. Ins. Co.*, 64 Mo. App. 408; *De Land v. Ins. Co.*, 68 Mo. App. 277. The company will not be heard to say the proof was unsatisfactory if it omits to inform the insured of defects so he may cure them; and especially is it precluded when its empowered agent adjusts the loss, makes out and approves the proof, and assures the insured, in the most positive terms, the adjustment is ended, and his loss will be paid at once, as happened in the instance at bar. *McCullough v. Ins. Co.*, 113 Mo., loc. cit. 615, 21 S. W. 207. Defendant never advised the Fullerton-Powell Company the proof prepared by Lowe and approved by Campbell was

unsatisfactory. Instead of doing this defendant pursued a course outside its rights under the contract. It first demanded the privilege of inventorying the stock in the yard, an act not authorized in the policy; next asked Campbell to get an exact statement from the insured of the quantity, grades, and kinds of lumber on hand when the fire happened, a request which, if Campbell preferred it, was not a demand for an examination according to the policy (*Dougherty v. Ins. Co.*, 87 Mo. App. 526), and, moreover, there was no evidence Campbell preferred it, for he was relied on to prove the fact, and could not remember. Finally, the company, without specifying objections to the proof of loss, demanded the insured withdraw it on pain of being called on to undergo an examination and produce books and papers. The demand for withdrawal was arbitrary, and defendant must be taken, under all the circumstances in proof, to have been given a satisfactory proof of loss on May 2d, so as to make the indemnity accrue 60 days later, on July 2d.

The facts we have recapitulated derive additional force from the further fact that Powell went to St. Louis at Campbell's request to confer with defendant's agent Lightner, and there furnished the latter all the information at hand, and, as far as appears, all Lightner wanted, regarding the value of the stock on hand when the fire occurred and the increase and diminution of it later; for Lightner, no more than Lowe, asked for an examination under oath. What defendant had been insisting on was an inventory of the stock, partly in order to verify the statement in the proof prepared by Lowe of the quantity of lumber on hand at the date of the fire, and partly as a means of determining whether or not it would write another risk on the stock, and so far the insured had rejected no demand by the company which was within the contract. On May 27th, about a month after the fire, defendant wrote Campbell to make a second and different demand, already mentioned and disposed of, to wit, for an exact statement of the quantity of lumber in the yard when the fire occurred, its kinds, grades, and quantity, and the extent of its diminution and increase in the two weeks following the fire. On June 11th the first mention of a sworn statement occurred in a letter from the secretary to Campbell, but no time or date was fixed for this, or demand made within the terms of the policy. *Dougherty v. Ins. Co.*, supra. Defendant then took a third position, and notified Campbell defendant would demand a personal examination under oath and production of the books and papers, in accordance with one of the provisions of the policy, unless the insured would withdraw the proof of loss, and that until the following Saturday would be allowed for withdrawal. The insured having refused to withdraw the proof of loss, on May 28th, two months after the

fire, defendant notified him, for the first time, the company asked for an examination under oath, and the production of the books and papers. This notice was given by a letter written from New York, but the actual demand was not made until July 5th, or more than 60 days after the proof of loss had been turned over to defendant, and when its liability had accrued. We think it is unnecessary to determine whether the aforesaid stipulation of the policy should be held, when construed in connection with other clauses, to call for an examination prior to the adjustment of the loss, or whether Campbell's unequivocal promise to pay at once and take a discount bound the company. All the authorities cited in support of the proposition that refusal of the insured to submit to an examination works a forfeiture of his rights under the policy are distinguishable from the present case in one or more important particulars: Either the refusal held to defeat recovery was for an examination demanded first, before the proof of loss was made and any subsequent delay occurred from the misconduct of the insured, as in *Vleisch v. Ins. Co.*, 58 Mo. App. 596, or the proof was prepared by the insured and sent to the company, and was not in the nature of an adjustment of the loss by an accredited agent of the company. In the present instance the proof was prepared for Powell's signature by an adjuster appointed by defendant, after an investigation of all the facts to his own satisfaction, was approved by Campbell, an agent of quite general powers, including power to adjust losses, and was then executed by Powell. We do not say these circumstances would necessarily preclude a company from demanding an examination if the company believed mistake or fraud had occurred in the adjustment, but neither is pleaded. But a demand to examine under oath must be reasonable as to place and time. 4 Cooley, *Ins. Briefs*, 3395; *Vleisch v. Ins. Co.*, supra; *Murphy v. Ins. Co.*, 61 Mo. App. 323; *Am. Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98. Defendant's demand was entirely unreasonable, in view of the facts that Lowe might have availed himself of an examination while adjusting the loss, and Lightner might have demanded one when Powell, at his own expense, met him in St. Louis; that formal demand was not made until, under the terms of the policy, it was the duty of defendant to pay the loss if there had happened no exonerating breach of the contract by the insured, and none is alleged. To allow the company to stave off payment by taking time for investigation after liability had accrued would abrogate the policy holder's right to be paid 60 days after satisfactory proof of loss was received by the company. *Ætna Ins. Co. v. Schacklett* (Tex.) 57 S. W. 583. As this contract appears to be an Illinois one, we have not applied our

statute, which requires examinations to be conducted where the loss occurred. Rev. St. 1899, § 7976 (Ann. St. 1903, p. 3792).

The judgment is affirmed. All concur.

VAN CLEVE v. ST. LOUIS, M. & S. E. RY. CO.

(St. Louis Court of Appeals. Missouri. April 6, 1909.)

1. CARRIERS (§ 308*)—DUTY AS TO PASSENGERS ALIGHTING FROM TRAIN—PERSONAL INJURIES—NEGLIGENCE.

It is the duty of a railroad to exercise high care for the safety of a passenger alighting from a train; and to back the car while the passenger is alighting, without waiting a reasonable time, is actionable negligence, if injury results.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1228, 1228½; Dec. Dig. § 303.*]

2. CARRIERS (§ 321*)—INJURIES TO PASSENGER ALIGHTING FROM TRAIN—NEGLIGENCE—ISSUES—INSTRUCTIONS.

Where the petition alleged that, while plaintiff, a passenger, was alighting from defendant railroad's car, it was negligently jerked and backed, thereby causing plaintiff to "fall against the depot platform," etc., an instruction authorizing a recovery if because of defendant's negligent act plaintiff was injured was not erroneous in failing to require a finding that plaintiff fell against the platform; it being immaterial whether she fell against the platform or the earth.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

3. APPEAL AND ERROR (§ 1097*)—LAW OF CASE—INSTRUCTIONS ON FORMER APPEAL.

An instruction approved by the court on appeal is the law of the case on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4358; Dec. Dig. § 1097.*]

4. APPEAL AND ERROR (§ 204*)—EVIDENCE—OBJECTIONS IN TRIAL COURT.

An assignment that the court erred in admitting certain testimony will be overruled, where no objection or exception was made at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

5. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where plaintiff, a strong, healthy woman 36 years old, received permanent injuries, developing tuberculosis, and was in an advanced stage thereof at the time of the trial, suffered great pain, became worn and emaciated, and paid from \$200 to \$300 for medicines and medical aid and attention, a verdict for \$4,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 132.*]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by Susie Van Cleve against the St. Louis, Memphis & Southeastern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

For former appeal, see 124 Mo. App. 224, 101 S. W. 632.

W. F. Evans and Moses Whybark, for appellant. Duncan & Bragg, Ward & Collins, and J. S. Gossom, for respondent.

NORTONI, J. This is a suit for damages alleged to have accrued to the plaintiff for personal injuries received by her while a passenger alighting from defendant's train. Plaintiff recovered, and defendant prosecutes the appeal.

The evidence tends to prove the plaintiff was a passenger on the defendant's mixed train. She boarded the train at Yarbrow, Ark., destined to Caruthersville, Mo., and paid the usual fare to the conductor. She was injured while in the act of alighting from the defendant's passenger coach at the depot at Caruthersville, because of a sudden jerk of the train, which precipitated her from the steps of the coach against the depot platform. It appears the train had stopped at the defendant's depot at Caruthersville, and the defendant's conductor and brakeman in charge thereof had invited the passengers to alight therefrom. The date of the injury was November 19th. Rain had fallen during the day, and by reason thereof mud had accumulated on the steps of the passenger coach from the shoes of those passing in and out. This had slightly frozen and was slippery. While plaintiff was in the act of alighting from the passenger coach, with her grip in her hand, and while she was upon the steps thereof, the train was suddenly jerked by a movement of the locomotive, which caused her to slip on the mud and ice accumulated on the car steps and fall, striking her breast against the platform of the depot, her limbs passing down between the depot platform and the car steps. She was immediately taken up by bystanders and carried into the depot waiting room, where she had a hemorrhage from the lungs. Afterwards she was carried to the hotel at Caruthersville, where she was confined to her bed for about eight days, and suffered frequent recurring hemorrhages. It appears that four or five weeks elapsed before she was able to perform any kind of service, and then she could only do a slight amount of housework each day. From the testimony of the physician who attended her it appears the fifth rib on the left side was broken near the breastbone, and probably inflicted an injury to the left lung. Numerous witnesses gave testimony to the effect that prior to her injury plaintiff was a strong, robust woman, in good health, of about 158 pounds in weight, and that she had never had a hemorrhage of the lungs prior to that time. It appears she had continued to suffer ever since the injury from hemorrhages of the lungs, and had depreciated from 158 to 130 pounds in weight; that tuberculosis of the lungs set in immediately after the injury, and has continued ever since. If the testimony of her witnesses, together with the inferences aris-

ing therefrom, are to be taken as true, plaintiff has been a great and continued sufferer since she was injured, and is now far advanced in the throes of consumption, resulting from a traumatic injury to the lung received from her fall against the depot platform. There was evidence on the part of the defendant that the train was not jerked or started at all while plaintiff was in the act of alighting therefrom, and that she received her fall from no other cause than slipping on the steps of the coach, or an accident. There was also expert testimony on the part of defendant to the effect that the plaintiff was not afflicted with consumption, and one witness said she had stated to him that she had had hemorrhages even prior to the time of her injury. However this may be, all of the testimony on either side tends to show the fall and resultant injury while in the act of passing from the defendant's coach to the defendant's depot platform, and that she was seized immediately with a hemorrhage of the lungs while in the waiting room of the depot. And, further, that she has continued to suffer from like hemorrhages ever since.

The first instruction given by the court on the part of the plaintiff is as follows: "The court instructs the jury that, if you find and believe from the evidence in this case that when the train upon which the plaintiff was a passenger arrived at the depot of defendant at Caruthersville, Mo., that it came to a stop or was at rest at said depot, and the employes of the defendant requested the passengers thereon to alight therefrom, and thereupon within a reasonable length of time the plaintiff attempted, without negligence on her part in so doing, as defined in the instructions, to alight from said train, and that while attempting to alight from said train, said train and cars were suddenly jerked by the negligent act or careless conduct of those in charge of said train, without having given a reasonable length of time for plaintiff to alight from said car of said train, and that in consequence of such negligence of defendant's employes in suddenly jerking or moving said train, the plaintiff, without negligence on her part, directly contributing thereto, was injured, you will find for the plaintiff in a sum not exceeding \$15,000." The principal argument for a reversal is that this instruction broadens the issues in the case, and permits a recovery on the part of the plaintiff on a matter not alleged in the petition. The petition alleges, in substance, that while the plaintiff was on the steps of the car, and in the act of alighting from the train, the car was negligently jerked and backed, thereby causing her to slip on the accumulated mud and ice on the steps thereof, and "fall to and against the said depot platform," etc. The particular point made against the instruction is that it does not require the jury to find that she

fell against the depot platform. There is certainly no merit in this argument. The gravamen of the case is the negligent act of the defendant in jerking and backing the car while plaintiff was in the act of alighting therefrom. It was the duty of the defendant to exercise high care for the plaintiff's safety until she was safely on the depot platform. To jerk or back the car while she was in the act of alighting therefrom, and without waiting a reasonable time for her to alight, was a breach of its obligation in that behalf, and actionable negligence if an injury resulted. *Canaday v. United Railways Co.* (Mo. App.) 114 S. W. 88. And such is the negligence relied upon in the petition. This negligent act of the defendant is the element which affixes liability against it. It is not what she did or did not fall against. It is immaterial whether she was precipitated against the depot platform or the earth. If plaintiff was precipitated to either by the negligent act of jerking or moving the car while she was in the act of alighting, the defendant is liable to respond for her injury. All of the witnesses on either side of the case who were present at the time testified to the same effect—that is, that the plaintiff fell against the platform—and the jury could not have found otherwise. Aside from this, it is sufficient to say on this appeal that the identical instruction was approved by this court in this case, between the same parties, on a former appeal. See *Van Cleve v. St. L. M. & S. E. Ry. Co.*, 124 Mo. App. 224, 233, 101 S. W. 632. Having been approved, the matter is now *res adjudicata*, and it remains the law of this case thereafter. *Feurt, Ex'r, v. Ambrose*, 34 Mo. App. 360; *Hombs v. Corbin*, 34 Mo. App. 393; *Shoninger v. Day*, 61 Mo. App. 366.

In rebuttal to certain expert testimony introduced by the defendant the plaintiff placed upon the stand two physicians, and examined them quite generally touching the disease of consumption. It is now argued that the court erred in permitting plaintiff to examine these physicians on the disease of tuberculosis in rebuttal. Without more it is sufficient to say of this assignment that no objection or exception whatever was made thereto by the learned counsel for defendant in the trial of the cause. And, further, it appears he fully and freely participated therein. The assignment will be overruled.

The jury awarded plaintiff a verdict of \$5,000. Upon the hearing of the motion for a new trial plaintiff voluntarily entered a remittitur to the extent of \$500, and the court entered judgment for plaintiff for \$4,500. We are asked to set aside this verdict on the ground that it is excessive. Besides the facts heretofore recited touching the injury, and that it resulted in entailing or developing consumption from a latent germ in the system, the evidence tended to show

the plaintiff was a woman 36 years of age at the time of her injury, enjoying good health and strength. It appears she has paid between \$200 and \$300 for medicines and medical aid and attention. She is now worn and emaciated, has suffered, and continues to suffer, great pain, and is now in a well-advanced stage of tuberculosis. Her injuries are permanent, of course. It is immaterial what the testimony on the part of the defendant may show. The question was for the jury. If the jury believed the plaintiff and her witnesses, as it evidently did, the verdict is not at all excessive. There is certainly nothing in the record to indicate that the verdict was the result of either passion, prejudice, or misconduct. In view of these facts, the verdict is certainly not excessive.

The judgment will therefore be affirmed. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

CHICAGO CRAYON CO. v. McNAMARA et al.

(Kansas City Court of Appeals. Missouri.
March 29, 1909. On Rehearing,
April 19, 1909.)

1. MASTER AND SERVANT (§ 3*)—CONTRACT OF EMPLOYMENT—CONSTRUCTION.

A contract of employment, binding the employé to act as district manager for the employer for a specified commission, out of which he must pay his subagents and defray the expenses of himself and subagents, and requiring the employer to make advancement if the employé had not sufficient funds of his own to carry on the business of his agents, binds the employé to return advancements made by the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 3.*]

2. PRINCIPAL AND SURETY (§ 59*)—CONTRACT OF SURETYSHIP—CONSTRUCTION.

A contract of a surety must be construed according to the intent of the parties, though it must be strictly construed, and though a surety is only bound to the extent of his agreement.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

3. PRINCIPAL AND SURETY (§ 59*)—CONTRACT OF SURETYSHIP—CONSTRUCTION.

Where a contract of suretyship is susceptible of two constructions, the one most favorable to the secured party should be adopted, if consistent with the object for which the bond is given.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

Appeal from Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Action by the Chicago Crayon Company against John J. McNamara and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Spencer & Landis, for appellant. Mytton & Parkinson, for respondents.

BROADDUS, P. J. This is a suit by plaintiff against J. W. Chapman, as principal, and defendants J. J. McNamara, A. J. Gordon, and D. C. Sampson, as his sureties, on his own bond, to recover the sum of \$461.84, alleged to be due plaintiff under the terms of the bond and the contract thereto attached, for money furnished Chapman while he was acting as plaintiff's agent under said contract, and for materials in his hands furnished him thereunder for which he failed to account to the plaintiff. Chapman not being a resident of the state and not being served with notice of the suit, the cause was tried against the sureties alone.

Under the contract mentioned, Chapman was to act as district manager for plaintiff in soliciting orders for frames and enlargement of portraits on his own account and through subagents. He was to receive as commission 98 cents per point, a point being \$1.98, out of which he was to pay his subagents 50 cents per point and was to defray the expenses of himself and subagents. This controversy arises over a proper construction of the following clauses of the contract, viz.: "Second party [Chapman] shall assume all responsibility for all money advanced to or collected by crew managers, solicitors, and deliverymen under his management. Second party shall not be allowed to hold or appropriate any money collected for goods by himself or deliverymen. When funds are inadequate to carry on the business, first party is expected to furnish the same from Chicago in such sums as first party deems advisable. Either party may, at any time they deem the business unsafe or unprofitable, terminate this contract by giving notice to that effect, and second party agrees, in the event of such termination, to turn over to first party the entire business and management of the same, including all subagents, orders, samples, printed matter, and everything pertaining to the business, and further agrees to permit first party to conduct and close such business and make final settlement to the best of its ability."

The conditions of the bond of the defendant sureties are as follows: "The conditions of this obligation are such that, whereas, John Ward Chapman (principal) has been appointed and has agreed to act as district manager for said Chicago Crayon Company in the state of Illinois, or such territory as may be mutually agreed upon, and is to conduct the business for and on behalf of said Chicago Crayon Company in accordance with the terms and provisions of the above contract between the said principal and said Chicago Crayon Company: Now, therefore, if the said John Ward Chapman (principal) shall faithfully perform the conditions imposed upon him by the above contract, then this obligation shall be void; otherwise, to remain in full force and effect."

The business not having proved satisfactory, it was terminated by the parties. During the course of Chapman's employment, his funds not being adequate for the purpose of carrying on the business, plaintiff made him advancements for that purpose as provided by the contract. Chapman, on the termination of his agency, turned back to plaintiff all the material, orders, etc., in his possession; but it was found that he had failed to pay back to plaintiff \$461.84 money advanced to him. The court, sitting as a jury, found and rendered judgment for defendant upon the theory that Chapman was not bound under his contract to repay said advancements, and therefore there was no breach of his contract and no liability incurred by the defendant sureties. The plaintiff appealed.

By the terms of the contract Chapman was to pay his own expenses and that of his agents in the business. No such obligation rested upon the plaintiff. And the provision that plaintiff might make advancements when he had not sufficient funds of his own to carry on the business of his agency is to be interpreted merely as that plaintiff might make a loan for that purpose, which by every rule of reasonable construction he was to pay back. Although the contract does not specifically provide that he was to return to plaintiff these advancements, it is clearly implied that he was to do so, and such was evidently the intention of the parties. If Chapman, the principal, was bound to return these advancements under his contract, defendants, as sureties, bound themselves to plaintiff that the contract in that respect should be performed.

Notwithstanding the contract of a surety must be strictly construed, and that he is only bound to the extent that he has agreed to be bound, yet his contract must be construed, like any other contract, according to the intention of the parties. It is said that "a surety has the right to stand upon the strict terms of his obligation, and is not liable unless the words make him so; but, beyond this, his undertaking must be construed, like any other contract, according to the intention of the parties." *Springfield Lighting Co. v. Hobart*, 98 Mo. App. 227, 68 S. W. 942; *Fairbank Co. v. Am. Bond & Trust Co.*, 97 Mo. App. 205, 70 S. W. 1096; *North St. Louis B. & L. Ass'n v. Obert*, 169 Mo. 507, 69 S. W. 1044. It is held that, if the contract is susceptible of two constructions, the one most favorable to the secured party should be adopted, if consistent with the object for which the bond is given. *Hurley v. Fidelity & Dep. Co.*, 95 Mo. App. 88, 68 S. W. 958. We believe the construction we have given the contract is fairly consistent with the object for which the bond was given.

As there is no dispute as to the evidence, the cause is reversed and remanded, with directions to the trial court to enter up judg-

ment for plaintiff for the amount of its demand, with interest. All concur.

On Motion for Rehearing and to Modify Opinion.

The opinion is modified, by striking out the last clause of the opinion and inserting the following words: "Cause reversed and remanded." All concur.

GLEASON v. CITY OF KIRKSVILLE.

(Kansas City Court of Appeals. Missouri. March 29, 1909. Rehearing Denied April 19, 1909.)

1. MUNICIPAL CORPORATIONS (§ 827*)—PUBLIC IMPROVEMENTS—LIABILITY.

To hold a city liable for grading a street by a fill with insufficient culverts, and thereby obstructing the flow of surface water, it is necessary to show that the work was directed by an ordinance of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 827.*]

2. NUISANCE (§ 10*)—MAINTENANCE OF NUISANCE—LIABILITY.

One not originally responsible for the erection of a nuisance is not liable for its continuance, in the absence of notice or request to abate it.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 41; Dec. Dig. § 10.*]

Error to Circuit Court, Adair County; Nat M. Shelton, Judge.

Action by William H. Gleason against the City of Kirksville. There was a judgment for defendant, and plaintiff brings error. Affirmed.

C. Knox and A. Doneghy, for plaintiff in error. Weatherby & Frank, for defendant in error.

ELLISON, J. This action is for damages alleged to have been caused by the defendant, a city of the third class, constructing a grade by a fill and insufficient culverts in one of its streets, whereby the surface water was collected and became foul and offensive, and whereby, at times of rain, it would be discharged over plaintiff's abutting property. At the close of the trial the jury was directed to find for the defendant.

There was no ordinance of the city council directing the construction of the work in the street, and plaintiff claims that it was on that ground the trial court directed a verdict. The petition alleges the work was negligently done, and plaintiff by his brief seeks to have the judgment against him reversed, and the cause remanded for trial, on the ground that in doing the work a nuisance was created and maintained by the city. But there was no ordinance alleged or shown for the work, and therefore under the ruling in this state the city is not liable for erecting or constructing the work. *Stewart v. City of Clinton*, 79 Mo. 603; *Koeppen v.*

City of Sedalia, 89 Mo. App. 648, and authorities cited in each.

But plaintiff claims that the work became a nuisance, and that it was so permitted to remain and continue, and by so doing the city became liable for maintaining a nuisance. The difficulty with plaintiff's case is that, as decided by the Supreme Court, for the continuance of a nuisance by one not originally responsible for its erection, there must be allegation and proof of a notice or request to abate it, and neither appeared in this case. *Rychlicki v. St. Louis*, 115 Mo. 662, 22 S. W. 908; *Martin v. City of St. Joseph* (decided this term) 117 S. W. 94; *Martinowsky v. Hannibal*, 35 Mo. App. 70.

So we have a case where the city was not shown to be liable for the erection of the work, and if we concede, under the line of argument advanced by plaintiff, that it is nevertheless liable for permitting a nuisance already erected to continue, then there is lacking the request to abate it. Authorities cited by plaintiff do not meet the case as presented.

The judgment is affirmed. All concur.

DE LAPP v. VAN CLOSTER.

(Kansas City Court of Appeals. Missouri. March 29, 1909. Rehearing Denied April 19, 1909.)

1. INNKEEPERS (§ 11*)—LOSS OF PROPERTY OF GUEST—LIABILITY OF INNKEEPER.

An innkeeper is liable for the loss of valuables left in his charge by his guest for safekeeping while the relation of innkeeper and guest continues.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 25; Dec. Dig. § 11.*]

2. INNKEEPERS (§ 8*)—"GUEST."

A guest is a traveler or transient comer who puts up at an inn for a lawful purpose to receive its customary lodging and entertainment (quoting Words and Phrases).

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 12, 13; Dec. Dig. § 8.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3188-3191; vol. 8, p. 7676.]

3. INNKEEPERS (§ 8*)—WHO ARE GUESTS.

Plaintiff about 1 o'clock at night registered at defendant's hotel, and was assigned to a room which he occupied until about 8 o'clock the next morning, when he went out for breakfast. In the afternoon he returned and slept in his room for a few hours, surrendering the key at supper time. *Held*, that he became a guest of the hotel when he registered and paid for his lodging, and ceased to be such when he surrendered his key and left the hotel without intention of returning.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 12, 13; Dec. Dig. § 8.*]

4. INNKEEPERS (§ 11*)—LOSS OF GUEST'S PROPERTY.

It is immaterial as affecting an innkeeper's liability for loss of a guest's property whether the guest was such upon the American or European plan.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 17, 19; Dec. Dig. § 11.*]

5. INNKEEPERS (§ 11*) — Loss of Guest's Property—Actions—Evidence.

Evidence held to show that a guest at an inn deposited money for safe-keeping until he should be ready to take a trip, and not for its security while he might be a guest at the inn, and not entitled to recover for its loss.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. § 38½; Dec. Dig. § 11.*]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Clyde B. De Lapp against John H. Van Closter. Judgment for plaintiff, and defendant appeals. Reversed.

Meservey & German and Cameron L. Orr, for appellant. Ward, Hadley & Neel, for respondent.

BROADDUS, P. J. This is an action based upon the defendant's liability as an innkeeper.

The plaintiff was a bartender in Kansas City, but was unemployed at the time of the occurrence in question. He was a married man and was living in said city. About June 10, 1907, his wife went on a visit to Indiana, and during a part of the time of her absence plaintiff stayed at night at what was known as the Centropolis Hotel, and took most of his meals there. The defendant was the lessee and proprietor of said hotel, which was conducted upon both the American and European plans; that is to say, a person stopping at the hotel could do so at so much per day for a room and meals, which is what is called the American plan, but he could also be accommodated, if he chose, by paying for a room and buying his meals at the hotel or elsewhere, to suit his taste and convenience, which is what is called the European plan. The plaintiff had to his credit in a bank in the city about \$1,500, from which he had withdrawn \$580 about the 8th or 10th of June, and carried the same upon his person until the 17th of June. It appears that he had withdrawn this money for use on a visit he contemplated making his wife in Indiana. About 1 o'clock on the night of the 16th day of June he registered at defendant's hotel, paid 50 cents, and was assigned to a room, which he took possession of and occupied until about 8 o'clock in the morning of June 17th, when his brother came to the hotel and went up to his room and awakened him. In about one hour they came down, when the plaintiff went to a desk in defendant's hotel and asked a clerk of the defendant to hand him an envelope, and, when same had been furnished, he took \$540 in bills from his pocket, and placed in it and handed it to the clerk for safe-keeping. The clerk in return gave him a slip of paper on which were written the figures and words, "6-17-07, De Lapp," and placed the package in the drawer of the desk which had a lock. Plaintiff and his brother at once left the hotel, and went out and took breakfast at the Saratoga Res-

taurant. In the afternoon plaintiff returned to the hotel and slept in his room for a few hours, but he did not stay at the hotel on the night of that day. Plaintiff stated: "I thought I might use the room the next night, but I did not stay at the hotel the next night. I surrendered the key to that room at supper time—at 6 o'clock." About three weeks afterwards, when he got ready to use the money on his contemplated trip to Indiana, he applied for his money, and it was not to be found. At the time plaintiff made the deposit of the money, a clerk of the defendant by the name of Williams was on duty, and was the person who received the package and gave in return the slip of writing mentioned. It was shown that plaintiff asked Williams to put the package in the safe kept for the security of money and other valuables, but that Williams replied that he did not have the key, that defendant had it, and that plaintiff met defendant in the hotel and called his attention to the matter, and he said that he would see to it himself. It was the custom of the hotel at about 7:30 o'clock p. m. each day to have the desk examined, and packages found in it taken out and placed in the safe. Defendant had no personal recollection of the matter, and Williams but little. He barely remembered the occurrence, and was unable to make any definite statement. The inference to be derived from the circumstances is that the money was stolen some time before the hour of 7:30 in the evening, the usual time for an examination of the desk for valuables to be placed in the safe. In fact, defendant testified that it must have disappeared between the two periods; otherwise it would have been discovered when the desk was searched for valuables, and have been placed in the safe. The judgment was for the plaintiff, and the defendant appealed. The attorneys of the respective parties have argued the cause with much ability and at great length, but, as we view it, there seem to be but two main questions for our determination. It must be conceded as a preliminary that the law is that an innkeeper is liable for the loss of valuables left in his charge by his guest for safe-keeping while the relation of innkeeper and guest continues.

The first question is: Was the plaintiff at the time he made the deposit of his money a guest of defendant's hotel. The St. Louis Court of Appeals defines a guest as follows: "A guest is a transient person, who resorts to, and is received at, an inn for the purpose of obtaining the accommodations which it purports to afford." *Overstreet v. Moser*, 88 Mo. App. 72. In some instances a guest is defined as a traveler or wayfarer. "Any one away from home receiving the accommodations of an inn as a traveler is a guest, and entitled to hold the innkeeper responsible as such. A guest is a traveler or

transient comer who puts up at an inn for a lawful purpose to receive its customary lodging and entertainment." Words and Phrases. "A guest is a traveler or wayfarer who puts up at an inn. It was said that it was not now deemed essential that a person should have come from a distance to constitute a guest. A leading case holds that distance is not material, and that a townsman or neighbor may be a traveler, and therefore a guest, as well as he who came from a distance or from a foreign country." *Curtis v. Murphy*, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242. From the foregoing we believe the rule as stated in *Overstreet v. Moser*, supra, is a proper definition of what it takes to constitute a guest, and that the testimony shows that the plaintiff was a guest of the defendant's hotel when he registered and paid for his lodging, and we think it immaterial whether he became such upon the American or European custom. It is reasonably clear that when the plaintiff surrendered the key to his room at 6 o'clock p. m. of June 17th, and left without returning, he ceased to be a guest of the inn. The fact that he had paid for his room for 24 hours, which would carry the time up to midnight, is of no significance in determining the question of whether he was a guest of the inn if before the expiration of that time he had left the inn without any intention of returning to it. The fact that he did not intend to return, and did not in fact do so, it seems to us is conclusive on that question.

Therefore instruction numbered III, given for plaintiff, to the effect that he continued to be a guest of the inn until the time expires for which he had paid for the accommodation of the hotel, was erroneous and misleading, as the jury might well have concluded from the language used that he was to be considered a guest for so long as he had paid for the use of the room. We cannot conceive how one could be considered the guest of an inn without being an inmate at the time or temporarily absent intending to return. The vice of the instruction is glaring when we come to consider that the evidence shows that the money must have disappeared between the time of its deposit with the clerk and 7:30 o'clock p. m. of the day. As plaintiff discontinued his relation as guest at 6 o'clock p. m., and if the money was taken after that time and between 7:30 o'clock and that time, defendant would not be liable for the loss, as the plaintiff would not be his guest. And, as it would be a matter of conjecture as to what time the money did disappear, whether before or after 6 o'clock p. m., the plaintiff was not entitled to go to the jury notwithstanding the instruction had been properly framed. We are persuaded that the plaintiff as a matter of fact did not make the deposit for its security while he might be defendant's guest, but

that he deposited it on call or until he should be ready to make his visit to Indiana. The evidence seems to be conclusive on this phase of the case. He had been carrying the money around on his person for about a week previous, had it with him when he went to bed on the night of June 16th, deposited it on the following morning, and made no inquiry or call for it until three weeks afterward. A man under such circumstances would not likely have made the deposit as a matter of security while a guest of the inn.

Viewing the case in all its aspects, we feel compelled to hold that the plaintiff was not entitled to recover. All concur.

STATE ex rel. VANDERBURG v. BIDWELL,
Justice of the Peace, et al.

(Kansas City Court of Appeals. Missouri.
March 29, 1909. Rehearing Denied April
19, 1909.)

1. JUSTICES OF THE PEACE (§ 124*)—JUDGMENT—CONFORMITY TO VERDICT.

Where a verdict in a justice's court was simply for plaintiff without assessing any amount of recovery, it must be assumed that the jury did not intend to find for plaintiff in any sum, and the entry by the justice of a judgment on the verdict for the sum demanded in plaintiff's statement was void.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 389; Dec. Dig. § 124.*]

2. JUSTICES OF THE PEACE (§ 124*)—VERDICT FOR PLAINTIFF NOT DESIGNATING AMOUNT—JUDGMENT FOR DEFENDANT.

Under Rev. St. 1889, § 4008 (Ann. St. 1906, p. 2189), providing that a judgment for defendant shall be rendered in a justice's court if no sum shall be found by the verdict or by the decision of the justice in favor of plaintiff, a judgment for defendant must be entered on a verdict for plaintiff not assessing any amount of recovery.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 389; Dec. Dig. § 124.*]

3. JUSTICES OF THE PEACE (§ 124*)—JUDGMENT—ENTRY.

The duty of a justice of the peace to enter judgment on a verdict is purely ministerial, and his failure to enter the right judgment does not deprive the verdict of any of its force.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 389; Dec. Dig. § 124.*]

4. MANDAMUS (§ 51*)—GROUNDS OF RELIEF—JUSTICE OF THE PEACE—ENTRY OF JUDGMENT.

Mandamus is a proper remedy to compel a justice of the peace to perform the ministerial duty of entering formal judgment on a verdict.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 100; Dec. Dig. § 51.*]

Appeal from Circuit Court, Carroll County; John P. Butler, Judge.

Petition by the State, on relation of Alfred Vanderburg, against M. C. Bidwell, Justice of the Peace, and another. Judgment for defendants, and relator appeals. Reversed and remanded, with directions.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Guy Whiteman and Busby & Busby, for appellant. W. A. Franken, for respondents.

JOHNSON, J. Relator filed his petition in the circuit court of Carroll county for a writ of mandamus to compel defendant Bidwell, a justice of the peace of Egypt township, Carroll county, to accept and treat a verdict returned by a jury in a cause tried before said defendant, wherein relator was defendant, as a verdict in favor of relator, and to enter judgment on his docket for relator, and to compel the defendant Lovell, the constable of said township, to receive and levy an execution when issued on such judgment. The facts disclosed by the alternative writ issued by the court and defendants' return thereto are as follows: On September 2, 1907, William M. Fulcher brought suit against Alfred Vandenburg, the relator, before defendant Bidwell to recover the purchase price of a hog, which he alleged in his statement he sold to Vandenburg for \$17. No counterclaim or set-off was interposed by defendant at the trial, which occurred September 26, 1907. The trial was to a jury, and the following verdict was returned: "We, the jury, find our verdict for plaintiff. J. W. Bowles, Foreman." This verdict was received by the justice, entered on his docket as the verdict of the jury, and the jury was discharged. The justice then, over the objection of relator, entered judgment on his docket for Fulcher in the sum of \$17, and on October 21, 1907, issued an execution on said judgment and delivered it to the defendant constable, who was proceeding to execute the writ when the present suit was begun. It is alleged in the return: "The said jury aimed and intended thereby to find for the plaintiff therein and against the defendant in the sum of \$17, that said verdict was publicly delivered to and received by the defendant Bidwell, that defendant Bidwell understood and interpreted said verdict as finding for the plaintiff therein and against the defendant therein in the sum of \$17, and thereupon discharged the jury finally. Defendants further state: That the said jury did not refuse to find any sum in favor of the plaintiff therein, but, on the contrary, they duly agreed upon a verdict in favor of the plaintiff therein and against the defendant therein, in the sum of \$17; that at the time of delivering said verdict to the justice, said jury, and each and every member thereof, understood and regarded their verdict, in the form aforesaid, as finding for the plaintiff therein and against the defendant therein in the sum of \$17, and they continued to so regard it up to and after their discharge; that the failure of said jury to insert the said amount in their said written verdict was due solely to a lack of information on their part that such was necessary and proper." A motion for judgment on the

pleadings was filed by relator and overruled by the court, after which the following judgment was entered: "Come the respective parties by their attorneys and this cause coming on for hearing before the court upon plaintiff's alternative writ of mandamus issued by the judge of this court in vacation, and upon defendants' return to said alternative writ, and upon the evidence adduced both by relator and by the defendants, the court doth order, adjudge, and decree that the peremptory writ of mandamus prayed for by relator against the defendants, M. C. Bidwell and J. T. Lovell, be denied, except as hereinafter directed. It is ordered by the court that said J. T. Lovell, constable, is hereby commanded to return the execution issued by M. C. Bidwell, in case of William Fulcher, plaintiff, against Alfred Vandenburg, for the sum of \$17 and costs on a purported judgment of M. C. Bidwell, justice of the peace, in favor of William Fulcher, and against Alfred Vandenburg, on the 26th day of September, 1907, without further executing the same; and the said M. C. Bidwell is here ordered and commanded to refrain from issuing any further execution on said purported judgment, and upon receipt of this mandate is commanded to set aside his docket entries of judgment in said cause and disregard the alleged verdict of the jury upon which said judgment was founded and then redocket the said cause for trial and set the cause for trial and give 10 days' notice in writing to each party of the day when said cause will be tried before him and then proceed to the trial of said cause. It is adjudged that the costs of this proceeding in mandamus shall go in the original case." After his motions for a new trial and in arrest of judgment were filed and overruled by the court, the relator brought the case here by appeal.

We shall treat as admitted the fact alleged in the return that the real purpose of the jury was to find for plaintiff in the sum of \$17; but, since the verdict on its face expresses no such purpose, we do not think any effect should be given this fact in the present state of the record. Defendants argue that the rules giving to a court of record the power to amend a verdict to express the manifest intention of the jury (*Acton v. Dooley*, 16 Mo. App. 441; *Hary v. Speer*, 120 Mo. App. 558, 97 S. W. 228) may likewise be exercised by inferior statutory courts in the furtherance of justice. It sufficiently answers this argument to say that defendant justice did not attempt to amend the verdict, and therefore the question of his right to amend is not before us. He received and recorded the verdict as the jury returned it and then, guided by his own interpretation of it, entered judgment for the plaintiff in the sum demanded in the statement. In such state of the record, the verdict should be accepted as conclusively

expressing the real purpose of the jury, and, since it does not assess the amount of the recovery, we must assume that the jury did not intend to find for the plaintiff in any sum. These considerations impel us to hold that the attempted assessment of an amount in the judgment entered by the justice was a clear invasion of the province of the jury, and as such was wholly nugatory.

The learned trial judge evidently so held, but we think he fell into error in treating the verdict as void, as he must have done in ordering the justice to redocket and retry the case as though no verdict had been returned. We concede for argument that in an action on contract for the recovery of money only, tried in the circuit court, a verdict for the plaintiff which fails to state the amount of the recovery is insufficient to support a judgment and should be treated as a nullity. In such cases the amount of the recovery is one of the vital issues, and the verdict must respond to all of the issues submitted to the jury. *Ryors v. Prior*, 31 Mo. App. 555. But a different rule has been prescribed by statute for cases tried in justice courts. Section 4008, Rev. St. 1899 (Ann. St. 1906, p. 2189), provides: "Judgment for the defendant, with costs, shall be rendered whenever a trial or hearing has been had and no sum shall be found by the verdict of the jury or by the decision of the justice in favor of the plaintiff." This statute treats a verdict, deficient in the respect under consideration, as no verdict for the plaintiff, doubtless because of its failure to pronounce on one of the essential issues

of the case, but in effect as a finding and verdict for the defendant. We perceive no reason in law for refusing to give effect to this statute. It construed the verdict in the present case, and, observing its requirement, the defendant justice should have entered judgment for the relator. The failure of the justice to enter the right judgment on his docket did not deprive the verdict of any of its force. The duty of a justice to enter judgment on a verdict is purely ministerial. From the moment the verdict is entered on the justice docket, it possesses all the force and effect of a formal judgment. *Morse v. Brownfield*, 27 Mo. 224; *Hazeltine v. Reusch*, 51 Mo. 50; *Glett v. McGannon*, 74 Mo. App. 209. Under this rule the verdict, when entered by defendant justice, ipso facto became a judgment in favor of the relator by virtue of the provisions of section 4008. A right to appeal from that judgment inured to the plaintiff *Fulcher*. As that right was not exercised in the time prescribed by law, it follows that the judgment now is final. Relator is entitled to the performance by the defendant justice of the ministerial duty of entering formal judgment in his favor and to the other relief he seeks in his petition. *Mandamus* is a proper remedy in a case of this character. *State ex rel. v. Clayton*, 34 Mo. App. 563; *State ex rel. v. Cline*, 85 Mo. App. 628; *State ex rel. v. Adams*, 76 Mo. 606; *State ex rel. v. Horner*, 86 Mo. 71.

The judgment is reversed, and the cause remanded, with directions to award a peremptory writ in conformity with the views expressed. All concur.

BIGGINS v. GULF, C. & S. F. RY. CO.

(Supreme Court of Texas. April 21, 1906.)

1. ASSAULT AND BATTERY (§ 3*)—ACTION—RECOVERY FOR NEGLIGENCE.

The intent to injure is the gist of an assault and battery, so that under a complaint therefor there can be no recovery for injury from an accidental, though negligent, act.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 2; Dec. Dig. § 3.*]

2. APPEAL AND ERROR (§ 712*)—RECORD—AFFIRMATIVE SHOWING OF ERROR.

The record does not, as it must, affirmatively show error in exclusion of evidence to affect credibility of defendant's witness C., for whose shooting of plaintiff action for assault and battery was brought, and which shooting witness testified was accidental, where, for all the record shows, the indictment charging witness with assault with intent to murder plaintiff, which was sought to be introduced, might have been founded on a different transaction, and it is not made to appear, or offered to be shown, that witness, when testifying, knew that the indictment had been found for such shooting, if such was the fact.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 712.*]

Error from Court of Civil Appeals of Sixth Supreme Judicial District.

Action by O'Finley Biggins, by next friend, against the Gulf, Colorado & Santa Fé Railway Company. Judgment for defendant was affirmed by the Court of Civil Appeals (110 S. W. 561), and plaintiff brings error. Affirmed.

Plummer & Haynes, for plaintiff in error. H. P. Brown, P. Lomax, Terry, Cavin, & Mills and Chas. K. Lee, for defendant in error.

WILLIAMS, J. The plaintiff in error sued for damages for an assault and battery alleged to have been committed upon him by a watchman in the employment of the defendant in error by shooting him with a pistol. There was evidence at the trial tending to show each of the following states of fact: (1) That the watchman fired the shot with the intent to hit plaintiff; (2) that he discharged the pistol purposely, not with the intent to hit plaintiff, whom he was pursuing, but with the intent to frighten and cause him to stop; (3) that the pistol was accidentally discharged as the watchman was climbing up a bank in pursuit of the plaintiff.

The charge of the trial court authorized a recovery by plaintiff if the jury, in addition to other facts, which need not be stated, should find either of the two facts first stated to have existed. It further instructed, in substance, that if the discharge of the pistol was unintentional and purely accidental the plaintiff could not recover. The plaintiff, by a requested charge, sought to have the jury instructed, in substance, that if the watchman shot plaintiff either intentionally or in a negligent manner in the

discharge of his duties they should find for plaintiff. This requested instruction stated a correct proposition of law; but, as was held by the Court of Civil Appeals, the ground of recovery for negligence was not within the scope of plaintiff's petition. It alleged nothing but an assault and battery to characterize the shooting as unlawful and wrongful. An intent to injure is the gist of an assault and battery, and the suit was, therefore, for an intentional and willful act not otherwise alleged to have been wrongful. If the only fact alleged to make it unlawful did not exist, there was no basis in the pleading for finding it to have been wrongful because of other facts not stated. There are defenses which could be made to a charge of a negligent inflicting of such an injury, such as contributory negligence, which would be no answer to an action for an intentional act. The defendant was not notified by the petition to come prepared to meet a case different from that alleged. 4 Thompson on Neg. § 7465. The court, therefore, did not err in charging as it did and in refusing the requested instruction.

Another assignment, upon which the writ of error was granted, complains of the exclusion of evidence offered by the plaintiff. Churchwell, the watchman whose act is in question, was a witness for defendant, and testified, among other things, that the shooting was accidental. To affect his credibility the plaintiff made the offer as shown by the following extract from the stenographer's transcript, which is all that appears from the record upon the point: "Plaintiff introduced in evidence the bill of indictment found by the grand jury of Johnson county against Joe Churchwell, charging him with an assault with intent to murder O'Finley Biggins on the 7th day of January, 1906; said indictment being filed in the district court of Johnson county, Tex., on the 27th day of January, 1906. This was offered as affecting the credibility of the witness Churchwell, and to show motive as to why he had sworn as he did. Court: I don't think that is admissible, and I exclude it from the record. I will state in the bill of exceptions that the case is still pending in court. Counsel for plaintiff excepted to the ruling of the court." It will be seen that neither the paper called an indictment nor the objections urged to it are set out. Why it was excluded does not appear. For all the record shows, the indictment may have been founded on a different transaction from that here in question, and there may have been other objections to its admission which we cannot see from what is presented. It was not made to appear, nor did the plaintiff offer to show, that the witness, when his deposition was taken, knew that an indictment had been found against him for the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shooting under investigation, if such was the fact. Error in such a ruling must be made to appear affirmatively; the presumption being that the court ruled correctly. Hence we cannot sustain this assignment. Affirmed.

FINE v. ROBISON, Land Com'r.

(Supreme Court of Texas. April 14, 1909.)
PUBLIC LANDS (§ 173*) — DISPOSITION BY STATE—SCHOOL LANDS.

Under Laws 1905, p. 160, c. 103, § 2, providing that, on the expiration or cancellation of a lease of school or asylum lands, the Land Commissioner shall fix a date not less than 90 days on and after which application for purchase may be filed, and that the land shall not be for sale until after such date, an application for the purchase of such land filed before the date so fixed is void.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

Original petition, on the relation of J. H. Fine, for mandamus against J. T. Robison, Commissioner of the Land Office. Petition denied.

D. E. Simmons, D. W. Doom, D. H. Doom, and J. D. Cunningham, for relator. R. V. Davidson, Atty. Gen., and Wm. E. Hawkins, Asst. Atty. Gen., for respondent.

BROWN, J. On the 10th day of January, 1909, being qualified to purchase public school lands of the state, the relator made application to the Commissioner of the General Land Office for the purchase of sections 18 and 19, in block A-47, Andrews county. The applicant complied in all respects with the requirements of the statute, and it is unnecessary to detail the facts here. Andrews county was unorganized, and was attached to Martin county for judicial purposes. On the 1st day of July, 1899, the Commissioner of the General Land Office leased the lands in question for 10 years to Thos. Newman, who paid the lease money on the same regularly until the 1st day of July, 1908, when the owner of the lease failed to pay the lease money, and, on the 15th day of October, 1908, the Commissioner declared the lease void, and notified the county clerk of Martin county of the cancellation of the lease, and that the land would be on the market on the 18th day of February, 1909. When relator's application was made, on the 10th day of January, 1909, the Commissioner of the General Land Office rejected it, because the land was not on the market at the time the application was made. The Commissioner filed his answer to this petition for mandamus, setting up the facts as stated above, and the issue is whether by operation of law the land was placed upon the market without any action on the part of the Commissioner.

The second section of an act of the Legis-

lature approved April 15, 1905, providing for the sale and lease of school and asylum lands, being chapter 103, p. 159, of the Laws of the Twenty-Ninth Legislature, prescribes the rule by which this case is to be decided as follows: "In cases where lands are now leased or may be hereafter leased and the same shall come on the market by reason of the expiration of such lease, it shall be the duty of Commissioner to notify the county clerk ninety days, when practicable, before the expiration of such lease, of the date of such expiration. When a lease is for any cause canceled, he shall notify the county clerk of that fact and fix a date not less than ninety days thereafter on and after which applications to purchase may be filed. All notices of expiration and cancellation of leases shall be forthwith recorded as required for notices of classification and valuation. The Commissioner shall adopt such means as may be at his command that will give the widest publicity as to when land will be on the market for sale by reason of expiration of any lease. Such publicity shall, when practicable, be given ninety days in advance of such expiration. When a lease is canceled for any cause, the land shall not be for sale until ninety days thereafter. Immediately after the cancellation of a lease or leases the Commissioner shall proceed to give publicity to the fact, the same as is herein required with reference to publicity of expiring leases. If there are no other satisfactory or sufficient means at the command of the Commissioner that will give the necessary publicity, he shall have printed at the expense of the state, to be paid out of the appropriation for public printing, a list or lists of the lands and send them out in the mail and to every person requesting them. Such lists shall also contain a brief statement as to how one shall proceed to purchase the land."

Upon cancellation of the lease it was made the duty of the Commissioner of the General Land Office to notify the county clerk of Martin county of that fact, which he did. It was also his duty at the same time to fix a date on which applications might be filed in the land office to purchase the land, and this he did also. The only limitation placed upon the time when applications might be filed for its purchase was that it should not be less than 90 days. The time beyond 90 days was left to the discretion of the Commissioner, in order that he might give suitable and necessary publicity to the fact that the land was on the market and thereby secure the benefit of competition among the different persons who might wish to purchase. In this instance purchasers had no right to present their applications until the date fixed by the Commissioner, which was the 18th day of February, 1909, and, the relator having present-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed his applications at a time when the land was not on the market for sale, the Commissioner rightly rejected them.

It is therefore ordered that the petition for writ of mandamus be refused, and that the relator pay all costs of this proceeding.

TEXARKANA & FT. S. RY. CO. v. ANDERSON.

(Supreme Court of Texas. April 14, 1909.)

MASTER AND SERVANT (§ 180*)—INJURY TO SERVANT—EXCEPTION TO FELLOW SERVANT RULE—"OPERATING A CAR."

Where sectionmen were building a temporary track in defendant's yard, and used a push car to bring the rails to be laid, and plaintiff was injured by the falling of a rail while being removed from the car to the track, the injury did not occur while engaged in the work of "operating a car," within the fellow servant rule of Batts' Ann. Civ. St. art. 4560ea.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 180.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4991-4992; vol. 8, p. 7738.]

Error from Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Jim Anderson against the Texarkana & Ft. Smith Railway Company. A judgment for plaintiff was affirmed by the Court of Civil Appeals (111 S. W. 173), and defendant brings error. Reversed and rendered.

Glass, Estes & King, for plaintiff in error. Hart, Mahaffey & Thomas and T. N. Graham, for defendant in error.

WILLIAMS, J. The defendant in error (plaintiff), a section hand in the service of plaintiff in error (defendant), had his foot mashed by the falling upon it of a steel rail which he and other sectionmen, his co-employees, were carrying from a push car to put it in place upon the ground, and recovered the judgment before us for the resulting damages. The negligence on which the judgment is based was that of the co-employees in allowing the rail to fall. They were plainly his fellow servants, engaged in doing the same piece of work, and he cannot recover, unless he was hurt "while engaged in the work of operating" the car, in such way as to bring his case within the provisions of Act Jan. 18, 1897 (Gen. Laws [Sp. Sess.] p. 14, c. 6, § 1 [Batts' Ann. Civ. St. § 4560ea]). The sectionmen were engaged in building a temporary track in defendant's yards, and used the push car to bring rails to the place where they were to be laid from another part of the yards. The car was propelled by pushing. When the load of rails had been brought to the proper place, the men proceeded to take them by hand from the car and put them on the ground, and while plaintiff and several others were supporting an end of one of them the others suddenly released their

hold and allowed it to drop upon plaintiff's foot. These are all the facts material to the question stated.

We think it quite clear that plaintiff was not hurt "while engaged in the work of operating" the car. The operation of the car had no more to do with the injury to him than if the rail had been lifted from a wagon or from the ground. In the case of G., C. & S. F. R. R. Co. v. Howard, 97 Tex. 518, 519, 80 S. W. 229, 230, the meaning of the provision in question is discussed, and the reason for the discrimination between employees hurt while operating trains, locomotives, cars, etc., and others differently occupied, is thus stated: "If we consider the perilous position of men while actually engaged in the work of operating trains, and their attitude toward other employees, whether upon the same trains or not, which renders it very difficult to protect themselves against the negligence of others, the discrimination appears to be just as a provision for such employees and their families, if injured, and a wise policy tending to excite the diligence of their employers to procure safe and reliable persons to perform the work affecting the safety of train service. When such employee is not actually engaged in the work out of which the danger grows, the reasons for the distinction between him and other employees cease; for there is no more reason why Howard, while walking upon the track, should be protected against the negligence of those who were upon the locomotive, than there would have been if he had been a section hand in the same situation, and had suffered the same injuries by the negligence of those handling the locomotive." In the case of G., C. & S. F. Ry. Co. v. Johnson (Tex. Civ. App.) 103 S. W. 447, facts very similar to those here in question were passed upon in an extended opinion by Judge Gill. This court again considered the question in reviewing that decision upon application for writ of error, approving the decision there made, and the doctrine as stated in those decisions may be regarded as settled. It is that the liability declared by this statute does not rest upon the mere fact that the injured servant is employed to do the work of operating trains, cars, etc., but upon the fact that, at the time he is hurt, he is engaged in that work; and this for the reason that it is the character of the work that gives rise to dangers incident to it. The Courts of Civil Appeals, in this case (111 S. W. 173) and in the Johnson Case, just referred to, were embarrassed by the decision in the case of T. & P. Ry. Co. v. Webb, 31 Tex. Civ. App. 498, 72 S. W. 1044, in which, also, an application for a writ of error, raising the question upon the facts therein involved, was refused by this court; and it is, to say the least, far from clear that that decision can be reconciled, in principle, with the construction given to the stat-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ute in the Howard and Johnson Cases. These cases, being the later, are of controlling authority, and nothing in the Webb Case is to be allowed to prevent the application of their doctrine to other cases as they arise. The case of St. Louis S. W. Ry. Co. v. Thornton (Tex. Civ. App.) 108 S. W. 437, was not reviewed by this court, and, besides, had features which may distinguish it.

The plaintiff has no cause of action, and the judgment is reversed, and judgment rendered for defendant.

Reversed and rendered.

STATE v. BRADY, Co. Atty.

(Supreme Court of Texas. April 14, 1909.)

1. STATUTES (§ 228*)—REPEAL—EFFECT OF SAVING CLAUSE.

The saving clause or proviso of a repealing statute, which preserves some right, must be strictly construed so as not to include anything not fairly within its terms.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 310; Dec. Dig. § 228.*]

2. STATUTES (§ 228*)—REPEAL—PROVISO.

Where a statute repealing a penal statute contains a clause saving the rights of the state under the repealed law, the right of action only is preserved, and it must be prosecuted under the new law or under some law other than that repealed.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 228.*]

3. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*) — COMPENSATION — STATUTES — REPEAL — EXCEPTIONS.

The anti-trust law of 1899 (Laws 26th Leg. p. 246, c. 146), approved May 25, 1899, gave the prosecuting attorney as compensation for prosecuting suits under the act one-fourth of the penalty collected, provided that the fees allowed him should be over and above the fees allowed him by the general fee bill. The anti-trust law of 1903 (Gen. Laws, p. 119, c. 94), expressly repealed the act of 1899 with a proviso that nothing in the repealing law should affect or destroy any rights of the state to recover penalties or forfeit charters of domestic corporations or prohibit foreign corporations from doing business within the state, for acts committed before it took effect. Held, that the repealing law repealed that part of the act of 1899 giving prosecuting attorneys one-fourth of the penalties as compensation; the proviso saving only those rights mentioned therein.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Dec. Dig. § 5.*]

4. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)—COMPENSATION—STATUTES—PROVISO.

Though the anti-trust law of 1903 (Gen. Laws, p. 119, c. 94), expressly repealing the anti-trust law of 1899 (Laws 26th Leg. p. 246, c. 146), approved May 25, 1899, but saving all rights of the state to recover penalties, etc., for acts committed before it took effect, repealed that part of the law of 1899 giving prosecuting attorneys as compensation one-fourth of the penalties collected, the provision of the law of 1903, providing that the fees of the prosecuting attorney for representing the state in prosecutions under the act shall be over and above the fees allowed him by the general fee bill, would apply to the collection of penalties for the violation of the law of 1899 by suits brought after its repeal, since prosecutions for the collection

of penalties for violations of the law of 1899 must be under the law of 1903 after the repeal of the former law.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Dec. Dig. § 5.*]

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by the State of Texas against John W. Brady, County Attorney. Judgment of the Court of Civil Appeals affirming a judgment for defendant (114 S. W. 895), and plaintiff brings error. Reversed, and judgment rendered as stated.

Jas. R. Hamilton, Dist. Atty., and J. M. Patterson, for the State. Jno. W. Brady, Allen & Hart, Gregory & Batts, D. W. Doom, D. H. Doom, and L. G. Denman, for defendant in error.

BROWN, J. The parties agreed in writing upon a statement of the facts, upon which the trial court gave judgment for Brady, and the Court of Civil Appeals adopted the statement, which follows, and affirmed that judgment:

"(1) It is agreed that the facts alleged and set out in plaintiff's petition are true and correct and shall be taken as facts in the trial of this suit, especially as to the official acts of the said John W. Brady, the dates and amounts of the judgments recovered and of the fees retained by the said Brady as county attorney under the anti-trust laws of 1899 and 1903 of the state of Texas. However, it shall not be taken as admitted by the said Brady that the fee alleged in the motion to be the fee allowed by law is the fee allowed him by law. In this respect he only admits that he received as county attorney 25 per cent. of each respective judgment for penalties as alleged in plaintiff's motion and claims that he was entitled to the same under the law.

"(2) It is agreed that in all of the suits named in said motion, except that of J. M. Guffey Petroleum Company, and the facts as to that are correctly stated in defendant's answer, the said John W. Brady appeared and represented the state, under the direction of the Attorney General of Texas.

"(3) That on March 31, 1903, C. K. Bell was Attorney General of Texas, and held that office until on or about January 2, 1905. That on July 14, 1904, the said John W. Brady, as county attorney of Travis county, Tex., assisted by D. A. McFall and G. W. Allen, attorneys, brought suit in the district court of Travis county, Tex., in behalf of and in the name of the State of Texas against the J. M. Guffey Petroleum Company and the Beaumont Confederated Oil & Pipe Line Company for violations of chapter 146 of the General Laws of the state of Texas of 1899, and by agreement recovered a judgment in said suit for \$5,000. That said judgment was collected in full by said John

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

W. Brady on or about December 5, 1904, and that said Brady retained \$1,250 as his official fee in said suit of the State of Texas against the J. M. Guffey Petroleum Company and the Beaumont Confederate Oil & Pipe Line Company. That out of said fees he paid under contract to the said two attorneys two-thirds thereof for their services therein. That the settlement which resulted in said judgment and collection was at the time approved by said O. K. Bell, Attorney General, as the construction of the anti-trust laws of 1899 and 1903, by which the said John W. Brady retained one-fourth of said judgment as his official fees therein.

"(3½) It is agreed that in all the judgments rendered in the cases in which collections were made, and in which penalties were assessed for violations of the act of 1899, such penalties were assessed for the minimum penalty of \$200 per day for each day's violations, as provided in said act of 1899, and collections made accordingly.

"(4) That the suit No. 21,046, the State of Texas v. United States Fidelity & Guaranty Company et al., was filed while O. K. Bell was Attorney General, but was settled a short time after R. V. Davidson qualified as Attorney General.

"(5) That all the suits named in plaintiff's motion, including those filed and settled under the administration of Attorney General Bell, as well as under the administration of Attorney General Davidson, were settled by agreed judgments, approved in terms and amounts by the Attorney General. That all of the fees retained by the said John W. Brady in said suits were retained by him in good faith, believing that he was entitled thereto under the law. That in so retaining said fees he relied upon and followed the construction given to the anti-trust laws of 1899 and 1903 by Attorneys General Bell and Davidson, viz., that the repeal of the act of 1899 (Gen. Laws, p. 246, c. 146) by the act of 1903 (Gen. Laws, p. 119, c. 94), with the saving clause in the latter act, had the effect of keeping alive the act of 1899 as to all acts committed before the act of 1903 took effect, not only as to the penalties named in the former act, but also as to all its machinery and provisions for the enforcement of the same, including the compensation of 25 per cent. to county and district attorneys. That such construction is still adhered to by the Attorney General's department of this state.

"(6) That upon the faith of said construction by the Attorney General's department, the said John W. Brady, with the knowledge and sanction of said department, employed attorneys and made contracts with them for contingent interest in said fees, based upon the construction that he was entitled to 25 per cent. of the recovery under the act of 1899, to assist him and the Attorney General in the prosecution of each of said suits. That said attorneys actively

assisted in the work of preparing said cases for trial, and performed all legal services therein required of them by the said John W. Brady or by the Attorney General. That out of the fees received by him in said cases, the said Brady has paid out to said attorneys and in expenses for procuring testimony and preparing the same for trial over two-thirds of the fees actually retained by him upon the faith of said construction."

The anti-trust law of 1903 contained this language: "That all laws and parts of laws in conflict with this act be and the same are hereby repealed, * * * and that an act entitled 'An act to prohibit pools, trusts, monopolies and conspiracies to control business and prices of articles, to prevent the formation or operation of pools, trusts, monopolies and combinations of charters of corporations that violate the terms of this act, and to authorize the institution and prosecution of suits therefor,' approved May the 25th, 1899, and published and known as chapter CXLVI of the General Laws of the Twenty-Sixth Legislature, be and the same are hereby expressly repealed," etc.; "provided nothing in this act shall be held or construed to affect or destroy any rights of the state of Texas to recover penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in this state, for acts committed before this act takes effect." Laws 1903, p. 122, § 17.

The only question in this case is: Did that language, quoted from the act of 1903, repeal this part of the anti-trust law of 1899: "The prosecuting attorney shall receive for his compensation one-fourth of the penalty collected; provided, the fees allowed the prosecuting attorney representing the state, provided for in this section, shall be over and above the fees allowed him by the general fee bill now in force." Laws 1899, p. 251, § 9.

It is a well-established rule of construction that, when a statute repeals another with a saving clause or proviso attached by which the right of some person or of the state is reserved, such proviso or saving clause must be strictly construed, and will not be held to embrace anything which is not fairly within its terms. *Endlich on Int. Stat.* § 186; *Sutherland Stat. Const.* § 223. When a statute repeals a pre-existing law with a clause saving the rights of the state, as in this case, the right of action only is preserved. The right to recover or to enforce the right under such conditions must be prosecuted under the new law or some other existing law. *Endlich, Int. Stat.* § 487; *Aaron v. State*, 40 Ala. 307; *Farmer v. People*, 77 Ill. 322; *Brotherton v. Brotherton*, 41 Iowa, 112; *People v. Livingston*, 6 Wend. (N. Y.) 527. The sound reason given by all the courts for holding that the cause of action which is preserved by a repealing act must be prosecuted under the new law is

that a repealed law is not a law, and courts cannot adjust rights nor afford remedies to parties without some law upon which to base their action.

The learned counsel for the defendant in error did not controvert either of the propositions that we have laid down, but claimed that the language of the saving clause is sufficient, when considered with the attending circumstances, to justify this court in holding that it was not the intention of the Legislature to repeal that portion of the law of 1899 which provided that the county attorney should receive for his services one-fourth of the recovery. This contention is based upon the words, "any rights," in the saving clause, which counsel ingeniously argued embraced the right of the state to employ and pay counsel for services to be rendered. Waiving the question as to whether the prosecution of causes through the officer of the state is a right within the meaning of the statute, we think that the Legislature so clearly defined the phrase "any rights" that there can be no question as to what was intended to be embraced in that language. If it had said that "no right of the state under the former law should be destroyed," that would be held to preserve all rights of action the state had under that law for acts done prior to the taking effect of the new law; but the Legislature enumerated what character of rights were preserved, limiting those rights to recovery of penalties for violations of the old law to procuring the forfeiture of charters of domestic corporations for violations of the old law, and the right to deny to foreign corporations the privilege to do business in this state, for acts committed before the last act took effect. The reservations are so definitely stated that it does not admit of a construction which will embrace anything more than that which is fairly included within the terms of the reservation. We are unable to see how it can be held that the payment to an officer of a portion of the sum recovered in the prosecution of a case is embraced in the terms of this proviso. Indeed, it is absolutely excluded from the proviso by the maxim that the mention of one thing excludes all others. It is not possible to reach the conclusion that the payment of the fees to the county attorney was necessary to the enforcement of the law of 1899 or 1903. Therefore it cannot be preserved as being necessary to enforce a reserved right. That the Legislature did not consider it necessary is shown by its omission from the law of 1903.

Counsel also contend that taking into consideration the fact that the new bill omits a number of provisions contained in the old law, which might be important and serviceable in the prosecution of trusts for the violation of the law, we must presume that it was not intended to repeal those important provisions which would include that which

provides for the fees claimed by the defendant in error. However important the provisions of the old law, looking to its enforcement, might have been considered in the enactment of that law, still a subsequent Legislature had the power in the enactment of a new law to omit those which appear to have been most important. It was a question of policy to be determined by the Legislature, and not by the courts, whether the extraordinary measures authorized by the old should be continued. The Legislature which enacted the law of 1899 doubtless thought it was sound policy to offer to county attorneys the inducement of one-fourth of the recovery to stimulate their action in the prosecution of such cases; but the body which passed the law of 1903 evidently thought the time had passed for the inducement to be beneficial, or may have differed from the preceding Legislature as to the policy of doing so, for in enacting the later law upon the subject almost the identical language that prescribed the duties of officers in prosecuting such cases as well as the fees that should be paid was copied into the new statute, except that part which gave to the county attorney one-fourth of the recovery, which shows conclusively that the Legislature intended to change the compensation of the prosecuting attorney in this class of cases. Other changes were made in like manner. Whether wisely or not is not a question for this court to determine.

It is said by counsel for the defendant in error that the construction which we place upon the statute will deprive the county attorney of any compensation for his services in those cases above the \$2,500 limitation placed upon his right to fees as county attorney. If that were correct, it would still not furnish a sound reason why this court should supply the omission by construction, for the Legislature might well presume that the officer would do his duty whether compensated or not so long as he should hold the office; but we are of opinion that the same fees that are allowed to the prosecuting attorney for collecting penalties under the law of 1903 will apply to collections of penalties for violations of the law of 1899, because in each case the prosecution and collection must be under the law of 1903. It follows that the collecting of penalties accruing under the law of 1899 comes within this language of the act of 1903: "And it shall be the duty of the Attorney General, or the district or county attorney under the direction of the Attorney General, to prosecute for the recovery of the same, and the fees of the prosecuting attorney for representing the state in proceedings under this act shall be over and above the fees allowed him under the general fee bill." Section 11. The defendant in error would be entitled to the benefit of that provision.

It is said that the construction which we place upon the statute would deprive the

county attorney of the ability to employ counsel to aid in prosecution of such cases, but the state is not without counsel in any event, because by section 21, art. 5, of the Constitution, it is provided: "The county attorneys shall represent the state in all cases in the district and inferior courts in their respective counties. * * * County attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law." The change of the law in these and other particulars may render the service less efficient than under the old statute, but, as we have said before, that was a matter for the Legislature to decide upon and not for this court to supply the omission of that department.

In the oral argument the constitutional right of the citizen to employ and pay counsel was invoked. If a citizen were denied that right, we would deal with that question; but such is not the case. If it were the case of a citizen whose rights are in question, he might waive the right, or he could make his own terms as to fees. The state has no less power in the transaction of her business and is asserting this right of control, the attorney complains.

The district court erred in entering judgment against the state, and the Court of Civil Appeals erred in affirming that judgment. Wherefore it is ordered that the judgments of the district court and Court of Civil Appeals be reversed, and judgment be here rendered in favor of the state of Texas for the excess of fees collected by defendant in error as agreed upon by the parties and found by the Court of Civil Appeals, with 6 per cent. interest per annum on each sum so received from the date of collection to this date, to wit, in the sum of \$10,875.76, together with all costs of all courts.

ST. LOUIS, S. F. & T. RY. CO. v. WALL.

(Supreme Court of Texas. April 14, 1909.)

APPEAL AND ERROR (§ 601*)—RECORD—STATEMENT OF FACTS—ORIGINAL STATEMENT—NECESSITY.

Act May 25, 1907 (Acts 31st Leg. 1907, pp. 509-513, c. 24), providing for an official stenographer for district courts, by section 15 provides that no statement of facts shall be incorporated in the transcript on appeal, but the original shall be sent up, and by section 16 requires the appointment of a stenographer in any civil action in the county court on application, and makes the provisions of the act as to the preparation of the statement of facts, etc., apply to statements of facts in civil cases tried in the county court. *Held* that, on an appeal from the county court to a Court of Civil Appeals, the original statement of facts should be sent up, without being made a part of the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2651-2652; Dec. Dig. § 601.*]

Certified Question from Court of Civil Appeals of Second Supreme Judicial District.

Action by E. J. Wall against the St. Louis, San Francisco & Texas Railway Company. Judgment for plaintiff, and defendant appeals. On certified question from the Court of Civil Appeals for the Second District. Question answered.

C. H. Yoakum and Decker & Clarke, for appellant. M. M. Hankins, for appellee.

GAINES, C. J. This is a certified question from the Court of Civil Appeals of the Second District. The statement and question are as follows:

"The above-styled cause is pending before this court on appeal from the county court of Hardeman county, and there are assignments of error which will perhaps require the reversal of the case in the event we are authorized to consider the statement of facts accompanying the record. This statement of facts consists of the original statement of facts made up under the act of 1907 (Acts 31st Leg. 1907, pp. 509-513, c. 24), and the same is not copied into the transcript. The Court of Civil Appeals for the Sixth Supreme Judicial District, in *St. Louis Southwestern Ry. Co. of Tex. v. Nelson* (Tex. Civ. App.) 108 S. W. 182, has construed this act to mean that 'on an appeal from a judgment of a county court (the statement of facts) should be copied into and made a part of the transcript, as required by the laws in force prior to the passage' of the act.

"In view of the uncertainty which appears to exist amongst the practitioners, and in view of the language used by your honors in the decision in *Tex. & Pac. Ry. Co. v. Stoker*, 113 S. W. 3, we deem it advisable to certify for your decision whether or not we are authorized to consider as the statement of facts in this case the original statement of facts properly made up under the act referred to, but not incorporated or copied in the transcript?"

We are of opinion that the original statement of facts in this case should be considered in deciding the case. It is presumed that the question grows out of the construction of section 16 of the act approved May 25, 1907, which reads as follows: "Whenever either party to a civil cause pending in the county court shall apply therefor, the judge of the court shall appoint a competent stenographer to report the oral testimony given in such cause. Such stenographer shall take the oath herein prescribed, and shall receive such compensation as the court may fix, to be not less than five dollars per day, which shall be taxed and collected as costs. The provisions of this act with respect to the preparation of the statement of facts, the time to be allowed therefor, and for the presentation to the opposite party, and the approval and filing thereof by the court shall

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

apply to all statements of facts in civil causes tried in the county court."

This section is appended to the act entitled "An act providing for the appointment of official stenographers for district courts," etc. The previous sections are devoted to the appointment and duties of stenographers in the district courts. Hence, in order to give the county courts the benefits of the act, this section was necessary. We find nothing in it which says that the statement of facts should be incorporated in the record for appeal. "The preparation of the statement of facts, the time to be allowed therefor, and for the presentation to the opposite party, and the approval and filing thereof by the court," are all to be governed by the provisions of the act. It is difficult to say that this provides for the sending up of the statement of facts upon appeal. But section 15 contains the declaration that "no statement of facts shall be incorporated in the transcript on appeal, but the original shall be sent up therewith"; and it may be that this was regarded as sufficiently comprehensive to include statement of facts from the county courts. We fail to see how, if the original statement was good enough for the district courts, it was not good enough for the county courts. Nor can we conceive why they should, for the sake of saving costs, require the original to be sent up from the district courts, and not make the same requirement as to judgments appealed from the county courts.

We answer the question in the affirmative.

EVANTS et al. v. FUQUA et al.

(Supreme Court of Texas. April 28, 1909.)

BROKERS (§ 57*)—COMPENSATION—CONTRACT NEGOTIATED DIFFERENT FROM THAT AUTHORIZED.

Real estate brokers cannot recover commissions on a sale, where the contract negotiated by them with the purchaser binds the owner, without authority from him to do so, to pay \$50 a day for each day that he fails, after a time fixed, to execute a deed, and makes that sum a lien on the land; and this, though the purchaser may be willing to waive the forfeiture and only hold the owner to such terms of the contract as the brokers were authorized to make.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by W. R. Evants and another against W. H. Fuqua and another. From a judgment of the Court of Civil Appeals (111 S. W. 675), affirming a judgment of the district court for defendants, plaintiffs bring error. Affirmed.

Reeder, Graham & Williams, R. W. Hall, and Geo. W. Barcus, for plaintiffs in error. Madden & Truelove, W. D. Wilson, Carl Gilliland, Turner & Boyce, and John P. Slaton, for defendants in error.

GAINES, O. J. This is an action by Evants and James P. Hagler to recover of defendants, Ferguson and Fuqua, \$72,000 for procuring a purchaser of 72,000 acres of land, alleged to belong to defendants. The plaintiffs alleged that they were employed and authorized by Ferguson to sell 72,000 acres of land owned by him and his codefendant Fuqua at a price of \$3.50 per acre net to the vendor, and that they were to have for their compensation all in excess of that sum for procuring the purchaser, and that in pursuance of the power conferred upon them by the contract they procured a purchaser of the land at \$4.50 per acre for the land and entered into a contract with him therefor. To the petition the defendants, among other defenses, pleaded a general denial. Upon conclusion of the evidence the court instructed a verdict for the defendants.

The plaintiffs proved a contract in writing authorizing them to make the sale at \$3.50 per acre for the entire tract or tracts of land, and proved by parol that they were authorized to sell on a credit over \$40,000 to \$100,000; the balance to be paid in notes running for 10 years and to bear 6 per cent. interest. When the terms of the sale were agreed upon with the proposed purchaser, they were put in writing and signed by the parties; Evants and Hagler signing for the proposed vendor, and John S. Hagler signing for himself. That contract contained the following stipulations: "It is further agreed by the said Jno. E. Ferguson et al. that in the event the said John S. Hagler makes and deposits with the First National Bank, heretofore referred to, the said sum of \$10,000 as a part of the purchase money of said 72,000 acres of land in said Bailey county, Tex., and in the event the said Jno. E. Ferguson et al. do not, by themselves or through their agents or attorneys in fact, execute and deliver to the said John S. Hagler a good and sufficient title and deed of conveyance to said land, duly and properly signed and acknowledged, for him and in his behalf, through the said bank, within or before the expiration of the said 60 days hereinbefore mentioned, then the said John S. Hagler is hereby empowered, and we hereby agree that he may take down, take from, receive, and withdraw from said bank the said sum of \$10,000 so deposited by him with said bank as a part of the purchase money on said land, together with all vendor's lien notes that he may have executed therefor and deposited with said bank, and the same shall be considered of no further force and effect against him, and we hereby release him from all further obligations for the purchase money for said land or damages from the nonperformance of said contract of purchase; and we furthermore agree with the said John S. Hagler to for-

felt and pay to him, his heirs, executors, administrators, or assigns, the sum of \$50 per day for each and every day after the expiration of the 60 days hereinbefore mentioned, as liquidated damages for the nonperformance of said contract of sale on the part of the said Jno. E. Ferguson et al., and the failure on our part to make, execute, and deliver to him a deed of conveyance in writing and a good and sufficient title to all of the land hereinbefore referred to. And we, the said Jno. E. Ferguson et al., do hereby give and guarantee unto the said Jno. S. Hagler, his heirs, executors, administrators, or assigns, a lien upon the 72,000 acres, just before referred to, as a security for the payment on our part to the said Jno. S. Hagler of all liquidated damages, agreed to be paid to him and provided for in this contract, should we fail to carry out and perform this contract for any reason whatsoever."

There is no claim that Evants and Hagler were empowered by the agency contract to make such a stipulation as the above. Indeed, one of the agents testified that they had no authority for that action. But it is insisted that the proposed purchaser was not bound to insist upon that stipulation; that he might waive it, and hold the proposed vendors to such of the terms of the agreement as they were authorized to make. But we do not concur in this view. The purpose of the contract between Evants and Hagler, as agents of Ferguson, and Jno. S. Hagler, as purchaser of the land, was to evince their acceptance of the proposition made by the vendors, and when he accepted in part and wrote into the contract the onerous stipulation set out above, it was not the contract of the vendors. They were not bound by the contract. It amounted to no more than a counter proposal, which they could accept or reject as they saw fit. It was a departure from the contract they authorized their agents to make, and they were not bound by it.

It is insisted that Hagler had the right to release Ferguson from the stipulation. This may be so, if he had gone about it in the right way; that is, by releasing the contract as executed and executing a new one with this stipulation left out. But this he did not do. The agents set out the contract in their petition, and pray to recover compensation for making it. It is the foundation for their action. It was Ferguson's right to say to him: If you desire to accept the contract of my agents, do so according to the terms they are entitled to make, but do not insert in it any terms which they are not authorized to grant. Because the plaintiffs were not authorized to make the contract which is declared upon in this case, we hold that they cannot recover compensation for making it.

Having examined the other assignments of error, and finding none the determination of which should have changed the result of the suit, the judgment of the Court of Civil Appeals is affirmed.

HAGLER v. FERGUSON.

(Supreme Court of Texas. April 28, 1909.)

SPECIFIC PERFORMANCE (§ 65*)—CONTRACTS ENFORCEABLE—CONTRACT NEGOTIATED DIFFERENT FROM THAT AUTHORIZED.

A contract of sale of land negotiated by a broker will not be specifically enforced against the owner, where binding the owner, without authority, to pay \$50 a day for each day he fails, after a time fixed, to execute a deed and making such sum a lien on the land; and this, though the purchaser may be willing to waive such forfeiture.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 65.*]

Error from Court of Civil Appeals of Second Supreme Judicial District.

Specific performance by John S. Hagler against John E. Ferguson. From a judgment of the Court of Civil Appeals (111 S. W. 678), affirming a judgment for defendant, plaintiff brings error. Affirmed.

Reeder, Graham & Williams and H. O. Randolph, for plaintiff in error. Turner & Boyce, Madden & Truelove, and W. D. Wilson, for defendant in error.

GAINES, C. J. This is a companion case to that of *Evants & Hagler v. Ferguson et al.* (this day decided by us) 118 S. W. 132. That case was a suit for commissions for a sale of 72,000 acres of land, alleged to have been made for plaintiffs by the defendants. This is a suit by John S. Hagler, the alleged purchaser at that sale, to enforce a specific performance of the terms of that sale. After the evidence was introduced the trial judge instructed a verdict for the defendant, which was accordingly returned and made the basis of a judgment for that party.

The two cases were tried in different counties and not before the same judge. It seems to us that the facts in the two cases were substantially the same. This suit is to enforce the contract which was made in the former case; and since we have held that, because that contract was unauthorized by the principal in the former case, the agents could not recover, we think it follows that it will not support a finding of a contract for the sale of the land. It is true that the alleged purchaser, John S. Hagler, may be willing to forego the stipulation that Ferguson was to pay him \$50 a day for every day that he fails after a certain time to execute a deed for the land; but the answer to the suggestion is that he did not so contract. The contract by an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

agent for the sale of land must be such as either party can enforce it strictly in accordance with its terms. How could Ferguson have enforced this contract against Hagler without complying with the stipulation that, if he failed after 60 days from the date of the contract to make a conveyance of the land, he should become liable to pay \$50 a day for each day he was so in default, and that sum should be a lien upon the land proposed to be sold. *Michael v. Hoffsteadt*, 5 Neb. (Unof.) 453, 98 N. W. 1078. In the case cited the husband authorized his wife to sell his land at \$50 per acre if she could not get more. She entered into an agreement to sell the land, and stipulated that, if her husband failed to convey, he should pay \$500 liquidated damages. This last stipulation was held to avoid the contract, for the reason that she was not authorized to make it, and a recovery was denied. For the same reason, we think a recovery should be denied in this case.

There are other assignments of error which we have considered; but we find none of them which, if sustained, would affect the question of the right of recovery.

For the reasons given, the judgments of the Court of Civil Appeals and of the district court are affirmed.

GALVESTON, H. & S. A. RY. CO. v. DE GROFF et ux.

(Supreme Court of Texas. April 28, 1909.)

1. NUISANCE (§ 23*)—INJUNCTION—ADEQUACY OF REMEDY AT LAW.

Injury to the business of keeping a hotel, occasioned by a nuisance, causing guests to leave the hotel and to induce others to remain away, is susceptible of ascertainment and satisfaction in money, and an injunction will not lie to restrain its continuance.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. § 57; Dec. Dig. § 23.*]

2. RAILROADS (§ 222*)—OPERATION IN STREET—NUISANCE—INJUNCTION—LACHES.

One entitled to an injunction restraining a railroad company from creating a nuisance by using streets for switching purposes and for hauling heavy locomotives and cars must act within a reasonable time after the creation of the nuisance, and the question of reasonable time depends on the facts of the case.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 724; Dec. Dig. § 222.*]

3. RAILROADS (§ 222*)—OPERATION IN STREET—NUISANCE—INJUNCTION—LACHES.

A railway company maintained for 19 years tracks in a street, and continually used the same for switching purposes, increasing the use only to meet the increase of the business. An individual kept a hotel for more than 9 years, and then sought to restrain the railway company from using the tracks on the ground that the use created a nuisance, interfering with the business of the hotel. *Held*, that the delay in instituting the suit was unreasonable, requiring the court to deny relief.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 724; Dec. Dig. § 222.*]

4. RAILROADS (§ 222*)—OPERATION IN STREET—NUISANCE—INJUNCTION—RELATIVE INJURY.

The court, in determining the propriety of restraining a railway company from using its tracks in a city street for switching purposes, on the ground that the same creates a nuisance causing damage to an individual, must consider the relative injury to the individual by a continuance of the business, and that which would be inflicted on the company and the public by granting the injunction, and, where the injury to the individual is greatly less than that to the company and the public, the court must deny relief.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 724; Dec. Dig. § 222.*]

5. RAILROADS (§ 222*)—OPERATION IN STREET—NUISANCE—INJUNCTION—REMEDY AT LAW.

A railway company maintained tracks in a street by permission of the city authorities. The machine and repair shops and railroad yards were so located that to reach them it was necessary to pass over the tracks in the street, and, unless such tracks could be used, the company would be obliged to incur a heavy expense in either removing its shops and yards, or resorting to some other part of the city on the main line at which to make the diversion of the cars to the shops and yards. A real estate owner in the vicinity suffered a depreciation in value of his property and in his business conducted thereon. *Held*, that an injunction restraining the company from using the tracks in the street should not issue, but the individual should be remitted to his action for damages.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 724; Dec. Dig. § 222.*]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Charles De Groff and another against the Galveston, Harrisburg & San Antonio Railway Company to enjoin the use of a city street for switching purposes. There was a judgment of the Court of Civil Appeals (110 S. W. 1006) affirming a judgment for plaintiffs, and defendant brings error. Reversed and rendered.

Baker, Botts, Parker & Garwood and Beall & Kemp, for plaintiff in error. Coldwell & Sweeney, for defendants in error.

BROWN, J. We adopt the statement of the pleadings and the result of the trial made by the Honorable Court of Civil Appeals, as follows:

"Defendants in error, who will hereinafter be called 'plaintiffs,' sued plaintiff in error, who will hereinafter be called 'defendant,' for an injunction to restrain defendant, from using that part of Main street, in the city of El Paso, lying between the east line of Mesa avenue and the east line of Kansas street for yard and station purposes, and from switching cars, making up trains, and doing like things on said street within the limits mentioned. As grounds for the injunction, plaintiffs alleged, in substance: That they are, and for many years hath been, the owners of certain premises, situated in said city within 120 feet from that portion of Main street above described, upon which and as a

part of said premises there is a large and commodious hotel, built and conducted in a manner calculated to secure the patronage of the traveling public, which would be secured and maintained were it not for the annoyance and disturbance caused by defendant's wrongful and unlawful use of said street between the points mentioned; that at all hours, day and night, and especially at night between the hours of 9 p. m., and 5 a. m., defendant is constantly switching and propelling heavy locomotives and cars along railway tracks unlawfully built and maintained along that part of Main street, which causes great noise, the ground to be constantly jarred, defendant's engines making loud, penetrating, and disagreeable sounds, the bells of the engines being constantly ringing, etc., to the great discomfort of persons stopping at plaintiffs' hotel, which disturb and are calculated to disturb the slumber of persons stopping at said hotel; that by reason thereof many guests who stopped there have left, and others stopping there will leave, and many persons, who would otherwise become guests, will not do so; that in the future, unless relief be granted to plaintiffs, many persons who would otherwise have stopped at said hotel will omit to do so on account of said acts of defendant; that by reason of the premises, the property which belongs to Mrs. De Groff, and the business of plaintiff, Charles De Groff, as a hotel keeper, has been greatly damaged; that such property and business will still be further damaged and render the premises valueless as a hotel and destroy such business of the plaintiff, Charles De Groff; that the damages plaintiffs have suffered and will suffer are not shared by the public at large; that such damages cannot be estimated in any fixed or approximately correct sum, and the injuries suffered are not susceptible of compensation in damages; that defendant threatens to continue its unlawful and injurious acts, and will do so unless restrained therefrom by the court; that plaintiffs have no adequate remedy at law, etc.

"The defendant answered by general and special demurrers, a general denial, and a special plea alleging, in substance: That it is a railway corporation created for the purpose of carrying freight and passengers, and had existed as such for over 25 years; that its road traverses almost the entire state of Texas, and is an important link in transcontinental routes between the Atlantic and Pacific Oceans; that under an ordinance passed by the city council of the city of El Paso in the year 1881, and by several amendments thereto, it acquired a right of way through said city over and upon Main street, with full authority to locate its tracks, switches, and spurs, and construct and maintain its depot and yards thereon, in order that it might fulfill the obligations imposed upon it by law as a common carrier of freight and passengers; that by virtue of the authority

conferred by said ordinances and franchises, and with the consent of the city council of El Paso and abutting property owners it, at great expense, acquired by purchase real estate and property contiguous to and abutting on Main street, constructed and built, and has continuously maintained thereon, its passenger and freight depots, machine shops, and other improvements necessary and incident to the operation of its line of railway and the discharge of its duty to the public as a common carrier; that the location of its said property and of its tracks and other improvements thereon is shown upon a certain map sent up with the record as a part of the statement of facts in the case. Defendant further alleged: That by an ordinance passed by the city council of El Paso May 14, 1883, it was given the privilege and right to erect on any part of Main street any additional tracks of railway it might desire. That so much of the street as lies between Kansas and Stanton streets was by ordinance of the city closed and abandoned for the purpose and use as a street by the public. That every and all of the privileges, rights, and franchises were granted the defendant upon the express condition that the passenger depot to be built and maintained should not be at a greater distance from the main plaza than 660 feet; it being the intention of the city council that such depot should not be located from the present business center of the city a greater distance. That defendant thereafter located its yards and grounds, tracks, side tracks, and switches and built its machine shops, and has continuously maintained the same in strict conformity with the conditions and requirements of the city of El Paso, in the proper performance of its duties to the public. That any noise or inconvenience arising from the operation of its trains and switching its cars was only a reasonable exercise of the rights and privileges granted it by said city. That long prior to the time plaintiffs acquired or owned the premises, the Orndorff Hotel was located thereon, and the hotel business conducted by its then owner, without complaint of any inconvenience or annoyance caused to its patrons. That plaintiffs thereafter purchased said property with full knowledge that there would be some inconvenience and annoyance incident to the handling and operation of defendant's trains, cars, and engines over said tracks, and has acquiesced in the same for a period of about 10 years. That it was then, and is now, absolutely necessary to so handle its cars and conduct its business on Main street between the points mentioned. And that such injury or inconvenience as complained of by plaintiffs arises from causes necessarily incident to railway service in the conduct of defendant's railway business under the rightful exercise of its franchises granted by the laws of Texas and the ordinances of the city of El Paso.

"The case was tried before the court with-

out a jury, and a decree was rendered perpetually enjoining and restraining the defendant from using that portion of Main street in the city of El Paso which lies between its intersection with the easterly line of Stanton street and its intersection with the easterly line of Mesa avenue for railroad yards and station purposes, and from making up in whole or in part any trains thereon, and from doing any switching thereon, and from causing its trains, engines, locomotives, and cars, or either, to stand thereon, subject to this provision: 'Provided, however, this shall not in any way be construed as prohibiting passenger, freight or other trains coming in over the main line from the west, or such trains as have been made up and are departing for the west, passing over the switches and side tracks onto the main tracks within said limits, or from stopping for a time reasonably sufficient to throw switches for that purpose. It is expressly ordered by the court, however, that this judgment, and no part thereof, shall be construed as to apply to any tracks of defendant not situated on that portion of Main street which is herein described, and this judgment and injunction hereby ordered shall not apply to any ground or territory other than to that portion of Main street herein mentioned and defined.'

The judge of the trial court filed conclusions of fact, which we condense in part and copy a portion, as follows:

On the 17th day of February, 1881, the city council of the city of El Paso adopted an ordinance by which it granted to the Galveston, Harrisburg & San Antonio Railway Company the right of way over a great number of the streets and alleys of the said city, which included Main and San Francisco streets and contained this provision: "Provided that the right of way, herein granted to said company for its railway, shall (not) exceed five feet from each side of a center line of the track thereof, from the point where such track touched San Francisco street, to the southwestern boundary of the depot grounds as herein-after defined and between which points no side tracks, switch or spur shall be constructed." On March 24, 1881, the said city adopted a second ordinance, by which it enlarged the right of way granted to the said railway company to the width of 16 feet and repealed the inhibition in the first ordinance against the building of said tracks, switches, etc., upon certain streets. On May 14, 1883, the said city council adopted a third ordinance, by which the right of way was extended 12 feet from each side of the 16 feet theretofore granted, making 40 feet in width, and the said ordinance contained these provisions:

"Beginning at the center of San Francisco and Anthony street as shown on map known as the official map of the city, and running thence through said San Francisco street twelve feet on either side of said sixteen

foot grant to the intersection of said San Francisco street with Main street; thence with Main street twelve feet in width on each side of said sixteen foot right of way to the northeasterly boundary of Kansas street, with privilege and right to said company to erect on said part of said street any additional tracks of railway as it may desire."

"Section 3. That so much of said Main street as lies between Kansas street and Stanton street be and the same is from and after the passage and approval of this ordinance, closed and abandoned for the purpose of use as a street on the part of the public."

"The defendant railway company as appears from the map introduced in evidence, in [is] operating and maintaining on Main street, between Stanton street and Mesa avenue, in addition to the double tracks of its main line, three side tracks; one leaving the main line on the south side thereof about 100 feet west of Mesa avenue, continuing east along Main street and diverging to the south from the Main line to a point about 50 feet east of Mesa avenue, where it leaves Main street and enters the private property of the defendant railway company and connects with the defendant's yards, and this track constituting the main lead track from the west to the freight yards of the defendant company. The other two tracks on the north of the north track of the Main line join the main line about 50 feet from the east line of Mesa avenue on Main street and run east on Main street to the east line of Stanton street and constitute the main lead to the coach tracks, coalyards, machine shops, etc., of the defendant. That the part of said side tracks and leads on Main street, as aforesaid, are constantly used for switching purposes; and the yard engines, in the course of making up trains and shifting cars for various purposes, are constantly going back and forth over same within said territory, ringing their bells, and stopping and starting. That the moving back and forth of the switch engines and cars attached thereto on said tracks and leads and upon the main line between Mesa avenue and Stanton street, while engaged in switching and shoving cars, causes a great deal of noise and vibration.

"Second. That the plaintiff Mrs. De Groff owns a large four-story building, called the 'Orndorff Hotel,' situated on Mesa avenue about 90 feet south of the south line of said Main street where same is intersected by Mesa avenue. That plaintiff Charles [De Groff] is conducting a hotel in said building, and the same has a large patronage.

"Third. That the noise caused by the moving back and forth of switch engines while engaged in switching and shifting cars and making up trains upon all of said tracks situated on Main street between Mesa avenue on the west and Stanton street on

the east, arising from the escape of steam, the exhaust of locomotives, the coming together of cars, and the ringing of bells, is so great and constant as to annoy and disturb the guests at said hotel, and keep them from sleep and rest at night, as has been the case for some time past, and continues to be. That the vibration caused by the stopping and starting of the switch engines and cars attached, and the passage of such engines and cars up and down the tracks in the course of switching, causes the building of the said De Groff to vibrate and shake, thereby disturbing the said De Groff and his guests, making his hotel uncomfortable.

"Fourth. That in consequence of such condition the plaintiff's property is seriously damaged and lessened in value, the said hotel's patronage has been materially decreased, and his hotel business materially injured.

"Fifth. That in addition to said switching there are some 18 to 20 trains a day passing along said main track, and out of and into the yards on the south side over the south side lead to and from the main track, and that these trains cause even greater vibration than the said switching, and cause also a great deal of noise.

"Sixth. That as now constructed, in order to get into and out of the defendant's freight yards on the south side of the main line, it is necessary that trains should pass over said lead south of the main line, leaving the same, as stated, about 100 feet west of Mesa avenue, and that, in order to reach said yards on the north side of the main line from the west as the same are now constructed, it is necessary that cars and engines enter the same upon said lead switch which joins the main line, as stated above, east of Mesa avenue about 50 feet. That the use made of said leads by switch engines is, in effect, the use of said Main street between Stanton and Mesa avenue for yard purposes.

"Seventh. That said south lead track as it is now upon the ground on Main street was constructed in the year 1887, or 1888, and has continuously remained and been used without intermission and without any action being taken on the part of the city to oust the railway company up to the present time. And that the said Orndorff Hotel building was in use for hotel purposes long before the plaintiff Mrs. De Groff acquired the property, and the said south lead was so used by the said defendant railway company long before that time."

The plaintiff in error will hereafter be called the "defendant," and the defendants in error will be called the "plaintiffs." In their petition the plaintiffs allege, in substance: That the use of Main street as therein alleged has caused many guests who were stopping at the hotel to leave, and, unless relief be given, many others will

leave; that many persons who would have become guests of the hotel had not done so on account of the noises and disturbances produced by the acts of the defendant, but have sought hotel accommodations elsewhere, and will continue to do so in the future unless relief be granted as prayed for. The petition alleges "that by reason of the premises the value of the said real estate belonging to the said Mrs. Alzina De Groff has been greatly depreciated, and the business of the plaintiff, Charles De Groff, as a hotel keeper, has been greatly damaged." No other element of damage is claimed to exist. It is a well-established principle which is recognized in the petition that the plaintiffs were not entitled to an injunction in this case if they had an adequate remedy at law; that is, if they could recover by a suit at law for the amount of the depreciation of the real estate and compensation for the decrease in the business of hotel keeping. It does not require authority nor argument to show that the decrease in the value of the real estate could easily be ascertained and could be compensated for in money. Therefore the irreparable injury upon which the right to an injunction depends rests wholly upon the question whether the injury to the business of the hotel keeper is susceptible of ascertainment and of satisfaction in money. We are of opinion that the injury arising from the depreciation of the business constituted a good ground of recovery in an action for damages. *Brunswick & W. Ry. Co. v. Hardey*, 112 Ga. 604, 37 S. E. 888, 52 L. R. A. 896; *Rose v. Groves*, 5 Man. & G. 826; *Aldrich v. Wetmore*, 56 Minn. 20, 57 N. W. 221. In the first case cited the action was to recover damages against a railroad company for obstructing the way by which persons usually did and would pass in going to a house on a public street where plaintiff did business. The complaint was that the obstruction prevented persons who had and would have traded with the plaintiff at that place from doing so, and thereby his business was injured. The railroad company contended that such damages were speculative in their nature and not the subject of a legal action. The court said: "In cases, however, where these elements are merely speculative and conjectural and cannot be ascertained with reasonable certainty, no allowance should be made therefor. This does not mean that the amounts of these elements of damage should necessarily be reduced to an exact calculation before a recovery could be had, but there must be sufficient data to enable a jury with a reasonable degree of certainty and exactness to ascertain the loss." Again the court said in the same opinion: "We think, on the contrary, that it is well established by this court * * * that illegally obstructing and continuing to obstruct a public street so as to prevent the customers of a merchant from getting to his

store is inflicting upon him a special wrong not shared in by the public at large, for which he is entitled to maintain an action for damages." The other cases cited are equally in point. Conceding that the acts of the defendant constituted a nuisance to the plaintiffs for which they would be entitled to be remunerated, they could not resort to the process of injunction; there being a remedy at law by which they could have been reimbursed for the injury sustained. *Duck v. Peeler*, 74 Tex. 273, 118 S. W. 1111.

If we concede for the argument that plaintiffs had a right to an injunction, then the law required that they should prosecute that right within a reasonable time after the nuisance was created by the operation of the trains upon that street. *Madison v. Ducktown Sul. Co.* (Tenn.) 83 S. W. 662; *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 South. 192. What will be considered a reasonable time depends upon the facts and circumstances of the case. In some instances courts have held three years an unreasonable time to delay proceedings of this character, and, in other instances, a longer time has been held to be reasonable. The facts, briefly stated, are: The lead tracks, upon which the operation of the trains is complained of, were constructed in the year 1888, and the acts complained of and now carried on upon said tracks were begun then and have been continued ever since, increasing only to meet the increase of business. This suit was instituted on the 27th day of June, 1907, 19 years after the commencement of the use of the tracks for said purposes. It does not appear at what time the hotel was built, but the plaintiff, Charles De Groff, testified that he had been keeping hotel there more than nine years at the time of the trial, and the house was there before he took charge of it, so it is a reasonable inference from the facts stated that the house had been there for a considerable number of years before Mrs. De Groff became the owner of it. We are of opinion that, as a matter of law, the delay of 19 years was unreasonable, and for that reason the court should not have granted the writ of injunction. Counsel for plaintiffs ask: "When did the injury occur?" That might be a pertinent question if this were a suit for damages, but it cannot affect the issue of delay in moving to abate the nuisance.

The question of issuing an injunction, under such state of facts, depends upon the circumstances, and it is the duty of the court to consider the relative injury to the plaintiffs by a continuance of the nuisance to that which would be inflicted upon the defendant and the public by granting and enforcing an injunction, and, if the injury to the plaintiffs appears to be greatly less in amount in comparison to that which will result to the railroad company and the pub-

lic, then it is the duty of the court to deny the writ of injunction. *Wees v. Coal & Iron R. Co.*, 54 W. Va. 430, 46 S. E. 166; *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 205. The undisputed evidence shows that the machine shops, repair shops, and the railroad yards were so located and constructed that to reach either of them from the main track it is necessary to pass over that portion of the tracks to which the injunction as granted applies. It is true that the running of the trains to the depots is not enjoined, but the cars which compose those trains must necessarily be taken off the main track and shifted from one track to another, to the yards and shops, and the facility with which this may be done is of great importance to a railroad company doing as much business as is done at that place. The use of the tracks which is enjoined consisted in bringing cars out of the shops, or from the railroad yards and attaching them to and forming them into trains for use, or in breaking up trains that might come in and distributing the cars, thus clearing the main track by running the cars into the yards or to the repair shops. With the injunction in force, the yards and repair shops could not be reached by the cars brought in on the main line, from which it will necessarily result that the railroad company must either remove its yards and shops to some other place where it may connect with them from the main track, or it must resort to some other part of the city on the main line at which to make the diversion of the cars from the main track on Main street to the yards and shops. In either event the cost to the railroad company will be great, and the whole system of its tracks, depots, shops, and yards would be broken up. The same business, if done in any other portion of the city, would create the same character of nuisance to people living in that neighborhood as is created at the present location. Besides, the people of El Paso are interested in the maintenance of those shops and depots at the place where they are located. In granting the right of way in 1881, the city made it a condition that the passenger depot should be located within 660 feet of the plaza. It appears from the testimony that it would work a great hardship, although it would not be an impossibility, for the railroad to reconstruct all of these yards, depots, and tracks so as to accommodate the business of the city as it is now done and as the people are entitled to have it done. It does not appear that this could be done and at the same time maintain the passenger depot at a point conforming to the ordinance. The public convenience is of controlling importance in this class of cases, especially is it so in this case, wherein it is shown that this railroad company carries the freight and passengers for El Paso over a large scope of country, and also carries

the through travel and traffic which reaches it over the Southern Pacific, as well as that which the Galveston, Harrisburg & San Antonio Railroad Company receives from and delivers to other roads.

The use of the tracks which are enjoined was lawful and indispensable to the operation of the railroad. It cannot be prevented without destroying the usefulness of this public utility. A railroad cannot be operated without locomotives which, being moved by steam, must produce noises. If removed beyond the limits of a city so as to place the yards out of contact with business houses and residences, their value to the public would be greatly impaired. Some one must suffer these inconveniences rather than that the public interest should suffer. If the defendant were compelled to remove to another part of the city, the same nuisance to other people would be caused by the same necessary operation of the machinery, and the citizens at that point could with greater propriety than plaintiffs seek another injunction. These conflicting interests call for a solution of the question by the application of the broad principles of right and justice, leaving the individual to his remedy by compensation and maintaining the public interests intact. This works hardships upon the individual, but they are incident to civilization with its physical developments, demanding more and more the means of rapid transportation of persons and property. The plaintiffs should be left to their action for damages. The injunction should not have been granted.

Plaintiffs rely upon *G., H. & S. A. Ry. Co. v. Miller* (Tex. Civ. App.) 93 S. W. 177, in which this court refused a writ of error. In that case the railroad company averred that its use of the street was temporary and would be abandoned by a certain time. The trial court granted the injunction to become effective at a time subsequent to the date fixed by the railroad company for its removal. The Court of Civil Appeals said: "We do not think appellant has any ground to complain of the court's action in decreeing that it should not do at a certain time certain things, which at that time it alleged that it did not desire to do, and promised that it would voluntarily desist from doing them. We are unable to see of what its grievance consists. Appellees might have had cause to complain, if the court had made their rights in the matter rest on promises made by appellant to remedy their wrongs at some time in the future. As it is, the court seems to have decreed the relief that appellant alleged and proved that it was willing to grant." This court did not undertake to review the case for the reason that by lapse of time the question had ceased to be of practical importance.

It is ordered that the judgments of the

district court and the Court of Civil Appeals be reversed, and judgment be here rendered that the petition for an injunction be denied, and that the petition be dismissed. It is further ordered that defendant in error recover of Charles De Groff and Mrs. Alzina De Groff all costs of all of the courts.

BROWN v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1900.)

1. CRIMINAL LAW (§ 90*)—JUSTICES OF THE PEACE—NATURE AND SCOPE OF JURISDICTION.

The jurisdiction of a justice of the peace is only that fixed by the Constitution and statutes; and, as a general rule any exercise of jurisdiction by him beyond his prescribed power is void.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129-136; Dec. Dig. § 90.*]

2. CRIMINAL LAW (§ 90*)—JUSTICES OF THE PEACE—AUTHORITY AS MAGISTRATE.

A justice of the peace has authority to sit as a magistrate under the express provisions of Code Cr. Proc. 1895, art. 41; but, in view of article 62, providing that, when a magistrate sits to inquire into a criminal accusation, his court is called an examining court, his authority as a magistrate is entirely distinct from his jurisdiction as a justice of the peace.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 90.*]

3. CRIMINAL LAW (§ 90*)—JUSTICES OF THE PEACE—JURISDICTION—TERRITORIAL EXTENT.

Ordinarily one justice of the peace has no authority to take cognizance of proceedings within the limits of the jurisdiction of another justice, and statutes permitting it under prescribed conditions are to be strictly construed; and, where by statute certain proceedings must be had before a proper justice, no other justice can take jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 90.*]

4. CRIMINAL LAW (§ 90*)—JUSTICES OF THE PEACE—JURISDICTION—AUTHORITY TO SIT IN ANOTHER PRECINCT.

One justice of the peace as such cannot sit in the precinct of another justice and take jurisdiction of matters arising therein, even when the other justice is absent, under Rev. St. 1895, art. 1568, providing that, if a vacancy exists in the office of justice of the peace of a precinct, or the justice shall be absent or unwilling to perform the duties of his office, the nearest justice in the county may perform the duty of the office, in view of article 1564, providing that each justice of the peace shall be commissioned as justice of the peace of his precinct, but, if he performs such duties, they must be performed in his own precinct; and hence, under Code Cr. Proc. 1895, art. 941, providing that a justice of the peace, having good cause to believe that an offense against the state laws has been committed, may summon and examine witnesses in relation thereto, a neighboring justice, as a justice of the peace, cannot go into another justice precinct where there is a resident justice, and hold a court of inquiry.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. 90.*]

5. CRIMINAL LAW (§ 90*)—JUSTICES OF THE PEACE—JURISDICTION—"ACCUSED"—"DEFENDANT."

Under Pen. Code 1895, art. 25, providing that the words "accused" and "defendant" there-

in refer to one who in a legal manner is held to answer for an offense at any stage of the proceedings, or against whom complaint in a lawful manner is made, charging an offense including all proceedings from the order of arrest to final execution, a defendant is not "accused" until charged with an offense, and hence a justice of the peace as a magistrate cannot sit as an examining court until a criminal action has been commenced against a person, and he has been arrested and brought before the justice, and therefore a justice does not act as a magistrate at a court of inquiry called to summon and examine witnesses as to a supposed crime, under the express provisions of Code Cr. Proc. 1895, art. 941; nobody being present and called upon to answer any accusation.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 90.*]

For other definitions, see Words and Phrases, vol. 1, pp. 105, 106; vol. 8, p. 7562; vol. 2, pp. 1936-1938.]

6. WITNESSES (§ 390*)—IMPEACHMENT—INCONSISTENT STATEMENTS—CONFESSIONS—FAILURE TO COMPLY WITH STATUTE.

Where an alleged confession of accused, claimed to have been made while he was under arrest, was not shown to have been a voluntary statement taken before an examining court, or to have been made in writing, signed by accused, showing that proper warning had been given as to his rights, as required by Acts 30th Leg. 1907, pp. 219, 220, c. 118, evidence thereof was inadmissible to impeach accused testifying in his own behalf.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 390.*]

Brooks, J., dissenting.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Simon Brown was convicted of perjury, and appeals. Reversed and remanded.

E. L. Agnew and McGrady & McMahon, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for perjury, the punishment assessed being three years' confinement in the penitentiary.

The evidence shows that on December 3, 1906, G. W. King was justice of the peace of precinct No. 3 of Fannin county, and that he, together with the assistant county attorney, sheriff, with deputies, and the county attorney of Lamar county, went into justice precinct No. 4 of said Fannin county, where there was a resident qualified justice of the peace, and that said King issued subpoenas for witnesses, under authority of article 941 of the Code of Criminal Procedure of 1895, and had said witnesses brought before him for the purpose of inquiring into violations of the law. While testifying before said King, appellant stated, "I never saw any card playing or craps in any room above Jim Lewis' frosty joint, and I have not seen a game of poker or crap game around or in Ladonia for three or four years, at least; it has been more than one year." Perjury was assigned against appellant upon his testimony before said King. As above stated, the evidence is that King was the duly

elected and qualified justice of the peace in precinct No. 3; that he went into precinct No. 4, where there was a resident qualified justice of the peace, and held a court of inquiry, and it is further shown that the justice of precinct No. 4 was in no way disqualified from holding said court of inquiry, or sitting in regard to these matters. The commissioners' court had designated Ladonia as the seat of justice, or place for holding the justice court for said precinct No. 4.

Appellant was brought before said King by a deputy sheriff, and held in custody from the time he was supposed to have been summoned before said King until indicted by the grand jury. The contention is made that King, as justice of the peace, had no jurisdiction or authority to act as justice of the peace, or preside as such over a court of inquiry in precinct No. 4, inasmuch as there was a resident justice of the peace, who was a qualified justice of precinct No. 4, and was in no way disqualified to act in such investigation. We are of opinion this contention is sound. A justice of the peace has no authority as such to act out of his precinct, and in the precinct of another justice of the peace. Article 5, §§ 18, 19, of the Constitution provide there shall be not less than four, nor more than eight, justices of the peace in and for each organized county in this state, unless there should be a city of 8,000 or more inhabitants, in which case there may be two justices elected for such city. It further provides that the county court then in existence should make the first division, and all subsequent divisions should be made by the commissioners' court, as provided by the Constitution. Further provisions of the Constitution provide for the jurisdiction, criminal and civil, of such justices of the peace, and that they shall hold their courts at such times and places as may be provided by law. In obedience to these provisions of the Constitution the Legislature provided, among other things, for the election of justices of the peace in these respective justice precincts, and to fill vacancies in case of such occurrence. Article 1564 of the Revised Statutes of 1895 provides: "Each justice of the peace shall be commissioned as justice of the peace of his precinct and ex-officio notary public of his county, and shall take the oath of office prescribed in the Constitution, and give the bond prescribed by law." Article 1565 provides: "Where any vacancy shall occur in the office of a justice of the peace, the same shall be filled by some person appointed by the commissioners' court of the county, who shall hold his office until the next general election, and until his successor shall be elected and qualified." Article 1566 provides: "During the period of such vacancy, or whenever the justice of the peace in any precinct shall be absent, or unable or unwill-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing to perform the duties of his office, the nearest justice of the peace in the county may perform the duties of the office until such vacancy shall be filled, or such absence, inability or unwillingness shall cease." This seems to be the extent of the law with reference to the authority of the justice of the peace as enacted by the Legislature, except as coroner and magistrate. Article 941 of the Code of Criminal Procedure is in the following language: "When a justice of the peace has good cause to believe that an offense has been, or is about to be committed against the laws of this state, he may summon all and examine any witness or witnesses, in relation thereto; and if it shall appear from the statement of any witness or witnesses that an offense has been committed, the justice shall reduce said statements to writing, and cause the same to be sworn to by the witness or witnesses making the same, and thereupon such justice shall issue a warrant for the arrest of the offender, the same as if complaint had been made out and filed against each offender." These are the provisions in the Constitution and statutory enactments in regard to the power and jurisdiction and authority of justices of the peace. It is a well-settled proposition that the jurisdiction and power and authority of justices of the peace are such only as are fixed by the Constitution and statutes. In some of the states their jurisdiction is coextensive with the limits of their respective counties, while in others it is confined to their townships, district, wards, precincts, or hundreds, and it is a general rule that any exercise of jurisdiction by a justice of the peace beyond his prescribed power is *coram non iudice* and void. See *Dew v. State Bank*, 9 Ala. 323; *Caldwell v. Meador*, 4 Ala. 755; *Gage v. Maschmeyer*, 72 Iowa, 696, 34 N. W. 482; *State v. Brayman*, 35 Kan. 714, 12 Pac. 111; *Russell v. Muldraugh's Hill*, etc, 13 Bush (Ky.) 307; *Hebel v. Amazon Insurance Co.*, 33 Mich. 400; *Hartford F. Insurance Co. v. Owen*, 30 Mich. 441; *U. S. Mutual Ins. Co. v. Reisinger*, 43 Mo. App. 571; *People v. Campbell*, 22 Hun, 574; *Sear v. Shanks*, 9 N. D. 204, 82 N. W. 734; *Neville v. Morgan*, 10 Phila. (Pa.) 522; *Leadbetter v. Kendall*, Fed. Cas. No. 8,157a; *The Martha Anne*, Fed. Cas. No. 9,146, OLC. 18. See, also, 24 Cyc. 484, 485. The same rule obtains in this state. See *Foster v. McAdams*, 9 Tex. 542. See, also, *Crawford v. Saunders*, 9 Tex. Civ. App. 225, 29 S. W. 102; *Horan v. Wahrenberger*, 9 Tex. 313, 58 Am. Dec. 145; *Stewart v. Smallwood* (Tex. Civ. App.) 102 S. W. 159; and *Peacock v. State*, 37 Tex. Cr. R. 418, 35 S. W. 964. The justice has also authority to sit as a magistrate, but this is entirely distinct from his jurisdiction as justice of the peace. Code Cr. Proc. arts. 41, 62; *Kerry v. State*, 17 Tex. App. 178, 50 Am. Rep. 122.

Another proposition is that ordinarily one justice has no authority to take cognizance

of proceedings within the jurisdiction of another justice; but in some states other justices, usually the nearest, are given jurisdiction over proceedings within the jurisdiction of another justice who has resigned or is disqualified, absent, or is some way legally disabled; but these statutes are to be strictly construed, and will not be extended to cases clearly not within their terms, and where by statute certain proceedings must be had before a proper justice, no other justice can take jurisdiction. See 24 Cyc. 493, and notes 85, 86, 87, and 88, for collated authorities. It is also settled that one justice of the peace, as such, cannot sit in the precinct of another justice, even when the other justice is absent. See *Stewart v. Smallwood* (Tex. Civ. App.) 102 S. W. 159. In no case can he take jurisdiction or cognizance of matters arising in another precinct where there is a resident justice of the peace capable of acting. *Stewart v. Smallwood*, supra; *Horan v. Wahrenberger*, supra; *Moss v. State*, 83 S. W. 829, 11 Tex. Ct. Rep. 763; *Pyles v. State*, 83 S. W. 811, 11 Tex. Ct. Rep. 732; *Liggett v. State*, 83 S. W. 807, 11 Tex. Ct. Rep. 764; *Wilson v. State*, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180. The three cases, supra, cited from the Texas Court Reporter arose in regard to whether the jurisdiction of the mayor's authority extended beyond his territorial limits. It was held where the case arose outside such limits, perjury assigned upon testimony delivered during the trial before the mayor could not afford the basis of a prosecution because of want of jurisdiction on the part of said officer to try such cases; that his action was *coram non iudice*. The latest utterance in regard to this matter is the case of *Stewart v. Smallwood*, supra. We quote from that case: "It is not disputed that John Fitzgerald, justice of the peace for precinct No. 1 of Fannin county, was absent at the time of filing this suit, and the issuance of the writ of attachment, and that T. J. Self, the justice of the peace of precinct No. 8, was the nearest justice of the peace in Fannin county. It is contended in argument that, when the justice of the peace is absent from his precinct, the nearest justice in the county has jurisdiction of all the cases which may be brought in the precinct of such absent justice, but such nearest justice cannot go out of his precinct and issue process, and make the same returnable to the court of the absent justice, but should make the same returnable to the court of said nearest justice of the peace; in other words, that there is no law authorizing a justice of the peace to go out of his precinct and issue process in another jurisdiction and make it returnable to that jurisdiction. We are of opinion that the intention of this statute is, in the case of the absence of the justice of the peace, to authorize and confer jurisdiction on the nearest justice of the peace in the county to perform the duties

of such absent justice. The statute, however, does not confer power upon such nearest justice to go outside of his precinct, and to the office of such absent justice, and there perform such duties, but contemplates that the duties shall be performed in the precinct of such nearest justice. *Crawford v. Saunders*, 9 Tex. Civ. App. 225, 29 S. W. 102." If this is correct, and it follows the authorities in this state from the beginning, and if the justice of one precinct cannot go into the precinct of another justice of the peace and issue process in that precinct returnable before another justice, then the reasoning is infinitely stronger why the neighboring justice cannot go into the domain of an adjoining or other justice precinct where there is a resident authorized and qualified justice of the peace, and institute or hold courts of inquiry, under Code Cr. Proc. art. 941. The visiting justice of the peace would have no such authority under any provision of law in Texas. This construction of our constitutional and legislative provisions seems to have been followed from practically the beginning of our jurisprudence. We are not discussing how far the Legislature may go in fixing the territorial jurisdiction of justices of the peace. We are only discussing the statutes as we find them enacted.

We have only been discussing the authority of a justice of the peace as such, and acting in the capacity of justice of the peace holding courts of inquiry under article 941, Code Cr. Proc.; but such officer is presented in another light which we have not been discussing. But that matter is not involved in this case, if at all, in an indirect or negative way, but will notice it, as it may be so involved. That is: That such officer is as well clothed with authority to act as magistrate as justice of the peace, and that as magistrate he may hold an examining trial which as justice of the peace he cannot. There is no contention, however, and no fact going to show, that the justice of the peace in this case was acting in the capacity of magistrate. On the contrary, the uncontroverted facts show that he was acting only as justice of the peace, carrying on what may be termed a "court of inquiry," under and by virtue of article 941, Code Cr. Proc., *supra*. In other words, he was summoning before himself, as justice of the peace, witnesses solely for the purpose, and only with the view, of ascertaining if any crimes or violations of the law had been committed in the neighboring precinct into which he had gone, and it may be presumably with the further view, if the witnesses summoned before him in the court of inquiry developed any violations of the law, of having them to make affidavit for the arrest of such discovered violators or offenders. He had no case before him; he was investigating as justice of the peace, with a view and for the purpose

of finding, or procuring, or originating, a case or cases. He was therefore not sitting as a magistrate in an examining trial, but only in his capacity as justice of the peace, ferreting out, or attempting to ferret out, crimes against unknown violators of the law. Our laws have clothed the justice of the peace with varied duties and powers, not only as justices of the peace, but as magistrates, coroners, and notaries public, and they have been assigned different relations, different duties, and the power and authority of such justices in each of these relations is different and entirely distinct from what it is in all of the other relations. As justice of the peace he may discharge certain duties, and in fact is required to discharge them, as justice of the peace, and not as notary public; as a notary public, certain duties as notary public, and not as justice of the peace; so, as coroner, and so, as magistrate. The Legislature has authority to pass laws investing the justice of the peace with these various duties and power, and to separate one from the other, and have so done. As magistrate he may hold an examining trial; reduce testimony to writing; remand parties to jail; discharge them; admit them to bail to await the action of the grand jury, etc. As notary public he could not; as justice of the peace he could not. As magistrate, however, he could. Code Cr. Proc. art. 41; *Kerry v. State*, 17 Tex. App. 178, 50 Am. Rep. 122. It has been held that the testimony taken before such magistrate sitting as an examining court may be used in subsequent trials under certain circumstances when the witness or witnesses have departed this life or have left the state; but this rule would not apply to evidence of a witness in a court of inquiry, for manifest reasons. Code Cr. Proc. art. 24; *Kerry v. State*, 17 Tex. App. 178, 50 Am. Rep. 122; *Childers v. State*, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899. Among others, the accused is not at the court of inquiry; he is not accused of any offense; he has not been arrested; nor has he been confronted with the witness. At the examining trial he has been arrested, and is confronted with the witnesses against him. In the examining court he must answer. At the court of inquiry he is not even accused, is absent, and cannot answer; he is not called upon to answer any accusation. At the court of inquiry, if the evidence of the witnesses summoned before the justice of the peace develop a sufficient case to authorize it, an affidavit is taken; a warrant of arrest issued; accused taken into custody; brought before the court for examination; and the witnesses are then called to face the accused in such examining trial. The justice of the peace is then, and not till then, a magistrate. So the difference between a court of inquiry and an examining court has a wide range of demarcation, and the justice of the peace sits

in entirely different capacities in the two characters of duty.

Again, all judges of courts of appeal, district courts, county courts, and justices of the peace are magistrates. Code Cr. Proc. art. 41. It would hardly be contended that as a magistrate these judicial officers could issue writs of habeas corpus. If so, then a justice of the peace, by virtue of his office as a magistrate, would have as much authority to issue a writ of habeas corpus as a district judge, judge of the Court of Criminal Appeals, or judge on the supreme bench. It would not seriously be asserted that justices of the peace can issue writs of habeas corpus, and yet, under the statute, there seems to be no distinction in the office of magistrate between the justice of the peace and any of the higher or more elevated judicial officers. A writ of habeas corpus can only be issued where a judge has a right to do it: First, as a court; second, as a judge—and this may be in vacation—but never can it be issued by a magistrate as such. The Court of Criminal Appeals, as a court, has authority to issue writs of habeas corpus, and each member of the court is clothed with authority to grant writs of habeas corpus. Each member of the court is a magistrate under our law, and so defined in the same article of the statute with the justices of the peace. As a magistrate, however, it would not be asserted that any member of this court could issue a writ of habeas corpus. Until a very recent date the Supreme Court and its members could not issue or grant writs of habeas corpus, but this authority was conferred by the Legislature recently; but, at all times prior to such recent legislation, the members of that court have been magistrates, and could sit as such, but could not issue writs of habeas corpus. They could, however, as magistrates hold examining trials. So, then, the official character of a magistrate is as distinct as the law can make it from any other official character pertaining to judicial officers, or the discharge of any other official duty devolving upon such officer. And this is true from the justice of the peace upward to the most elevated judicial officer in Texas. The Legislature has exercised its authority in prescribing the duties of the justice of the peace in such relations as deemed proper. In the discharge of these various duties will be found the limit of jurisdiction. It only remains with the courts to uphold such legislation. The cases of *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188, and *Childers v. State*, 30 Tex. App. 180, 16 S. W. 903, 28 Am. St. Rep. 899, recognizes the correctness of this position, as does *Evans v. State*, 12 Tex. App. 370, and *Kerry v. State*, 17 Tex. App. 178, 50 Am. Rep. 122.

In the *Hart* case the justice of the peace was sitting as a magistrate conducting an examining trial in a cause pending before

him, wherein *Hart* was charged with assault to murder, was sitting in the precinct of which he was justice of the peace, and taking the testimony as magistrate in an examining trial, as the statute directed, or authorized, such magistrates to do when sitting as examining court. He was holding his examining trial in precinct No. 1 as magistrate, and of which precinct he was presiding as justice of the peace. It became necessary in that case to go into a neighboring precinct to secure the testimony of the party who had been shot by *Hart*. He proceeded to the neighboring precinct, and took the testimony of the wounded man, not as justice of the peace, nor as a court of inquiry, but strictly as magistrate conducting an examining trial. The opinion sustained this action of the magistrate as reported supra. So in the *Childers* Case, supra. In that case the district judge had granted a writ of habeas corpus. Evidence was adduced before him as such judge presiding over the trial had under the writ of habeas corpus. Later on, when *Childers* was upon final trial before a jury, the state sought to introduce the evidence taken before the district judge on the habeas corpus trial, and it was admitted, but on appeal the judgment reversed for this alleged error, on the ground that testimony taken before a judge sitting in a habeas corpus proceeding could not be reproduced before the jury, because the statute limits the introduction of this character of evidence to depositions or testimony taken before a magistrate, and that the district judge sitting in a habeas corpus trial was not sitting or acting as a magistrate. See, also, *Evans v. State*, 12 Tex. App. 370. These cases clearly draw the distinction between a judge acting as a judge on habeas corpus proceedings, and the same person or officer acting as a magistrate in an examining trial. So the difference between the office of magistrate and that of justice of the peace is decidedly marked and evident. It is as distinctly marked where the justice of the peace is acting as magistrate, and where he is acting as justice of the peace, as is the difference in the authority of a district judge in a writ of habeas corpus and where the same judge is acting as magistrate.

Article 41, Code Cr. Proc., provides who are magistrates, as follows: "Either of the following officers is a 'magistrate' within the meaning of this Code: The judges of the Supreme Court, judges of the Courts of Appeals, the judges of the District Court, county judges of the county, either of the county commissioners, the justices of the peace, the mayor or recorder of an incorporated city or town." Article 42, Code Cr. Proc., clothes magistrates with authority to preserve the peace within their jurisdiction by the use of all lawful means, etc. Article 62, Code Cr. Proc., defines what it takes to constitute an examining court, thus: "When

a magistrate sits for the purpose of inquiring into a criminal accusation against any person this is called 'an examining court.'"

Wherever a justice of the peace sits as an examining court, it has been held his jurisdiction is coextensive with the limits of his county. *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188; *Kerry v. State*, 17 Tex. App. 178, 50 Am. Rep. 122. But this does not constitute such justice or judge a justice of the peace under the terms of article 941, supra. In *Kerry's Case* Judge White, delivering the opinion of the court, used the following language: "A justice of the peace is a 'magistrate'. Code Cr. Proc. art. 41. When a justice sits for the purpose of inquiring into a criminal accusation against any person, he sits, not as a justice of the peace, but as a magistrate, and the court which he then holds is not a justice's, but an 'examining,' court. Code Cr. Proc. art. 62. When holding such a court, his functions as a magistrate are the same as those of the judges of the county, district, Supreme, or Court of Appeals, when they sit as magistrates to hold an examining trial. The same rules govern each." This decision very clearly draws the line, and marks the distinction between a justice of the peace, as such, and when he is acting under his authority as a magistrate. A magistrate can never act until he has a criminal action before him, and a criminal action must be prosecuted in the name of the state against the person accused, and is conducted by some officer or person acting under the authority of the state in accordance with its laws. Article 60, Code Cr. Proc. Therefore there must be a criminal action filed against the party before the justice of the peace can act as magistrate. This is not the condition under the terms of article 941, supra. Under the terms of the latter article, as before stated, the justice of the peace may inquire in regard to violations of the law in order to obtain a criminal action.

Article 25, Pen. Code 1895, reads as follows: "The word 'accused' is intended to refer to any person who, in a legal manner, is held to answer for any offense, at any stage of the proceedings or against whom complaint, in a lawful manner, is made, charging the commission of an offense, including all proceedings from the order for arrest to the final execution of the law; and the word 'defendant' is used in the same sense." So it would seem from this that a defendant is not accused until he has been charged with an offense, and he cannot be tried until he has been arrested, and therefore a magistrate cannot sit as an examining court, or conduct an examining trial, until he has the party under arrest and before him. Under article 941 as justice of the peace he may make inquiry as to violations of the law, and, after one has been discovered, complaint may be tak-

en, process issued, and the arrest consummated; the prisoner brought before the court; and, if he has not final jurisdiction over it, he can resolve himself into an examining court or magistrate, but a prior accusation must be filed before he can obtain jurisdiction of such party as magistrate. In the case in hand, therefore, we say that the justice of the peace had no authority to go into the neighboring precinct to hold a court of inquiry. He was not acting as a magistrate, and could not do so as justice of the peace. Again, would it be contended that a judge of this or the Supreme Court could as a magistrate institute courts of inquiry under article 941, Code Cr. Proc.? Of course not. Why? Because the terms of that article limit the power to justices of the peace. They do not extend or include magistrates, county judges, district or higher judges.

There is another proposition in the case that would be fatal to the conviction independent of the jurisdictional matter. A bill of exceptions was reserved to the ruling of the court permitting the introduction of the confession of appellant while in jail, which seems to have been for the purpose of impeaching him while testifying in his own behalf. The bill, in substance, is as follows: That after appellant had stated he did not remember making the statement upon which the perjury was based, the state's counsel then asked him, for the purpose of impeachment, "Didn't you swear that [meaning the statements upon which the perjury is based] up there, and afterwards didn't you go before Mr. Lattimore, and go before the grand jury of this county, and if you did not go before it, and ask to go before it; and, if you did not there state that Jim Lewis persuaded you to make the statement that is made here, and you testified falsely, and that you wanted to correct it, and say that you saw the gambling from the start to finish"—and counsel for defendant interrupted, and asked the defendant the following question: "Were you under arrest at that time for this offense, and in charge of an officer?" To which defendant replied, "Yes, sir," and defendant then objected to said question, and any answer thereto, because it was an attempt to get a confession before the jury that was not a legal confession, it not being in writing and signed by the defendant, and not showing that he had been warned by the person to whom the same was made, and because it was pretending to lay a predicate to impeach the defendant by illegal testimony, and quite a number of other objections; and it was further asked by said state's attorney: "And when you came up there, if I didn't tell you this: 'Simon, I don't want you to make any statement before this grand jury. If you do make this statement, it will be used as evidence against you, and not for you; that it cannot help you in your case'—and after I told

you that, didn't you go ahead and make this statement [the district attorney reading from a paper purporting to be the statements so made by defendant before the grand jury], and tell the grand jury that you wanted to tell them what was right; that you had lied there, and you wanted to go there and correct it? Defendant answered, 'I don't remember.' These statements were read from a paper by the district attorney to the witness, before the jury. The jury heard them all as read from the paper, and were evidently considered by them as evidence. They were not denied nor withdrawn, but left in that condition. No more dangerous way could be resorted to, to secure consideration of illegitimate and harmful evidence. This was not right, and ought not to have been permitted. This testimony was not admissible. The trial occurred on September 10, 1907, after the act of the Thirtieth Legislature had gone into effect on the 12th of July, 1907. This act provides that, where a party is under arrest, and his confession is sought to be used against him, the party being under arrest, it must be shown that it was a voluntary statement, taken before an examining court in accordance with law, or be made in writing and signed by him, which written statement shall show that he has been warned by the person to whom same is made: First, that he does not have to make any statement at all; second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made, or unless in connection with said confession, he makes statements of facts, or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed, provided that, where the defendant is unable to write his name and sign the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness. See Acts 30th Leg. 1907, pp. 219, 220, c. 118. This law had been in effect some time when this purported confession was sought to be used against appellant. Evidently the legislative intent here enunciated is that confessions, under the circumstances stated in this act, shall exclude all verbal confessions, except as provided in said act. The confession and statements here sought to be used and read to the jury are clearly outside of, and not included within, the provisions of said act of the Legislature. Even before the last act of the Legislature, this court had held that confessions of a party under arrest, made without warning, could not be used against him, even for the purpose of impeachment, citing

Morales v. State, 36 Tex. Cr. R. 234, 36 S. W. 436, 846; Wright v. State, 36 Tex. Cr. R. 427, 37 S. W. 732; Bailey v. State, 40 Tex. Cr. R. 153, 49 S. W. 102; Rodriguez v. State (Tex. Cr. App.) 36 S. W. 439; Walton v. State, 41 Tex. Cr. R. 454, 55 S. W. 567; Parker v. State (Tex. Cr. App.) 57 S. W. 668; Johnson v. State, 43 Tex. Cr. R. 476, 66 S. W. 846. The Morales Case overruled Quintana v. State, 29 Tex. App. 401, 16 S. W. 258, 25 Am. St. Rep. 730, which laid down a contrary rule.

Under the views enunciated above, it is unnecessary to discuss the remaining questions, though some of them seem to be well taken. As the case is presented to us, the judgment should be reversed, and the cause remanded, and it is accordingly so ordered.

BROOKS, J., dissents believing that Hart v. State, supra, conclusively settles the case adversely to appellant.

SMITH v. STATE.

(Court of Criminal Appeals of Texas. Dec. 12, 1908. Rehearing Denied March 20, 1909.)

1. CRIMINAL LAW (§ 594*)—CONTINUANCE—ABSENT WITNESS.

Application for continuance for absence of a witness was insufficient; there being filed, on motion for new trial, an affidavit by such witness that he would not, if present, have testified to the matters set up in the application, and that such statements were not true.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

2. CRIMINAL LAW (§ 598*)—CONTINUANCE—ABSENT WITNESS.

Defendant may not have continuance for absence of a witness, who had not been served with subpoena and was under no obligation to attend, as was known to defendant at the preceding term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1337; Dec. Dig. § 598.*]

3. HOMICIDE (§ 190*)—ASSAULT WITH INTENT—THREATS—PROOF OF REPUTATION.

The state, on a prosecution for assault with intent to murder, where defendant gives evidence of threats to kill him, made by P., the person assaulted, may prove the general reputation of P., as to whether he was of a violent or dangerous character or of a kind and inoffensive disposition; this being within the spirit of Pen. Code 1895, art. 713, though in terms it provides for evidence of character of "deceased" where one accused of murder seeks to justify on the ground of threats.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 390-413; Dec. Dig. § 190.*]

Appeal from District Court, Robertson County; J. C. Scott, Judge.

Henry Smith appeals from a conviction. Affirmed.

Bailey, Woods & Morehead, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Robertson county on a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

charge of assault with intent to murder one Scott Phillips. On trial he was convicted, and his punishment assessed at confinement in the penitentiary for a period of 10 years.

When the case was called for trial, appellant made an application for continuance on account of the absence and for the want of the testimony of two witnesses, Jim Rains and Fred Rumbeck, both of whom are alleged to reside in Robertson county. We think that the application is not sufficient as to Jim Rains, for the reason that on motion for new trial an affidavit was filed by the said Rains to the effect, in substance, that he would not, if present, have testified to the matters set up in defendant's application, nor were said statements true. We think the application was insufficient as to Fred Rumbeck for the reason that the proof taken on the hearing shows as a matter of fact that this witness was never subpoenaed, and that this fact was known, soon after the prosecution was instituted, to appellant. The application for a continuance, under consideration, was a second application. At a former term of the court an application had been made for continuance on account of the witness Rains. It appeared at that term of the court that, while the subpoena for Fred Rumbeck was returned as served on him, as a matter of fact it was not served, and, while the process was yet in the hands of the sheriff, appellant said to him that he need not delay matters, or trouble himself about serving a subpoena on Rumbeck; that he (appellant) would see personally as to his appearance as a witness. At the second term of the court, several months thereafter, the witnesses, including Rumbeck, not appearing, appellant asked for an attachment for them, including Rumbeck, which for some reason was not served, although it appears that Rumbeck was in the county at the time and reasonable diligence might have obtained his attendance. In view, however, of the fact that no subpoena had ever been served on Rumbeck, and he was under no obligation to attend as a witness, and that this fact was known at the preceding term to appellant, it seems to us that he was in no condition to ask or demand a continuance on account of the absence of this witness.

Complaint is made of the admission by the court of evidence as to the general reputation of Phillips. The matter arose in this way: The appellant had testified to certain threats, which he stated had been communicated to him by Rumbeck and Rains, on the part of Phillips to kill him. There were no witnesses to the difficulty, except Phillips. In view of the threats claimed by appellant to have been made by Phillips, the state, under article 713 of the Penal Code of 1895, offered in evidence proof of the general reputation of Phillips, as to whether he was a man of violent, dangerous character, or a

man of kind and inoffensive disposition. Article 713 is as follows: "Where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense unless it be shown that at the time of the homicide the person killed by some act then done manifested an intention to execute the threat so made. In every instance where proof of threats has been made it shall be competent to introduce evidence of the general character of the deceased. Such evidence shall extend only to an inquiry as to whether the deceased was a man of violent or dangerous character, or a man of kind and inoffensive disposition, or whether he was such a person as might reasonably be expected to execute a threat made."

It is obvious that the testimony here introduced does not come within the letter of this statute, for the reason that the person assaulted was not killed, and the case does not, therefore, come within the statute, which seems to apply in its language to a case where the person assaulted died; but it seems clear to us that the evidence sought to be introduced does come within the spirit of this statute, and that in a case where an assault is claimed to be unlawfully made, and is sought to be justified on the ground of self-defense, superinduced by communicated threats, in arriving at the truth of this contention it should be permissible to introduce evidence of the general reputation of the person assaulted. In this case the parties were well acquainted, lived in the same neighborhood, and presumably appellant was acquainted with the reputation and character of Phillips in the respects mentioned. We think, after all, the statute is but declaratory of a general rule; and to limit it to cases of actual death of the person assaulted would be to nullify its salutary provisions. We think, therefore, and so hold, that this testimony was admissible.

The other questions raised in the case are not of important character, nor of such gravity as to demand discussion.

We think there was no error committed in the trial of the case, and that the judgment should be, as it is, in all things affirmed.

SHANLEY et al. v. YORK.†

(Court of Civil Appeals of Texas. Feb. 26, 1909. Rehearing Denied March 18, 1909.)

1. EXECUTION (§ 238*)—SALES—FAILURE TO COMPLY WITH BID—LIABILITIES OF BIDDER.

Under the direct provisions of Rev. St. 1895, art. 2381, one failing to comply with the terms of his bid at an execution sale shall be liable to the execution plaintiff for 20 per cent. of the value of the property bid for, and should the property bring less on the second sale, is liable to pay defendant in execution all loss he

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

† Writ of error denied by Supreme Court April 21, 1909.

sustains by the failure to consummate the sale; the difference between the amounts for which the property sold on the two sales belonging, under the statute, to defendant in execution, and not to plaintiff.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 662; Dec. Dig. § 238.*]

2. MONEY RECEIVED (§ 7*)—MONEY OBTAINED UNDER CLAIM OF RIGHT.

Where plaintiff in execution recovered from the first bidder, who failed to consummate the sale, the difference between his bid and the price obtained on the second sale, which, under the statute, belonged to defendant in execution, the execution defendant, not being a party to the action against the defaulting bidder, could recover from plaintiff in execution, in a proper proceeding, the amount wrongfully recovered in his action against the bidder.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 28; Dec. Dig. § 7.*]

3. EXECUTION (§ 171*)—RELIEF AGAINST EXECUTION—INJUNCTION—SATISFACTION OF JUDGMENT.

Where plaintiff in execution recovered from a defaulting bidder, seemingly on the ground that he was entitled to it as a creditor of defendant in execution, the difference between the amount of his bid and the price obtained on resale, which, under the statute, belonged to defendant in execution, such amount being sufficient to satisfy the judgment, equity, to prevent injustice, will enjoin plaintiff in execution from seeking to further enforce his execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 497; Dec. Dig. § 171.*]

4. JUDGMENT (§ 521*)—COLLATERAL ATTACK—WHAT CONSTITUTES.

Where plaintiff in execution recovered from a defaulting bidder, in an action in the circuit court, the difference between his bid and the amount received on resale, which, under the statute, belonged to defendant in execution, a suit to enjoin plaintiff from further enforcing his execution was not a collateral attack on the judgment of the circuit court; equity simply intervening to prevent injustice.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 964; Dec. Dig. § 521.*]

Appeal from District Court, Jackson County; J. C. Wilson, Judge.

Suit by S. B. York against M. H. Shanley and another to enjoin the enforcement of an execution, in which the defendant named filed a cross-action. From a judgment for plaintiff in both actions, defendants appeal. Affirmed.

Guy Mitchell and W. W. McCrory, for appellants. O. S. York, for appellee.

REESE, J. This is an appeal from a judgment of the district court enjoining appellants, M. H. Shanley, plaintiff in execution, and A. C. Egg, sheriff, from seeking to enforce an execution upon a certain judgment in favor of appellant Shanley against appellee York, and against Shanley on his cross-action. Shanley had sued out an execution upon a certain judgment in his favor against York, in a justice court of Hood county, which he claimed was unsatisfied. The execution had been placed in the hands of Egg as sheriff, who was proceeding to enforce the

same by levy and sale of York's property, when York instituted this action to restrain them, and obtained a temporary injunction. In his petition York alleges that the judgment had been satisfied. The grounds of this contention will appear from the findings of fact by the trial court, which are set out in full, and which are contested by appellant. By his answer appellant Shanley contended that the facts so set out in the petition did not constitute payment of the judgment, and that the same was a valid, subsisting judgment. There is no statement of facts in the record. The findings of fact are not disputed, appellant resting his appeal upon the contention that the conclusions of fact do not support the conclusions of law, nor the judgment.

The conclusions of fact of the trial court, here adopted by us, are as follows:

"(1) On the 31st of October, 1898, M. H. Shanley, in a suit numbered 654, and styled 'M. H. Shanley v. S. B. York, in the Justice of the Peace Court of Precinct No. 1 of Hood County, Texas,' recovered a judgment against the plaintiff herein, S. B. York, for the sum of \$151.50, with 10 per cent. interest thereon from the date of said judgment, and all costs of suit.

"(2) An abstract of this judgment was duly and regularly filed and recorded in the office of the county clerk of Jackson county, Tex., on the 27th day of February, 1899.

"(3) Execution was issued on said judgment soon thereafter, and levied upon the land of said S. B. York in Jackson county, Tex., and said land was by the sheriff of said Jackson county sold under said execution of the 6th day of February, 1900, and one C. Redman bid same in at said sale for the sum of \$165.

"(4) Said C. Redman failed and refused to comply with the terms of said sale, and thereafter there was a second sale of said land, at which said land was sold for the sum of \$1.

"(5) Soon after said second sale M. H. Shanley filed a motion in said justice of the peace court of precinct No. 1 of Hood county, Tex., in said suit No. 654, against C. Redman for 20 per cent. on the value of said property on which C. Redman had bid the sum of \$165, and also for the sum of \$164, which was the difference between the prices sold for on the first and second sales, and on the 30th of October, 1900, M. H. Shanley recovered a judgment in said justice of the peace court of precinct No. 1 of Hood county, Tex., on said motion in said suit No. 654 against C. Redman for the sum of \$33, as a penalty of 20 per cent. on the value of the land sold under execution for his failure to comply with his bid thereon, and the further sum of \$164, 'difference in the price realized upon the sale of said land under second sale from the sale wherein it was purchased by said C. Redman,' also 6 per cent. interest on said amounts from the date of said judgment.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"(6) From said last-mentioned judgment of the justice of the peace court of precinct No. 1 of Hood county, Tex., C. Redman appealed to the county court of Hood county, Tex., in which court, upon a trial of cause, a judgment was rendered in favor of said M. H. Shanley against C. Redman for said sums of \$33 penalty, and \$164 difference in the price of the land at the first and second sales thereof. This last judgment the said C. Redman paid off in full, as shown by the receipt of the sheriff of Jackson county, Tex., acknowledging the receipt from said C. Redman of the sum of \$211.21, 'the amount of the judgment and costs and interest in case No. 414/654, county court, Hood county, Tex., M. H. Shanley v. S. B. York et al.'

"(7) The first sale of the land of S. B. York to C. Redman, by the sheriff of Jackson county, by virtue of the execution issued upon the judgment for \$151.50, in the justice of the peace court of precinct No. 1 of Hood county, Tex., M. H. Shanley v. S. B. York, being for payment and satisfaction of the said judgment against the said S. B. York, if said sale had been complied with by said C. Redman, the proceeds would have been applied to the satisfaction of said judgment, and would have been sufficient in amount to have satisfied said judgment, interest, and costs.

"(8) Execution was issued April 6, 1907, on the judgment of the justice of the peace court of precinct No. 1 of Hood county, Tex., by the justice of the peace thereof, in the cause No. 654, M. H. Shanley v. S. B. York, for \$151.50, and directed to the sheriff of Jackson county, Tex., who levied said execution upon certain lands of the plaintiff, S. B. York, in Jackson county, Tex., and advertised the same for sale to satisfy said judgment and execution. Plaintiff sued out a writ of temporary injunction on the — day of May, 1907, to restrain said sale, and now seeks to perpetuate same."

Upon these conclusions of fact the trial court concluded, as matter of law, that appellant, not having the right to recover the difference between the amount realized upon first and second sales for his own benefit, said recovery and the payment of the judgment for this difference should be credited upon the judgment against York, and the same satisfied said judgment. The assignments of error attack this conclusion of law. The action invokes the equity jurisdiction and powers of the court, and the case presented, it seems to us, involves the question of whether the arm of equity, properly administered, is long enough to prevent what would clearly be an act of gross injustice if not of positive fraud.

It is indisputably clear, and is not attempted to be denied here, that there was no right of action in Shanley to recover in his own

name, and for his own use, the difference between the amount bid by Redman at the first sale and the amount for which the property was sold at the second sale. Under the statute Redman's liability was to York. Rev. St. 1895, art. 2381. He was liable to appellant for 20 per cent. of the amount of the judgment, by way of damages, for failure to comply with his bid, to be recovered on motion in the original suit, and this appellant did recover, and was entitled to. It is not pretended that appellee had in any way transferred to appellant his cause of action against Redman. Just upon what ground the court in Hood county proceeded, in awarding appellant a recovery of this difference, and upon motion in the original suit, we cannot determine, but the only ground we can conceive of is that, as Redman owed York this amount, and York owed Shanley the original judgment, it was sought in this way, by a species of garnishment, not set down in the books, to reach and condemn this amount to be applied on the judgment against York. It is clear that by means of this proceeding appellant received \$164 which really belonged to appellee. Appellee not having been a party to that proceeding, we think it clear that he could, by a timely proceeding, have compelled appellant to surrender this money. If Redman had voluntarily paid this money to appellant, without appellee's consent, under the mistaken view that it belonged to appellant, appellee would have had a right of action against appellant for the recovery of the same. If A. owes B., and, under a mistaken belief that C. is entitled to the money, A. pays it to C., without the consent of B., surely B. could recover it from C. It is true that such payment would not relieve A. of liability to B. B. would have his remedy against both of them. It would not, we think, at least in equity, affect essential merits of the question that A. does not voluntarily make such payment, but is compelled, by a proceeding not binding on B., to do so, as in this case. The substance of the whole matter is that appellant has received and appropriated money belonging to appellee sufficient to pay the judgment. It adds to the force of appellee's contention that there is a strong suggestion that he recovered it on the ground that he was entitled to it as a creditor of appellee.

This is in no sense, we think, a collateral attack upon the Hood county judgment. Equity simply intervenes to compel that to be done which every principle of justice and fair dealing requires to be done.

We think the conclusion of the trial court was correct, and that the judgment should be affirmed, and it is so ordered.

Affirmed.

MOSS & RALEY v. WREN.

(Court of Civil Appeals of Texas. April 25, 1908. On Rehearing, May 30, 1908.)

1. BROKERS (§ 64*) — COMMISSIONS — WHEN EARNED.

A real estate broker employed to sell land earns his commissions when he procures a purchaser who is ready and able to buy on the terms offered and enters into an enforceable contract therefor, but who subsequently refuses to comply with the terms.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 97; Dec. Dig. § 64.*]

2. SPECIFIC PERFORMANCE (§ 58*)—CONTRACT ENFORCEABLE.

A vendor may enforce specifically a contract for the purchase of land, though it stipulates for a sum as liquidated damages on its breach.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 179, 180; Dec. Dig. § 58.*]

Appeal from Potter County Court.

Action by D. T. Wren against Moss & Raley. From a judgment for plaintiff, defendants appeal. Reversed.

For report on certified questions to the Supreme Court, see 118 S. W. 739.

C. C. Fredericks and R. F. Hall, for appellants. F. P. Powell and Hunter & Hunter, for appellee.

Conclusions.

SPEER, J. This appeal presents the same question as that decided by us in *Price v. White* (No. 5,665) 117 S. W. 484, which is whether or not a real estate broker employed to make a sale of his principal's land has earned his commission when he has procured a purchaser who is ready, able, and willing to buy on the terms offered and enters into an enforceable contract to that effect, but who subsequently fails or refuses to comply. We there held that in such a case, if the owner chose not to enforce the contract with the purchaser, it was no fault of the broker, and that the commissions were earned. We are not aware of the question's having been specifically decided in this state by any other court, but the Court of Appeals of Illinois in the cases of *Greene v. Hollingshead*, 40 Ill. App. 195, and *Lang v. Hand*, 57 Ill. App. 134, has very clearly announced the rule in accordance with our holding in the case referred to. The contract between the owner and the purchaser in the present case stipulated for a sum as liquidated damages for its breach, but, if it could be held that this represented the measure of the owner's recovery for a breach, still that would not alter the rights of appellants, since their principal saw fit to accept the contract containing such stipulation, and presumably contemplated his liability to them as a part of the damages which he would sustain in the event the purchaser failed to comply with his undertaking.

The judgment of the county court is therefore reversed and here rendered for appellants for the sum of \$800, the amount shown by the undisputed evidence to have been agreed upon between the parties as commissions in the event of a sale.

Reversed and rendered.

On Rehearing.

Appellee could have elected to insist on a specific performance of the contract to purchase notwithstanding the stipulation for a forfeit as liquidated damages, since the parties evidently contemplated that the transfer of the land was the principal consideration, while the provision for a forfeit was a means of enforcing a compliance. 1 Pom. Eq. §§ 446, 447, and authorities cited in last section; also *Hoskins v. Dougherty*, 29 Tex. Civ. App. 318, 69 S. W. 103.

Motion overruled.

UECKER v. ZUERCHER et al.†

(Court of Civil Appeals of Texas. March 3, 1909. Rehearing Denied March 31, 1909.)

1. INSANE PERSONS (§ 93*) — ACTIONS — AUTHORITY OF GUARDIAN.

Striking from the petition of one to come in and prosecute the action as plaintiff's next friend the allegation that plaintiff was on a certain day adjudged by the probate court to be of unsound mind, and that petitioner was by said court appointed her guardian, was not error; it further appearing therefrom that the order of the probate court had been appealed by certiorari still pending and superseded by bond.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 163; Dec. Dig. § 93.*]

2. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR.

Where the issue of ratification was not submitted to the jury, there is nothing pertinent in the proposition, under an assignment of error to refusal to strike out a clause of answer, that, where a person is insane when she enters into a contract, acts of ratification cannot be shown without pleading and proof of restoration to reason at the time of such acts of ratification.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4113; Dec. Dig. § 1042.*]

3. CANCELLATION OF INSTRUMENTS (§ 89*) — PLEADING — ANSWER — CONSTRUCTION.

Where the petition seeks to set aside a deed not only on the ground of insanity of plaintiff when it was executed, but also on the ground of imposition and fraud, proceeding on the theory of her sanity, acts of ratification by plaintiff alleged in the answer, denying insanity and fraud, do not necessarily have reference to her being insane.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. § 82; Dec. Dig. § 39.*]

4. PLEADING (§ 364*)—MOTION TO STRIKE OUT IMMATERIAL MATTER.

Where, on a motion to strike out an allegation of the answer as immaterial and irrelevant, it did not appear so, in view of a pleading in the answer of ratification, refusal of the motion was not error, though the feature of ratification

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 5, 1909.

was afterwards eliminated by its not being submitted to the jury.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1156; Dec. Dig. § 364.*]

5. PLEADING (§ 32*) — ALLEGATIONS AS TO WRITTEN INSTRUMENTS — DATE.

An allegation in the answer as to an agreement is not objectionable as not giving its date; it being evident that the agreement is the one previously pleaded in the answer as of the date of the deed sought by the petition to be set aside.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 57; Dec. Dig. § 32.*]

6. EVIDENCE (§ 419*)—PAROL EVIDENCE—CONSIDERATION OF DEED.

Inadequacy of the consideration being alleged by the petition as a ground for the relief sought, the setting aside of a deed, defendant may plead and prove the real consideration, including more than recited in the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912, 1913, 1917; Dec. Dig. § 419.*]

7. WITNESSES (§ 237*)—EXAMINATION—QUESTION CALLING FOR FACT.

Objection to the question, "State how she is with regard to remembering and being influenced by parties," that there were no facts offered to show that she was easily influenced, was not good, as the answer, which, but for the sustaining of the objection, would have been, that she was easily influenced, would have been a statement of a fact.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 829-832; Dec. Dig. § 237.*]

8. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR.

Sustaining an objection to a question to plaintiff's witness H., as to plaintiff being easily influenced, was harmless, where H. was an interested witness, and at least two disinterested witnesses testified to the same fact, notwithstanding which the jury found against plaintiff, and H. otherwise testified fully as to plaintiff's condition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4196; Dec. Dig. § 1067.*]

9. APPEAL AND ERROR (§ 760*)—BRIEF—REFERENCES TO RECORD—SHOWING OBJECTIONS.

An assignment of error to exclusion of testimony cannot be considered; the brief referring to no bill of exceptions, and, though it refers to the statement of facts, and it there appears objection to the testimony was sustained and exception was taken to such action, no mention being made of the ground of objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3065; Dec. Dig. § 760.*]

10. APPEAL AND ERROR (§ 837*) — MATTERS WHICH CAN BE CONSIDERED.

In passing on the question of error in exclusion of evidence, reference cannot be had to an allegation of a pleading properly stricken therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3262; Dec. Dig. § 837.*]

11. INSANE PERSONS (§ 26*) — ADJUDICATION OF INSANITY — EFFECT ON PRIOR ACTS.

A judgment adjudging one of unsound mind, as preliminary to granting guardianship, is not admissible in a suit to set aside, on the ground of insanity, her deed executed a year before.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 36; Dec. Dig. § 26.*]

12. CANCELLATION OF INSTRUMENTS (§ 52*)—VERDICT—SPECIAL ISSUES—TEST OF SANITY.

The issue submitted to the jury in a suit to set aside plaintiff's conveyance of land to defendants was: At the time she executed the deed, did she have the mental capacity to and was she capable of understanding that by the execution of it she was parting with her title to the property and vesting title thereto in defendants for the consideration claimed by them? Held, that there was no foundation for the criticism thereof that the proper test was her mental capacity to understand the nature and effect of the transaction.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 106; Dec. Dig. § 52.*]

13. TRIAL (§ 352*)—SPECIAL ISSUE—CONFORMITY TO PLEADING AND EVIDENCE.

A special issue: Did plaintiff, when she executed the deed to defendants, believe she was simply making a contract by the terms of which they were to have the use of land for taking care of her—was based on the pleadings and evidence; the petition setting up fraud and imposition in the obtaining of the deed, and under this the proof of fraud and imposition being, in substance, that she did not understand that she was signing a deed, and that she was led to believe that they were to have the use of the land for taking care of her.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840, 851½; Dec. Dig. § 352.*]

14. CANCELLATION OF INSTRUMENTS (§ 52*)—VERDICT—SPECIAL ISSUES—FRAUD.

The special issue: Did plaintiff, when she executed the deed to defendants, believe she was simply making a contract by the terms of which they were to have the use of the land for taking care of her—cannot be complained of by plaintiff, in a suit to set aside a deed for fraud, as not submitting the proper test as to whether fraud had been practiced on her; it, if anything, being too liberal to her.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 106; Dec. Dig. § 52.*]

15. DEEDS (§ 99*)—CONSTRUCTION—CONSTRUCTING INSTRUMENTS TOGETHER.

A deed and a contract, executed at the same time, as part of the consideration of the deed, whereby the grantees agreed to move onto the land and there give the grantor a home and support her, are to be considered as though the contract were incorporated in the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 261-265; Dec. Dig. § 99.*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Anna Uecker against John Zuercher and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Gunn & McNeill, for appellant. Sallaway & McAskill, for appellees.

JAMES, C. J. The first amended original petition was by Anna Uecker to cancel a deed, executed by her on May 16, 1906, to the appellees, reciting the consideration of \$200 cash and a vendor's lien note for \$2,000, upon the ground that at the time she executed it she was incompetent to do so by reason of the weakness of her mind to comprehend and understand the nature of the transaction or the effect of the instrument. This pleading

alleged, also, that the consideration received by her was insufficient and inadequate, that she signed it under a misapprehension of its contents, brought about by the fraud and deception of defendants, and that they also misrepresented to her the force and effect of said instrument and its consideration. The answer denied any mental weakness or incompetency on her part, or fraud on the defendants' part. That, in addition to the consideration stated in the deed, there was a further consideration for the land; same being set out in a contract in writing of same date reciting a small consideration, wherein defendants agreed to support, maintain, and keep the said Anna Uecker during her life. That the agreement set out in the written contract, and the further oral agreement that they would move on the ranch and give her a home there, was a part of the consideration to be received by her for the land. Defendants further pleaded that plaintiff had ratified the deed by various acts, such as living with the defendants and accepting interest payments on the \$2,000 note. There were supplemental pleadings, but the above is the statement of the pleadings given in appellant's brief and adopted as correct by appellees. The case was submitted by special issues, with verdict for defendants.

It appears that the amended original petition was filed by Anna Uecker. It appears further that Herman Harms, a son of plaintiff, subsequently filed a petition suggesting the mental incapacity of Anna Uecker, praying to be permitted to come in and prosecute the action in her name and behalf as next friend. The court appears to have allowed this to be done, as the decree shows. In his said petition Harms alleged, among other things: "That on the — day of May, 1907, she (Anna Uecker) was formally adjudged to be of unsound mind by the probate court of Bexar county, Tex., and this petitioner was duly appointed and confirmed by said court as guardian of her person and estate, which action of the court the said defendants Zuerchers contested, and by writ of certiorari have appealed said cause for revision and correction and filed bond superseding said judgment of the probate court, which appeal is now pending." This allegation was stricken out on demurrer, and this is the complaint of the first assignment of error. Inasmuch as it appeared from the allegation that the order of the probate court had been vacated by the certiorari proceeding, and the appointment was not in effect, there was no error in the ruling. *Railway v. Jackson Bros.*, 85 Tex. 605, 22 S. W. 1030.

The second assignment complains that the court refused to strike out, upon an exception, the fourth clause of the third amended answer. The first proposition is overruled for the reason that it appears that the allegation claimed to be omitted from the clause is alleged elsewhere in the pleading. The

second proposition is this: "When a person is insane at the time she enters into a contract, subsequent acts supposed to be in ratification of the original contract cannot be shown, without first alleging and proving that the insane party has been restored to reason at the time of such acts of ratification." Inasmuch as the issue of ratification was not submitted, there is nothing substantial or pertinent in the proposition. Besides this, the petition sought to set aside the deed also on the ground of imposition and fraud (proceeding upon the theory of her sanity), and acts of ratification on her part would not necessarily have reference to her being insane.

The third assignment complains of the overruling of an exception to this clause of the answer: "And for further answer these defendants state: That they did not wrongfully go into possession of this property, but say that John Zuercher and Mrs. Anna Uecker, the mother of his wife, peacefully went into possession of same because he was the owner of same, and because of an agreement with his mother-in-law that he was to move thereon and give her a home upon the ranch; that he had agreed to do this, and she asked and requested him to move thereon; and that she wanted, in her old age, to return to the ranch where she had spent nearly all her life and remain the balance of her life." The exception to this was that it did not show when such agreement was made, or the consideration therefor, that it was immaterial and irrelevant, and attempts to inject into the case an immaterial issue, that it was argumentative, and a pleading of the evidence. It should be borne in mind that this answer contained pleading of a ratification of the sale. True, this feature was afterwards eliminated by not submitting such matter to the jury, but at the time this exception was presented the allegation contained in the clause did not appear to be irrelevant, immaterial, and foreign to the issues made by the pleadings. It is also contended that this clause should have shown the time such agreement was made, and the consideration therefor, in order that its connection with the main transaction may be seen and its relevancy and materiality arrived at. We find that elsewhere in the answer it was alleged that plaintiff moved with John Zuercher "to the ranch and has made her home there in accordance with the agreement, and getting her rights under a valid agreement, forming a consideration for the conveyance." It is evident that the agreement referred to was the one alleged as being a part of the consideration of the deed.

The fourth assignment relates to another exception, the nature of which is disclosed by appellant's proposition: "The tenth paragraph of defendants' answer sets up a consideration for the land in addition to that named in the written instrument executed by the

parties at the time, and inconsistent and contradictory of the terms of such written instrument, and for that reason should have been stricken out." Appellant is evidently contending that no consideration for the land could be shown except that expressed in the deed of conveyance. Inadequacy of consideration is alleged by plaintiff as a ground or circumstance connected with the relief asked, and in such a case we know of no rule denying defendant the right to plead and prove the real consideration.

The fifth is that the court erred in sustaining objection to the question propounded to Harms: "State how she is with regard to remembering and being influenced by parties." He would have answered that she was easily influenced. The objection was that there were no facts offered to show that she was easily influenced. The objection was not a good one, as the answer would have been the statement of a fact. The evidence was perhaps admissible, but we have come to the conclusion that it is apparent that plaintiff's case was not prejudiced by the ruling. In the first place, Harms was an interested witness, and there were at least two disinterested witnesses who testified to the fact, and yet the jury found against plaintiff. In the second place, Harms' testimony in reference to plaintiff's condition, concerning which he testified very fully, was not accepted by the jury, and it is not to be supposed, from what is said above, that, if he had been allowed to give the additional testimony objected to, it would have made any difference in the result.

The sixth assignment complains of the exclusion of certain testimony by Harms and others. The brief refers us to no bill of exception. It does refer to the statement of facts where we find that the court sustained defendants' objection to this testimony, and, the objection being sustained, plaintiff excepted. No mention, however, is made of the ground of the objection. Ingenhuett v. Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310.

The seventh complains of the admission of testimony of H. B. Sallaway of conversations between him and plaintiff in his office in reference to the terms of the deed and agreement entered into by her and the defendants. The eighth complains of similar testimony by witnesses Mathews and John Zuercher. The proposition advanced is that, the deed and agreement having been reduced to writing, parol testimony was inadmissible to vary, add to, or contradict the same. The testimony of H. B. Sallaway, as it is copied in appellant's brief under the seventh assignment, does not vary or contradict the terms of the writings, and the testimony of the other two witnesses is stated in the brief as being substantially the same.

The ninth complains of the exclusion of evidence contained in the probate records showing that since the making of the deed and contract Anna Uecker had been held non compos mentis, that Harms had been ap-

pointed the guardian of her person and estate, and that said judgment had not been set aside and annulled. This evidence was objected to upon the ground that it was immaterial, foreign to the issue before the court, and could not be res judicata, had nothing to do with the case, and that same took place about one year subsequent to the making of the deed. The proposition contended for is that such an adjudication was admissible for the purpose of showing mental unsoundness. We cannot, in passing on this question, have reference to the pleading of Harms, which alleged that the judgment of the probate court had been superseded by an appellate proceeding, because that part of his pleading had been stricken from it. We must take it for granted that plaintiff would have shown, as the bill shows he offered to do, that the judgment had not been set aside or annulled in any manner, and therefore the question seems to be squarely presented as to the admissibility of such a judgment, rendered a year after the deed in question was executed, as evidence relevant to the question of the grantor's sanity a year previous. The courts have adopted a liberal rule of admitting evidence of acts, conduct, etc., of the person, both prior and subsequent to the time of the execution of the instrument in question, in inquiries of this nature. As stated in *Hamburger v. Rinckel*, 164 Mo. 398, 64 S. W. 106: "Evidence of the condition of the mind of the testator before and after making a will is admitted of course for the sole purpose of shedding light upon his mental condition at the time of executing the will." See, also, *Williams v. Sapieha* (Tex. Civ. App.) 62 S. W. 72. The acts, conduct and peculiarities, etc., of the person before and after the time are allowed.

The judgment offered was evidently one adjudging plaintiff of unsound mind, as preliminary to the granting of guardianship of her person and estate. The determination of her mental capacity for that purpose was a matter within the jurisdiction of the county judge, but it was nothing more than an adjudication of her condition at that time. Perhaps the evidence on that hearing was much the same as that in this record, and it probably was, for there was evidence on this trial that no changes have taken place in plaintiff's condition for a considerable period. It seems to us an unsound and dangerous rule which would permit either side to use the judgment of the county judge to strengthen the facts. We presume that, if the county judge had ruled that plaintiff was of sound mind and had refused to appoint a guardian, appellees would have endeavored to have the prestige of that court's views to fortify their theory of the evidence. We think that while subsequent acts, conduct, etc., of the party are proper evidence, a subsequent judgment, such as we have here, declaring the person to be of

unsound mind at that later time, is not. Such judgment is in no sense the act or conduct of the party, and to allow it to be used as testimony would tend to the substitution of the judgment of the county judge upon the facts for that of the jury who were there to try this case. It has been decided in this state that a contract made with one who has been adjudged insane and is under guardianship is void (*Elston v. Jasper*, 45 Tex. 409); but it has not been held in this state that a contract is affected in any manner by such proceedings had after the making of the contract, nor that such subsequent proceedings can be looked to as a material fact in determining the state of the party's mind when the contract was made. What is said by the Supreme Court in *Boehme v. Sovereign Camp*, 98 Tex. 876, 84 S. W. 422, and in *McCamant v. Roberts*, 66 Tex. 260, 1 S. W. 260, is not in line with the view that the subsequent judgment sought to be used in this case was any evidence of insanity of plaintiff when she executed the papers in question. In a case similar to this the Supreme Court of Missouri stated: "It is claimed by defendant that, as the inquest was held subsequently to the exchange of the properties, it was not competent evidence against defendant. The record was clearly inadmissible. The inquest was a judicial proceeding after the trade. Defendant was not a party to it, had no connection with it, and his rights previously acquired could in no possible way be affected thereby. It raised no presumption as against him of Rhoades' insanity at the time of the trade, which was consummated something over 20 days before the date of the inquest." *Rhoades v. Fuller*, 139 Mo. 179, 40 S. W. 760. This accords with our views and determines the tenth assignment also.

The eleventh assignment complains of the first issue submitted, which was as follows: "At the time Mrs. Anna Uecker executed the deed in evidence before you, and in which she conveyed her ranch property to the defendants, John and Wm. Zuercher, did she have the mental capacity to and was she capable of understanding that by the execution of the said deed she was parting with her title to said ranch property and vesting title to same in said defendants, John and Wm. Zuercher, for the consideration claimed by them?" The answer was, "Yes." It is contended that the proper test was her mental capacity to understand the nature and effect of the transaction. As the transaction in question was a conveyance of land, in its nature and effect, we are unable to perceive any foundation for this criticism.

The second special issue was as follows, to be answered if the above was answered in the affirmative: "Did the plaintiff, Mrs. Anna Uecker, at the time she executed the deed to John and Wm. Zuercher, believe she

was simply making a contract with said defendants, John and Wm. Zuercher, by the terms of which they, the said John and Wm. Zuercher, were to have the use of said ranch free of rent, for taking care of her?" This was answered, "No." The propositions are: (1) That this charge was not based on the pleadings and evidence. The petition set up fraud and imposition in the obtaining of the deed. Under this the proof of fraud and imposition was, in substance, that she did not understand that she was signing a deed, and that she was led to believe that they were to have the use of the ranch for taking care of her. The court did not err in submitting the very contention made by the evidence on this issue. (2) The question was erroneous in not submitting the proper test as to whether or not fraud had been practiced upon plaintiff. The submission was, if anything, too liberal to plaintiff. If the question had been answered in the affirmative, it was evidently the purpose of the court to enter judgment upon it for plaintiff, and this upon the simple finding that she believed when she made the deed that she was making such a contract, even though she had her full faculties. Requiring the jury to further find fraud inducing such belief would have rendered the submission less effective in appellant's favor. As it resulted, however, the jury found she labored under no such idea, and unless she did the issue of fraud could not have been resolved in her favor. These remarks dispose of the twelfth, thirteenth, and fourteenth assignments.

The fifteenth is overruled for the reason that there was no necessity of the jury answering the third question after answering the others as they did.

The sixteenth assignment is overruled. The deed and the contract were executed at the same time and formed one transaction. The latter was a part of the consideration for the deed, and in legal contemplation had the same effect as if it had been incorporated in the deed, instead of being taken and considered separate from the deed and destructive of it.

Judgment affirmed.

WHITFIELD et al. v. BURRELL et al.†
(Court of Civil Appeals of Texas. March 11, 1909. On Rehearing, March 25, 1909.)

1. LIMITATION OF ACTIONS (§ 39*)—ACCOUNTING—LIMITATIONS—"ACTION."

Rev. St. 1896, art. 2766, provides that the court shall, upon its own motion or upon the written complaint of any one interested, cause a guardian to be cited to file his final account, and article 2770 provides that, after citation, the court shall examine the account, and, if correct, direct the guardian to pay over the estate to the ward. Article 8358 requires every action other than for the recovery of land, for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 5, 1909.

which no limitation is otherwise prescribed, to be brought within four years. *Held*, that neither article 3358 nor the two-year statute of limitations includes proceedings to compel a guardian to render a final account, such proceedings not being an "action" within the statute, nor did the filing of exceptions to the account by the ward and the hearing thereon, as permitted by statute, constitute an "action" within the statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 200; Dec. Dig. § 39.*]

For other definitions, see Words and Phrases, vol. 1, pp. 128-140; vol. 8, p. 7563.]

2. GUARDIAN AND WARD (§ 145*)—ACCOUNTING—LIMITATIONS.

Rev. St. art. 3357, requiring suit on a guardian's bond to be brought within four years after discharge by the court, has no application to proceedings under article 2766 to compel a guardian to file his final account, though the bondsmen became parties in opposition thereto, and such proceedings, brought four years and nine months after the ward became of age, could not be said to be brought too late, section 2766 not barring such proceedings within any definite time.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 483; Dec. Dig. § 145.*]

3. LIMITATION OF ACTIONS (§ 18*)—STATUTORY PROVISIONS—"SUIT."

The words "action" and "suit," as used in statutes of limitation requiring every action or suit to be brought within a stated time, are generally synonymous.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 70; Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 1, pp. 139, 140.]

4. GUARDIAN AND WARD (§ 137*)—ACCOUNTING—NATURE OF DUTY TO ACCOUNT.

The final settlement of a guardian's accounts by the probate court arises from the trust relationship of the guardian, and is for the purpose of securing a detailed statement of the guardian's accounts showing the balance of receipts and disbursements of the estate in his possession.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 461; Dec. Dig. § 137.*]

5. GUARDIAN AND WARD (§ 163*)—ACCOUNTING—EFFECT OF DECREE.

The decree of the probate court upon final accounting of a guardian operates as an account stated between the guardian and ward, as well as the formal discharge of the trust relationship.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 540; Dec. Dig. § 163.*]

6. GUARDIAN AND WARD (§ 137*)—ACCOUNTING—DUTY.

Under the statute, the guardian must render an account to the court for final settlement and discharge when the ward becomes 21 years old, and is not entitled to an absolute discharge until he has submitted an accounting.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 461, 462; Dec. Dig. § 137.*]

7. GUARDIAN AND WARD (§ 158*)—ACCOUNTING—SCOPE OF INQUIRY.

When a guardian renders his final account, the probate court can inquire into it to determine whether it is fair and correct.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 514, 515; Dec. Dig. § 158.*]

8. GUARDIAN AND WARD (§ 144*)—ACCOUNTING—JURISDICTION OF COURT—MAJORITY OF WARD.

The probate court retains jurisdiction to compel a guardian to file a final account though the ward has become of age.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 481; Dec. Dig. § 144.*]

9. APPEAL AND ERROR (§ 601*)—RECORD—STATEMENT OF FACTS—ORIGINAL STATEMENT OR COPY.

Under Act May 25, 1907 (Laws 1907, p. 509, c. 24), requiring the original statement of facts to be sent up on appeal, that is the only statement that can be considered on appeal, the clerk not being authorized to certify a copy, and, unless the parties by agreement waive the original and substitute a copy, the appellate court cannot assume that what purports to be a statement of facts, is a true copy thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2651, 2652; Dec. Dig. § 601.*]

10. GUARDIAN AND WARD (§ 162*)—ACCOUNTING—OPPOSITION—COSTS.

Under Rev. St. 1895, art. 2785, authorizing the taxing of costs against any one who makes opposition and is defeated, where a guardian's sureties voluntarily became parties in opposition to proceedings against the guardian for an accounting, the costs of the appeals from the county court to the circuit court were properly taxed against the sureties and guardian on judgment against them.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 538; Dec. Dig. § 162.*]

11. GUARDIAN AND WARD (§ 159*)—ACCOUNTING—DECREE—SURETIES AS PARTIES—INCLUDING SURETIES' NAMES IN FINDINGS AGAINST GUARDIAN.

In proceedings against a guardian for a final accounting, in which the bondsmen made themselves parties without citation and defended the guardian's account, the decree properly found the amount due both against the bondsmen and the guardian, the former not being entitled to complain that they were named therein, since under Rev. St. 1895, art. 2770, authorizing the court to examine the account for final settlement after citation had been served, objections heard, etc., and enter a decree directing payment over of the estate, and article 2771, authorizing the court to correct the account and have it restated, if incorrect, a settlement of the account is conclusive against the bondsmen, even without citation.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 516; Dec. Dig. § 159.*]

On Rehearing.

12. GUARDIAN AND WARD (§ 58*)—EXPENDITURES—MAINTENANCE AND EDUCATION.

Under Rev. St. 1895, art. 2630, providing that the guardian shall not be allowed more than the clear income from the estate for the ward's maintenance and education without the court's direction, where the yearly interest on the principal of the estate exceeded the amount expended for those purposes, such sums were properly allowed the guardian, though not expended under order of the court.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 275; Dec. Dig. § 58.*]

13. GUARDIAN AND WARD (§ 54*)—ACCOUNTING—CHARGES—INTEREST—FAILURE TO INVEST.

Rev. St. 1895, art. 2639, requires the guardian, under the court's direction, to invest all surplus money, and by article 2643, if the guardian neglects to invest such money, when he could do so by exercising reasonable dili-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gence, he shall be liable for the principal and the highest legal rate of interest for the time he neglects to invest it, so that a guardian who invested the ward's funds for his own personal use would be liable for the highest legal rate of interest from the time he could have properly invested it.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 243, 252; Dec. Dig. § 54.*]

14. GUARDIAN AND WARD (§ 161*)—ACCOUNTING—FINDINGS—CONCLUSIVENESS ON APPEAL.

In proceedings to compel a guardianship account, a finding supported by the evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 523; Dec. Dig. § 161.*]

Appeal from District Court, Lampasas County; John M. Furman, Judge.

Proceedings by Eugenia G. Burrell and others against E. E. Whitfield and others to compel a final accounting by a guardian. From a decree for plaintiffs, defendants appeal. Affirmed.

By order of the probate court of Lampasas county, Tex., made April 8, 1890, appellant E. E. Whitfield was appointed guardian of the person and estate of Eugenia G. Whitfield and Ethel M. Whitfield, minors, and he duly qualified as such guardian. On May 22, 1907, said Eugenia G. Burrell (née Whitfield), joined by her husband, filed in the probate court of Lampasas county a complaint in writing complaining to such court that said guardian had never made and rendered any annual account of his guardianship, or settlement in any manner, of his transactions as such guardian, and had failed and refused to settle with complainant for her estate; that she was now a married woman; and prayed that an order be made citing the said guardian to appear and file his final account of settlement as such guardian, and for an order directing him to pay and deliver to complainant such money and property as she was entitled to have. The application also asked for his accounting with Ethel M. Whitfield, who was still a minor. After service of citation the guardian appeared at the regular term of the probate court and answered by general denial and a plea of the statute of two and four years' limitation in bar of the right to have final accounting, and, without waiving his plea of limitation, tendered an account in final settlement. The probate court passed the accounting as to Ethel, a minor, and determined the accounting as to appellee only. The appellee entered a contest to some of the items in the account of the guardian; and, after hearing evidence thereupon, the court entered an order restating the account as filed and presented by the guardian, and, after approving and allowing certain disbursements by the guardian, decreed that by a full and fair settlement of accounts the guardian has in his possession as due the appellee the sum of \$2,644, and "which said sum he, the said

E. E. Whitfield, is hereby ordered and directed to at once pay over to said Eugenia G. Burrell; and upon compliance with this order said E. E. Whitfield shall be discharged and said guardianship closed, so far as the same affects said Eugenia G. Burrell." From the order of the probate court the appellant and the sureties on his guardian's bond appealed to the district court. The sureties on the guardian's bond seem, from the record, to have voluntarily appeared and made themselves parties to these proceedings in the probate court. In the district court a decree was entered upon trial fixing the amount of the property in money after allowing certain disbursements due by the guardian to appellee, and directing the guardian to pay over the same to the appellee, and upon the payment of the same that he be fully discharged by reason of his guardianship; and further ordered that the decree be certified to the county court for observance. From this decree so entered by the district court an appeal was prosecuted to this court by the guardian and his sureties.

L. C. McBride, for appellants. W. D. Abney, for appellees.

LEVY, J. (after stating the facts as above). Appellant Whitfield, the guardian, pleaded limitations in bar of the proceedings, and complains, by proper assignments of error, that the court erred in not sustaining the pleas. The court in his decree finds, and we consider that finding, that appellee, the ward, became 21 years old on August 24, 1902. The application to the probate court in this case was filed in the probate court on May 22, 1907. Appellant contends that this is an action to which article 3358 of the limitation statute (Rev. St. 1895) would apply in bar. The application in this record on which the proceedings in this case were founded was under authority of article 2766, Rev. St. 1895, which provides: "Should the guardian fail to file his account for final settlement at the proper time, the court shall, upon its own motion, or upon the complaint in writing of any one interested in the estate, cause such guardian to be cited to appear at a regular term of the court and file such account." The order of the probate court was entered in accordance with article 2770, which says: "After citation has been duly served the court shall proceed to examine the account for final settlement, and to hear all exceptions and objections thereto, if any, and the evidence in support of and against such account, and if the same is found to be fair, just and correct an order shall be entered upon the minutes approving it and directing the guardian to deliver the estate remaining in his hands to the ward or other person legally authorized to receive the same, and upon compliance with such order the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

guardian shall be discharged, and such guardianship closed by an order to that effect upon the minutes." By article 3358, which appellant insists is applicable to these proceedings, it is provided: "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward." The "every action" in this article does not include nor mean the demand by the probate court of the guardian, as in these instant proceedings, for a final accounting of his transactions about the estate of his ward during his ward's minority. Such special proceeding by the probate court is not an action within the meaning of the article just quoted. All the limitation statutes employ the words "action" and "suit." As was said in *Webb v. Allen*, 15 Tex. Civ. App. 605, 40 S. W. 342, "Actions" and "suits," as generally used in these limitation statutes, are synonymous and interchangeable terms." "Suit" is defined in *Ex parte Towles*, 48 Tex., at page 433. The accounting "for final settlement" by the probate court arises from the trust relation of guardian, and is within and under the power and control of the probate court. Such proceedings constitute a process of returning a detailed statement of the accounts of the fiduciary relation, showing the balance of receipts and disbursements of the estate in his possession. The decree of the court in respect thereto operates as an account stated between ward and guardian, as well as the formal release from the trust upon such account. It is the duty of the guardian under the statute, when his ward arrives at 21 years of age, to render his account to the court for final settlement and discharge. It is within the power of the probate court to inquire into and determine whether the same as rendered be fair, just, and correct. *Sheffield v. Goff*, 65 Tex. 354. The probate court having the power to appoint the guardian, such court retains jurisdiction and control over him to terminate the appointment in the way provided by statute. *Marlow v. Lacy*, 68 Tex. 154, 2 S. W. 52; *Logan v. Robertson* (Tex. Civ. App.) 83 S. W., at page 397. The guardian is not entitled to an absolute discharge of his trust by the court until he has submitted his final account or settlement with the court. The fact that the ward has reached majority does not deprive the probate court of its jurisdiction over the guardian to compel and enforce an accounting of his guardianship about the estate during the ward's minority. This article (2766) continues the control and jurisdiction of the probate court over the guardian for final accounting during the ward's minority, and expressly authorizes the court either "upon its own motion, or upon the complaint in writing of any one interested in the estate," to cause the guardian to appear and at a regular term of the court file such account.

The article does not undertake to limit the length of time after the ward becomes of age that the court shall have power and control over the guardian as to the settlement of such account; neither does it provide that, where a guardian has failed in his duty to file such account immediately upon the ward's arriving at the age of 21 years, the lapse of any given period of time thereafter furnishes a bar to the enforcement of an accounting by the probate court. In the absence of express provision of law restricting the time when the probate court can exercise its power to inquire into and investigate the transactions of the guardian during the ward's minority after the ward becomes of age, the courts cannot rule that the probate court cannot so exercise its power within the time shown by the facts of this case. There is a provision of law that compels suits on the guardian's bond within four years after discharge by the court. Article 3357, Rev. St. 1895; *Allen v. Stovall*, 94 Tex. 619, 63 S. W. 863, 64 S. W. 777. This is the only provision of the statutes of limitation that has express relation to guardians, but the same has no application to the proceedings in this case. It is true that the statute provides that the ward may appear and file exceptions to the account of the guardian, and authorizes the probate court to hear evidence in support of or against such account; but such answer merely constitutes opposition to the account as rendered, requiring the scrutiny of the court as to the claim of the guardian. Such opposition, however, does not constitute the proceeding before the court an "action" in the sense of suit or case, within the meaning of the article of limitation above quoted. We are of the opinion that neither the four nor two years' statute of limitations, as insisted by appellants, would apply to this proceeding; and the first and second assignments of error are overruled.

The third, fourth, fifth, and sixth assignments cannot properly be reviewed in the absence of a statement of the facts. There is no statement of facts in the record that we are authorized to consider, except the findings and the decree of the trial court as far as made by him. It is required by the act of May 25, 1907 (Laws 1907, p. 509, c. 24), that the original statement of facts, signed and approved in terms of the act, be the statement of facts to be considered in the case on appeal by the appellate courts. *Garrison v. Richards* (Tex. Civ. App.) 107 S. W. 863; *Ry. v. Stoker* (Tex.) 113 S. W. 3. The clerk is not authorized to certify to a copy; and unless the parties to the suit by agreement waive the original, and by agreement substitute a copy, the appellate court cannot assume that what purports to be a statement of the facts is a true copy of all the facts upon which the disposition of the case should be made to rest, or of the material facts in-

involved. *Bean v. Bird* (Tex. Civ. App.) 115 S. W. 121.

The seventh assignment is overruled. The judgment of the district court, which it had power to render on appeal, for costs of the appeal from the county court against the guardian and his bondsmen, with execution therefor, was proper, the sureties having voluntarily become parties to the proceedings and made opposition thereto. Article 2785, Rev. St. 1895. The decree of the court establishing the amount of money the guardian should have on hand, and which was due as against the guardian and his sureties by name and before the court, is not error. *Bopp v. Hansford*, 18 Tex. Civ. App. 340, 45 S. W. 744. The order and decree of the court against the guardian upon a settlement of the accounts is conclusive against the sureties, without citation. Articles 2770, 2771, Rev. St. 1895; *Honung v. Schramm*, 22 Tex. Civ. App. 327, 54 S. W. 616. But in this case the sureties have made themselves parties without citation, and, having defended the account of the guardian, they cannot complain if they were named by the terms of the decree.

The case was ordered affirmed.

On Rehearing.

We concluded to and did grant the rehearing herein, in order to consider the statement of facts copied into the record. *Royal Ins. Co. v. Ry. Co.* (Tex.) 116 S. W. 46. We have no reason to change our views on the assignments of error disposed of in the original opinion. This leaves for consideration the assignments not heretofore disposed of. The following findings of fact were made by the court, and are sustained by the evidence: "I find that the guardian should be charged with insurance money as specified in his final account, \$5,700, also with the value of jewelry as specified in his final account, \$63; total, \$5,763. I find that one-half of said \$5,763 belongs to Eugenia G. Burrell, née Whitfield, amounting to \$2,881.50. I find that said guardian should be credited with one-half of attorneys' fees paid W. D. Abney, \$12.50, and to Lauderdale \$25, and Bernard & Edwards, \$152.50, and one-half of the expense in bringing minors from Washington, total \$390, and leaving a balance of \$2,491.50. I find that the guardian failed to invest said sum for the benefit of his ward's estate, but did use, invest, and convert same to his own use, and should be charged with 10 per cent. interest per annum on said \$2,491.50 during his ward's minority, and with interest thereon at the rate of 6 per cent. from the time she obtained her majority on August 24, 1902, until this time, which amounts to \$3,874.25. I find that said guardian is entitled to a credit on said interest for expenses for maintenance of said

ward during her minority, which is the reasonable sum of \$100 per annum, amounting in all to \$1,250."

By the third and fourth assignments it is contended that the court erred in not allowing the guardian credit for the \$1,250 item for support and maintenance of the ward out of the corpus of the estate, instead of the interest from the corpus as was done. The amounts were not expended under order of the court, but by the guardian without such authority. We do not think there was error. The statute expressly provides, "but without such direction of the court the guardian shall not be allowed, in any case, for the education and maintenance of the ward, more than the clear income of the estate." Article 2630, Rev. St. 1895; *Smythe v. Lumpkin*, 62 Tex. 242; *Jones v. Parker*, 67 Tex. 82, 3 S. W. 223. By the finding of the court the interest per annum on the principal of the estate more than exceeded the amount per year expended for the maintenance and education.

By the fifth assignment it is contended that the court erred in allowing 10 per cent. interest upon the principal of the estate for the time indicated. By the finding of the court the guardian used, invested, and converted the principal of the estate shortly after receiving the same as such guardian to his own personal use, and failed to invest or loan the same. It is the duty of the guardian to loan the money of the ward (article 2639, Rev. St. 1895), and, if he neglects to do so when by use of reasonable diligence he could do so, is liable for the highest legal rate of interest upon the principal for the time he neglects to loan the same (article 2648, Rev. St. 1895). This statute was intended for the faithful administration of estates, and is imperative. *Smythe v. Lumpkin*, supra. See *Reed v. Timmins*, 52 Tex. 84. Having converted the estate to his own use and benefit shortly after receiving the same, the guardian was properly held liable for the highest legal rate of interest.

By the sixth assignment it is claimed that the court erred in refusing to allow the guardian the claim for \$750. The court made the finding: "I find that the claim for \$750 made by the guardian, to cover the expense of a trip to Washington, is not a proper legal charge against the estate of the minor." The court's finding is based upon the evidence that the trip was made for the mother of the children before he qualified as guardian, and not solely for or in the interest of the minors themselves. The court's finding is supported by the evidence, and we do not feel authorized to disturb such finding.

The eighth assignment is overruled. This, together with the original opinion, disposes of all the assignments presented.

The case was ordered affirmed.

GALVESTON, H. & S. A. RY. CO. v. HILLMAN.

(Court of Civil Appeals of Texas. March 24, 1909.)

EVIDENCE (§ 501*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.

A witness cannot testify as to the value of an article, based on information derived from an unidentified and undescribed catalogue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292, 2303; Dec. Dig. § 501.*]

Appeal from Victoria County Court; T. R. Wood, Judge.

Action by Charles Hillman against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Proctor, Vandenberg & Crain, for appellant. Dupree & Pool, for appellee.

JAMES, C. J. The case originated in the justice's court, and was tried in the county court on the following statement of the cause of action found in the citation: "That said galvanized roofing was placed in a car containing unslacked lime, and same permitted to be covered with lime. That, on arrival of said roofing at Telfner, the same was, by the defendant, placed upon the platform and not covered, and permitted to remain there without any notice to plaintiff, during which time the same became wet by reason of a rain and the falling of dew, causing the lime to slack, which destroyed the galvanizing and burned into holes the sheets of iron above referred to." Plaintiff recovered judgment for what he claimed, \$128.81.

The first, second, and third assignments of error are overruled, because the pleading and evidence thereunder were sufficient to support the finding of the jury and the charge submitting the case.

We perceive no error in the matters complained of by the fifth, sixth, and seventh assignments.

The fourth assignment of error must be sustained. Appellee testified that this galvanized roofing, as damaged, "was not worth more to him than ordinary black iron would be. This black iron was worth—I got the price from the catalogue. It is worth \$1.25 per square." This was objected to, upon the ground that the witness was not qualified to testify as to the market value of black iron at Telfner, which objection was overruled. The testimony was material, in that the amount of the verdict recovered was based upon it, in preference to the testimony of a tinner and cornice maker, who stated that ordinary black iron was worth \$3.07 per square. We know of no case that has gone so far as to admit testimony of value based upon information derived from a catalogue, and in this instance it was an unidentified

and undescribed catalogue. To hold the evidence proper would be to make a precedent which would be troublesome in the future.

Reversed and remanded.

HOUSTON LAND & IRRIGATION CO. v. BRADFORD.

(Court of Civil Appeals of Texas. March 24, 1909.)

1. LANDLORD AND TENANT (§ 232*)—ACTION FOR RENT—EVIDENCE—SUFFICIENCY.

Where one, suing for the reasonable rent for land for three years, testified that the reasonable rent was \$50 a year, a verdict for \$45 rent per year was not excessive.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 232.*]

2. LANDLORD AND TENANT (§ 233*)—ACTION FOR RENT—INSTRUCTIONS.

In an action for rent for land occupied by a canal dug across plaintiff's land by defendant's predecessor, instructions that the jury should find the reasonable rental value of the canal, and that if plaintiff, in renting the land, included the use of the canal, they should find nothing for him in that respect, did not make defendant liable for the rental value of the canal in addition to the land on which it was situated.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 233.*]

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by the Houston Land & Irrigation Company against Sam Bradford, in which defendant filed a cross-action. From a judgment for defendant on his cross-action, plaintiff appeals. Affirmed.

Hogg, Gill & Jones, for appellant. Tharp & Whitehead, for appellee.

FLY, J. Suit was brought by appellant to try title to a strip of land extending across the homestead tract of appellee, claiming that it had acquired it by purchase from the Sheldon Canal Company; but after the trial had begun, and a certain written contract between that company and appellee had been introduced in evidence, which showed that it had no rights whatever in the land, appellant withdrew its claim against the land, and the cause was tried on appellee's cross-action for rent for the years 1905, 1906, and 1907.

Appellee swore that the reasonable rent for the land occupied by the canal, which was dug across his land by the Sheldon Canal Company, to whose rights and liabilities appellant had succeeded, was \$50 a year; and it cannot be held that the amount of \$45 a year for three years, found by the jury, is excessive, or without testimony to support the verdict.

The court did not charge the jury, as stated by appellant in its third assignment of error, "that appellant was liable for the rental value of the canal in addition to the land

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

upon which it was situated." The jury was instructed that they should find for appellee "in such sum as you believe from the evidence to be the reasonable rental value of the canal in question for the years 1905, 1906, and 1907." In addition, at the request of appellant, the court charged the jury that if they believed that appellee, in renting the lands, "included the use of the canal," they should find nothing for him in that respect.

The judgment is affirmed.

BRADFORD et al. v. LEMBKE.

(Court of Civil Appeals of Texas. March 17, 1909. On Rehearing, April 7, 1909.)

1. CHATTEL MORTGAGES (§ 150*)—NOTICE—EXECUTION IN WRONG NAME.

A chattel mortgage signed in a wrong name, or a name by which the grantor is not customarily known, imparts no notice.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 252; Dec. Dig. § 150.*]

On Motion for Rehearing.

2. CHATTEL MORTGAGES (§ 177*)—CONVERSION OF MORTGAGED GOODS—MORTGAGE UNDER ASSUMED NAME—BURDEN OF PROOF.

In an action by a mortgagee for conversion of chattels, where defendants, who had purchased them from the mortgagor under a name different from that under which he had executed the mortgage, defended as purchasers for value in good faith and without notice, having found no claims against the mortgagor in respect to the property under the name by which they knew him, the burden was upon them to show that the name under which the mortgage was given was the assumed name.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 352; Dec. Dig. § 177.*]

3. CHATTEL MORTGAGES (§ 150*)—EXECUTION UNDER ASSUMED NAME—BONA FIDE PURCHASER.

If a person should take a mortgage on chattels remaining in the mortgagor's possession, and without investigation allow the mortgage to be executed under an assumed name so that the records would show no mortgage given by the mortgagor in his true name, and the mortgagor should afterwards under his true name sell the property to a purchaser in good faith who had found no claim against the property on the records in the mortgagor's true name, the mortgagee, having been most instrumental in making the loss possible, would be liable for the loss, instead of the purchaser.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 252; Dec. Dig. § 150.*]

Appeal from Bexar County Court; P. H. Shook, Judge.

Action by W. C. Lembke against L. H. Bradford and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded on rehearing.

Will A. Morriss and Ernest H. Powell, for appellants. R. L. Watkins and C. C. Todd, for appellee.

FLY, J. This is a suit for \$350, instituted by appellee against L. H. Bradford and the San Antonio Furniture Company, alleged to

be due by reason of their conversion of certain personal property mortgaged to appellee by H. Odin and Ethel Odin, his wife, to secure him in a debt of \$260, evidenced by a promissory note executed by said Odins January 2, 1907. Appellants claimed to be the purchasers in good faith of the property, without notice and for value. No jury was demanded, and after hearing the evidence the county judge rendered a judgment in favor of appellee for \$314.75.

On January 2, 1907, a man claiming to be H. Odin borrowed \$260 from appellee, and as security for the loan gave a promissory note and chattel mortgage signed by H. Odin and Ethel M. Odin, the latter being described in the mortgage as the wife of H. Odin. The property consisted of furniture, a sewing machine, stove, and cooking utensils, a roan horse 6 years old, single harness and phaëton, and a Jersey cow 4 years old. The mortgage was filed for registration on January 9, 1907, and remained on file, and an entry was made of it as required by law. On September 10, 1907, a man, claiming to be named H. Cowley, offered to sell L. H. Bradford, who was a member of the firm known as the San Antonio Furniture Company, certain secondhand furniture. The next morning he met the man Cowley, and bought some furniture and a sorrel pony and muley Jersey cow for \$172, which he paid in a check. Bradford testified that he did not get any dining table or diningroom chairs. Cowley told Bradford that he had sold part of the furniture before Bradford bought. Bradford swore that he paid the reasonable market value of the property. He made diligent inquiry before he bought the property as to whether there was any claim against the furniture, and had the records of chattel mortgages examined to see if there was any instrument on record affecting the property. Bradford bought the property under the belief that there was no claim. The mortgage given by Odin and wife did not state where the property was situated on which the mortgage was given. The horse was not described except as "1 roan horse, 6 years old, 14 hands high." The horse bought by appellants was a "sorrel pony." The cow is described as "1 Jersey cow S. M. branded 4 years old." The cow bought by appellants was a "very old cow." The only property named in the mortgage that appellee attempted to show was in possession of appellant Bradford was a refrigerator, an iron bed, leather couch, and extension table. The only witness who tried to identify those articles was not positive about them. The witness again stated that he would not swear positively that any of the articles bought by Bradford were those named in the mortgage, except the sewing machine and the articles he saw in the store. He did not testify that he saw the sewing machine in the possession

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of Bradford; and there is nothing indicating that the latter got a sewing machine.

The evidence disclosed that the mortgagor of the property sometimes called himself Odin and sometimes Cowley, but his true name was not shown. He had been arrested about a year before this trial as H. Odin Cowley. Appellants knew nothing of the arrest or about the two names.

The case presented is one of a mortgage being taken from a man under an assumed name, or, at most, not in his surname, but in that of his given name. A mortgage in the name of H. Odin and Ethel M. Odin was not notice to a buyer of personal property from a man named Cowley that the property had been mortgaged by him under another name. When appellants investigated the records of Bexar county and found no mortgage given by H. Cowley to any one on personal property of which he held possession, they had done all they could so far as the records were concerned, and, when they followed that investigation up by seeking for information from other sources, they had done all that was required of them under the law.

We think the duty devolved upon appellee of ascertaining whether the party giving the mortgage bore the name in which he gave the mortgage when the property was to be left in the possession of the mortgagor. If the mortgagee was willing, without investigation, to trust an entire stranger, going under an assumed name, with mortgaged property, his trust should not work to the disadvantage of one who bought the property in good faith. It is indeed a hardship on appellee to lose the property, but it is also a hardship on appellants to lose it, and appellee, having assumed the position of placing others at a disadvantage by his trust and want of care should bear the penalty. This is a case where the application of the rule of equity should be made that he who trusts most, where one of two innocent persons is to suffer, shall lose most. If appellee was deceived by the mortgagor, or if the former was willing to take the risk of the latter being an imposter, he, and not others misled by him, should take the consequences, however innocent he may be. *Kesler v. Zimmerschitte*, 1 Tex. 50.

It does not appear which was the true name of the mortgagor, Odin or Cowley, although the testimony tends slightly towards the latter, and there is no evidence that the man was customarily known as Odin. A mortgage or other conveyance signed in a wrong name, or a name by which the grantor is not customarily known, imparts no notice. *Jones on Mort.* § 491.

If the mortgage had been executed in the name of the mortgagor, it was not sufficient to give notice because of the lack of description of the property. There was nothing to distinguish the property from that of like character, except the number on the sewing machine, and that was not shown to have

been seen by appellants or to have come into their hands. The horse appellants bought was of a different color from the one described in the mortgage, and the cow of a different description. The mortgage did not locate the property by street number, city, or even state or county, although it might be assumed that the property was in Bexar county, where the mortgagors resided. There was nothing in the mortgage by which the property could be identified which was made clear by a failure to identify it on the part of witnesses.

The judgment is reversed, and judgment here rendered in favor of appellants.

On Rehearing.

While entertaining grave doubts as to the sufficiency of the description of the furniture in the mortgage to give any notice, even though the name in which the same was given had been the same given to L. H. Bradford, yet, in deference to the views of the other members of the court, the writer reluctantly consents to the proposition that the description was sufficient.

A reconsideration of the evidence convinces us that it fails to show that the mortgagor and seller went by any other name than that of Odin prior to the time that he sold the property to Bradford, or that Odin was not his real name. All the evidence as to his going under two names is to the effect that it was after the mortgage had been executed and sale made. The mortgagor's true name may have been Odin, so far as the record indicates. The burden was on appellants to prove that the mortgage was given under an assumed name, and not a real name. Had this proof been made, the writer would adhere to the original opinion filed herein, because it is well sustained by high authority. *Mackey v. Cole*, 79 Wis. 428, 48 N. W. 520, 24 Am. St. Rep. 723; *Brayton v. Beall*, 73 S. C. 308, 53 S. E. 641. Those cases disagree with the Nebraska case, *Alexander v. Graves*, 25 Neb. 453, 41 N. W. 290, 13 Am. St. Rep. 501, so confidently cited by appellee as decisive of this case.

There is evidence which tends to show that all the mortgaged property was not converted by appellants, but that some of it had been sold to other parties. The evidence indicates, also, that a different cow and horse from the ones described in the mortgage were sold to Bradford. The only testimony as to value was that the whole property was worth \$600 to \$800, and the value of all that Bradford received was \$240. The testimony, therefore, does not sustain the amount of the judgment, which was for \$314.75. The evidence being uncertain as to the property converted by appellants, and its value, this court cannot render the proper judgment, and it follows that the judgment of the lower court should be reversed and the cause remanded.

The motion for rehearing is granted, and the judgment reversed and cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS et al. v. McLEAN.

(Court of Civil Appeals of Texas. March 10, 1909. On Rehearing, April 7, 1909.)

1. CARRIERS (§ 134*)—CARRIAGE OF GOODS—DAMAGE—EVIDENCE.

Where, in an action against a carrier for damages to plaintiff's shipments of cabbages by failure to properly ice the cars, plaintiff testified that defendant's agents had positive instructions to ice all the cars, the fact that the records covering the movements of cars showed with one or two exceptions that the cars were ordered without ice, and the written requisition for the cars failed to contain an order for ice, did not tend to disprove a finding that ice was ordered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 588; Dec. Dig. § 134.*]

2. CARRIERS (§ 117*)—CARRIAGE OF GOODS—REFRIGERATION.

A common carrier undertaking to carry perishable property in cars specially adapted to preserve it is responsible for any defect in the cars resulting in injury to the property, and the duty to provide suitable cars extends to proper refrigeration according to established custom.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 510; Dec. Dig. § 117.*]

3. CARRIERS (§ 134*)—CARRIAGE OF GOODS.

Evidence that plaintiff's cabbages had just been cut, were sound, firm, and hard when shipped, but decayed in transit, and were badly damaged on reaching their destination, was of itself sufficient to warrant a finding that defendant railroad's cars were either not properly constructed or not refrigerated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 588; Dec. Dig. § 134.*]

4. CARRIERS (§ 121*)—CARRIAGE OF GOODS—INJURIES IN TRANSIT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

Though a shipper may discover before loading or the departure of the car that it is not suitable for carrying perishable goods, he will not thereby be deemed guilty of contributory negligence, or to have assumed the risk, where he has no means of relieving himself of the situation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 531; Dec. Dig. § 121.*]

5. CARRIERS (§ 135*)—CARRIAGE OF GOODS—INJURIES IN TRANSIT—DAMAGES.

Defendant railroad was not liable for special damages where it had no notice that plaintiff's shipments of cabbages were made to fill a contract of sale at any special price.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 599; Dec. Dig. § 135.*]

6. APPEAL AND ERROR (§ 1054*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action against a railroad for damages to plaintiff's shipments of cabbages, the case was tried by the court without a jury, and the damages were estimated from the market value of the goods at destination, and not for a price bargained for in advance of the shipments, defendant was not prejudiced by the erroneous admission of evidence as to the amounts for which the shipments were bargained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 485; Dec. Dig. § 1054.*]

7. CARRIERS (§ 133*)—CARRIAGE OF GOODS—INJURIES IN TRANSIT—DAMAGES—EVIDENCE.

In an action against a railroad for damages to plaintiff's shipments of cabbages, testi-

mony that the amount realized from the sale of the cabbages at destination was the cash market price in their damaged condition, and that they were sold for the best market value obtainable, was admissible on the issue of damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 583; Dec. Dig. § 133.*]

8. APPEAL AND ERROR (§ 1073*)—HARMLESS ERROR—JUDGMENT.

Though, in an action against a railroad for damages to plaintiff's shipments of cabbages, the judgment was for what the cabbages were worth at the point of shipment, and not for their market value at destination had they not been damaged, defendant was not prejudiced, it appearing that they would have been worth at least that much and probably more on the market at destination had they arrived there in the condition they would have been in but for defendant's negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4245; Dec. Dig. § 1073.*]

On Rehearing.

9. CARRIERS (§ 131*)—ISSUES, PROOF, AND VARIANCE.

In an action against a railroad for damages to plaintiff's shipment of cabbages, there was a variance between an allegation that the damage was caused from delay in transportation and proof that it arose from lack of refrigeration, which was not alleged.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 574; Dec. Dig. § 131.*]

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by Marrs McLean against the Missouri, Kansas & Texas Railway Company of Texas and another. From a judgment for plaintiff against the first-named defendant, it appeals. Affirmed.

F. J. Duff, Coke, Miller & Coke, and Thomas & Rhea, for appellant. W. D. Gordon and Thos. J. Baten, for appellee.

NEILL, J. This suit was brought by Marrs McLean against the Missouri, Kansas & Texas Railway Company of Texas and the Gulf & Interstate Railway Company of Texas to recover damages to nine shipments of cabbage made by the firm of McLean Bros. from various points on the line of the Gulf & Interstate Railway Company to various destinations; some being intrastate and others interstate shipments, and are numbered from 1 to 9 in plaintiff's petition.

The plaintiff alleged that he had succeeded to the rights of McLean Bros., a firm composed of himself and Jack McLean; that all the cabbages in the several shipments were in good condition when shipped, and were transported on through bills of lading, with instructions thereon to ice the cars at Galveston, and to re-ice them whenever it was necessary; that defendants failed to ice the cars in shipments numbered 1 to 8, and that by reason thereof the cabbages arrived at destination in a damaged condition, to plaintiff's damage, etc.; that as to ship-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ments numbered 3 and 7, in addition to the cars not being properly iced, the cars in which the shipments were made were not properly constructed, and that plaintiff thereby suffered loss. The petition alleges, as to each of the several shipments, that, when made, the cabbages had been bargained to the respective consignees at a stipulated price, and then avers the difference in the value in their damaged condition at destination and the price at which they had been bargained to be sold. It then avers: "That the prices at which the above-mentioned lots and parcels of produce were bargained as above alleged were the respective cash market prices of such produce respectively at the times and places aforesaid, and that the same could have been sold but for the deterioration and damage caused as aforesaid at such prices in the open market; and that the amounts received therefor in the damaged condition of the respective cars of produce was the full market price therefor as alleged in respect to each specific shipment." The damages prayed for were \$2,145. The Missouri, Kansas & Texas Railway Company answered by a general denial, and pleaded specially that the shipment originated on the line of its codefendant; and that the bills of lading issued by it provided that each line should be responsible only for damages occurring on its own line, and in no event would it be liable for any damages except those done in its possession. It also pleaded contributory negligence. The case was tried without a jury, and resulted in a judgment in favor of plaintiff for \$2,046.80 against the Missouri, Kansas & Texas Railway Company, and against plaintiff in favor of the other railroad company.

The trial judge filed conclusions of fact and of law, which are as follows:

"Findings of Fact.

"I find that McLean Bros. (Marrs McLean, the plaintiff, being now the successor in interest of said firm) shipped the nine car loads of cabbages, substantially as alleged in the plaintiff's petition in this case, from the points on the Gulf & Interstate Railway Company's line running between Beaumont and Bolivar, making deliveries of each car after being loaded to the said Gulf & Interstate Railway Company, which transported the same across the bay to Galveston, where said cars were delivered to the connecting carrier, Missouri, Kansas & Texas Railway Company of Texas, for transportation to the points of destination, as alleged in each specific shipment.

"(2) I find that the plaintiff, and said firm of McLean Bros., made requisitions on the defendants for suitable refrigerator cars to be iced before loading, and that when said requisitions were made the defendant Missouri, Kansas & Texas Railway Company undertook to furnish the same to be promptly transported to the loading station to re-

ceive the cargo. That the said McLean Bros. thereupon notified the growers from whom said cabbages were obtained to have said cabbages cut and ready to be loaded as soon as the train coming from Galveston in the afternoon, leaving Bolivar at about 4 p. m., brought said cars, and that said cabbages were so cut and prepared to be loaded in said cars immediately upon arrival at loading station.

"(3) I find that said McLean Bros. loaded each car with first class quality of cabbage, hard, green, and firm, and that each car was turned over to the defendants with the cabbages in first-class condition, with instructions to the defendants written in the bills of lading to ice at Galveston and re-ice when necessary.

"(4) I find that said cars, after being loaded in a proper manner, were expeditiously transported by the Gulf & Interstate Railway Company of Texas, and delivered to and received by its codefendant, the Missouri, Kansas & Texas Railway Company of Texas, at Galveston.

"(5) I find that the Missouri, Kansas & Texas Railway Company of Texas failed to keep said cars properly iced from the time it received the same to their destination, and that this caused the produce to rot and decay in quantity and manner as set up in the statements of each shipment in the plaintiff's petition, and that the Missouri, Kansas & Texas cars described in the petition were not properly constructed so as to keep the contents in proper refrigeration even if the same had been kept iced in transit, and that the plaintiffs were not at fault in using said cars, and that this failure of refrigeration on the part of the defendant Missouri, Kansas & Texas Railway Company of Texas caused the produce to decay as described in plaintiff's petition.

"(6) I find that the cabbages were all the property of McLean Bros. while in transit, and that the prices f. o. b. shipping point were simply a price basis at which said produce was to be delivered to the consignee, subject to the right of the latter to receive or reject the same upon inspection.

"(7) I find that the market prices of each respective shipment at the point of destination was in excess of said price basis f. o. b. shipping point, and if said produce had arrived at the respective points of destination in good condition, which it would have done if it had been properly refrigerated by the defendant Missouri, Kansas & Texas Railway Company, that it would have brought upon the market in excess of the amounts specified as the market price in such condition in each specific shipment. On the contrary, the amounts realized, as stated in said plaintiff's petition, were all that said cabbages were worth upon the market in the condition in which said cars arrived respectively as detailed in said petition.

"(8) With reference to shipment No. 9, I

find that four or five days was a reasonable time within which to transport said produce from the shipping point to its destination at Kansas City, Mo., and that the loss on said shipment, amounting to about 3,900 pounds in shrinkage, occurred as therein alleged, and I find that the value of said shrinkage is as alleged in said petition, but I find that said car No. 9 was kept properly refrigerated en route by the defendant, and that such shrinkage was not due to any fault of the defendant in the refrigeration.

"Conclusions of Law.

"(1) I conclude, as a matter of law, that the plaintiff is not entitled to recover of the defendant Gulf & Interstate Railway Company of Texas, but that the plaintiff is entitled to recover of the Missouri, Kansas & Texas Railway Company of Texas, by reason of its negligence, the sum of \$2,046.80, with 6 per cent. interest from August 14, 1907, until paid.

"(2) I conclude, as a matter of law, that there is a variance between the allegations and proof concerning shipment No. 9, and that the plaintiff is not entitled to recover for that shipment.

"(3) I conclude, as a matter of law, that the plaintiff, or the firm of McLean Bros., was not guilty of contributory negligence, but that the defendant, Missouri, Kansas & Texas Railway Company of Texas, was guilty of negligence which resulted in the damages to the shipments of cabbages as alleged in plaintiff's petition, except as to shipment No. 9."

The Missouri, Kansas & Texas Railway excepted to all the findings of fact and of law, and the plaintiff to the refusal of the court to award him damages to shipment No. 9.

The first assignment complains of the second finding of fact, in finding that defendants ordered refrigerator cars to be iced before loading, on the ground that it is contrary to the evidence, in that the written requisition and the records covering the movements of the cars in Galveston to the Gulf & Interstate Railway Company show indisputably that the cars, with one or two exceptions, were ordered without ice. The fact that the records referred to in the assignment show that the cars were sent out without ice does not tend to disprove the finding of the court, nor does the failure of the written requisition for the cars to contain an order for ice tend to show that ice was not otherwise ordered to be sent out with them. The testimony of the plaintiff is to the effect that he instructed appellant's commercial agent at Galveston to ice the cars before sending them out to be loaded. His testimony is: "He" (Fontaine, appellant's commercial agent) "had positive instructions from us that we wanted the cars sent out with ice, and not sent without it at all—not to send them at all unless he could send them with ice." Besides, the appellant knew that the cars were ordered for the ship-

ment of cabbages, and it was its duty to furnish cars, where they were required, suitable and in proper condition for the transportation of such goods. 2 Hutch. Car. (3d Ed.) § 505; Davis v. Houston Oil Co. (Tex. Civ. App.) 111 S. W. 219.

The second assignment assails the fifth finding of fact in finding that the Missouri, Kansas & Texas Railway Company failed and refused to keep the cars iced, and that such failure caused the produce to rot; in finding that cars 3,143 and 3,135 were not properly constructed so as to keep the cabbages in proper refrigeration, even if said cars had been properly iced in transit; and in finding that plaintiff was not guilty of contributory negligence in loading cars as he did.

If a common carrier undertake to carry perishable property in cars specially adapted to preserve it, he will become responsible for any defect in the cars resulting in the injury of the property. And under modern methods, in the case of carriers by rail, the duty of a carrier, where he accepts perishable property for transportation, to provide suitable cars, extends to proper refrigeration according to established custom. Johnson v. Railway, 133 Mich. 596, 95 N. W. 724, 103 Am. St. Rep. 406; Railway v. Cromwell, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. Rep. 722. The facts that the cabbages had just been cut from their stalks, were sound, firm, and hard when shipped, and decayed in transit, and badly damaged when they reached their destination, are circumstances tending to show either that the cars were not properly constructed for the carriage of such goods, or that they were not properly refrigerated. These circumstances were of themselves sufficient to warrant the court in finding, at least, the cars were either not properly constructed or refrigerated. A finding of either would be sufficient to render appellant liable for the damage to the produce.

Although a shipper may discover before loading of the departure of the car that it is not suitable for carrying cabbages, or other like perishable goods, he will not on that account be deemed guilty of contributory negligence, or of having assumed such risk, where he has no means or opportunity of relieving himself of the situation. In a case like this, where the cabbages had been purchased and gathered by the shipper from various farms in view of immediate shipment on cars the defendants had agreed to furnish suitable for the purpose, the shippers, even though they may have known the cars were not of the proper kind or iced as required, had either to ship them at the risk of their decaying in transit, or to let them lay and rot at the place where they were carried for shipment; for, as they had no means of preserving them, the cabbages would certainly decay if they were not shipped. This condition of things was brought about by the railroad's breach of its obligation to furnish

suitable cars properly refrigerated. And it, rather than plaintiff, should be held liable for the damages consequent on loading the goods upon the cars it furnished for that purpose.

As the assignments just disposed of are the only ones that attack any of the trial judge's findings of fact (and only the second and fifth), we adopt and make such findings our own.

The fourth assignment complains of the trial court's first conclusion of law, upon the ground that it is wholly unsupported by the evidence. The court's seventh finding of fact, which is unassailed by any assignment of error, furnishes a complete predicate for the conclusion of law questioned by this assignment. The correctness of the principle of law involved in the conclusion not being assailed by the assignment, and it being based upon an unquestioned finding of fact, the assignment of error is overruled.

The fifth assignment of error complains of plaintiff's counsel having been permitted to ask him this question: "Now, I will ask you whether or not you know of your own knowledge as to the amounts for which these cars, set up in the petition, were bargained as alleged?" over defendant's objection that it was incompetent, in that plaintiff had not alleged that the defendant had notice that the shipments, or any of them, were made to fill a contract of sale at any special price, and that, in the absence of such notice, defendants were not liable for special damages. The objection to the question embodies a correct principle of law, and evidence countervailing it should not be received. But as the case was tried before the court without a jury, and it is apparent from its findings of fact and conclusions of law that the damages were estimated from the market value of the goods at destination and not from a price bargained for in advance of the shipment, it is evident that defendant was not prejudiced by the question. This also disposes of the sixth assignment, which complains of a similar question.

The testimony of the witness R. B. Cochran that \$158.15, realized from the sale at destination of a certain car load of the cabbages, was the cash market price in their damaged condition, and that they were sold for the best market value obtainable, was certainly admissible on the issue of damages. *St. L. I. M. & S. Ry. v. Boshear* (Tex. Civ. App.) 108 S. W. 1032; *Id.* (Tex.) 113 S. W. 7. While the "best price obtainable" is not necessarily the "market price," which ordinarily is to be taken in measuring the damages, yet when it is shown in a case where the consignee or owner sells the goods at destination at their market price, and that such price was the best price obtainable, we cannot perceive any reason for the carrier's complaining. If the price actually obtained

for the sale of the goods had been in excess of their market value, the carrier would be entitled to have the price so received considered in estimating the damages, rather than the market value. Hence it was proper to show that the sale was not only at their market value, but for the best price obtainable, in order to negative the idea that a better price could have been obtained than the market price. This, however, though proper, was unnecessary. All required was proof that the price obtained was the market value.

The ninth assignment is based upon the erroneous assumption that the court based its judgment on the market price of the goods at the point of origin of the shipment, and not for the market value of the goods at destination had they not been damaged by defendant's negligence. Though the judgment may have been for what the goods were worth at the point of origin, yet, as the finding of the trial court shows that they would have been worth at least that much, and probably more, on the market at destination had they arrived there in the condition they would have been in but for defendant's negligence, the defendant has no ground to complain of the amount of damages awarded.

There is no error in the judgment, and it is affirmed.

On Rehearing.

In this motion it is urged that we erred in not sustaining appellee's cross-assignment of error, which complains of the trial court's second conclusion of law.

The variance consisted in this: that the allegations charged that the damage was caused from delay in transportation, while, according to the court's finding of fact, there was no such delay—four or five days being a reasonable time for transportation to destination, the shipment having arrived there within that time—consequently no damage could accrue from the alleged cause; but it arose from defendant's failure to keep the car properly refrigerated, which was not alleged. Therefore, the motion is overruled.

LEE et al. v. BROOCKS.†

(Court of Civil Appeals of Texas. Feb. 27, 1909. Rehearing Denied March 18, 1909.)

1. INJUNCTION (§ 145*) — APPLICATION FOR TEMPORARY WRIT—INSUFFICIENT AFFIDAVIT.

Act April 16, 1907 (Gen. Laws 30th Leg. p. 206, c. 107), provides that applications for writs of injunction made to another judge than the one before whom the writ is made returnable shall be accompanied by an affidavit setting out fully the facts showing that the resident judge is inaccessible, and the efforts made to communicate with him, and the result thereof. *Held*, that an affidavit in such a case that the petitioner was at the time unable to reach the judge having original jurisdiction in time to secure the relief sought was not sufficient.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 145.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court April 21, 1909.

2. EXECUTION (§ 171*)—INJUNCTION AGAINST SALE.

Where the amount of an execution as stated in the advertisement of sale exceeds the judgment by only 20 cents, the difference, on an application for injunction against the sale, should be disregarded as too trifling to be considered.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 171.*]

3. EXECUTION (§ 171*)—INJUNCTION AGAINST SALE.

The failure of the advertisement of sale to state that the execution provided for collection of interest affords no ground for injunction.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 171.*]

4. INJUNCTION (§ 145*)—TEMPORARY WRIT—NECESSITY OF SWORN APPLICATION—EVALUATION OF REQUIREMENT.

Where the only grounds relied on for a temporary injunction granted were stated in an unsworn petition, a copy of which was made an exhibit to the petition for injunction, and the affidavit did not pretend to state that the petition was true, the matters therein stated could not be considered, in the face of the requirement of Rev. St. 1893, art. 2992, providing that no injunction should be granted except on a sworn application.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 145.*]

Appeal from District Court, Liberty County. Action by John H. Broocks against R. I. Lee and another. From an order granting a temporary injunction, defendants appeal. Reversed.

See, also, 111 S. W. 778.

G. H. Pendarvis, for appellants.

REESE, J. This is an appeal from an order of the district judge of the Fifty-Eighth district granting a temporary injunction restraining R. I. Lee, plaintiff in execution, and Lee C. Cherry, sheriff of Liberty county, from enforcing an execution, or order of sale, issued by the district clerk of Liberty county, upon a judgment of the district court of said county in favor of R. I. Lee and against John H. Broocks, appellee. The appeal is prosecuted under the provisions of the act of 1907, allowing appeals from such interlocutory orders. Acts 30th Leg. p. 207, c. 107.

The petition for injunction was presented to Hon. W. H. Pope, judge of the Fifty-Eighth district, by whom the temporary writ was granted, returnable to the district court of Liberty county, which is in another district. To satisfy the requirements of the act of April 16, 1907 (Gen. Laws 30th Leg. p. 206, c. 107), there was attached to the application the following affidavit: "Your petitioner, John H. Broocks, plaintiff herein, relying on the Constitution of the state of Texas, as well as other rights granted by the government, and being at this time unable to reach the Hon. L. B. Hightower, the judge having original jurisdiction hereof, in time to secure the relief sought by reason hereof, brings this his petition and alleges," etc.

The first objection made by appellant to the order of the judge is that this affidavit was not sufficient, under the act aforesaid, to authorize the judge of the Fifty-Eighth district to act. This contention must be sustained. The act referred to was intended to cure what had become an intolerable evil in procuring temporary injunctions from district judges remote from the court where the case was to be tried, instead of making application to the judge of said district, under which practice it was not infrequent that parties desiring such suit started out on a roving quest over the state for some district judge who would listen favorably to their plea, to which the resident judge was not favorable, thus securing temporary injunctions, which were promptly dissolved by the judge of the court to which such writs were returnable. To put a stop to such practices, it was provided by the act that such applications, when presented to a judge other than the judge of the court to which, under the law, such writ was required to be made returnable, should be accompanied by an affidavit "setting out fully the facts showing that the resident judge is inaccessible, and the efforts made by the applicant to reach and communicate with said resident judge, and the result of such efforts in that behalf." It was not considered sufficient that the applicant should merely make affidavit that the resident judge was inaccessible or that he could not be reached, but, in order that the purpose and intent of the act should not be evaded, it was required that the facts showing such inaccessibility, and the efforts made to reach him, should be fully stated, in order that the judge to whom the application was presented might determine whether a fair and reasonable effort had been made, in good faith, to reach the resident judge, without which it is positively declared by the act that "no non-resident judge shall have the power to hear said application upon the ground of inaccessibility of the resident judge." The act goes further, and provides that "should any non-resident judge hear said application upon the ground of inaccessibility of the resident judge, and should grant the writ of injunction prayed for, said injunction so granted should be dissolved upon motion, upon its being shown that the petitioner has not first made a reasonable effort to procure a hearing upon said application before the resident judge." The effect of this is that even if a proper affidavit, as required by the statute, is made, of the inability to reach the resident judge, and an injunction granted, upon motion to dissolve under the statute, it may be shown that reasonable effort had not in fact been first made to invoke the action of the resident judge, and this alone should authorize a dissolution of the injunction, notwithstanding

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the statements of the affidavit. The purpose of the act is clear and its language plain. Such an affidavit as made in this case, if held sufficient, would enable an applicant for injunction in every case to evade the plain requirements of the statute. The district judge of the Fifty-Eighth district had no authority to grant the temporary writ, and, for the reasons indicated above alone, the order must be set aside.

Upon other grounds, also, the injunction should not have been granted. The only ground stated in the application, as sworn to, for the injunction, is that there was a discrepancy between the amount of the judgment as stated in the advertisement of the sale and as stated in the judgment of \$1,000. The judgment, as shown by the application, is for \$17,316.88, with interest thereon at the rate of 8 per cent. per annum from the date of judgment—August 17, 1904. The amount of the execution as stated in the advertisement is \$17,316.88, without stating the interest. It will be seen that there is a difference of 20 cents, which may be and should have been disregarded as too trifling to be considered. The failure of the advertisement of sale to state that the execution provided for collection of interest afforded no ground for the injunction. It was an utterly immaterial matter.

The only grounds relied upon for the injunction are stated in an unsworn petition filed in the district court of Liberty county, a copy of which is made an exhibit to the petition. In the affidavit to the application presented to the district judge, appellee does not pretend to state that the statements of this petition are true, nor can the affidavit be so construed, and, so far as the allegations of said petition are concerned, they cannot be considered as grounds for the injunction. The statute provides that no injunction shall be granted except upon a sworn application. Rev. St. 1895, art. 2992. This requirement cannot be evaded as was done in this case, in so far as the temporary injunction rests upon the allegations of the petition referred to.

For the reasons indicated, the order of the district judge granting the temporary injunction is reversed, the order set aside, and the injunction dissolved.

GULF, C. & S. F. RY. CO. et al. v. RAILROAD COMMISSION OF TEXAS.

(Court of Civil Appeals of Texas. March 31, 1909.)

Appeal from District Court, Travis County; Chas. A. Wilcox, Judge.

Suit by the Gulf, Colorado & Santa Fé Railway Company and others against the Railroad Commission of Texas to set aside certain orders of the commission establishing lumber rates. A demurrer to the amended petition was sustained, and plaintiffs appealed to the Court of

Civil Appeals, which certified questions to the Supreme Court. On rehearing by the Supreme Court (116 S. W. 795), the former decision of the Supreme Court (113 S. W. 741) was overruled, and the decision of the Supreme Court in sustaining the demurrer was reversed.

Terry, Cavin & Mills, for appellant. R. V. Davidson, Atty. Gen., Claude Pollard, and Andrews, Ball & Streetman, for appellee.

FISHER, C. J. As per opinion of the Supreme Court on file in answer to certified questions (116 S. W. 795), the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. NEISER.

(Court of Civil Appeals of Texas. March 17, 1909. Rehearing Denied April 14, 1909.)

1. RAILROADS (§ 481*)—FIRES—ACTION—EVIDENCE.

Where, in an action against a railroad company for the destruction of timber, grass, and hay by fire set by sparks from an engine, a witness testified that the market value of the land before the fire was a specified sum per acre and that just after the fire it was worth half that amount, and, on cross-examination, testified that the land had the same value after the fire as it had before, but that the grass and timber were damaged, the sustaining of an objection to the question whether, if the fire reduced the value of the land, grass, and timber one-half, two fires would not entirely destroy the value, was not erroneous.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1717; Dec. Dig. § 481.*]

2. RAILROADS (§ 481*)—FIRES—ACTION—EVIDENCE.

In an action for the destruction of timber, grass, and hay by fire set by a railroad engine, the fact of another fire on the same land is inadmissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1719; Dec. Dig. § 481.*]

3. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS.

Where it was apparent that a witness answered under a mistake as to the meaning of a question, it was not error to allow counsel for the party calling the witness to ascertain what he meant by the answer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 837; Dec. Dig. § 240.*]

4. EVIDENCE (§ 474*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.

One who had experience in putting up hay, knew how much a tract of land would likely produce, the cost of baling the same, and knew what the hay would be worth after it was baled was competent to testify to the value for hay or grass destroyed by fire.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2218; Dec. Dig. § 474.*]

5. RAILROADS (§ 481*)—FIRES—ACTION—EVIDENCE.

Where the petition in an action against a railroad company for the destruction by fire of grass for pasturage alleged that the pasture had both a market and real value, evidence that the grass used for pasturage had a real value, though no market value, was competent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1726; Dec. Dig. § 481.*]

6. DAMAGES (§ 112*)—FIRE—DESTRUCTION OF PROPERTY.

The measure of damages for the destruction by fire of timber and grass for hay and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pasturage is the difference between the value of the land just before and just after the fire.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 1737; Dec. Dig. § 112.*]

7. EVIDENCE (§ 474*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.

One who lived in the immediate vicinity of land injured by a fire which destroyed the timber and the grass, and who knew the injury resulting from the fire and the market value of land in the community, was competent to testify as to the reasonable market value of the land immediately before and after the fire.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2217; Dec. Dig. § 474.*]

8. APPEAL AND ERROR (§ 692*)—EXCLUSION OF EVIDENCE—REVIEW.

Before error can be predicated on the refusal to permit a witness to testify, it must appear from the bill of exceptions what the testimony would have been, and that the testimony would have been beneficial to the party complaining.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2905; Dec. Dig. § 692.*]

9. RAILROADS (§ 481*)—DESTRUCTION OF PROPERTY BY FIRE—EVIDENCE—ADMISSIBILITY.

In an action against a railroad company for the destruction of property by fire set by an engine, evidence of the inspection of a designated engine and the result thereof with reference to its spark arrester was properly excluded, in the absence of proof that such engine was the one setting the fire, or of proof that such engine had run on the road on the day of the fire.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1717; Dec. Dig. § 481.*]

10. RAILROADS (§ 485*)—FIRES—ACTION FOR DESTRUCTION OF PROPERTY—EVIDENCE—INSTRUCTIONS.

Where, in an action against a railroad company for the destruction of property by fire set by an engine, the evidence showed an ineffectual effort of the company's employees to stop the fire, that plaintiff's son aided in the effort, that a strong wind was blowing, and that the fire had gained such headway that any effort to put it out would have been fruitless, etc., the refusal to charge on the issue of contributory negligence was proper.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1755; Dec. Dig. § 485.*]

11. RAILROADS (§ 454*)—FIRES—CARE REQUIRED OF RAILROAD.

A railroad company must equip its engines with the most approved spark arresters, and must exercise ordinary care to keep the same in good repair, and a company is liable for damages from fires proximately caused by its negligent failure to exercise such care in the equipment and maintenance of its engines.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1668-1671; Dec. Dig. § 454.*]

12. RAILROADS (§ 485*)—FIRES—ACTIONS—EVIDENCE—INSTRUCTIONS.

Where fire injuring plaintiff's land originated in some grass on a rock quarry at a point within 20 feet of the railroad track, and it appeared that the quarry containing only a few acres was fenced in with the right of way, an instruction that it was negligence for a railroad company to allow grass and combustible material to accumulate on the land inclosed in its right of way was proper.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1754; Dec. Dig. § 485.*]

13. TRIAL (§ 194*)—INSTRUCTIONS—INVADING PROVINCE OF JURY—WEIGHT OF EVIDENCE.

An instruction, in an action against a railroad company for the destruction by fire of

timber and grass, that the jury, on finding that the timber and grass was injured, should assess plaintiff's damages at the difference between the reasonable value of the land immediately before and immediately after the fire, not taking into consideration any value of the grass burned on the land, was not on the weight of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 465; Dec. Dig. § 194.*]

14. APPEAL AND ERROR (§ 739*)—ASSIGNMENTS OF ERROR—GROUPING PROPOSITIONS OF LAW.

A single assignment of error complaining of the refusal to give special charges not germane to each other, but presenting distinct propositions of law, will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3034; Dec. Dig. § 739.*]

Appeal from Williamson County Court; T. J. Lawhon, Judge.

Action by John Neiser against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Spell & Nickels, for appellant. Wilcox & Graves, for appellee.

RICE, J. On the 7th day of June, 1906, appellee owned a tract of land through which appellant's railway ran, 90 acres of which was situated just north of and adjoining appellant's right of way, 68 acres of which was in pasture and timber, and 22 acres thereof was used as a meadow, and upon which said entire tract there was growing a luxuriant, well-matured, and valuable crop of native grass, which grass was being used as pasture and for the purpose of making hay, and that said 68 acres was partially covered with a growth of native timber, from which plaintiff obtained wood for his own use and for market. On said day, immediately after the passage of one of appellant's trains, a fire occurred, burning over a part of said tract of land, destroying the grass growing thereon, killing some and injuring many of the trees thereon, and likewise injured the turf. This suit was instituted by appellee to recover damages therefor, predicated negligence on the part of the defendant in permitting grass and other inflammable material to grow and collect upon its right of way, as well as in maintaining and operating its engines without proper appliances to prevent the escape of sparks and coals of fire; that, by reason of such negligence, sparks and coals of fire escaped from its said engine on the day named, setting fire to said combustible material upon its right of way, which was communicated to the grass upon plaintiff's land, thereby occasioning the injury complained of. Appellant answered by general demurrer, general denial, and a plea of contributory negligence, to the effect that, if the plaintiff suffered injury, the same was proximately caused by reason of the exposure of his property to danger of destruction by fire escaping from defendant's passing locomotives. There was a verdict

and judgment for plaintiff in the sum of \$300, from which this appeal is prosecuted.

On direct examination, Martinka, a witness for plaintiff, had testified that the market value of the land just before the fire was \$50 per acre, and just after it was worth half that amount. On cross-examination, as shown by its bill, appellant asked this witness: "If the fire reduced the value of the land and grass and trees to one-half, would not two such fires entirely destroy its value?" The court sustained plaintiff's objection to said question, of which appellant complains, claiming in his bill that, if said witness had been allowed to testify, his answer would have been "Yes" or "No," either of which would have had a tendency to impeach him. We do not think any error was shown in this ruling of the court, because it appears from the record that on cross-examination, when first asked this particular question, this witness replied that he did not understand the question. Upon its being repeated, he answered that the land had the same value as it had before, but the timber and grass were damaged. Besides this, it was immaterial what might be the effect of another fire on the same land, as this was not an issue involved in this case. We therefore overrule this assignment.

We overrule appellant's second assignment, because we do not think the question therein complained of was leading. It is apparent from the record that the witness had answered under a misapprehension of the meaning of the question, and certainly there was no error in allowing counsel for plaintiff to ascertain what the witness in fact meant by the answer given.

We overrule the third assignment of error, because we do not think there was any error in permitting the witness to answer the question objected to, since his testimony showed that he had experience in putting up hay, knew how much the land in question would likely produce, the cost of baling the same, as well as what the hay would be worth after it was baled.

We overrule the fourth assignment of error, wherein it is insisted that the court erred in permitting the plaintiff to testify that the pasturage land had a real value and was worth about \$1.50 per acre. The objection thereto was predicated upon the idea that the witness had not qualified to testify in this regard. The record discloses that the witness testified that he had never sold any pasture grass by the acre, did not know of any selling that way, and had never tried to sell it, but knew that it was worth something. Another witness upon the same subject had testified that grass used for pasture purposes had no market value in that community, but that it had a real value, to wit, \$1.50 per acre. It was alleged in the petition that the pasture had both a market and real value, which were the same. Hence we overrule this objection. See Rail-

road Co. v. Searight, 8 Tex. Civ. App. 593, 28 S. W. 40.

We do not think there is any merit in the fifth assignment of error, and overrule the same. The objection therein to testimony could not be urged against its admissibility, but would go simply to its weight in this respect.

We overrule the sixth assignment of error, complaining of the action of the court in permitting the witness Zurowitz to testify as to the reasonable market value of the land immediately before and immediately after the fire, because we understand the law to be that the plaintiff would have the right to show its market value in this way, and that the measure of damages in this respect is the difference between its value just before and just after the fire, and the witness in this connection testified to facts showing that he lived in the immediate vicinity of the land, and that he was familiar with and knew the injury resulting from the fire, and that he knew the market value of land in that community, which authorized him to speak relative thereto. See Railway Co. v. Knapp, 51 Tex. 592; Railway Co. v. Wallace, 74 Tex. 583, 12 S. W. 227; Railway Co. v. Hogsett, 67 Tex. 687, 4 S. W. 365.

We do not think the court erred, as urged by appellant in its seventh assignment, in refusing to allow the witnesses Coffee, Miller, and Page upon plaintiff's objection to testify what in their opinion was the fair reasonable cash value at the time of the fire of the damages, if any, that the burning off of the land occasioned to plaintiff, because the bill fails to show any injury resulting to plaintiff therefrom, for the reason that it fails to show what said witnesses or either of them would have testified to in this respect; and, before error can be predicated upon the ruling in reference thereto, it must be made to appear from the recitation of the bill what the testimony of said witnesses would have been in answer to the question asked, and it must appear therefrom that said witnesses would have testified to matters beneficial to appellant. This assignment is therefore overruled.

By its eighth assignment of error appellant complains that the court erred in excluding certain interrogatories to and answers of the witness Black, as well as the answers of the witness Muller, relative to the inspection of engine No. 215 and the result of said inspection with reference to the spark arrester thereon and other parts thereof; the objection to said testimony on the part of the plaintiff being that no evidence had been offered identifying the engine as the one causing the injury, nor had it been shown that said engine 215 had run on the road from Austin to Granger by Neiser's place on the day of the fire. We think this was a valid objection to the admissibility of said testimony, because, unless said engine had been identified as the one setting out the fire or

that it likely did, the evidence offered was immaterial.

The court did not err in refusing to charge the jury on the issue of contributory negligence upon the part of plaintiff. While this issue was raised by the pleadings, there was no evidence whatever to justify its submission. It was shown that there was an ineffectual effort on the part of the railway company's employes to stop the progress of the fire while plaintiff knew of the fire; still it is shown that his son aided the employes to put it out, and it appears a strong wind was blowing from the south, and the fire had gained such headway that any effort to put it out would have been fruitless; that some of the trees left burning might have been extinguished if they had had water, but none was near. We therefore overrule this assignment.

We do not think the objections made to the charge wherein it defines the terms "ordinary care" and "negligence" are well taken. The charge seems to be in accord with the decisions upon the subject.

By appellant's eleventh assignment of error it is insisted that the court erred in the fourth paragraph of its charge to the jury, because the same is upon the weight of evidence, and placed a greater burden upon the defendant than was required of it by law. The paragraph complained of is as follows: "A railway company in running its trains over its road is required to exercise ordinary care to equip its engine or locomotive drawing such train with the most approved appliances in general use to prevent the escape of sparks and fire therefrom, and to exercise ordinary care to keep such appliances in good repair to prevent such escape of sparks and fire, and to exercise ordinary care to keep the land included within its right of way sufficiently free of combustible and inflammable material as to prevent same catching fire from sparks or fire emitted from passing engines, and communicating such fire to adjacent property, and a railway company is liable for damages from fires directly and approximately caused by its negligent failure to exercise such ordinary care in the keeping of its said right of way, or to exercise such ordinary care in the equipment and maintenance of its said engines, as above instructed. But a railway company has complied with the requirements of the law when it has exercised such ordinary care in the equipment and maintenance of its engine alleged to have set out said fire, and has exercised such ordinary care in the so keeping of its said land inclosed in its said right of way, and, when a railway company has exercised such care in the above-named respects and particulars, it is not liable for any damages from fire set out by its said engines." By his counter proposition appellee insists, first, that a railway company must use ordinary care to equip its engines with the most approved appliances in general use

to prevent the escape of fire. We think the charge in this respect is an admirably clear and correct presentation of the law, and is supported by decisions of our courts. See *Highland v. Railroad Co.* (Tex. Civ. App.) 65 S. W. 649; *Railroad Co. v. Goode*, 7 Tex. Civ. App. 245, 26 S. W. 441; *G., C. & S. F. Ry. Co. v. Johnson*, 92 Tex. 591, 50 S. W. 563. By his second counter proposition appellee asserts that it is negligence for a railway company to allow weeds, grass, and combustible material to accumulate on the land inclosed in its right of way. It is shown from the testimony that the land which was burned over lies immediately north of and adjoining the right of way and the rock quarry belonging to defendant. There is evidence going to show that the fire originated in some grass growing on what is termed the rock quarry, but at a point within 20 feet of the railroad track; and we must conclude from the evidence that the point of its origin, therefore, was on the right of way. The quarry was fenced in with the right of way, contained only a few acres, and, so far as the evidence goes to show, may have been at this point a part of the right of way. We think the charge in this respect was proper. *Railway Co. v. Hogsett*, supra; *Railway Co. v. Connally* (Tex. Civ. App.) 93 S. W. 207.

As the twelfth and thirteenth assignments of error virtually raise the same question as involved in the eleventh, it will be unnecessary to consider the same.

By its fourteenth assignment of error appellant complains that the following charge is upon the weight of evidence, and places a greater burden upon defendant than was required by law: "If you find from the evidence under the above instructions that plaintiff's said grass or any part thereof was burned, and if you further find from the evidence that the turf and land upon which said grass was growing was injured thereby, as alleged by plaintiff, and if you further find under the above instructions that plaintiff's said timber on his said land, or any part thereof, was burned, killed, and injured by said fire, as alleged by him, and if you further find that the land upon which said killed or injured timber, if any, was growing was injured thereby, then you will find for plaintiff as to these items of injury, if any, and assess his damages, if any, that may have directly and proximately accrued to said land by reason of the injuries, if any, to said turf and said timber, at the difference, if any, in the reasonable value of said land immediately before and immediately after said fire, not taking into consideration, however, in arriving at this item of damage, if any, any value of the grass, if any, that you may find was burned on said land." As we understand it, this charge is not open to the objection urged against it, and the assignment is therefore overruled.

Appellant's fifteenth assignment complains of the refusal to give special charges Nos.

3 to 10, inclusive, an examination of which shows that these charges are not germane to each other, but present distinct and several propositions of law. Wherefore we are not required to consider them, because only matters germane can be so grouped.

The remaining assignment questions the sufficiency of the evidence to support the verdict, which we overrule, because in our judgment this assignment is not sustained.

Finding no error in the proceedings of the trial court, its judgment is affirmed.

Affirmed.

GREEN v. HEWETT.

(Court of Civil Appeals of Texas. Feb. 17, 1909. On Rehearing, March 24, 1909. On Motion to Certify to Supreme Court, April 14, 1909.)

1. WILLS (§ 300*)—PROBATE—PROCEDURE.

Since an application to probate a will is a proceeding in rem, the provisions of Rev. St. 1895, art. 1904, requiring certain facts to be established before probate, cannot be waived.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 300.*]

2. WILLS (§ 321*)—PROBATE—RIVAL WILLS—OPENING AND CLOSING.

In determining which of two wills should be probated, the right to open and close ought to be given to him having the burden to establish the only issue in the case, and hence, where two wills were offered for probate, and the only issue was whether the second was a forgery, the party offering it had the right to open and close.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 761; Dec. Dig. § 321.*]

On Rehearing.

3. APPEAL AND ERROR (§ 392*)—AFFIDAVITS IN LIEU OF APPEAL BONDS—DEFECTS—EFFECT.

If an affidavit in lieu of an appeal bond is void or was made before an officer not authorized to administer an oath or attest such documents, the defect is jurisdictional, but if it is merely defective, or there is an omission of some fact which can be waived or which can be established by evidence, the objection must be taken within a reasonable time to be available.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 392.*]

4. APPEAL AND ERROR (§ 389*)—AFFIDAVITS IN LIEU OF APPEAL BONDS—BEFORE WHOM PROPERLY MADE.

The statute authorizing an affidavit in lieu of an appeal bond to be made before the county judge of the county where appellant resides does not comprehend county judges of other states.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2075; Dec. Dig. § 389.*]

5. APPEAL AND ERROR (§ 389*)—AFFIDAVITS IN LIEU OF APPEAL BONDS—BEFORE WHOM PROPERLY MADE.

Where there is no contest and the trial court is not in session, an affidavit in lieu of an appeal bond made before an officer authorized to take the affidavit is sufficient if approved by the county judge.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 389.*]

6. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF SISTER STATE.

The laws of a sister state will be presumed to be similar to the law of the forum, unless the contrary is shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

7. APPEAL AND ERROR (§ 392*)—AFFIDAVITS IN LIEU OF APPEAL BONDS—DEFECTS—WAIVER.

Under Rev. St. 1895, art. 7, subd. 2, authorizing clerks of foreign courts of record having a seal to take affidavits, etc., an affidavit in lieu of an appeal bond taken before the clerk of a county court in Tennessee is not void for failing to show affirmatively that he was a clerk of a court of record, nor because it was not verified and approved by the county judge, where the affidavit shows that he was the clerk of a court having a seal, and the affidavit and jurat were in proper form, officially signed and with seal affixed, and the defects were waived by appellant's failure to raise them until after reversal of the judgment appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 392.*]

Appeal from District Court, Brown County; John W. Goodwin, Judge.

Samuel Green and J. W. Hewett, executor, applied for the probate of different instruments as Ed. Green's will, and the proceedings were consolidated in the county court. From a judgment probating the instrument offered by Hewett, Green appeals. Reversed.

Jenkins & McCartney and E. J. Miller, for appellant. E. C. Harrell, for appellee.

FISHER, C. J. Appellee, Hewett, filed in the county court an application to probate the will of Ed. Green, deceased, dated January 22, 1906. Thereafter the appellant, Samuel Green, filed an application in the county court to probate what is purported to be the last will of Ed. Green, deceased, dated May 7, 1906. Both of these applications were filed as separate proceedings in the county court. In that court the two proceedings were consolidated, and upon trial the first will—that is, the one propounded by appellee—was probated. Upon appeal to the district court the two causes were again consolidated over the protest and objection of appellant, and upon trial there judgment was rendered as in the county court probating the will of January 22, 1906. Appellee in the court below attacked the instrument propounded by appellant of date May 7, 1906, as a forgery. Upon a trial of the case in the district court appellant insisted that he had the right to open and close, which privilege was denied him by the trial court, and upon which ruling he has based an assignment of error.

Article 1904 of the Revised Statutes of 1895 states what facts must be proven to entitle a will to be probated. Owing to the fact that an application to probate a will is a proceeding in rem, and as the provisions of the statute mentioned require certain facts to be established, they cannot be waived in the court below, but in the court below in establishing

these facts, the evidence may be so satisfactory that there can be no controversy about the force and effect of the evidence by which it is sought to establish the facts; and in a contest such as this, in determining which of two wills should be established, the right to open and conclude ought to be given to the party upon whom rests the burden of proving and establishing the only controverted issue that remains in the case. So far as the will propounded by the appellee is concerned, there is absolutely no question. It appears that the testator was of sound mind, 21 years of age; that the court had jurisdiction of his estate; that the process had been served; that the will was executed with the formalities required by law, and that it had not been revoked by the testator, provided the will of May 7th propounded by appellant was not genuine, and which was attacked by the appellee on the ground that the testator never executed it—or, in other words, that it was a forgery. If the latter will was executed by the testator, and was his last will, undoubtedly it should have been probated, and that, as said before, was the only controverted issue in the case, and was so regarded by the trial court in its charge to the jury. There was no other objection offered to that will. There existed all of the facts that entitled it to probate required by the statute, except the controverted issue of fact whether it was executed by the deceased, Ed. Green. As to this issue, we are of the opinion that the burden of proof was upon the appellant, and, this fact being the turning point in the case, he should have been accorded the privilege of opening and concluding the argument to the jury. On this question this case can be distinguished from *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308.

We have examined the remaining assignments of error, and are of the opinion that they are not well taken.

For the reasons stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

On Rehearing.

In this case judgment was rendered in the court below against the appellant on January 20, 1908, and the motion for new trial was overruled and notice of appeal given on February 1, 1908. In lieu of appeal bond, the record contains two affidavits made by appellant in Bedford county, Tenn., where he resides, both in the form of the statute, one of date February 10, 1908, made before the clerk of the county court of Bedford county, and the other of date February 17, 1908, made before the judge of the county court of Bedford county. These affidavits were made after the court trying the case had adjourned. The appeal to this court was perfected on these affidavits, and they were never questioned or contested before the case reached this court. The case was submitted during

the present term, and on February 4, 1909, the appellee filed in this court a motion to dismiss the appeal on the ground that notice of appeal was not given in the time required by the statute, and that the affidavit in lieu of an appeal bond was not filed within the time required by law. We overruled the motion for the reason that the motion for new trial was overruled February 1, 1908, and that the notice of appeal then given was in time, and that the time for perfecting the appeal would commence from that date, and that, therefore, the affidavits were filed in time. This motion was acted on the same day (February 17, 1909) that this court entered a judgment reversing and remanding the case to the court below.

On February 24, 1909, the appellee filed a motion for rehearing, questioning the disposition made of the case, as well as the motion, and in addition, for the first time, presented to this court the following objection to our judgment: "This court erred in reversing the judgment of the court below and in remanding said cause, for the reason that this court never acquired jurisdiction thereof, because the appellant has neither filed an appeal bond herein nor made proper proof of his inability to pay or secure the costs of this suit." This objection is very general and does not point out any specific objections to the affidavits upon which the appellant perfected his appeal; but appended to the motion is a written argument which attacks the affidavit made before the county judge of Bedford county on the ground that he was not an officer before whom the affidavit could be made. On March 3, 1909, he filed what he called a supplemental motion for rehearing, in which for the first time he objects to the affidavit made before the clerk on the ground that he was not an officer before whom an affidavit can be made, and, if he is, the affidavit alone, without the approval of the county judge, is not sufficient, which approval he contends was not made. It is contended by the appellant that the affidavits are sufficient, and that the objections thereto come too late, and that the failure to object and contest operated as a waiver. On the other hand, the appellee insists that the affidavit must be made before the proper officer and in the terms of the statute to confer jurisdiction upon this court, and that a jurisdictional question can be urged at any time. If it be true that the affidavits are void, or that they were made before an officer not authorized by the laws of this state to administer oaths and attest such documents, then there would be force in appellee's contention; but if merely defective, or there is an omission of some fact which can be waived, or which could be established by evidence, the objection should be made within a reasonable time, which question is fully passed upon and discussed in *Stewart v. Heidenheimer*, 55 Tex. 648. The case of *Harvey v. Cummings*, 62 Tex. 187, is

to the effect that, while the statute authorizes an affidavit if the court is not in session to be made before the county judge of the county where the appellant resides, this power is intended to be conferred upon the county judges of Texas, and not upon the county judges of other states. There is nothing upon the face of the statute that indicates such a limitation. It broadly says that the affidavit must be before the county judge of the county where the party resides, and the affidavit made in this instance is a compliance with the literal terms of the law. The appellant resided in Bedford county, Tenn., and the affidavit was made before the county judge of that county. The narrow reasons given by the court in that case for restricting the operation of the statute should yield to the broader view that such statute with reference to the manner and method of perfecting appeals applied alike to nonresident litigants, as to those residing within the state; that the same privileges and the same methods of acquiring the benefit of the statute was intended, unless the contrary is made to appear from the express language of the law. But, however dissatisfied we may be with this decision, we feel constrained to follow it. But the appeal can in our opinion rest upon the affidavit made before the clerk.

It has been held that, if the court that tried the case is not in session, the affidavit may be made before any officer authorized to take the affidavit of parties. *Smith v. Buffalo Oil Co.*, 99 Tex. 77, 87 S. W. 639; *Hearne v. Prendergast*, 61 Tex. 628. And, where there is no contest, this is all that is required if the affidavit is approved by the county judge. The statute does not in terms require this approval, but there are cases holding that this should be done. *Hearne v. Prendergast*, supra; *Wooldridge v. Roller*, 52 Tex. 452. Subdivision 2 of article 7 of the Revised Statutes of 1805 authorizes clerks of a court of record having a seal residing in other states to administer oaths and to take affidavits, etc. It does appear from the affidavit that the clerk is a clerk of a court having a seal, and the affidavit and jurat is in the proper and usual form, and that it was officially signed and the seal affixed. It was signed by the appellant and sworn to before the clerk. This would be a good and sufficient affidavit if made before a county clerk, and would be good and effectual in Texas by force of the article cited if made before a like officer of another state, if he has a seal of office and is clerk of a court of record. Now, there are only two things that can be suggested against the sufficiency of this affidavit. The first is that it does not affirmatively appear that he is the clerk of a court of record. A sufficient answer to this might be that appellee's supplemental motion for rehearing that alone attacks this affidavit does not raise this question; but, if it did, is it essential that it should appear from the

face of the affidavit or the jurat that the court of which he was clerk was a court of record. It might be the fact that the court was a court of record, and by oversight or otherwise he omitted to state that fact, and, if attention had been called to this omission and objection made thereto, it could have been cured. Furthermore, it appears that the designation given to the Tennessee court is the same as the county courts of this state, and that it has a clerk and seal, such as in this state; and, such being the case, we by no means are certain but that we should presume that the Tennessee county court is similar to our county court, which is a court of record. And we are inclined to the opinion that the presumption that the laws of a sister state will, in the absence of evidence to the contrary, be held similar to our own, should be given application in this instance.

The next objection and the one urged in the supplemental motion for rehearing is that the affidavit made before the clerk is of no effect because it was not verified and approved by the county judge. As said before, there was no contest below. Therefore there was nothing for the county judge to pass upon so far as demanded by the express terms of the statute. But there are decisions which, as before said, hold that, when the affidavit is made before some other officer than the county judge, it must be approved by the latter. This requirement was by these decisions read into the law, just as the county judges out of the state were read out of the law by the opinion in *Harvey v. Cummings*, all of which illustrates the evil of courts undertaking to subtract or add to legislative enactments. But, however, we will yield again as we did to *Harvey v. Cummings*, and see how the matter stands with reference to this objection. Just how the approval of the county judge should be made and preserved we do not know. It may be that he did approve the affidavit, and that might be made to appear in some other document or in some other way than by an indorsement on the affidavit. All that we know is that there is nothing in the record upon this subject nor are there any affidavits filed or proof made in this court relating to that question. If it is a fact that the affidavit was approved, although no record is made of it, we are inclined to the opinion that we would have jurisdiction, and on appeal could determine and ascertain that fact in this court. *Smith v. Buffalo Oil Co.*, supra. The appellee has permitted without objection or raising this question this affidavit to be acted upon as perfecting the appeal and the case submitted in this court and decided, and the first time we hear from him on this subject is in his second or supplemental motion for rehearing, relying merely upon the fact that the record does not contain a certificate of approval of the county judge, without any affidavit or

proof of the fact that such approval was not in fact made.

On the two grounds considered the affidavit is not void. Therefore the objection thereto coming at this late day should be held to be waived. *Stewart v. Heidenheimer*, supra.

The motion for rehearing complaining of the disposition made of the case, as well as the motion for rehearing on the action of the court in refusing to dismiss and the motions to dismiss filed since the judgment was rendered, are all overruled.

Motions overruled.

On Motion to Certify to Supreme Court.

It is claimed by appellee, in his motion to certify the question decided in our opinion of March 24, 1909, overruling the motion to dismiss the appeal, that our opinion conflicts with the decision of the Court of Civil Appeals of the Fifth District in the case of *Sidoti v. Rapid Transit Ry. Co.*, 79 S. W. 827, and the case of *Sanders v. Benson*, 114 S. W. 435, by the Court of Civil Appeals of the Second District. The principal reason given in the *Sidoti* Case why the affidavit in lieu of the appeal bond was not sufficient, and why the law had not been complied with, was approved in the case of *Smith v. Buffalo Oil Co.*, in 85 S. W. 482, by the Court of Civil Appeals of the First District, where the *Sidoti* Case was expressly cited with approval, and the appeal was there dismissed for the same reason as stated in the first case. *Smith v. Buffalo Oil Co.* went to the Supreme Court on writ of error, and will be found reported in 99 Tex. 77, 87 S. W. 659, where the rule announced in the two cases noticed was disapproved, and the Supreme Court in its opinion substantially held that the statute should not be given such a rigid construction as to defeat the right of appeal.

The case of *Sanders v. Benson*, which it is claimed we are in conflict with, in part relies upon the two first cases cited as a basis for its decision. The court, in deciding the case and preparing its opinion, evidently overlooked the case of *Smith v. Buffalo Oil Co.*, by the Supreme Court; but, as before said, it cites with approval the *Sidoti* Case and *Smith v. Buffalo Oil Co.*, by the Court of Civil Appeals, in 85 S. W. 481; which was overruled by the decision of the Supreme Court.

We have not conflicted with any settled decision upon the question passed upon in our opinion. We expressly yielded to decisions which we did not approve. In reaching the conclusion expressed in our opinion, we in the main relied upon the fact that those objections pointed out in the opinion to the affidavit could be waived, and that, by reason of the long delay upon the part of appellee, he waived the objections to the affidavit that we discussed.

Motion overruled.

ROBERSON v. FIRST STATE BANK.

(Court of Civil Appeals of Texas. Feb. 27, 1909.)

APPEAL AND ERROR (§ 512*)—RECORD—JURISDICTION—DISMISSAL.

An appeal from the county court in a case brought in justice court must be dismissed, where the record does not show that the case was prosecuted to final judgment in justice court and that an appeal was taken to the county court, since no jurisdiction in the county court nor in the Court of Civil Appeals is shown in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2326; Dec. Dig. § 512.*]

Appeal from Hill County Court; N. J. Smith, Judge.

Action by the First State Bank against George E. Roberson, brought in justice court. From a judgment of the county court, defendant appeals. Appeal dismissed.

W. E. Spell, for appellant.

TALBOT, J. This suit was instituted by appellee in the justice court for precinct No. 1 of Hill county, as appears by what purports to be a copy of the citation issued by that court contained in the record, to recover of appellant an amount less than \$200, alleged to be due on a promissory note. The transcript sent to this court contains nothing to show what was done with the case in the justice court. If prosecuted in that court to a final judgment, and an appeal taken to the county court, it is not shown. Hence there is nothing in the record before us showing that the county court ever acquired jurisdiction of the case, and without such jurisdiction this court has none. We have heretofore held that the facts necessary to confer jurisdiction upon this court must affirmatively appear in the record, and if they do not so appear the appeal must be dismissed. *Railway Company v. Jordan* (Tex. Civ. App.) 83 S. W. 1106; *Penn Fire Ins. Co. v. Pounders* (Tex. Civ. App.) 84 S. W. 666.

The record failing to show jurisdiction, the appeal is dismissed.

GREEN v. KEGANS et al.

(Court of Civil Appeals of Texas. Feb. 27, 1909.)

1. TRIAL (§ 237*)—INSTRUCTIONS—BURDEN OF PROOF.

An instruction that the burden of proof is on plaintiff to establish to the jury's reasonable satisfaction by a preponderance of the evidence the allegations in his petition is erroneous, because imposing on plaintiff a greater burden than the establishment of his cause by a preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 551; Dec. Dig. § 237.*]

2. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

An instruction in an action for the possession of mules, requiring a verdict for de-

defendant unless defendant authorized his son to enter into an agreement with plaintiff whereby the latter retained title to the property for the security of a debt, was misleading, because ignoring the issue of ratification, of which there was evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 613; Dec. Dig. § 253.*]

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

Action by W. L. Green against J. H. Kegans and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Wagstaff & Davidson, for appellant. Hardwicke & Hardwicke and W. H. Clett, for appellees.

SPEER, J. Appellant instituted this suit to recover from appellees the title and possession of two certain mules, and from an adverse decision has appealed.

The cause will be reversed for the error of the court contained in the following charge on the burden of proof: "The burden of proof is upon the plaintiff to establish to your reasonable satisfaction by a preponderance of the evidence the material allegations of his petition, and a failure to do so will entitle the defendants to your verdict." It is quite well established that the use of any expressions fairly imposing upon the plaintiff a greater burden than the establishment of his cause of action by a preponderance of the evidence is erroneous. The use of the words "satisfy" and "satisfaction" in this connection has been especially condemned. *Prather v. Wilkins*, 68 Tex. 187, 4 S. W. 252; *Baines v. Ullmann*, 71 Tex. 529, 9 S. W. 543; *Wallace v. Berry*, 83 Tex. 328, 18 S. W. 594.

We are also inclined to the view that the charge complained of in appellant's first assignment of error, requiring a verdict in appellees' favor unless the jury found from the evidence that appellee Kegans authorized his son to enter into the arrangement with appellant whereby appellant retained the title to the mules for the security of the amount due to the Belcher Land Mortgage Company, was misleading, in that it tended to exclude from the consideration of the jury the effect to be given to appellee Kegans' acceptance of the services of his son—i. e., the issue of ratification.

In reversing the case, however, we call attention to *Crews v. Harlan*, 99 Tex. 93, 87 S. W. 656, wherein a transaction in no essential respect different from the one under consideration was held, under article 3327, Rev. St. 1895, to create a chattel mortgage, rather than a conditional sale.

For the error above indicated, the judgment is reversed, and the cause remanded for another trial.

ESTES et al. v. ESTES et al.

(Court of Civil Appeals of Texas. March 24, 1909.)

APPEAL AND ERROR (§ 387*) — FAILURE TO PERFECT APPEAL—BONDS.

Where parties fail to execute their bond on appeal within the time required by Rev. St. 1895, art. 1387, they are not entitled to the benefits of the statute authorizing the Court of Civil Appeals to permit a party to file a new bond in lieu of a defective one.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2068; Dec. Dig. § 387.*]

Appeal from District Court, Bell County; John M. Furman, Judge.

Action between J. W. Estes, Margaret Murphy, W. G. Murphy, and others and Mrs. Florence Estes and others. From the judgment, the first-named parties appeal. On motion to dismiss appeal. Appeal dismissed as to certain appellants.

Saunders & Saunders and Woodward & Baker, for appellants. Tyler & Tyler and A. L. Curtis, for appellees.

FISHER, C. J. The clerk of the court below fixed the probable costs of the court below and of this court and Supreme Court at \$150. The appeal bond is only for the sum of \$150, and therefore not double amount of the probable costs as fixed by the clerk, as required by article 1400, Rev. St. 1895. There are also some objections to the bond in that it does not correctly describe the judgment appealed from and in some particulars misdescribes same. This will doubtless be corrected in the new bond to be given by the appellant, who is allowed by our order to file same.

The district court of Bell county, from which this case is appealed, may remain in session more than 8 weeks, and did in fact remain in session at the term at which case was tried about 13 weeks. Consequently the time in which the appeal should be perfected, is governed by the latter part of article 1387, Rev. St. 1895, which is to the effect that, when court may continue in session more than 8 weeks, the bond shall be filed within 20 days after notice of appeal if the party taking the appeal resides in the county, and within 30 days if he resides out of the county. Notice of appeal by appellant was given on March 31, 1908, and the appeal bond was filed and approved April 21, 1908. This statement shows that the appeal bond was not filed within the time required by law by those appellants residing in the county, who from the pleadings are shown to be appellants J. W. Estes, Margaret Murphy, and her husband, W. G. Murphy, but was filed in time by appellant C. P. Estes, who resides in Coleman county; and he is allowed 20 days from this date in which to execute and present to this court a new bond, in double the amount of costs fixed by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the clerk, with a certificate of the clerk to the effect that the sureties are good for the amount and have property sufficient to secure bond subject to execution over and above all exemptions. It is suggested that bond correct the other defects pointed out in the motion. As to appellants J. W. Estes, Margaret Murphy, and her husband, W. G. Murphy, the appeal will be dismissed, as requested by appellees in their motion. Failing to perfect their appeal within the time required by law for executing a bond, they are not entitled to the benefits of statute that authorizes this court to permit a party to file a new bond in lieu of one that is defective.

Appeal dismissed as to J. W. Estes, Margaret Murphy, and W. G. Murphy. C. P. Estes is given 20 days from this day to file new bond; otherwise, appeal will be dismissed.

TEXAS CENT. R. CO. v. WATSON.

(Court of Civil Appeals of Texas. March 20, 1909.)

1. CARRIERS (§ 177*)—INJURY TO FREIGHT—LIABILITY.

A carrier of freight is only liable for injury thereto resulting from its own negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-803; Dec. Dig. § 177.*]

2. CARRIERS (§ 185*)—INJURY TO FREIGHT—SUCCESSIVE CARRIERS.

Where freight transported by successive carriers is injured en route, the presumption is that the injury occurred on the line of the last carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-842; Dec. Dig. § 185.*]

3. CARRIERS (§ 137*)—INJURY TO FREIGHT—MEASURE OF DAMAGES—INSTRUCTIONS.

An instruction, in an action against a carrier for injuries to freight, that the measure of damages is the difference in the value of the goods in the condition in which they were delivered and their value if delivered in good order, is erroneous, as leading the jury to include injuries necessarily incident to the shipping of the goods, while the carrier is liable only for the injury resulting from its negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 137.*]

4. CARRIERS (§ 135*)—INJURIES TO FREIGHT—MEASURE OF DAMAGES.

The measure of a shipper's damages for injuries to freight is the difference in the value of the goods in the condition in which they were delivered at their destination and the condition they would have been in had there been no negligence of the carrier, and in determining these values the values at the point of destination must be used.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 599-604; Dec. Dig. § 135.*]

Appeal from Jones County Court; Jas. P. Stinson, Judge.

Action by J. B. Watson against the Texas Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Thomas & Chapman, for appellant. Arnold & Arnold, for appellee.

SPEER, J. Appellee recovered a judgment against appellant for damages to certain household goods shipped by him over the line of appellant and a connecting carrier from Llano to Stamford. At Stamford the goods, or a portion of them, were received by appellee and again shipped over another line of railroad to Anson. The damages recovered covered certain articles of the goods that were lost and damages for injuries to the balance.

Complaint is made of the following paragraph of the court's charge: "You are therefore charged that if you find, from a preponderance of evidence before you in this case, that J. B. Watson, plaintiff, shipped over the line of railway of defendant, Texas Central Railroad Company, the household goods alleged to have been shipped, and you further find that said goods, or any of them, were damaged, lost, or destroyed, if they were damaged, lost, or destroyed, you will find for plaintiff such sum as you may believe him entitled, if any, not exceeding the amount sued for; and unless you so believe, you will find for defendant." It will be seen from this charge that the jury were authorized to find for appellee if the goods were shipped over the line of appellant and were subsequently lost or damaged, regardless of whose fault caused such loss or damage, or, indeed, whether the loss was caused through the fault of any one. Appellant, of course, would only be liable for damages resulting from its own negligence. Besides, as already stated, the goods were transported over the line of another carrier before they finally reached the hands of appellee, and as to the damaged goods delivered to him the presumption is that the last carrier was liable. *F. W. & D. C. Ry. Co. v. Shanley*, 36 Tex. Civ. App. 291, 81 S. W. 1014; *Tex. & Pac. Ry. Co. v. Capper*, 38 Tex. Civ. App. 61, 84 S. W. 694.

The charge also imposed too great a burden on appellant with respect to the measure of damages; the language used being as follows: "And in case of damage to goods the measure of damages is the difference in the value of the goods in the condition in which they are received and the value of such goods if received in good order." This charge is calculated to cause the jury to include in their estimate of damages injuries necessarily incident to the shipping of the goods, while the carrier would be liable only for those injuries resulting from its negligence. *Tex. & Pac. Ry. Co. v. Stewart* (Tex. Civ. App.) 114 S. W. 414.

The measure of appellee's damages will be the difference in the value of his household goods in the condition in which they

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were delivered to him at Stamford, and the condition they would have been in had there been no negligence on the part of appellant; and in determining these values the Stamford values should be used, and not those of Llano.

For these errors, the judgment is reversed, and the cause remanded for another trial.

ALLEN v. FLECK.

(Court of Civil Appeals of Texas. March 20, 1909.)

1. APPEAL AND ERROR (§ 216*)—INSTRUCTIONS—OBJECTIONS WAIVED.

A party failing to request an instruction on a particular point supported by evidence cannot complain of the failure of the court to give such an instruction.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216;* Trial, Cent. Dig. § 627.]

2. PARTNERSHIP (§ 199*)—DEBTS DUE FIRM—ACTIONS—PARTIES.

In a suit to collect a debt due to a firm, all partners in interest, except dormant partners, are necessary parties plaintiff.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 362-368; Dec. Dig. § 199.*]

3. PARTNERSHIP (§ 216*)—FIRM CLAIMS—ACTIONS—EVIDENCE.

A partner suing on a firm claim, and alleging that his copartner, equally interested in the firm, had transferred his interest in the claim to the partner, must, to recover, prove such transfer.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 216.*]

Appeal from District Court, Wichita County; A. H. Carrigan, Judge.

Action by Frank Fleck against R. S. Allen. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. T. Montgomery, for appellant. L. H. Mathis and Huff, Barwise & Huff, for appellee.

DUNKLIN, J. Frank Fleck recovered a judgment against R. S. Allen for \$2,006.57 as commissions earned in negotiating sales of lands for Allen. Plaintiff alleged in his petition that Allen employed the partnership firm of Fleck & Ehlers, composed of plaintiff and T. M. Ehlers, to sell lands owned by Allen situated in Wilbarger and Wichita counties, and that the sales made, for which commissions were claimed, were made by said partnership; that the members of said firm were equal partners; that T. M. Ehlers had transferred to plaintiff all his interest in the commissions claimed, thus vesting in plaintiff the entire interest therein; but, upon the trial, no evidence was offered to prove such transfer. Both members of the firm of Fleck & Ehlers resided in Little Rock, Mo., and the sales for which commissions were sought were made to emigrants from Missouri. Plaintiff came with the purchasers and the nego-

tiations conducted in Texas on the part of the firm were by him exclusively.

Appellant contends that for lack of proof of a transfer to plaintiff of Ehlers' interest the judgment of the trial court should be reversed. Plaintiff's failure to make this proof was made one of the grounds of defendant's motion for new trial, which was overruled by the trial court, and in this ruling we think there was error which requires a reversal of the judgment. Appellee contends that the record shows that the trial of the case was upon the assumption that Fleck alone owned the claim which was made the basis of the suit, and that, as appellant failed to request a charge to the jury to find in his favor on account of plaintiff's failure to prove the transfer to him of Ehlers' interest, appellant has waived his right to complain of such omission of proof. To support this contention numerous cases are cited, collated in 1 Green's Digest, col. 354, § 235, announcing the familiar rule that a party failing to request instructions to the jury on a particular theory supported by evidence cannot complain on appeal of a failure of the court to give such an instruction, but we think these authorities are not applicable. Neither do we think that appellee's contention is sustained by the cases of Pierson v. Tom, 10 Tex. 145, and People's Bldg. & Loan Ass'n v. Dalley, 17 Tex. Civ. App. 38, 42 S. W. 364. In the case of Pierson v. Tom, supra, plaintiff recovered judgment for certain personal property, and proof of a certain judgment in his favor rendered in another case was necessary to sustain that judgment. The records of the former case showing the judgment therein rendered were introduced in evidence, but the judgment itself was not read to the jury; and this failure was assigned as error by the appellant in the case. Affirming the judgment, the court, in discussing the plaintiff's failure to prove that he had such a judgment, said: "Had it been questioned, a reference to the record, a part if not all of which was in evidence, would have conclusively settled the question." In the case of People's Bldg. & Loan Ass'n v. Dalley, supra, the association, a foreign corporation, was plaintiff and failed to make proof that it had a permit to do business in the state. It was held that defendants, who did not assign such failure of proof as error in their motion for new trial, and who failed to request a special instruction to the jury based thereon, could not complain. But this contention was by cross-assignment of error by the defendant in the court below in whose favor the judgment was rendered and which judgment was, on appeal, affirmed, thus rendering the decision of the question unnecessary to a disposition of the case. It is well settled by the authorities that in a suit to collect a debt due a partnership firm all the partners in interest, except dormant partners,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

are necessary parties plaintiffs. In the case at bar, plaintiff having alleged that his former partner Ehlers had transferred to him all his interest, and that he alone owned the claim, one-half of which was formerly owned by Ehlers, to sustain a recovery by him for the full amount of the claim acquired by the firm, proof of such transfer to him of Ehlers' interest was as necessary as proof of the validity of the claim itself. *Ricker v. Schadt*, 5 Tex. Civ. App. 460, 23 S. W. 907; *Speake v. Prewitt*, 6 Tex. 252; 15 Ency. Pl. & Pr. pp. 854, 855, and notes.

Other questions presented in appellant's brief will not likely arise upon another trial, and a discussion of them is therefore unnecessary.

For the error above noted, the judgment of the trial court is reversed, and the cause remanded for another trial.

HARGROVE v. COTHRAN.

(Court of Civil Appeals of Texas. Feb. 13, 1909. Rehearing Denied March 20, 1909.)

1. NEW TRIAL (§ 119*)—MOTION—TIME TO MAKE—DISCRETION OF COURT.

Though the statute provides that a motion for a new trial shall be filed within two days after judgment, the judge trying the cause has the discretion to consider a motion filed after that time.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 243; Dec. Dig. § 119.*]

2. NEW TRIAL (§ 86*)—GROUNDS—ABSENCE OF PARTY AND COUNSEL.

Where, in support of a motion for a new trial on the ground that defendant and his counsel were unavoidably absent at the trial, it appeared that the absence of the counsel was excusable and that defendant, who had been ill before the date set for trial, could not have employed other counsel and prepared for trial, the denial of a new trial was erroneous.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 173; Dec. Dig. § 86.*]

Appeal from District Court, Montague County; Clem B. Potter, Judge.

Action by T. J. Cothran against Walker Hargrove. From an order denying a new trial after judgment for plaintiff, defendant appeals. Judgment reversed, and cause remanded.

Graham & Williams, for appellant. J. A. Templeton and W. S. Jameson, for appellee.

DUNKLIN, J. From a judgment in favor of T. J. Cothran against Walker Hargrove, rendered by the district court of Montague county, the defendant has appealed. During an altercation between the defendant and John Adams, city marshal of Bowie, the defendant's pistol was discharged, the bullet therefrom wounding T. J. Cothran in the foot, and the judgment rendered was for damages for this injury. The case was tried without a jury, in the absence of defendant and his counsel, whom he had em-

ployed to represent him, and who had filed an answer to the plaintiff's petition. On the third day after rendition of the judgment, defendant filed his motion for a new trial, and later amended the motion. The grounds upon which the motion was based were that defendant and his counsel were both unavoidably prevented from being present at the trial by illness, and the motion alleged facts which it appeared he could prove, and which constituted a meritorious defense to plaintiff's suit. The excuse given for the defendant's absence was controverted by plaintiff, and the motion was overruled by the court, who filed findings of fact and conclusions of law in support of the ruling, and upon this ruling appellant has assigned error. The trial was in Montague, the defendant resided in Ft. Worth at the time, while his counsel resided in Amarillo.

The court found that the absence of defendant's counsel was caused by the serious illness of one of his family, and was excusable. A further finding by the court, however, was that prior to the date set for the trial defendant had been ill, but on that day he could have been present at court, and that he did not use that care he should have used to obey the process of court. The affidavit of the defendant in support of the motion was to the effect that he was too ill to make the trip to Montague to attend court, and attached to the motion was a certificate to the same effect, signed by his attending physician in Ft. Worth, but plaintiff introduced evidence showing that defendant went from Ft. Worth to Weatherford the day before the trial, and this evidence was the basis of the court's finding that defendant could have been present at the trial. If defendant had reached Montague in time for the trial, after learning that his attorney would not be present, it would have been too late to employ other counsel and duly prepare for trial on the day set, and doubtless the court, after learning of the cause of the attorney's absence, would have granted a new trial.

Appellee contends that, as the motion for new trial was not filed within two days after the judgment, the same should not have been considered; but this contention is overruled. While the statute provides that a motion for a new trial shall be filed within two days after rendition of the judgment, it is well settled by the decisions of our Supreme Court that the judge trying the case has the discretion to consider a motion filed after the expiration of that period, and in this instance it does not appear that this discretion was improperly exercised. *George v. Taylor*, 55 Tex. 99.

We think the court erred in overruling appellant's motion for a new trial, and for this error the judgment is reversed, and the cause remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

KEYSTONE MILLS CO. v. CHAMBERS.

(Court of Civil Appeals of Texas. March 17, 1909. Rehearing Denied April 14, 1909.)

1. MASTER AND SERVANT (§ 180*)—"RAILROAD."

The word "railroad," as used in Sayles' Ann. Civ. St. 1897, art. 4560h, prescribing what railroad employes are fellow servants with each other, includes a logging railroad operated by a corporation solely to carry its own lumber from the woods to its sawmill.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 360; Dec. Dig. § 180.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5899-5908; vol. 8, pp. 7777-7778.]

2. MASTER AND SERVANT (§ 181*)—RAILROADS—"FELLOW SERVANTS"—WHO ARE.

One employed by a lumber company to cut and scale timber was not a fellow servant of employes operating a logging train within the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 369, 370; Dec. Dig. § 181.*]

For other definitions, see Words and Phrases, vol. 8, pp. 2716-2730; vol. 8, p. 7662.]

3. MASTER AND SERVANT (§ 289*)—LOGGING RAILROADS—INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether one employed by a lumber company to cut and scale timber was guilty of contributory negligence in being on the engine of a logging train when injured in a collision held, under the evidence, a jury question.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

4. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PRESENTATION—TECHNICAL INSUFFICIENCY.

The Court of Civil Appeals will not refuse to consider an assignment of error complaining of an instruction merely because the point is not presented in the brief by such proposition as is contemplated by the rules.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8000; Dec. Dig. § 742.*]

5. APPEAL AND ERROR (§ 1068*)—ERROR—PRESUMPTION OF PREJUDICE.

Error in an instruction authorizing double recovery of damages is presumptively prejudicial, and cannot be held harmless because of the small amount of damages awarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

Appeal from Montgomery County Court; S. A. McCall, Judge.

Action by George W. Chambers against the Keystone Mills Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

C. W. Nugent and W. N. Foster, for appellant. Williams & Reid, for appellee.

NEILL, J. This suit was brought by appellee against appellant to recover damages for personal injuries alleged to have been caused by defendant's negligence. The plaintiff alleged that in September, 1907, the defendant, in connection with its sawmill, operated a tram railway for the purpose of hauling logs to its mill and carrying its employes, engaged in cutting and scaling tim-

ber, to and from their work; that plaintiff was one of such employes; that he was on the train used by the company for so carrying its employes to and from their work, when several cars of a logging train on an upgrade beyond were, by defendant's servants operating such train, negligently cut loose and permitted to come in violent collision with the one plaintiff was on, whereby he was injured, etc. The plaintiff recovered a judgment for \$750.

Appellant urges by a number of assignments that neither the allegations nor the evidence show a right of recovery, because it appears therefrom that plaintiff's injuries were caused by a fellow servant. We cannot sustain the contention. Article 4560h, Sayles' Ann. Civ. St. 1897, provides who of the servants of those operating a railroad are fellow servants with each other, and that those who do not come within the provisions of the article shall not be considered fellow servants. The word "railroad," as used in the article, includes a logging railroad operated by a corporation solely for the purpose of carrying its own lumber from the woods to its sawmill. Lumber Co. v. Taylor (Tex. Civ. App.) 87 S. W. 359; Cunningham v. Neal (Tex.) 107 S. W. 539, 15 L. R. A. (N. S.) 479. It is clear that plaintiff and the servant of defendant who cut from the train the cars which collided with the train plaintiff was on were not in contemplation of the article referred to fellow servants. We therefore overrule all the assignments of error under which such contention is urged. Whether plaintiff was guilty of contributory negligence in being on the engine at the time of the collision was purely a question of fact, to be determined by the jury from the evidence and attending circumstances.

Upon the ground that it permits a double recovery, complaint is made of this paragraph of the court's charge: "The court erred in paragraph 13 of his general charge, wherein the jury was instructed: 'If you find for the plaintiff, it will be your duty to assess his damages at such sum as you believe will be a fair and reasonable compensation to him for such physical injuries, if any, and such physical and mental suffering, if any, as the plaintiff received or sustained by reason of being run upon or against by the log cars of said defendant; and in estimating such damages, if you find any damage, which the plaintiff has sustained, if you find any, you will consider bodily and mental pain endured by plaintiff, if any, and probable future loss that will result to him from such injuries, if any, and, if you believe from the evidence that the plaintiff received injuries of a permanent character, you can, in determining what amount of damages you will assess, take that fact into consideration, as well as the time it took to recover, if he has

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

recovered, or may probably take time to recover therefrom, if you find he has not already recovered; and in addition thereto, if you find for plaintiff, you will find for such sum as plaintiff was compelled to spend, not to exceed \$100, as you believe to be fair and reasonable, for such medical treatment, if you find that such medical treatment was necessary, and such charges reasonable; and if you find that plaintiff necessarily lost any time from his business by reason of his injuries, if any you find, then you will also find such further sum as you believe will be a fair and reasonable compensation to plaintiff for time so lost or that may hereafter be lost, if any, provided that the whole amount of damages you so find and assess, if any, shall not exceed the amount of \$1,000.* It was conceded by appellee's counsel on oral argument that the charge is obnoxious to the objection, in that it authorizes compensation for the time it might take plaintiff to recover, and also for the time he might hereafter lose from his business. But he contends that the assignment should not be considered because the point is not presented in appellant's brief by such a proposition as is contemplated by the rules; and, if considered, it is apparent from the small amount of damages awarded that it did not affect the verdict. We cannot sustain either contention. It would be carrying a purely technical objection to its extremity to uphold the first; and presuming against the presumption that such an error must be regarded as prejudicial, unless it clearly appears to the contrary, to sustain the second.

On account of the error indicated, the judgment is reversed, and the cause remanded.

TEXAS & N. O. R. CO. v. GEIGER.†

(Court of Civil Appeals of Texas. Feb. 24, 1909. On Rehearing, March 31, 1909.)

1. EVIDENCE (§ 471*)—ADMISSIBILITY—OPINIONS.

Witness' statement that he was using a revolving saw in "the usual and customary manner" was a statement of fact and not of opinion.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

2. MASTER AND SERVANT (§ 293*)—INJURY TO EMPLOYÉ—INSTRUCTIONS—CONFORMITY TO PLEADING.

In an action for injury to a minor employé while operating a revolving saw, allegations of dangers in using the saw connected with specified defects, that though inexperienced he did not know of the defects and dangers, that the employer by using ordinary care would have known thereof, that the employer knew of the employé's youth and inexperience and failed to warn him of the defects and dangers, justified an instruction that the employer was bound to use ordinary care to instruct an employé as to the particular perils of the employment and the means of avoiding them, and where the employer knows, or by ordinary care ought to

know, that the same are unknown to the employé, and where the means of avoiding them would not be obvious to an inexperienced person of ordinary intelligence without such instruction, that if, in such circumstances, the employer fails to use ordinary care so to instruct an inexperienced employé, and such failure proximately causes injury to the employé, the employer is liable, unless the employé has otherwise become informed of such perils and how to avoid them, or unless he has in some manner negligently contributed to the injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

3. MASTER AND SERVANT (§ 293*)—INJURY TO EMPLOYÉ—INSTRUCTIONS.

The instruction was not erroneous as basing the employer's negligence on its failure to use ordinary care to warn the employé, regardless of knowledge or means of knowledge of the danger, since the clause "in such circumstances" makes the preceding part of the instruction the basis for what follows.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

4. APPEAL AND ERROR (§ 882*)—INVITED ERROR.

Error, in a personal injury action against an employer, in authorizing recovery on a theory not pleaded, is not ground for reversal, where defendant induced, or contributed to, the error by requesting charges embodying such theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. § 882.*]

5. MASTER AND SERVANT (§ 293*)—INJURY TO EMPLOYÉ—INSTRUCTIONS—CONSISTENCY.

In an action against an employer for injury to an employé caused by a revolving saw, an instruction that if plaintiff was not inexperienced at that work and ignorant of its perils and how to avoid them, or defendant did not know that such perils were unknown to plaintiff, or ought to have been unknown to him in using ordinary care, or if defendant's agent did not fail to use ordinary care in not instructing him of such perils and how to avoid them, or if the jury did not believe that but for such failure the injury would not have happened, plaintiff could not recover, was not inconsistent with an instruction that if plaintiff was injured at the time and place and substantially in the manner as alleged, if the machine was defective in a specified respect producing the injury, and if permitting the machine to remain in such condition was negligent, and such negligence proximately caused the injury, plaintiff could recover, unless he assumed the risk or was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

6. MASTER AND SERVANT (§ 108*)—INJURY TO EMPLOYÉ—DEFECTIVE MACHINERY—LIABILITY OF EMPLOYER.

Any employé, regardless of his experience, can recover for damages caused by defective machinery given him to use, if the defect was due to the employer's negligence and proximately causes the injury, if it was not an assumed risk, and there was no contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 208; Dec. Dig. § 108.*]

7. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL—MATTER COVERED.

An instruction covered by the charge is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 5, 1909.

8. MASTER AND SERVANT (§ 234*)—DEFECTIVE MACHINERY—CONSTRUCTIVE KNOWLEDGE.

An employé is not chargeable with knowledge of defects in machinery merely because the use of ordinary care would disclose them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. § 234.*]

9. MASTER AND SERVANT (§ 293*)—INJURY TO MINOR EMPLOYÉ—INSTRUCTIONS.

An instruction, in an action against an employer for injury to a minor employé, that an employer need not furnish absolutely safe machinery, being merely required to use ordinary care to provide safe machinery, and that hence if a part of the machine in question had lost motion, but that it was necessary in the operation of the machine and could not have been avoided by defendant in the use of ordinary care, plaintiff could not recover, was properly refused for ignoring the theory of his youth and inexperience.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

10. DAMAGES (§ 130*)—PERSONAL INJURY—EXCESSIVE RECOVERY.

A recovery of \$10,000 for injury to the right hand of a minor employed as a chisel mortiser, caused by his hand being caught by a revolving saw, was excessive by \$4,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 361; Dec. Dig. § 130.*]

On Rehearing.**11. MASTER AND SERVANT (§ 295*)—INJURY TO EMPLOYÉ—LIABILITY OF EMPLOYER.**

Where an employé sued for injury caused by a revolving saw on the theory that it was caused by dangers arising from defects in the machine, the employer had the right to plead specially and to have the jury instructed that, if plaintiff's injuries resulted from risks and dangers incident to the operation of the saw, he could not recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

12. WORDS AND PHRASES—"PERMITTING."

The term "permitting" presupposes the idea of knowledge.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5315-5318; vol. 8, p. 7752.]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Jacob Gelger against the Texas & New Orleans Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed on condition remittitur is entered; otherwise reversed and remanded.

Baker, Botts, Parker & Garwood and Lane, Jackson, Kelley & Walters, for appellant. Lovejoy & Parker, for appellee.

JAMES, O. J. Jacob Gelger, a minor, by next friend, alleged: That he was in the defendant's employ as a worker at a chisel mortiser, when he was ordered away from same by his superior and put to work at a rip saw. That, while in the act of ripping a small piece of timber, the rip saw caught in front of the same with the back teeth thereof throwing same back, over, and around, and dragging and throwing plain-

tiff's right hand into the saw and injured it, without fault or negligence on plaintiff's part. That said injuries were caused by defendant's negligence in these respects: That the guide to the rip saw and its connections were defective and unsafe and improperly fastened, in that the piece or rod of iron to which the guide was attached, and which moves and operates in a slot or groove in the table, did not fit close enough, but had lost motion, by reason of which defect the guide was permitted to get out of plumb and square, and the piece of timber was caught and bound in the back teeth of the saw. That said saw and the table, through the top of which it was operated, were negligently permitted to get out of level and remain out of plumb. That the false table, through which the saw operated and protruded upward, was negligently permitted to be in an unsafe condition, in that it was warped, and the defendant negligently attempted to keep the same level and plumb by putting underneath a piece of wood, or by driving a wedge in the side. That plaintiff was a minor, and his regular work was at the mortiser. That he was unaccustomed to said machine and inexperienced in operating it. That defendant, by the exercise of ordinary care, could and would have known of its defects and the danger thereof, and could and did know of the youth and inexperience of plaintiff. And that, as a direct and proximate result of said negligence, plaintiff's hand was drawn into said saw by the binding and catching of said timber, and he thereby received the injuries he specifies. Defendant pleaded general denial, assumed risk, and contributory negligence. There was a verdict for plaintiff in the sum of \$10,000.

The first assignment complains of plaintiff being allowed to testify, in reference to the question as to whether or not the manner plaintiff was shoving the plank in was an unusual manner, or a usual and customary manner, that "it was the usual and customary manner I was doing it." The objection to this was it was the expression of his opinion. It was the statement of a fact, and not of an opinion.

The rule of law, stated in the charge complained of by the second assignment, was correct, and had application to the case. That portion of the charge was devoted to stating rules of law applicable to the case and undertook to submit nothing. The portion of the charge which submitted the issues explained clearly that the negligence of defendant, if any, must have been the proximate cause of plaintiff's injuries in order for him to recover.

The third assignment complains of this paragraph of the charge: "It was the further duty of the defendant to use 'ordinary care' to instruct or inform an employé of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

particular perils of the employment, and how to avoid them, where the employé is inexperienced and in ignorance of such perils and the means of avoiding them, and where the defendant knows, or in the exercise of ordinary care ought to know, that the same are unknown to the employé, and where the means of avoiding them would not be obvious to an inexperienced person of ordinary intelligence, without such instruction or information. In such circumstances, if the defendant fails to use ordinary care so to instruct or inform an inexperienced employé, and such failure is the proximate cause of the injury to the employé, then the defendant is liable, unless the employé has otherwise become informed of such perils, and of how to avoid them, or unless he has in some manner, by his own negligence, contributed to the injuries complained of, in which event he could not recover." The point made by appellant's proposition is: "That there was no claim or allegation that the operation of the rip saw was a perilous employment, and that defendant was negligent in failing to warn him of its dangers and how to avoid them. Therefore, under plaintiff's pleading, in order for defendant to have been guilty of negligence in failing to warn plaintiff of the danger of operating this machine, it must have actually known, or in the exercise of ordinary care should have known, that said defects existed and failed to warn plaintiff thereof; whereas, this charge bases the negligence of defendant on its failure to use ordinary care to warn plaintiff of the perils of operating the saw, regardless of whether it knew, or in the exercise of ordinary care should have known, of such defects or not."

The petition does contain allegation of dangers in the use of the saw connected with certain alleged defects, that plaintiff was a minor and inexperienced in the use of the machine, because of which he did not know of its said defects and dangers, that defendant by the exercise of ordinary care could and would have known of said defects and dangers, and could and did know of plaintiff's youth and inexperience, and failed to warn him of such defects and dangers. The charge complained of correctly expressed rules of law applicable to the allegations. The real complaint regarding it appears to be that the court based the negligence of defendant on its failure to use ordinary care to warn plaintiff, without regard to its knowledge or means of knowledge of the existence of the danger; but the latter part of the paragraph, where this alleged defect occurs, begins by saying, "In such circumstances," thereby incorporating into it what had preceded, and making that the basis of what the latter part of the instruction says.

The fifth assignment involves alleged error in the eleventh and twelfth paragraphs of the charge read in connection with each other:

"On the other hand, if you do not believe from the evidence that plaintiff was injured at the time and place, and substantially in the manner alleged, or do not believe that the guide to the rip saw got out of square, on account of lost motion in the slot or groove in which the guide as attached was operated, or do not believe that such condition of said guide, if it existed, caused the piece of timber to catch or bind in the back teeth of the saw, producing the injuries complained of, or do not believe that said condition of the guide, if it existed, was negligence on the part of the defendant, or do not believe that said condition of the guide was the 'proximate cause' of plaintiff's injuries, then in any, each, or all of said alternative events you will find for the defendant, unless you find for plaintiff under the instructions submitted to you in the next and following paragraph of this charge.

"If you believe, from a preponderance of the evidence, the following group of facts, and each and all of them, to wit, that said plaintiff was injured substantially in the manner alleged, and that he was inexperienced in the work at which he was hurt, and ignorant of its perils, if such there were, and how to avoid them, and that the defendant's authorized agent knew, or in the exercise of ordinary care ought to have known, same were unknown to plaintiff, and that such perils, if any, and the means of avoiding them, would not be obvious to an inexperienced person of ordinary intelligence, without instruction or information, and that defendant's authorized agent, in putting plaintiff to work at the rip saw where he was hurt, failed to instruct or inform him so as to enable him to comprehend the particular perils, if such there were, in operating and feeding said machine, and that such failure so to instruct or inform plaintiff, if any, was a want of 'ordinary care' on the part of such agent of defendant, as before defined, and that but for the want of such ordinary care plaintiff would not have undertaken to do said work in the manner he did, and would have avoided the injury, then you will find your verdict for plaintiff, unless you further find from the evidence that plaintiff assumed said risks, or that he was guilty of contributory negligence."

Appellant has two propositions, in substance: First. That the eleventh paragraph, taken in connection with the twelfth, to which it refers, authorized the jury to find for plaintiff upon a state of facts and upon grounds wholly independent and different from those set up; in other words, authorized a recovery upon a different case from that sued on. In support of this proposition, appellant says: That there was no allegation that the rip saw was a dangerous machine, nor that any perils were involved in its use apart from the defects alleged, nor that defendant's agent failed to instruct plain-

tiff how to operate it and to warn him of its dangers; that plaintiff's case, as alleged, was negligence of defendant in permitting the defects in the machine and failing to warn him of such defects and the danger connected with such defects; and that plaintiff by reason of his youth and inexperience was not aware of such defects and their dangers, but defendant knew, or should have known, of them and of plaintiff's youth and inexperience and were negligent in failing to warn him in respect thereto. In other words, the point which appellant makes is that, there being no allegation that the operation of a rip saw machine is in itself a dangerous employment, it was error to allow any recovery upon the theory of failure to warn plaintiff, in case the jury should have found for defendant under the eleventh paragraph. This goes upon the idea that, if there was no negligence of defendant in reference to the construction of the machine, there was no liability claimed under plaintiff's pleading, because the dangers referred to in the petition were solely those arising from defects in the machine.

The petition, after alleging the defects in the machine, contained these allegations concerning negligence in regard to warning plaintiff: "That defendants and each of them, their agents, servants, and employés, respectively, failed and omitted to use ordinary care to warn plaintiff of the defects in said rip saw and the dangers thereof and how to avoid them; that by reason of his youth and inexperience, plaintiff did not know of said defects and of their dangers, but the defendants, their agents, servants, and employés, respectively, by the exercise of ordinary care could and would have known of said defects and their dangers, and could and did know of the youth of plaintiff and of his inexperience." The petition did not state a case for recovery upon the theory that the operating of a rip saw machine was dangerous, and that defendant was negligent in not instructing or warning the boy, when he was put to work upon it, in respect to dangers ordinarily involved in its use. The only danger alleged was that attending certain specified defects therein. It appears that the only alleged defect of which there was proof was the one that the guide to the rip saw was out of square on account of lost motion in the slot or groove in which the guide operated. This appears from a later paragraph of the charge which eliminated all the other alleged defects.

Now, in the eleventh paragraph, above quoted, it will be seen that the jury were told to find for defendant if they did not believe that the guide to the rip saw got out of square on account of lost motion in the slot or groove in which the guide, as attached, was operated. If the jury found this to be the fact, we think it should have been the end of the case as the same was

pleaded by plaintiff, for the reason that the only danger alleged and proved by plaintiff, and the only negligence alleged by him, were those which had reference to such defect. Yet under the twelfth instruction the jury were authorized to go ahead and find for plaintiff upon the theory of peril incident to the operation of the machine and the duty to warn in respect thereto. It is claimed that the error committed in said paragraphs was invited, because defendant, at the trial, proceeded upon the theory that the court did, that a case was stated of negligence in not warning plaintiff of the general danger incident to the use of a dangerous machine, and asked charges which would have been applicable upon that theory. If the court was led into the error by such requests, or they contributed to it, we think that defendant would not be heard to ask a reversal on such ground of a verdict which might after all have been found on the theory that was properly involved. *Donk Bros. v. Stroetter*, 229 Ill. 134, 82 N. E. 251; *Railway v. Matthews*, 34 Tex. Civ. App. 306, 79 S. W. 71; *Ellis v. Marshall* (Tex. Civ. App.) 95 S. W. 680.

Defendant requested a number of charges, all of which were marked "Refused." Upon the first one is written: "Refused because, in so far as it is correct, it is covered by the general charge, and the reason will be taken as applying to all charges refused." This might be taken to indicate that they were requested after the court had prepared its charge. *Tel. Co. v. Bowen*, 97 Tex. 623, 81 S. W. 27. But there is unmistakable evidence that all the special charges which were numbered 1 to 10, consecutively, were asked before the court had finished the preparation of its charge, in the fact that five of them are found incorporated in the charge precisely in the terms asked, and the nature and wording of some of them are such that it is inconceivable but that the court placed them in the charge in response to the requests. Not only this, but we find that while the petition, carefully construed, does not allege that there were dangers incident to the operation of such a machine, as a dangerous machine, the defendant pleaded to such a case as follows: "And for further plea and answer the defendants aver that plaintiff is not entitled to recover for the alleged injuries to the said Jacob Geiger for the reason that the same resulted from risks and dangers which were incident to the service in which plaintiff voluntarily engaged as an employé," etc. Thus we see that defendant construed the petition as embodying the issue. It appears, therefore, from its pleading, that defendant itself considered that the issue of dangers ordinarily incident to the operation of such machine, apart from defects, was involved, and, upon the idea that this was so, tried the case and asked instructions which were not relevant

except on such theory. *Bragg v. Railway Co.* (Mo. Sup.) 91 S. W. 534.

Requested charge No. 2 stated: "If you believe from the evidence that the danger from operating the saw upon which plaintiff got hurt was patent and obvious to a person of plaintiff's age, experience, and understanding, * * * then no duty devolved upon defendant to give any warning to plaintiff of such danger, and on the allegation of failure to warn and instruct plaintiff of such danger you will find for the defendants." The danger which this charge had reference to was not the danger growing out of the defects, but those generally incident to operating the saw. Requested charge No. 4 states: "You are charged that if it was a fact that the circular saw with which plaintiff was injured was a piece of dangerous machinery and likely to injure any one coming in contact with it, * * * then he cannot recover for his injuries sustained by coming in contact with this saw, * * * and under such circumstances your verdict should be for the defendant." This charge refers to the machine as a 'dangerous one, without any reference to defects, and authorized a verdict for the defendant upon that theory. Requested charge No. 6 was based upon the same theory of dangerous machine, of danger connected with the employment, and failure to warn in reference thereto. These charges all went bodily into the main charge, and it seems to us that appellant cannot complain that the court's charge dealt with the case and submitted it upon that theory. The adoption by the court of that, as one of the theories in the case, appears to have been contributed to, if not caused, by the defendant, and as already stated, having participated in introducing an improper issue, it ought not to be heard to say that the verdict which could stand, and may have been found, upon another proper issue, should be, for that reason, set aside.

There is no merit in the second proposition under the fifth assignment of error if both of said theories of recovery are treated as having been in the case. What has been said disposes of the fifth and sixth assignments and the first proposition under the seventh.

The seventh assignment has an additional proposition, complaining of the thirteenth paragraph of the charge, which was as follows: "On the other hand, if you do not believe that plaintiff was inexperienced in the work in which he was engaged at said rip saw, and was ignorant of the particular perils of such service, if such there were, and how to avoid them; or do not believe that the defendant's authorized agent knew that such perils, if they existed, were unknown to plaintiff, or ought to have been known to him by the exercise of ordinary care; or do not believe that such agent failed to use 'ordinary care' in not instructing or informing him of such perils, and how to avoid them, if you find he did not warn or instruct him;

or do not believe that but for such failure, if any, the injuries complained of would not have happened—then in any, each, or all of said alternative events you will find for the defendant, unless you find for the plaintiff under instructions submitted to you in the first group of facts."

The tenth paragraph of the charge, the one to which the above refers, reads as follows: "If you believe, from a preponderance of the evidence, the following group of facts, and each and all of them, to wit, that plaintiff, Jacob Geiger, was injured at the time and place and substantially in the manner as alleged, and that the guide to the rip saw at which he was working got out of square on account of lost motion in the slot or groove in which the rod to which the guide was attached was operated, and that this caused the piece of timber to catch and bind in the back teeth of the saw, producing injuries as alleged, and that permitting the guide to be and remain in said condition, if you so find, was 'negligence' on the part of the defendant, Texas & New Orleans Railroad Company, and that said negligence, if any, was the proximate cause of plaintiff's injury, then you will find for the plaintiff, unless you further find from the evidence that plaintiff assumed the risks, or that he was guilty of 'contributory negligence' in some respect as alleged in defendant's answer."

The point is that these charges, read together, told the jury that although plaintiff was experienced in the use of the machine, and knew the particular perils connected with it, and although defendant was not guilty of negligence in not warning and instructing him concerning its perils, still defendant would be liable according to the tenth paragraph, if lost motion was in the guide, and defendant had been negligent in permitting such lost motion, and such negligence was the proximate cause of plaintiff's injury. We see no conflict in them. Plaintiff may have been experienced in the use of such machine, and may have known the dangers incident to its operation. In fact, he might have been a mature man and familiar with such dangers, and may have needed no instruction on the subject, yet it would not follow that he could not recover. Any servant is entitled to recover for damages arising from defects in machinery given him to use, if the presence of the defect is due to the master's negligence, and it is the proximate cause of the injury, conditioned, of course, as charge No. 10 states, that it was not an assumed risk, or not due to contributory negligence. The charge No. 13 and charge No. 10 treat of different subjects. The former deals with the perils incident to the service, and the latter with the peril due to a certain defect. Under the former the jury may have seen fit to find for defendant, but nevertheless there was still the other theory of liability to consider.

The eighth assignment is overruled for the reason that the refused charge is embodied sufficiently in the charge given.

The ninth is overruled because the requested charge was erroneous, as ignoring the issue based on plaintiff's youth and inexperience.

The tenth is overruled because the charge requested was erroneous, in this: that it charged the employé with the consequences of a defect in the machine of which he knew "or in the exercise of ordinary care would have known." An employé is not charged with knowledge of defects in machinery, because the exercise of ordinary care would disclose them, as the duty to exercise care to discover them does not rest upon him.

The eleventh complains of the refusal of the following charge: "You are instructed that an employer is not bound to furnish absolutely safe machinery or appliances for the use of his employés, but all that is required of him is to use ordinary care in providing safe machinery for the employé. Therefore, if you believe from the evidence that the guide in question had lost motion, but that same was necessary in the operation of said machine, and could not have been avoided by defendants, by the use of ordinary care, then you will find for defendants on the issue of their liability by reason of said lost motion." The charge was properly refused because it also ignored the theory of the youth and inexperience of plaintiff.

We sustain the assignment as to excess in the verdict, and shall affirm the judgment, provided a remittitur is filed within seven days of \$4,000, reducing the amount to \$6,000; otherwise the judgment will be reversed, and the cause remanded.

On Rehearing.

The discussion of the fifth assignment of error in this motion makes a further opinion appropriate. It is earnestly contended that the answer, and the requested charges which are mentioned in the original opinion, under this assignment were not interposed because defendant considered that the petition involved the theory of dangers ordinarily incident to the operation of the machine, as a theory of recovery; but, on the contrary, that they proceeded upon the idea that no such theory of recovery existed, and the matter was pleaded as a sufficient defense in itself, and the charges were asked in order to present the defense, because it cannot be denied that, if no case was pleaded by plaintiff involving dangers inherent in the use of the machine as a dangerous instrument, he would not be allowed to recover at all upon that theory, and defendant would have had a good defense by merely establishing that the danger which led to plaintiff's injury was one incident to the use of a dangerous machine. In other words, if plaintiff stated no case upon the theory of dangerous machine, he would be defeated

by proof that his injury was due to the danger ordinarily involved in its use. Defendant undoubtedly had the right to plead specially, as it did, that, if plaintiff's injuries were the result of risks and dangers which were incident to the operation of a rip saw, he could not recover. He also had the right, in the state of plaintiff's pleading, to have the court charge the jury to find for defendant outright if plaintiff's injury was caused by dangers that were incident to the use of such machines, for the simple reason that plaintiff had asked for a recovery upon the theory that the injury was caused by dangers arising from defects in the machine.

But it seems to us that defendant's charges Nos. 4 and 6 show upon their face that they were not drawn with any idea that, if the injury occurred by reason of dangers ordinarily incident to the use of such a machine, defendant was ipso facto entitled to a verdict. The wording of said two special charges, mentioning various considerations not at all material to the above theory, negatives the position now taken by counsel. If plaintiff had pleaded that the machine, without defects, was dangerous, he could have recovered if there was a duty to warn plaintiff and it had not been performed. The questions of warning, plaintiff's intelligence, and equal opportunity of knowing, were questions which would have been material upon the issue of dangers incident to the use of such a machine, if plaintiff had pleaded such a case. However, as the pleading was, these questions were immaterial if the jury should have found that the injury was the result of dangers incident to the service, as distinguished from dangers arising from defects. All that defendant had to do, in the state of the petition, in asking a charge appropriate to that theory, was to say that if the injury was caused by dangers incident to the use of such machines, or incident to the service in which plaintiff was engaged, to find for defendant. Instead of this, two of the special charges, which defendant now claims referred only to such theory, included mention of matters not at all material to it, and which would not have incumbered the charges had counsel had the idea at the time that the mere fact that the injury occurred from dangers inherent in the service was sufficient to defeat a recovery. We think the requested charges Nos. 4 and 6 as they were framed indicate: That defendant considered that it was called on to meet a case for recovery, based upon dangers incident to the use of a rip saw machine; that it tried the case and asked instructions upon that theory; and that the court probably was led to consider and submit the case upon that theory, by the course pursued by counsel at the trial, including counsel for the defendant.

The motion calls attention to the fact that we have not passed on assignment 4. There was no error in the charge it attacks. The

charge deals with the question of negligence of defendant in permitting the guide to be and remain in a defective condition. The term "permitting" presupposes the idea of knowledge.

Motion overruled.

TOUDOUZE v. KELLER.†

(Court of Civil Appeals of Texas. March 10, 1909. Rehearing Denied April 7, 1909.)

1. BOUNDARIES (§ 55*)—PLATS—WIDTH OF LOTS.

Where a plat of lots in a block specifies the frontage of each lot, with one exception, any deficiency in the width of the block will fall on that lot, and its width will be the length of the block minus the sum of the width of the other lots.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 278; Dec. Dig. § 55.*]

2. BOUNDARIES (§ 10*)—PLATS—WIDTH OF LOTS.

Where two adjoining lots in a block are conveyed in accordance with the plat of the block, their boundaries will be located in accordance with such plat, and they will not be affected by the transfer, by the same owner, of another lot under a prior plat, giving the lots different widths and boundaries.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 90, 91; Dec. Dig. § 10.*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Martin Keller against August Toudouze and John Legler. Judgment in favor of plaintiff against defendant Toudouze, and in favor of defendant Legler, and defendant Toudouze appeals. Reversed as to defendant Toudouze, and judgment rendered, and affirmed as to defendant Legler.

W. P. Finley, for appellant. Sallaway & McAskill, for appellee.

JAMES, C. J. Keller, as owner of a certain lot No. 8, block 4, fronting 50 feet on the south side of Keller street in the city of San Antonio, sued Toudouze, alleging that the latter had come upon his lot, threatening to tear down his fence, and to fence off a portion of said lot, and asking for an injunction against Toudouze. Toudouze answered by general denial, etc., and pleaded in reconvention, claiming that a parcel of land in controversy, viz., about 12 feet of land located on the south side of Keller street, was in fact a part of lot No. 9 in said block owned by him; that plaintiff's fence was an obstruction to his enjoyment of said strip; and prayed that plaintiff take nothing by his suit; that defendant have a permanent mandatory injunction directing that said fence, in so far as it interfered with defendant's use of his said property, be removed and taken away; and that the division line, a true line for the said fence between the lots 8 and 9, be fixed, etc. By supplemental peti-

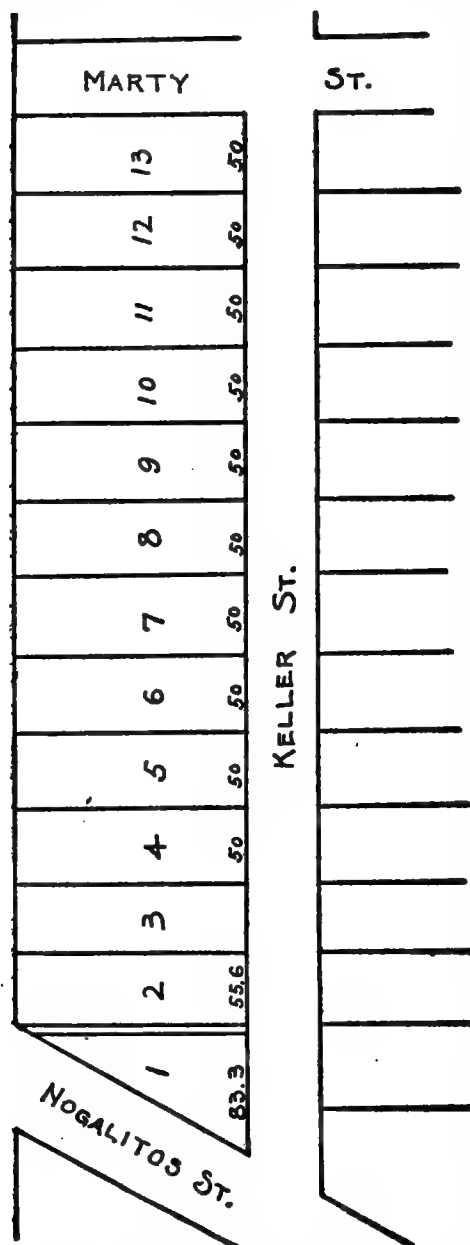
tion Keller pleaded that on August 16, 1906, he bought the land in controversy from John Legler and wife by general warranty deed, for the consideration of \$250, and took possession of the said lot, and built a fence around same at a cost of \$12, and asked that, in the event defendant recovered the lot, or a portion of it, he have judgment over against Legler. At the request of the parties the court submitted this issue: "Is the location of the boundary line between lots Nos. 8 and 9, in controversy in this suit, that claimed by plaintiff, Martin Keller, or as contended for by defendant August Toudouze?" The finding was in favor of Keller. The correctness of this verdict depends upon the testimony.

The testimony is that the block No. 4, in which both lots in question are situated, is a part of a tract of land formerly owned and subdivided by Thomas J. Devine. Block 4 is a long block lying between Nogalitos street on the east, and what is now known as Marty street on the west, and is bounded on the north by Keller street. What appears to be the first subdivision of this tract of land was made by G. Freysleben, a surveyor in San Antonio, who died about 1885 or 1886. According to his plat of this subdivision, block 4 was composed of 12 lots, numbered from 1 to 12, beginning on the east end at Nogalitos street for lot No. 1, and running consecutively west to a street unnamed on the plat, but where what is known as Marty street now is. As platted upon that map, the 12 lots (except lot 1) appear to have been 20 varas front on the south side of the street, which was also unnamed on it, but now known as Keller street. What appears to be a later subdivision, or resubdivision, by Devine of the same territory is a plat found on file in the city engineer's office in San Antonio, bearing the date November 25, 1885, styled "Subdivision of Property of T. J. Devine." This plat or subdivision shows 12 lots carved out of said block No. 4, numbered from 1 to 13 consecutively, from Nogalitos street westward to Marty street, lot 1 represented as having 83.3 feet front on south side of Keller street, lot 2 as fronting 55.6 feet thereon, and the rest of the lots as fronting 50 feet thereon, with one exception hereinafter noted. This plat is unmistakably of a subdivision of the same tract later than Freysleben's, because it gives Marty and Keller streets names, which the latter does not, and the width of Marty street is increased. In addition to this the Freysleben map has the date of April 20, 1885, marked upon it, though it is not certain that this was intended to represent its date, and the other bears date November 25, 1885. The exception above referred to is lot No. 3, which is the only lot that has no frontage designated upon it; and its lines, compared

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error dismissed by Supreme Court May 19, 1909.

with the lines of the other lots calling for 50 feet, show perceptibly that it was of a less width than the others. We annex a sketch of block 4 according to this later plat.



The evidence shows that the Marty street corner and the Nogalitos street corner of said block are undisputed; also that, taking the lots 1 and 2 having the front assigned them in said sketch, and giving all the other lots a front of 50 feet, there is a shortage of about 12 feet in the width of the block.

The controversy is the locality of the division line between lots 9 and 10. Measuring from the northwest corner of the block on Marty street giving lots 13, 12, 11, and 10, 50

feet front each on Keller street, would fix lot 9, and said division line, where Toudouze claims it to be, but to run from the northeast corner on Nogalitos street westward according to the frontage shown on the sketch, giving lot 3 a frontage of 50 feet, would place this line about 12 feet to the west, where Keller claims it to be. To do the latter, however, lot No. 3, which has no stated frontage on the plat, and which is plainly of less width than the others which call for 50 feet, must be given 50 feet. The decree fixes the division line in question in this manner by going west from the Nogalitos street corner, crediting lot No. 3 with 50 feet front. If, however, lot No. 3 was not entitled to a frontage of 50 feet, but to about 12 feet less, then, whether we measure from the Marty street corner, or the Nogalitos street corner, Toudouze would be right in his contention. The trouble between these parties grew out of an early sale by Devine of lot No. 3, in 1889, to Theo Heisser, the deed describing the lot thus: "Lot No. 3 in block No. 4 city lot, having a front of fifty feet on the south side of Keller street and running southwardly for depth 147 feet more or less, between parallel lines; said lot No. 3 being situated between lots 2 and 4 in said block 4, and said block 4 being situated west of Nogalitos street, reference being made to plat of G. Freysleben for a more complete description of said lot." We may assume, for the purposes of this appeal, that Devine intended to sell this lot as it appears on the Freysleben map, and mistook it as having 50 feet front, when according to that map it had 20 varas, or about 56 feet. Heisser, it seems, claimed and took under it only 50 feet. The difficulty before us arises from the fact that sales of lots in the block were subsequently made by the representatives of Devine according to the later map. Lot 4, and the two lots in controversy were shown to have been so sold, and probably so all of the lots in the block west of lot 3. We say, according to the later map or plat, although none of these deeds mentions any plat. While this is so, the descriptions in the subsequent deeds, so far as they are in evidence, are not reconcilable with any other plat than this one, they calling for 50-foot lots, and this is the only plat giving the lots that frontage. We regard it as unmistakable from the evidence, and we so hold as a fact, clearly apparent, that the sales of lots 4, 8, and 9 were made with reference to the second plat of the subdivision from which the attached sketch is taken, because they are totally inconsistent with the other. This being so, the grantees of lots 8 and 9 took their respective lots in the position they occupied on that plat.

As both plats appear to have been in existence when Heisser bought lot 3 by the Freysleben map, such sale of 50 feet front to him might have involved a sale of a part of

No. 4, as the lots are represented upon the later plat, if on this later plat lot 3 had a less frontage than 50 feet. Therefore, upon this theory, when subsequently lot 4 was sold in accordance with the later plat, there was a strip twice sold. The purchaser of lot 4 would, under such circumstances, have had a claim against his grantor on the warranty for that part of lot 4 which had been previously sold to Helsser. The purchaser of lot 4, however, did not have the right to go over on lot 5 to make up his full 50 feet, for the reason that he had no deed for lot 5, or any part thereof. The conflict caused by these circumstances would be between lots 3 and 4, and the trouble would be located there, and confined there. Because the purchaser of lot 3 may have gone over on lot 4, and the purchaser of lot 4 may have gone over on lot 5, and so on, for quantity, would be no reason why Toudouze, who bought lot 9, should yield to this practice, and allow Keller, who took deed to lot 8, to come over and take 12 feet from lot No. 9, which he had not bought. The right of Keller to do this must be authorized by the plat according to which he bought lot 8, or it does not exist at all.

This plat, from which the annexed sketch is taken, calls for a specific number of feet frontage (50 feet) on Keller street for all said lots, except lot 3, where no frontage is shown, except that it appears upon the plat as being of less width than the others. The legal effect of this failure to designate any frontage for one of the lots is to make any deficiency in the width of the block fall upon lot No. 3. The surveyors who testified stated that the proper way to ascertain the width of lot 3 was to measure from the Marty street corner of the block as far as the lots had stated fronts, which would bring them to the west line of No. 3, then to measure from the Nogalitos corner the given frontage of lots 1 and 2, and the intervening space would constitute lot No. 3. This has been judicially declared to be the legal and proper way, under the circumstances, to ascertain the appropriate width or frontage of No. 3, as the lots are represented upon the sketch. In *Pereles v. Magoon*, 78 Wis. 31, 46 N. W. 1049, 23 Am. St. Rep. 389, the Supreme Court of Wisconsin says: "Had the plat given the specific dimensions of each of the several lots fronting on Jefferson street except lot 1, and given no dimensions of that lot, then such absence of the dimensions of that lot would have evinced the intention that it should include whatever should be left after setting off the several lots of which the specific dimensions had thus been given, whether the same should be more or less." In *Pereles v. Gross*, 126 Wis. 128, 105 N. W. 220, 110 Am. St. Rep. 901, the same court says: "This is a complete perversion of the rule, founded on both reason and authority,

that, when, in subdividing a line or space the surveyor declares the dimensions which he has given to each except the last, and there leaves an irregular space without designating the dimensions, he will be presumed to have thrown the remainder, much or little, into that irregular and unmeasured portion." We take it that, when the plat, of which the annexed sketch is a part, and by which plaintiff and defendant undoubtedly acquired their lots, designated all the lots in the subdivision except one by a specific number of feet front, the lots so designated were intended to have that frontage, to take that frontage, if there was enough of land to give it to all such lots, as there was in this case. There was something over, and whatever was over (about 39 feet) constituted what appertained to lot 3, as that lot is represented upon the plat.

If we begin at the Marty street corner, and measure east along Keller street, giving 50 feet to each lot, lot 9, belonging to Toudouze, is found where he claims it to be. If we begin at the Nogalitos street corner, and measure west, giving each lot what the plat calls for, but giving to lot 3 its width as above stated, instead of 50 feet as the trial court considered it, we arrive at the same result. The trouble in this block was a conflict between lot 3 as represented on the Freysleben map and lot 4 as represented on the Devine map; and the lots 8 and 9 in question were not concerned in said conflict. They were described and conveyed in accordance with the latter map. Their descriptions fit no other map. They can readily be located on the ground in accordance with their own descriptions, when the only map or subdivision to which the descriptions conform, or point to, is considered; and, under these circumstances, it is not admissible to look to descriptions or conflicts in other lots in the block to show that something else was conveyed. As stated in *Thompson v. Langdon*, 87 Tex. 258, 28 S. W. 935, the rule is: "If there is no conflict in the calls, found in the field notes of a survey, there is no room for construction, and the calls must speak for themselves."

For the foregoing reasons we conclude that appellant is entitled to judgment, and therefore the judgment of the district court is reversed, and judgment will be rendered here accordingly.

Appellee brought in his warrantor, Legler, who answered. The deed to appellant was simply a conveyance of lot 8. So far as this record shows, there has been no breach of the covenant of warranty. Appellant testified that when he bought, the lots 7, 8, and 9 were vacant property. It is a case where he, without warrant of law, entered and fenced a strip belonging to lot 9.

The judgment in favor of the warrantor will be affirmed.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. TAYLOR.

(Court of Civil Appeals of Texas. March 27, 1909.)

1. TRIAL (§ 133*)—IMPROPER ARGUMENT OF COUNSEL—INSTRUCTIONS—NECESSITY.

In an action against a corporation for a personal injury, the refusal to instruct to disregard the improper argument of plaintiff's counsel, referring to the respective conditions of the parties as to riches and thereby prejudicing the jury, was ground for reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 816; Dec. Dig. § 183.*]

2. TRIAL (§ 120*)—IMPROPER ARGUMENT OF COUNSEL.

Counsel should not state in his argument his knowledge of the facts, unless he has testified thereto as a witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 285-287; Dec. Dig. § 120.*]

Appeal from District Court, Rains County; R. L. Porter, Judge.

Action by A. L. Taylor against the Southwestern Telegraph & Telephone Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

A. P. Wozencraft, W. S. Bramlett, and B. M. McMahan, for appellant. O. H. Rodes, for appellee.

RAINEY, O. J. The appellee sued to recover for injuries alleged to have been caused by reason of the horse he was riding stepping into a hole dug by appellant's agents and falling, throwing him to the ground; said hole being in or near the public road. On the trial of the case the counsel for the appellee in his closing argument used the following language: "We could prove that this defendant was responsible for the injured condition of plaintiff if we had money, like this defendant corporation, to bring the witnesses as it has done; but we are not rich, and we cannot bring them here, so we can make this proof," and, further, "I know, and the defendant's attorneys know, what plaintiff's condition is, and that he is in the condition he says he is in, and that he has hernia, and, if they doubt it, let them have him examined. We will submit to it, and I dare them to do it; and if he has not now got hernia I will ask this jury to find for the defendant, and if he has let the jury find for the plaintiff the amount that he is entitled to. They won't do it." This language was excepted to by the appellant, and the court requested to instruct the jury not to consider it; but this request the court refused.

We think the use of this language was very improper. It referred to the respective conditions of the parties as to riches in a manner that was calculated to prejudice the jury against the appellant. The statement of counsel as to his knowing, and defendant's counsel knowing, that plaintiff had hernia, was improper. The jury should be governed

alone by the evidence adduced, and counsel should not state in his argument to the jury his knowledge of facts, unless he has testified to such facts as a witness on the trial. Ordinarily a case will not be reversed on account of improper remarks made in argument to the jury, unless it appears that it is probable injury resulted to the losing party. The evidence in this case is such we do not feel authorized to say that no injury resulted to appellant from the use of said language. The issue, whether or not the plaintiff was injured, was sharply drawn, and the effect the remarks counsel made had upon the jury cannot be determined. The court should, by an appropriate instruction, have withdrawn from the jury the improper language of counsel, and for failing to do so the judgment will be reversed.

The assignments of error relating to the charge of the court and refusal of special charges are not well taken.

The judgment is reversed, and cause remanded.

GIBBS v. SCALES et al.†

(Court of Civil Appeals of Texas. Feb. 20, 1909. Rehearing Denied March 13, 1909.)

1. TAXATION (§ 648*)—JUDGMENT—COLLATERAL ATTACK.

A judgment for delinquent taxes, rendered on service by publication regular in all respects, and reciting that citation had been duly had by publication, and decreeing a lien with foreclosure thereon for the taxes in favor of the state against all persons claiming any interest in the land, and directing the sale of the land, cannot be collaterally attacked by one failing to show that he was in possession of the land when the foreclosure suit was filed and citation issued.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 648.*]

2. JUDGMENT (§ 490*)—COLLATERAL ATTACK.

A judgment reciting service of citation without identifying the precise writ on which the court acted is not subject to collateral attack for lack of proper service.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 490.*]

3. TAXATION (§ 642*)—DELINQUENT TAXES—ACTIONS—CITATION.

The citation served by publication in an action for delinquent state and county taxes may be addressed directly to defendants, and it need not be addressed to any officer nor require any officer to make return thereof.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 642.*]

4. TAXATION (§ 647*)—DELINQUENT TAXES—JUDGMENT—VALIDITY.

A judgment for delinquent state and county taxes is not wholly invalid because it improperly decrees that the order of sale to be issued thereon shall have the force of a writ of possession, and that the officer making the sale by virtue thereof shall place the purchaser in possession.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 647.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 28, 1909.

5. TAXATION (§ 674*)—FORECLOSURE OF DELINQUENT TAX LIENS—PURCHASERS.

Sayles' Ann. Civ. St. 1897, art. 5232g, providing that, where there is no bidder for land offered for sale under a judgment foreclosing a lien for taxes, the county attorney shall bid the same off to the state, etc., does not render a purchase of the land by the county attorney for his own use void as contrary to public policy; the state being a purchaser only when there are no bidders.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1357-1360; Dec. Dig. § 674.*]

Appeal from District Court, Hartley County; J. N. Browning, Judge.

Action by Mrs. Sallie A. Gibbs against John A. Scales and another. From a judgment for defendants, plaintiff appeals. Affirmed.

James & Yeiser, for appellant. Turner & Boyce and Webb & Joiner, for appellees.

DUNKLIN, J. This suit was instituted by Mrs. Sallie A. Gibbs against John A. Scales and W. Boyce in the district court of Hartley county to recover the Joseph Welsh survey of 177 acres of land, and from a judgment in favor of the defendants the plaintiff has appealed.

The plaintiff's original petition was in the usual form of trespass to try title. To this petition defendants filed general denial, plea of not guilty, and special answers, in which both defendants pleaded a judgment in favor of the state against the unknown owners of the land in controversy of date May 10, 1890, rendered by the district court of Hartley county, foreclosing a lien for taxes due the state and said county, and a deed of conveyance of date July 4, 1899, executed by the sheriff of said county to defendant W. Boyce under and by virtue of an order of sale issued on said judgment, and defendant Scales further pleaded a deed of conveyance from W. Boyce to himself for a valuable consideration paid to Boyce by Scales. The evidence introduced upon the trial established a regular chain of title to the land from the state down to J. W. Haynes, plaintiff's father, who by will in due form and duly probated devised the land to the plaintiff, and the judgment and deeds of conveyance pleaded by defendants were also established by proof. The judgment was for taxes due the state and county on the property for the years 1892 to 1896, both inclusive. The land was assessed for taxes for the year 1891 on the nonresident tax rolls of the county in the name of plaintiff's husband, Barnett Gibbs, who then resided in Dallas county and who died in 1896, and Dallas county was the place of plaintiff's residence at the date of the institution of the suit and at the date of the judgment. W. Boyce was the county attorney of Hartley county, and in that official capacity represented the plaintiff in the institution of the suit and in its prosecution to final judgment. He was like-

wise county attorney of Hartley county when he purchased the land under the foreclosure sale by the sheriff. The judgment was upon service by publication, was regular in all respects, specifically reciting that citation had been duly had by publication, and decreed a lien with foreclosure thereof for the taxes due for the years 1892 to 1896, inclusive, and was in favor of the state against all persons (said persons being unknown) owning, having, or claiming any interest in the land, and directed the clerk to issue an order of sale to sell the same for the purpose of satisfying said taxes and costs of suit, subject to the right of the owner to redeem the same within two years. The affidavit for the issuance of the citation was made by W. Boyce as attorney for the state, was in statutory form, affiant stating therein that the owners of the land in controversy were unknown to him, and after inquiry could not be ascertained. By supplemental petition duly filed plaintiff alleged that this affidavit of the county attorney was fraudulently made, and that by reason thereof the judgment of foreclosure was void. The trial court sustained general and special exceptions to this pleading on the ground that it was a collateral attack on the judgment, and in this ruling we think there was no error. This was clearly a collateral attack upon the judgment, based upon alleged facts dehors the judgment and all other records in the suit, which could not be sustained in view of the affidavit for citation by publication and recitals of service in the judgment, above noted. *Crawford v. McDonald*, 88 Tex. 626, 83 S. W. 325; *Kenson v. Gage*, 34 Tex. Civ. App. 547, 79 S. W. 605; *Scudder v. Cox*, 35 Tex. Civ. App. 416, 80 S. W. 872. The evidence failing to show that appellant was in possession of the land when the foreclosure suit was filed, and when citation was issued therein, the cases of *Hollywood v. Wellhausen*, 28 Tex. Civ. App. 541, 68 S. W. 329, and *Bingham v. Matthews*, 39 Tex. Civ. App. 41, 86 S. W. 781, relied on by her, are therefore not applicable. Other authorities cited by appellant, such as *Babcock v. Wolfarth*, 35 Tex. Civ. App. 512, 80 S. W. 642, *Stoneman v. Bilby*, 43 Tex. Civ. App. 293, 96 S. W. 51, and *Earnest v. Glaser*, 32 Tex. Civ. App. 378, 74 S. W. 605, are applicable only in cases where the judgment assailed fails to recite service of citation.

Appellant calls our attention to the decision of our Supreme Court in *Martin v. Burns, Walker & Co.*, 80 Tex. 679, 16 S. W. 1072, and *Fowler v. Simpson*, 79 Tex. 617, 15 S. W. 682, 23 Am. St. Rep. 370, to the effect that, when the judgment recites the precise character of service upon which it is rendered, then proof is admissible to show that the service was not as required by law; and upon these authorities the contention is made

that, in view of the recital in the judgment of foreclosure in question that citation was by publication, the trial court erred in sustaining defendant's exceptions to the allegations in plaintiff's supplemental petition that the citation was not addressed to all persons owning or claiming any interest in the land in controversy, that it was not addressed to the sheriff or any constable of Hartley county, and that it failed to state that the taxes claimed in the petition constituted a lien on the land. In the case of *Martin v. Burns, Walker & Co.*, supra, the judgment assailed failed to recite any service of citation, and the only authority therein cited to sustain the announcement above noted, which was not necessary to a decision of that case, was *Fowler v. Simpson*, supra; and in the latter case the court said: "The judgment now in question identifies by referring to its date the return of the officer and the writ upon which the court's conclusion of lawful service is based. Instead of relying upon a presumption, it points out the proof upon which its validity depends. It would be doing violence to the recitals of the judgment itself to doubt upon what evidence of the service of its process the court was acting." If the judgment recites service of citation, then, in the absence of some recital identifying the precise writ upon which the court acted, such as was contained in the case last cited, we do not believe the judgment is subject to a collateral attack for lack of proper service. However, irrespective of this view, the citation offered by appellant in support of these allegations is contained in a bill of exception appearing in this record, and we think the same was in substantial compliance with the statutory requirements. It is not addressed to the sheriff or any constable, but is addressed directly to the defendants, and the affidavit of the publisher of the newspaper publishing it shows publication thereof as required by law. We find no statute requiring such citations to be addressed to any officer, nor requiring any officer to make return thereof. We therefore overrule appellant's contention last noted. *Young v. Jackson* (Tex. Civ. App.) 110 S. W. 79.

That portion of the judgment decreeing that the order of sale to be issued thereon should have the force and effect of a writ of possession, and that the officer making the sale of the land by virtue thereof should place the purchaser in possession, was improper, but it did not invalidate the judgment in its entirety, and should be treated as surplusage only. *Masterson v. State*, 17 Tex. Civ. App. 94, 42 S. W. 1003. *Sayles' Ann. Civ. St.* 1897, art. 5232g, provides that when land is offered for sale by the sheriff under a judgment foreclosing a lien for taxes, if there be no bidder for such land, the county attorney shall bid the same off to the state for the amount of all taxes, penalties, inter-

est, and costs adjudged against the property. Appellant insists that, W. Boyce being the county attorney of Hartley county at the time he purchased the land in controversy under the foreclosure sale, he should have bid the property off to the state, and that, therefore, his purchase of same for his own use and benefit was contrary to public policy and void. In support of this contention, appellant cites *Edwards v. Estell*, 48 Cal. 194, and *Clute v. Barron*, 2 Mich. 192. In the case first cited a purchase by a surveyor of public land, and in the second case cited a purchase by a tax collector of lands he sold for taxes, were both held to be contrary to public policy, and therefore void. But in these cases and others we have examined, where sales of like character were likewise held void, the purchasers were the officers making the sales and selling to themselves, or else were charged by law with some duty relative to making the sale, the performance of which was necessary to a valid sale. It will be noted that the statute quoted above requires the land to be bid in for the state only when there are no bidders for the same, thus evidencing the policy of the state to become the purchaser only when it is necessary to do so in order to collect the taxes due. It is not made the duty of the county attorney to sell the land, that being the official duty of the sheriff, and, in the absence of allegations of fraud in making the purchase, we do not think that it can be said that the purchase by W. Boyce was contrary to public policy and therefore void. *Walcott v. Hand*, 122 Mo. 621, 27 S. W. 333. In the case last cited a tax collector was the purchaser under a tax sale by the sheriff, and the contention was made that the transaction was void as being contrary to public policy, but the Supreme Court of Missouri, rendering the decision, held the deed valid, citing *Dillinger v. Kelley*, 84 Mo. 565, and *Briant v. Jackson*, 99 Mo. 585, 13 S. W. 91, and saying: "A careful examination of each and every case cited by plaintiffs discloses that in every instance in which the sale was held void or voidable it was under a tax law in which the collector himself made the sale, and either by himself or deputy purchased the land, or, if sold by a sheriff or constable, he purchased at his own sale." See, also, 1 *Blackwell on Tax Titles*, § 604.

Finding no error in the record, the judgment of the trial court is affirmed.

PHILLIPS et al. v. HAIL.

(Court of Civil Appeals of Texas. March 31, 1909.)

LIMITATION OF ACTIONS (§ 167*)—CONSTABLE'S BOND—BAR OF DEBT AS BAR OF SECURITY.

A constable's official bond being merely a collateral security for performance of his duty, the two-year limitation, which bars an action

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for breach of his duty, also bars an action on the bond.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 651-653; Dec. Dig. § 167.*]

Appeal from Houston County Court; John Spence, Judge.

Action by J. W. Hall against A. W. Phillips and others, in which the First National Bank of Crockett was interpleaded. Judgment for plaintiff against defendants, and for defendants over against the bank, and defendants appeal. Reversed and rendered.

Adams & Adams, Nunn & Nunn, and J. W. Madden, for appellants. Moore & Adams and L. A. Sallas, for appellee.

NEILL, J. On the 30th of April, 1907, J. W. Hall sued A. W. Phillips and the sureties on his official bond as constable of precinct No. 1, Houston county, Tex., to recover damages for negligently taking a defective claim bond to property which he had levied upon, on November 4, 1904, by virtue of an execution issued on a judgment owned by the plaintiff, Hall, and for delivering the property to the claimant, the First National Bank of Crockett, on the day of the levy. Phillips' answer contained a special exception to plaintiff's petition, upon the ground that it shows upon its face that the action was barred by the two-year statute of limitation, and a special plea in bar of the two-year statute. The bank was also interpleaded, and judgment was asked by Phillips and the sureties on his bond over against the bank, in the event plaintiff recovered against them. The case was tried before the court without a jury, and judgment rendered in favor of the plaintiff against Phillips and his sureties in the amount shown to be due upon the execution up to the time the cause was tried, and also rendered in favor of Phillips and his bondsmen over against the bank.

In the view we take of the case, we need only consider the assignment which complains of the court's holding that plaintiff's action was not barred by the statute of limitation. The undisputed facts, as well as the allegations in plaintiff's petition, show conclusively that the suit was not brought until two years after the right of action against Phillips accrued. Unquestionably the two-year statute of limitation is applicable to a case of this character. Woods v. Huffman, 64 Tex. 98. This is founded on the principle that an official bond is simply a collateral security for performing the officer's duty, and, when suit is barred for breach of his duty, action is also barred on the bond. State v. Conway, 18 Ohio, 235; State v. Blake, 2 Ohio St. 147; Dawes v. Shed, 15 Mass. 6, 8 Am. Dec. 80; Ryus v. Gruble, 31 Kan. 767, 3 Pac. 518; Com'rs v. Van Slyck, 52 Kan. 622, 35 Pac. 299; Spokane Co. v. Prescott, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733; Davis v. Clark, 58 Kan.

455, 49 Pac. 685. As is said in Ryus v. Gruble, supra: "The bond does not give the cause of action. The wrongs or delicts do; and the bond simply furnishes security to indemnify the persons who suffer by reason of such wrongs or delicts. And while the statute cited by plaintiff operates to bar every action brought upon the bond to enforce a cause of action which accrued more than five years prior to the commencement of the action, yet such statute does not operate to suspend the operation of the other statutes of limitation, or to continue in force or revive a cause of action which had already been barred by some one of the other statutes of limitation. Whenever a cause of action is barred by any statute of limitations, the right to maintain an action therefor upon a bond, which simply operates as a security for the same thing, must necessarily cease to exist."

From this it follows that the court erred in not holding that the action was barred, and in failing, for that reason, to render judgment in favor of defendants against the plaintiff. Wherefore the judgment of the county court is reversed and set aside, and judgment is here rendered for defendants.

WRIGHT v. HARTFORD FIRE INS. CO.†
(Court of Civil Appeals of Texas. Feb. 13, 1909. Rehearing Denied March 13, 1909.)

1. INSURANCE (§ 282*)—FIRE INSURANCE—ENTIRE, UNCONDITIONAL, AND SOLE OWNERSHIP.

A purchaser of real estate who receives a deed retaining a vendor's lien for the unpaid part of the price acquires the entire, unconditional, and sole ownership within an insurance policy stipulating that it shall be void on the interest of insured being or becoming other than entire, unconditional, and sole ownership.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 613; Dec. Dig. § 282.*]

2. INSURANCE (§ 282*)—FIRE INSURANCE—UNINCUMBERED "INTEREST."

A fire policy stipulating that it should be void on the interest of insured becoming other than unincumbered was with the consent of insurer, subject to its conditions, assigned to a purchaser whose deed of the property retained a vendor's lien for the unpaid part of the price. Insurer had no notice of the lien. Held, that the policy was void.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 282.*]

Appeal from District Court, Howard County; Jas. L. Shepherd, Judge.

Action by J. G. Wright against the Hartford Fire Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

L. A. Dale, for appellant. Wm. Thompson and Jno. B. Littler, for appellee.

CONNER, C. J. Appellant sued upon a policy of insurance acquired by him for dam-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court April 14, 1909.

ages in the sum of \$1,950 done to his dwelling by lightning. The policy by its terms was to become "void" if, among other things, "the interest of the assured be or become other than the entire, unconditional, unincumbered, and sole ownership of the property." Appellee, in addition to the general denial, pleaded the quoted provision of the policy in defense, and, it appearing upon the trial from the undisputed proof that at the time of the alleged destruction of the property there existed thereon, an unsatisfied, valid vendor's lien to secure the aggregate sum (excluding interest and attorneys' fees) of \$1,650, the court peremptorily instructed a verdict for appellee, and upon the return of such verdict judgment was entered accordingly.

The undisputed evidence shows that the policy which contained the provision we have quoted above was made to one S. E. Davis on the 1st day of November, 1906, insuring the said Davis for the period of three years against loss by fire or lightning upon the property in controversy; that on July 29, 1907, S. E. Davis, joined by his wife, conveyed the property to appellant for a total consideration of \$5,000, of which \$1,650 was evidenced by two promissory notes, each for the sum of \$825, executed by appellant, payable to the order of S. E. Davis on or before April 23, 1908, and 1909, respectively, each bearing interest from date until paid at the rate of 10 per cent. per annum, stipulating that all past-due interest should bear interest from maturity until paid at the rate of 10 per cent. per annum, and that a failure to pay either note or any installment of interest when due should at the election of the holder mature both notes; that, if placed in the hands of an attorney for collection, collected by suit, or through the probate court, 10 per cent. additional on the principal and interest should be paid as attorneys' fees. To secure the two notes thus described, the vendor's lien upon the property conveyed was expressly retained in the deed. The deed was duly acknowledged by S. E. Davis on August 14, 1907, and by his wife on the 9th day of September, 1907, upon which last-named day the deed was duly recorded. Davis assigned the policy to appellant with appellee's consent given in the following terms, as appears by indorsement upon the policy: "The insurance company within named hereby consents that the interest of S. E. Davis in the within policy be assigned to J. G. Wright, subject to all the terms and conditions therein mentioned and set forth. Dated at Big Springs, Texas, the 3d day of August, 1907. George D. Lee, Agent."

There is no evidence that appellee had notice of the lien so shown, and the only material question presented on this appeal is whether the facts invalidated the policy and authorized the peremptory instruction. Numerous authorities have been cited to the effect that a policy of insurance is not voided

by a lien on the subject-matter of the insurance by reason of a provision that "if the interest of the assured be or become other than the entire, unconditional, and sole ownership of the property." See *Liverpool & London & Globe Ins. Co. v. Ricker*, 10 Tex. Civ. App. 264, 31 S. W. 248; *Hamburg-Bremen Fire Ins. Co. v. Ruddell*, 37 Tex. Civ. App. 30, 82 S. W. 826; *Queen Ins. Co. v. May* (Tex. Civ. App.) 35 S. W. 831; *Merchants' Ins. Co. v. Nowlin* (Tex. Civ. App.) 56 S. W. 198; *Fire Association of Phil. v. Calhoun*, 23 Tex. Civ. App. 409, 67 S. W. 153; *De Arnaud v. Home Ins. Co. (C. C.)* 28 Fed. 603; *Ellis v. Ins. Co. (C. C.)* 32 Fed. 646; *Dolliver v. Insurance Co.*, 128 Mass. 315, 35 Am. Rep. 378; *Franklin Fire Ins. Co. v. Crockett*, 75 Tenn. 725; *Dohn v. Farmers' Joint-Stock Ins. Co.*, 5 Lans. (N. Y.) 275. These authorities proceeded on the theory that such condition has reference alone to the status of the title, and that the title or ownership, whether legal or equitable, is none the less "entire, unconditional, and sole" merely because of an incumbrance on the subject-matter of the insurance. None of the cases, however, that we have examined construe a provision of a policy which, as here, inhibits an incumbrance, and we fail to find any just ground upon which to avoid the force of a contract of insurance as the parties saw fit to make it. It was not shown, as in one of the cases cited, that at the time of appellee's consent to the transfer its agent had notice, either actual or constructive, of the existence of the lien. On the contrary, such consent was expressly made "subject to all the terms and conditions" of the policy as made to Davis. If the provision under consideration could be construed as a representation merely, it can hardly be said that the representation was immaterial to the risks contemplated by the policy, and that, therefore, the policy should be upheld. In 1 Wood on Fire Ins. (2d Ed.) § 345, it is said that: "Where the policy specially provides that any 'incumbrance' shall invalidate it, of course, a mortgage operates as a breach." And in the case of *Curlee v. Texas Home Fire Ins. Co.*, 31 Tex. Civ. App. 471, 73 S. W. 831, it was held in an opinion by Judge Key, of the Third Supreme Judicial District, that a vendor's lien avoided a policy of insurance which contained a provision to the effect "that this entire policy shall be void if the subject of insurance, or any part thereof, be or become incumbered by mortgage or otherwise. A writ of error was refused in this case by our Supreme Court, and it would seem to be conclusive here, save that appellant insists that in the policy before us the condition is against an incumbrance of the "interest" of the assured instead of the "subject" of insurance, as in the case cited. It seems difficult, however, to make the distinction urged available here. Appellant's "interest" in the property insured, considered in the sense of title or ownership merely, was constituted

by the property itself. It might be entirely extinguished by successive alienations of the several estates that might be carved out of the property, or might be wholly lost by excessive or successive mortgages. Within the meaning of the policy, as shown by the authorities first cited by us, appellant had the entire, unconditional, and sole ownership, notwithstanding the existence of the vendor's lien, but no method of incumbering such title or interest for the payment of debt occurs to us other than to incumber the property so owned. In *Fire Ins. Co. v. Clarke*, 79 Tex. 23, 15 S. W. 186, 11 L. R. A. 293, it was held that a mortgage on certain property constituted a conveyance of an "interest" therein within the conditions of the policy. In *Hicks v. Farmers' Ins. Co.*, 71 Iowa, 119, 32 N. W. 201, 60 Am. Rep. 781, it was held that: "A condition in a fire insurance policy issued to a firm that property should not afterwards be in any manner incumbered was violated by the execution of a mortgage by one of the partners on his undivided one-third interest in the property, and by a judgment against him, which became a lien on his said interest." In other words, these decisions seem to treat the interest in property and the property itself as convertible terms, although we have been unable to find any case either for or against the precise distinction appellant has urged.

On the whole, we conclude that under the undisputed facts the court's peremptory instruction was proper, and that the judgment should be affirmed.

SLAUGHTER v. SLAUGHTER.

(Court of Civil Appeals of Texas. March 13, 1909.)

DIVORCE (§ 27*)—CRUEL TREATMENT—ABANDONMENT.

Under Sayles' Ann. Civ. St. art. 2977, providing that a divorce may be granted for cruel treatment, the act of a husband in stealthily abandoning the wife and taking from her an infant child is not cruel treatment, authorizing a divorce on that ground.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 77; Dec. Dig. § 27.*]

Appeal from District Court, Dallam County; J. N. Browning, Judge.

Action by Eloise Slaughter against Coney C. Slaughter. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Jno. W. Veale, for appellant. Wallace & Lumpkin and D. B. Hill, for appellee.

DUNKLIN, J. Eloise Slaughter recovered a judgment in the district court of Dallam county against her husband, Coney C. Slaughter, dissolving the marriage of the parties and awarding to plaintiff the custody and education of their minor child. The following were the only facts proven upon the

trial to sustain the allegation in her petition that defendant had treated plaintiff so cruelly as to render their living together insupportable, and on account of which she sought a divorce:

Defendant left plaintiff without cause, and immediately went to the republic of Mexico, where he has resided ever since, taking with him, and keeping, a girl baby 11 months old, the fruit of the marriage. The child had been weaned by the mother at the time she was carried away. The parties were living in Dalhart at the time of the separation, but on or about December 15, 1906, defendant represented to plaintiff that he desired to move to Amarillo, and planned that they both make a trip there for the purpose of selecting a place to board. Plaintiff's mother lived in Amarillo, and plaintiff expected to stop with her on that trip. Defendant induced plaintiff to leave the child with his mother in Dalhart by representing to her that her mother had so requested, and this representation was false. When plaintiff boarded the train at Dalhart to go to Amarillo, the defendant, upon the pretext of returning to his room for some articles of wearing apparel, which he had forgotten and which he would need on the trip, left plaintiff to take the trip alone. Very early on the following morning he left with the child, and up to the date of the trial, April 2, 1908, plaintiff had never received any tidings of defendant or her child, and since he abandoned plaintiff defendant has never contributed anything to her support. Plaintiff loved her child, and her separation from the child has caused her grief.

Construing all these facts together, and giving them full force and effect, they do not warrant the decree of divorce rendered. Sayles' Ann. Civ. St. art. 2977, reads in part as follows: "A divorce by separation from the bonds of matrimony may be decreed in the following cases: (1) Where either the husband or wife is guilty of excesses, cruel treatment or outrages towards the other, if such ill treatment is of such a nature as to render their living together insupportable. * * * (3) In favor of the wife when the husband shall have left her for three years with the intention of abandonment, or where he shall have abandoned her and lived in adultery with another woman." And article 2979 requires the material facts alleged in a petition for a divorce to be sustained by full and satisfactory evidence before a divorce can be decreed. It will be seen from article 2977, quoted above, that simple abandonment of his wife by the husband cannot be a ground for divorce, unless it has continued for three years. This is a separate and distinct ground from cruelty, and cannot be considered, even in connection with failure to support the wife after abandonment, as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

constituting a ground for divorce under paragraph 1 of the article above quoted. Every abandonment of the wife by the husband within the meaning of subdivision 3 of article 2977 necessarily implies nonsupport by the husband during abandonment.

The act of the husband in taking from the mother the infant child, under the circumstances above enumerated, while reprehensible, is not in terms made a ground for divorce by the statutes, and cannot be construed as "cruel treatment or outrages" toward her "of such a nature as to render their living together insupportable," within the meaning of subdivision 1 of article 2977. In cases of separation of husband and wife, controversies over the custody of their minor children are of common occurrence, and to hold that for one to take the exclusive control of the minor children would constitute cause for divorce at the suit of the other spouse, we think, would extend our divorce statutes beyond the intention of the legislatures enacting them.

For the error of the trial court in decreeing a divorce between the parties upon the facts above recited, the judgment rendered is reversed, and the cause remanded, without passing upon any other errors assigned by appellant. However, the writer is inclined to the opinion that the venue of this suit was improperly laid in Dallam county. The separation occurred in December, 1906, and the suit was filed in August, 1907. Ever since the separation plaintiff has lived with her parents in Amarillo, Potter county, although at the time the suit was filed she owned a house and lot in Dalhart, Dallam county, which she and her husband had formerly occupied as their home, but which she afterwards sold, and at the time of trial she still claimed Dalhart as her home. See *Michael v. Michael*, 34 Tex. Civ. App. 630, 79 S. W. 74; *Haymond v. Haymond*, 74 Tex. 414, 12 S. W. 90; *Sayles' Ann. Civ. St. art. 2978*. But, as above said, this question is not decided; a decision of it being unnecessary, for the reasons already noted.

Reversed and remanded.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. ALSUP & GRAY.

(Court of Civil Appeals of Texas. March 31, 1909.)

APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FINDINGS.

An erroneous finding of fact by the court was immaterial, where it did not affect the other findings, which were supported by the evidence and sustained the verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4234, 4236; Dec. Dig. § 1071.*]

Appeal from Coryell County Court; R. E. West, Judge.

Action by Alsup & Gray against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Affirmed.

E. B. Perkins and Scott, Sanford & Ross, for appellant. Sadler & Arnold, for appellees.

FISHER, C. J. We are inclined to agree with appellant, as stated in its first assignment of error, that the evidence does not show that the distance from Naples, Tex., to Gatesville, Tex., is 250 miles; but, however, this question is unimportant, and in no wise affects the other findings of fact complained of. There is evidence, or, in other words, the deductions that arise from the evidence justified the court in the other findings, which show that there was an unreasonable delay and improper and rough handling of the stock en route; and there is also evidence which justifies the conclusion as to the amount of damages awarded by the judgment.

We find no error in the record, and the judgment is affirmed.

Affirmed.

FLORESVILLE OIL & MFG. CO. v. TEXAS REFINING CO.

(Court of Civil Appeals of Texas. April 3, 1909.)

1. CORPORATIONS (§ 503*)—ACTIONS—VENUE.

Under Rev. St. 1895, art. 1194, exception 23, providing that suits against any private corporation may be brought in any county in which plaintiff's cause of action or a part thereof arose, where it appeared prima facie that a written contract on which suit was brought against a corporation was to be performed at least in part in a certain county, and that for a breach thereof by the corporation plaintiff had a cause of action in that county, a plea of privilege to be sued in the county of its residence was properly overruled.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1935-1938; Dec. Dig. § 503.*]

2. EVIDENCE (§ 213*)—ADMISSIONS—OFFERS OF COMPROMISE.

In an action by a buyer against a seller for breach of the contract of sale, evidence that, after the buyer had bought other goods on the market, it offered by letter to waive claim to the difference in price if the seller would deliver the goods contracted for, and that the seller made no reply, was improperly admitted, over objection, as evidence of an offer to compromise a controversy.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 745-747; Dec. Dig. § 213.*]

3. EVIDENCE (§ 431*)—PAROL EVIDENCE—SHOWING NONEXISTENCE OF CONTRACT.

In an action by a buyer against a seller for breach of purported contracts for sale of cotton oil which were signed only by a broker, to show that they had been executed by the seller's authority and therefore binding on it, the broker testified that he had received over the phone from the seller an offer of the oil, and on the same day had notified it that he had sold it to the buyer, that the sales were confirmed on the day made over the phone, and that his firm

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was acting as the seller's broker, and testified on cross-examination that his firm was governed by a rule of an association of which both the buyer and seller were members that required such sales to be confirmed by the seller on the day made, and it appeared that the contracts of sale stipulated that the sales were governed by the rules of the association. It was error to exclude testimony of the seller's manager that the broker did not during the day of the sale report to the seller confirming the sale as required by the rules of the association; the testimony not tending to vary the terms of the purported contracts, but to show that they never became binding because of failure to comply with the condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1975, 1976; Dec. Dig. § 481.*]

4. PLEADING (§ 291*)—VERIFICATION—DENIAL OF AUTHORITY TO EXECUTE WRITTEN INSTRUMENT.

In an action by a buyer against the seller for breach of a written contract of sale signed by one purporting to act as defendant's broker, defendant may introduce evidence tending to show that the broker failed to report the sale to his principal for confirmation, as required by the rules of an association to which the parties to the contract were members, though defendant did not deny the execution of the contract under oath.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 877; Dec. Dig. § 291.*]

5. SALES (§ 413*)—ACTION FOR BREACH—ISSUES AND PROOF.

In an action by a buyer against the seller for breach of a written contract of sale, defendant under a general denial may introduce evidence tending to show that a broker by whom the contract was signed failed to report the sale to defendant for its confirmation, as required by the rules of an association to which the parties to the contract belonged as members.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1167; Dec. Dig. § 413.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by the Texas Refining Company against the Floresville Oil & Manufacturing Company. There was a directed verdict for plaintiff, and defendant appeals. Reversed and remanded.

J. E. Canfield and J. S. Sherrill, for appellant. Geo. S. Perkins, for appellee.

TALBOT, J. Appellee brought this suit against appellant in the district court of Hunt county, Tex., to recover damages for an alleged breach of contract. It was averred: That on the 10th day of September, 1906, plaintiff was engaged in the business of buying crude oil and in refining such oil and selling the refined product. That on said date defendant was engaged in the manufacture and sale of crude cotton seed oil at the town of Floresville, in this state, and acting by and through its duly authorized agents, John Hamilton & Co., in the city of Dallas, Tex., called by phone plaintiff's manager at its office in Greenville, said Hunt county, Tex., and sold to plaintiff three tanks of 132 barrels capacity of new, prime, crude cotton seed oil, at the price of 28½ cents per gallon, f. o. b. Floresville, shipment

to be made during the month of October, tanks to be furnished by the plaintiff, and to be loaded by the defendant to their capacity. That on same date and in the same manner the defendant also sold to plaintiff three tanks of 132 barrels capacity of new, prime, crude cotton seed oil at the price of 28 cents per gallon f. o. b. at the said town of Floresville, shipment to be made during the month of November, tanks to be furnished by plaintiff and loaded by defendant to their capacity. That said sales were duly confirmed by said brokers to plaintiff on the same day by phone message and telegraph message, and by mailing the plaintiff and defendant written copies of the contract in the usual form used by the brokers, as is usual and customary in such cases, and copies of those so mailed to the plaintiff are hereto attached, marked "Exhibit A" and "Exhibit B," and made a part hereof. Said written contracts were executed by authority of defendant. That, by the terms of said contracts, the defendant was to draw sight drafts on the plaintiff free from exchange payable at said city of Greenville with bill of lading attached for full amount of the invoices, defendant guaranteeing weight and quality of the oil at Greenville. That said contracts were by express terms subject to the Texas Cotton Seed Crushers' Association rules. It was further alleged that the defendant failed and refused to comply with the said contracts for the delivery to the plaintiff of the six tanks of oil, either in whole or in part, to plaintiff's damage \$2,000; that on or about the 19th of October, 1906, plaintiff learned from the defendant that it would not comply with its contract or any part thereof, and on October 20th gave the defendant notice that the plaintiff intended to purchase and would purchase on open market for the account of the defendant six tanks of oil, three to be delivered in October and three in November to cover defendant's contract with plaintiff, and that defendant would be charged with the difference in price, if any, which plaintiff was authorized to do under and by virtue of the said terms of said contracts with the defendant; that plaintiff purchased for the account of defendant three tanks of prime cotton seed oil for October shipment on the 20th day of October, 1906, at the price of 28 cents per gallon f. o. b., two tanks at Cooper, Tex., and one tank at Lone Oak, 28 cents per gallon being then the lowest market price for which said oil for said shipment could be obtained, and on the 23d of October plaintiff purchased for the account of the defendant three tanks of oil for November shipment at the rate of 28 cents per gallon therefor f. o. b., two tanks from the Farmers' & Merchants' O. O. Mills, Mt. Pleasant, Tex., and one tank at Roxton, Tex., the price paid therefor being the then lowest market price for which said oil for said shipment could be obtained,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said six tanks being of the grade and quality of the oil originally purchased from defendant; that the difference in price which the plaintiff had to pay for said oil which was the market price and the price at which defendant had so contracted to deliver the same to the plaintiff was \$1,881, for which it prayed judgment. The defendant filed a plea of privilege to be sued in the county of its residence, namely, Wilson county, Tex., and pleaded general and special exceptions, a general denial, and special matters not necessary to state. The plea of privilege was overruled, and the case proceeded to trial upon its merits. When the evidence was closed, the court directed the jury to return a verdict in favor of the plaintiff, and from the judgment entered thereon this appeal is prosecuted.

The first assignment of error complains of the court's action in overruling defendant's plea of privilege to be sued in the county of its residence. This assignment is not in our opinion well taken. Exception 23, art. 1194, Rev. St. 1895, provides, among other things, that suits against any private corporation may be prosecuted in any county in this state in which the plaintiff's cause of action or a part thereof arose. The defendant was such a corporation, and, while it had no agent in Hunt county, yet the allegations of the petition and the evidence adduced were sufficient to support the court's conclusion that a written contract for the sale and purchase of the oil in question, and upon which this suit was founded, had been entered into between the plaintiff and defendant, which was to be performed at least in part in Hunt county, and that for a breach thereof by defendant a cause of action arose in favor of plaintiff in that county. *Seley v. Williams*, 20 Tex. Civ. App. 405, 50 S. W. 399. The evidence showing prima facie such a contract, we would not be warranted in reversing the case on this assignment. This also disposes of appellant's second and third assignments of error.

E. H. Tassey, a witness for the plaintiff, was permitted to testify, over the objections of defendant, as follows: "We notified defendant by wire on October 23d that we had purchased for its account six tanks of oil in question, charging them with the difference in price, and giving it the names of the mills from which we had purchased the six tanks of oil. We also stated in said wire that we would make no claim for this difference in price, provided they would answer by telegram on that date stating they would fill our contract, and referring to our letter of October 19th. We meant by this that, in the event the defendant would fill its contract with us, we would be willing to waive claim for the difference in the contract price and the price at which we had purchased the six tanks for their account, and receive the six tanks we had bought for their account for the account of ourselves. Said telegram,

marked 'Exhibit U,' is a copy of the telegram dated October 23d, referred to above, and which we sent defendant on said date. We received no reply to it." This testimony was objected to on the ground that it showed an offer to compromise the matter in dispute between the plaintiff and defendant, and was irrelevant and improper to go before the jury. We think this contention correct. The testimony seems to fall within the well-established rule "that an offer to compromise a prospective suit, if expressly or impliedly made without prejudice, cannot be admitted in evidence when objected to." The reason of the rule is that the law favors the compromise and settlement of controversies without litigation, and, as the admission in evidence of such offers tends to discourage such settlements, they are against the policy of the law, and should be excluded. *Railway Co. v. Ragsdale*, 67 Tex. 24, 2 S. W. 515. But it is argued by appellee that, inasmuch as it appears that appellant made no reply to appellee's proposition, "the reason for invoking the rule in this instance did not exist, that the testimony could not possibly have operated prejudicially to the appellant, and there was no error in its admission." We do not regard this as a satisfactory answer to the contention. The testimony objected to did not tend to show the admission on the part of appellant of any material fact involved in the suit, but disclosed a mere proposition of settlement. In the case cited it is said that "numerous authorities may be cited to show that the admission of a fact pending a negotiation for compromise may be admitted; but we have found none that a proposition, which has not been accepted and become a contract, is legal testimony." Neither do we agree to the proposition that the testimony could not possibly have operated prejudicially to the appellant. On the contrary, we think it was clearly calculated to injuriously affect the rights of appellant.

We are also of the opinion that appellant's fifth assignment of error is well taken. After the witness W. C. Bruff had testified that he was manager for appellant on or about the 10th day of September, 1906, and that on said date he had a conversation with John Hamilton & Co., of Dallas, with reference to the sale of some cotton seed oil, and that he gave to said Hamilton & Co. an option on six tanks of oil to sell the same during that day and up to midnight of that night, and that he had other conversations with him on the same day, the appellant then offered to prove by said witness that nothing was said by said Hamilton & Co. in the second or third conversation with reference to the sale of said oil, except that in the second conversation he told him that he had not yet heard from the people to whom he expected to sell; that said Hamilton & Co. did not at any time during that day report to him or the defendant confirming the sale of any oil, and that he did not

at any time receive any written notice of the sale of said oil or the letter or contracts called the confirmation of sale, as claimed by the plaintiff, and attached to plaintiff's petition; that said Hamilton & Co. did not on that day or at any other time confirm the sale of said oil, and that said Bruff did not hear anything of said sale until several days thereafter. This testimony, as shown by the bill of exception reserved to the court's action, was objected to on the grounds. (1) That it varied the terms of the written contract sued on; (2) that defendant had not denied under oath the execution of said contract; (3) that there were no pleadings to authorize the introduction of said testimony, and it was irrelevant and immaterial. Some one or all of these objections were by the trial court sustained, and the testimony offered excluded. This was error. It was not essential to the admissibility of the testimony offered that a denial under oath of the authority of John Hamilton & Co. to make the alleged contract in behalf of appellant should have been filed by it. The contract was not signed by either the plaintiff or defendant, but alone by John Hamilton & Co., as brokers. It was not sufficient without evidence aliunde to show that it had been executed by authority of appellant, and therefore binding upon it. The evidence was sought to be supplied by the testimony of John Hamilton. He testified in behalf of appellee, among other things, in effect, that he talked over the telephone at Dallas with the manager of appellant, who was at Floresville three times on the 10th day of September, 1906, the first time at 11:30 o'clock in the morning, the second time at 12:37 o'clock p. m., and the third time at 2:50 p. m.; that, according to the memorandum which his firm keeps of daily conversations with the different mills in the state, appellant gave to his firm in the first conversation an offer of three tanks of October oil at 23½ cents, two tanks of November oil at 23 cents f. o. b. cars at Floresville; that in the second conversation he advised appellant of the sale of the five tanks of oil to appellee, and at that time the two tanks of November oil were increased to three tanks. He further testified that, in making the sale of the oil to appellee, his firm was acting for appellant as brokers, and by the authority given them over the phone in the conversations stated; that said sales were confirmed the day made over the telephone, and by mailing the contracts sued on to appellant and appellee, and that such course was the usual custom in such transactions. On cross-examination of this witness he testified in this connection that the rule by which his firm was governed in making the sales of the oil to appellee required such sales to be confirmed by the seller on the day they were made, and, if not, they were not binding. The undisputed testimony further showed that appellant and appel-

lee were members of the Texas Cotton Seed Crushers' Association; that the sales to them of the oil in question were made under the rules of that association; and that said rules governing option sales, etc., stipulated that, unless such a sale is confirmed by 12 o'clock at night on the day the option is given, it is not binding upon either party. E. H. Tasse, appellee's manager, testified: "In the event that John Hamilton & Co. secured from the defendant on which there was no time limit (and there was none) an offer on the six tanks of oil at price and terms specified, and did not give the defendant their reply verbally or by phone or by telegraph on or before midnight of the day on which the offer is secured, the trade would be considered off." In addition to the foregoing testimony, the contracts upon which appellee's suit is founded stipulate, in effect, that the sales alleged are governed by the rules of the Texas Cotton Seed Crushers' Association. Clearly in this state of the evidence the testimony offered by appellant and excluded by the court was material and admissible. It was not offered with a view of merely varying the terms of the purported contracts declared on or to show want of authority in John Hamilton & Co. to make such contracts, but for the purpose of showing that said contracts, although signed by John Hamilton & Co., and by them delivered to appellee, did not take effect and become binding because an important condition upon which their completion and binding force depended, and which was well known to and understood by appellee to be essential to their vitality and efficacy, was not complied with. If the sale of the oil under the option given by the appellant to John Hamilton & Co. was not reported to appellant by or before midnight of September 10, 1906, as prescribed by the rules of the Texas Cotton Seed Crushers' Association, then the execution and delivery by the said John Hamilton & Co. of the instruments sued on were not the contracts of appellant. This was the issue tendered by the testimony excluded, and no denial of the authority of John Hamilton & Co. to execute in behalf of appellant said instruments or to make a sale of the oil was necessary to warrant the admission of said testimony. It follows that the testimony should have been admitted, and the question involved submitted for the determination of the jury by an appropriate instruction.

We are further of the opinion that the court erred in excluding the testimony of the witness J. E. Canfield as to the contents of a letter claimed to have been written by John Hamilton & Co. to appellant in reference to the matter involved in this suit. The loss of the letter was sufficiently established to authorize the admission of parol evidence of its contents, and it does not appear that its authenticity was questioned. It was material upon the issue upon which

the testimony of the witness Bruff was offered as shown in a former part of this opinion, and, if we are correct in our holding that the testimony of Bruff was admissible, then for the same reasons the testimony of the witness Canfield was admissible.

The judgment of the court below is reversed, and the cause remanded.

FT. WORTH & D. C. RY. CO. v. LONGINO.
(Court of Civil Appeals of Texas. Feb. 20, 1909. Rehearing Denied March 27, 1909.)

1. RAILROADS (§ 369*)—INJURIES TO PERSON ON TRACK—CARE REQUIRED.

A railroad company reasonably chargeable with knowledge that persons are on the track, whether as trespassers or licensees or under a claim of right, must exercise ordinary care to discover their presence, and to avoid injuring them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1261; Dec. Dig. § 369.*]

2. RAILROADS (§ 381*)—USE OF TRACK BY PEDESTRIANS—CARE REQUIRED.

One using a railroad track, either as a licensee or under a lawful claim of right, must exercise ordinary care for his own safety, and one exercising no care whatever is guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1286; Dec. Dig. § 381.*]

3. RAILROADS (§ 396*)—USE OF TRACK BY PEDESTRIANS—CARE REQUIRED—PRESUMPTIONS.

One struck by a train at a place long used as a footway by the public, and so injured as to be unable to recall anything connected with the accident, presumptively looked and listened for the approach of trains before entering on the track, especially where it appeared that he was familiar with the running of the trains, and where his companion to some extent looked for an approaching train before going on the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1341; Dec. Dig. § 396.*]

4. RAILROADS (§ 400*)—INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether one struck by a train at a place used by the public as a footway was guilty of contributory negligence is for the jury, unless the undisputed evidence shows that he exercised no care for his own safety.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1377; Dec. Dig. § 400.*]

5. RAILROADS (§ 397*)—INJURIES TO PERSON ON TRACK—EVIDENCE.

One using a railroad track as a footway may show on the issue of contributory negligence the proximity of crossings, stations, and the like, and the custom of the company to give signals for such places.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1354; Dec. Dig. § 397.*]

6. RAILROADS (§ 385*)—INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE—RELIANCE ON PRECAUTIONS.

One on a railroad track may in some measure depend on the company operating its trains in the usual manner, and may rely on the exercise of the usual precautions for the safety

of those whose presence on the track is to be anticipated.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1311-1313; Dec. Dig. § 385.*]

7. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL TO GIVE CHARGE COVERED BY CHARGE GIVEN.

It is not error to refuse a requested charge substantially embraced in the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by S. B. Longino against the Ft. Worth & Denver City Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee recovered a judgment against appellant for the sum of \$7,000 for personal injuries, and the latter has appealed.

The principle issue arising on the appeal is one growing out of appellant's plea of contributory negligence, and upon which it now insists the court should have instructed a verdict in its favor. The testimony which is claimed to necessitate such instruction is thus set out by appellant:

J. W. Finney testified as follows: "I remember the occasion of young Longino getting knocked off the railroad track there. On that day I was at home. I was right in the lot. * * * From the place where I was standing I could see the Denver track, both north and south; could see it north and south of the county road where it crosses. * * * I was looking there at the time he was knocked off the track. * * * There are two tracks there right together, about 50 feet off, maybe 100 feet apart. * * * My attention was first attracted by the Cotton Belt freight blowing—coming by on the Cotton Belt. The Cotton Belt track was farthest south. The Denver track was nearest to me. The Cotton Belt was coming out blowing northeast, and that attracted my attention, and I looked down there, and I saw the Denver coming into town, and there was a man coming this way and two men going the other way. I mean one man coming towards me, and two men going towards town on the Denver. * * * I have been on the track there along about where the young man was knocked off, and have made observations back up towards the northeast. You can see the track back towards the northeast for a quarter of a mile or further. You could see any one walking along on the track if they was on it—nothing at all to obstruct the view. * * * What first attracted my attention was the whistle or something on the Cotton Belt coming this way. When I looked at it, the passenger train was about maybe 100 yards above the crossing, something like that—above the county road crossing when I saw it. I saw it as it crossed the crossing, kept watching it come right up. I saw it until it got right

at them. * * * It is true that as you go down that road from your (my) house, or the house where he (plaintiff) lived, go down the road to the south in the direction of the Ft. Worth & Denver track, that by looking up there to the right you can see that track all the way from Hodge clear down. * * * For a space of 100 yards there, as a man would travel towards that track, there is no reason in the world why he couldn't see a train coming down from Hodge south if he had looked. It is about a mile from my place up there to the old station of Hodge. * * * The Cotton Belt that I was speaking of was going in the direction of Hodge, and the passenger train that I speak of having struck this boy was coming from Hodge in the direction of Ft. Worth. * * * When my attention was drawn down there by the whistle of the Cotton Belt train, these two boys were just starting in on the Denver railroad. They had just about gotten to the track—to the Denver track—when my attention was drawn to the Cotton Belt train by its whistling, and I looked down there. The passenger train was about 100 yards, something like that, above the dirt road. It had not got to the dirt road crossing by about 100 yards. About that time these boys were just turning onto the railroad track. This boy and the boy with him went onto the railroad track there in broad daylight, with the passenger train about 100 yards off coming. They could have seen it if they had looked back up the track something like 300 feet. I couldn't say, but then it was not very far. * * * The boys were running. They were on a long run in the middle of the track. I reckon my attention was turned to what they were doing after that. They were running pretty lively. The never looked back from the time they got on that track until they were hit, that I saw. A man would have to go down there to get on the inside of that inclosure, walk over that cattle guard, if he got over that bridge, in order to travel that way to the packing houses. When they got down there, these 300 or 400 yards that I speak of, they walked out over another stock gap. * * * I do not know of any other way of fencing it so as to keep stock and people off of this track. Have never seen any other way for the railroads to keep them out. At the time I saw the Denver train, it was then approaching the boys, and they were going in the direction away from the train. They did not look back, or anything, check speed, or make any effort to get off while I was looking at them. At the time I looked up the train was about 100 yards north of the county road. They continued down the track."

A. C. Russell testified as follows: "I recollect the incident of a young man being hit by a passenger train beyond the Kolp elevator in December, 1904. We were going to work on the 27th of December. * * * At

the time plaintiff was hit, I was helping to set the hand car off out of the way of the train, I suppose. * * * When we had our car on the track, we were going north, and the train was coming our way. * * * I suggested that some one go out and flag against the train, for we were running on the train time, and one of the men, Blakeley, got off, said he would go out and flag, and he went on and we kept going on slow and kept a lookout for the train, and, before we got a signal, I saw him stop. I saw the train coming. Just then it started to blow for the crossing, and we stopped then to set the car off. * * * I was looking up the track until I saw the train coming—until the train commenced to whistle. Just before I turned to take hold of the hand car, there was two men got on the track at that crossing, and turned coming south, coming in a long running walk, tolerably pert. I couldn't tell which way they come from. They just got on the track, just as I saw the train. I never noticed them until they stepped into the track. The train was then in my view. I was about 150 or 200 yards south of the public crossing. * * * That crossing whistle sounded just before I saw those boys on the track. I saw the train just, you might say, for a second before I heard the whistle. * * * When I first saw the man that got knocked off, I was about 200 yards from him, I suppose. * * * Immediately after the crossing whistle, these two men come on to the track. That is the first I saw of them. When I saw them, I had already heard the whistle for the crossing. It all occurred about the same time. * * * I heard the crossing whistle before I ever saw the men, and the crossing whistle was about at the whistling post. * * * I suppose the post is a quarter of a mile from the crossing."

Fred Blakeley testified by deposition as follows: "I was flagging ahead of a hand car, and was looking directly at the man just as he was struck, and had just told them to look out for the train. * * * The men got on the railroad track to the north of me some 200 feet, I suppose, and from there to the point where he was struck I suppose it was some 250 or 300 feet in a southerly direction from where he got on the track. There was another person with the party that was struck. * * * I saw both parties before they were struck by the engine. I saw them just before they got on the railroad track. They were then in the dirt road crossing the railroad track; that is, the road crossed the track. They were running along that dirt road. * * * They left the dirt road, and were running on the railroad track south. When these parties were even with me, or near me, I said to both parties: 'Look out for the train!' That was a short time before the train struck him."

The witness Hoard testified thus: "I went out with him [appellee] the evening before.

* * * Going out there, we went up around back of the packing house, and walked across there. We went across this road—the Denver road. This accident happened on the Denver road. The next morning after we started back we crawled through, I believe, the same place where I came along the next day after my suitcase. I went the same road that I went in the evening before, and that was up the Denver road. To get in the right of way we crawled through the fence where the fence wire— You might say we walked through it. The wire was down and up. It was a gap that we could walk through, bending so. We didn't have much trouble getting through. * * * Next morning I started to town with him. We came down the road until—there is a public road there—we came down the road until we got to the railroad, and then we walked up the gap just across, and got onto the railroad, and came down the railroad track. When I stepped on the track, I seen a train on the Cotton Belt, a freight train; but at this time on this road no train was heard nor seen by me. We started down the track. We were running along, you might say, in a trot down the track, and had gone at least something about 150 yards, * * * maybe a little further, and, while we were going down the track, this train on the Cotton Belt were going north, and I heard a whistle and seen the steam from the valve, and we were watching, and we were watching this train. * * * There was a man walking up the track—the track that I was on. He was off to the side of the track that I were on, and I spoke to him. * * * I spoke to him, and then I jumped. At the time I jumped there was a train coming up behind us. * * * Mr. Longino, I guess, was, I couldn't say, maybe eight or ten feet ahead of me as I called to him. The last I seen of him was as he made, when he turned his head this way. Why, he seen the train, and he made an effort to get off. * * * I jumped off, and, after I jumped, I called to him, and saw him look back to the left, and he made an effort to get off. He jumped out, caught him, and, I couldn't say, carried him I guess 50 yards, and he fell on the same side that I was on. * * * Before we got to the railroad track, we started in a slow trot. We were not exactly running. When we got to the railroad track, we crossed over the cattle guard onto the inside of the railway inclosure and onto the track. We were going in a slow trot down the track, just a slow trot. This fellow that I speak of as having met and holloed at me was coming towards us. * * * He was walking on the left side of the embankment. * * * It (the Cotton Belt train) was nearly opposite me by the time Longino got struck. The engine was somewhere near me by that time. I had been watching this. I had been watching it at the

time. I was watching the engine and the train at the same time. Longino was running a little bit ahead of me. I had been watching this Cotton Belt train as I was going down there. * * * I hadn't looked back up there just at that time to see whether there was any train coming, but I looked up to the road near the house onto the track, and there was nothing that I could see. I didn't see any train up there about 100 yards. There was a small cut there, and I wouldn't say how far I could see. I did not stand there on the track and look at all. I looked just about the time we got on the track. I glanced up the track and down it to see if there was a train, and there was nothing I could see. I didn't make no stand. I don't say I turned and looked both ways for a train. I looked both ways."

Appellee himself testified as follows: "I remember leaving the house that morning. I remember after we got out of the yard. I remember of closing the front gate. I don't remember anything else that occurred that day. * * * I knew that that railroad track was used daily for running trains over it. I had seen trains going back and forth over that track. I knew that the railroad company had partly fenced its track. * * * I don't recollect going down that road to the railroad track that morning on which I was hurt. I don't know a thing after I closed the gate that happened that day. * * * At that time the condition of my eyes was good. I could see. I guess they were as good as any ordinary eye. I have my own ears, and I reckon they are as good as anybody's. That morning before I was hurt there was nothing wrong about me that I know of." It is undisputed that the track at the place of the accident had been long used as a footway by the public generally, and the evidence tends to show that this was the most practicable and most used route open to appellee, and the train was 30 minutes behind time.

The issues were thus submitted in the charge of the court:

"If you believe from the evidence that at the time of the accident in controversy, and for a long time prior thereto, that portion of defendant's track on which plaintiff was traveling on the occasion of the accident was and had been commonly and habitually used by the public as a pathway for travel by pedestri-
trains, with the knowledge and acquiescence of the defendant; and if you further believe from the evidence that plaintiff did not discover the approach of the train in time to avoid being struck by the engine; and if you further believe from the evidence that persons of ordinary prudence, filling the respective positions of engineer and fireman of said engine, would, under the same circumstances, have been on the lookout for pedestri-
trains on said track at the place where plaintiff was traveling before he was struck,

and could and would have discovered that plaintiff was on the track sooner than defendant's said engineer and fireman made such discovery, and, after making such discovery, could and would have sounded signals of the bell and whistle or either at such time and in such manner as to warn plaintiff of the approach of the train in time to have enabled him to leave the track before being struck by the engine—then you will find that the failure of the engineer and fireman to make such discovery and to sound such warnings was negligence; and if you so find, and further believe and find that such negligence, if any, was the proximate cause of plaintiff's injury, then you will return a verdict in favor of the plaintiff.

"The foregoing instruction, however, is given subject to the following instruction, to wit: If you believe from the evidence that at the time plaintiff went upon said track at the road crossing immediately prior to his injury he failed to look and listen, or to do either, to discover whether or not a train was approaching from the direction of Hodge station, and that by so looking and listening, or both, he could have discovered that said train was approaching, and in failing so to do he was guilty of negligence; or if you believe from the evidence that after starting down said track he was guilty of negligence in failing, if he did fail, to discover the approach of said train in time to have left the track before he was struck by the engine of said train; or if you believe from the evidence that, had plaintiff been traveling on the outside of the rails of said track instead of between the rails, he would not have been injured, and that he was guilty of negligence in traveling between the rails instead of on the outside thereof—then in any one or more of said contingencies you will return a verdict in favor of the defendant, independent of any findings you may make on any other issue submitted to you in this charge. If you do not believe from all the facts and circumstances in evidence that the engineer and fireman on the engine which struck plaintiff were guilty of negligence in failing to sound warnings of the approach of said train other than the warnings you believe were sounded, then you will return a verdict in favor of the defendant. If plaintiff's case has not been made out by a preponderance of the evidence, you will return a verdict in favor of the defendant."

Spoons, Thompson & Barwise and J. M. Chambers, for appellant. Capps, Cantey, Hanger & Short, for appellee.

SPEER, J. (after stating the facts as above). We take it to be well settled that railroad companies are charged with the duty of exercising ordinary care to discover the presence of persons on their tracks, and to avoid injuring them at those places where, under all the circumstances, they are rea-

sonably chargeable with knowledge that such persons are liable to be; and in our judgment it can make no difference, so far as the duty of the railroad company is concerned, whether such persons are technically to be classed as trespassers, licensees, or persons using the company's tracks as of right. In all such cases the duty is imposed because of the broad rule of humanity that one engaged in so dangerous a business is required to exercise ordinary care to avoid injuring another when the presence of and danger to such other person is reasonably to be anticipated. That this rule extends to those places where the railroad company's track is commonly used as a footway has been too often held to enumerate. It is pointedly stated in *G., C. & S. F. Ry. Co. v. Smith*, 87 Tex. 357, 28 S. W. 524: "That there may be no mistake hereafter as to the effect of *Railway v. Matula*, 79 Tex. 577, 15 S. W. 573, we announce the rule that railroad companies at crossings and such portions of its track as may be commonly used as footway or crossing, which is known to the company and at which persons may be expected, must use ordinary care to discover their presence and to avoid inflicting injury upon them (*Railway v. Croasnoe*, 72 Tex. 79, 10 S. W. 342), and that, in the exercise of that degree of care, they must use such an amount of vigilance and caution as a man of ordinary prudence would use under like circumstances." Indeed, appellant does not controvert in the least this proposition; but the insistence is that, notwithstanding its negligence in this respect, the appellee cannot recover because of his own contributory negligence. The very recent case of *Texas Midland R. R. Co. v. J. W. Byrd* (not yet reported) 115 S. W. 1163, is pressed upon us in support of this contention. In the opinion in that case the Supreme Court quotes Mr. Justice Williams' language in *G., C. & S. F. Ry. Co. v. Matthews*, 100 Tex. 63, 93 S. W. 1068, as follows: "An implied permission, such as is claimed, to use a railroad track as a footpath, may relieve the person enjoying it of the imputation of being a trespasser, but it does not relieve the place of its inherent dangers, nor exempt the traveler from the duty to act with ordinary prudence. When he voluntarily chooses the dangerous pathway, instead of a safe one beside it, we can see no escape from the conclusion that he is guilty of negligence if there be no justifying or excusing circumstances." In the case under review the facts show that the plaintiff while walking over the bridge of the defendant, which was 195 to 200 feet in length, discovered a train approaching, and, in order to escape being struck thereby, attempted to jump off the bridge, and in doing so was injured, and it was held that it was "apparent from plaintiff's own testimony that there were other ways of going to his destination by which the crossing of

the bridge might have been avoided, and, he having selected a way he knew to be dangerous, his conduct must be considered negligence on his part. Giving all the effect of implied license to use the bridge as is claimed for it in this case, it could hardly be said that it implied a license to use the structure to the obstruction of the defendant's business." While as we read the case of *G., C. & S. F. Ry. Co. v. Matthews*, supra, the latter part of the quotation above made, upon which is based the decision in the *Byrd* Case, is wholly a dictum, in that the court expressly there found that there was not a safe place to walk beside the track, yet the dictum of yesterday has become the decision of to-day, and we are confronted with the question whether or not the holding in the *Byrd* Case is decisive of the present appeal. It is not quite clear from the report of that case either by the Supreme Court or the Court of Civil Appeals (*Texas Midland R. R. v. Byrd* [Tex. Civ. App.] 110 S. W. 199) just what were the "other ways of going to his destination by which the crossing of the bridge might have been avoided by the deceased *Byrd*"; yet, however that may be, we think it is quite clear the trial court could not summarily have instructed a verdict for appellant in this case upon the theory that there was a safe way alongside of the track by which appellee could have traveled, and thus have averted the injury. That there was such a way at all is but an inference deducible from the evidence, and the same cannot in any wise be said to be an undisputed fact requiring such an instruction. The Supreme Court further say in the decision of the *Byrd* Case: "We think that the doctrine upon which the license of the railroad company is implied by the use which persons put to it by using it as a footpath has been pushed far enough in this state, and we are not inclined to let it go any further." But we, in view of the long and unbroken line of decisions in this state, to the effect generally that contributory negligence is a question of fact for the determination of the jury under all the circumstances, are not inclined to push the doctrine of that decision any further than we are required to do so. It would perhaps be an injustice to say that the Supreme Court meant that the doctrine should be carried further than announced by it in that case, but clearly, in our judgment, if the Supreme Court meant to announce the broad doctrine as now contended for by appellant that a licensee upon a railroad track is necessarily guilty of contributory negligence because he has gone into a place of danger and been injured in consequence, then the case ought speedily to be overruled.

We are aware of the rule announced in *I. & G. N. Ry. Co. v. Edwards*, 100 Tex. 22, 93 S. W. 106, to the effect that, while persons using a railway crossing have the right to ex-

pect that the law requiring signals will be obeyed, yet this is not a substitute for the duty of exercising care for themselves; and this rule is perhaps nowhere more broadly stated than by this court in *Ft. W. & D. C. Ry. Co. v. Wyatt*, 35 Tex. Civ. App. 119, 79 S. W. 349, wherein we stated: "There are many authorities holding as matter of fact that one who goes upon a railroad track without taking the precaution to look and listen for approaching cars, and is injured by a car which he might have discovered by the exercise of such diligence, is guilty of such negligence as will preclude a recovery by him." And so it ought to be held in any case, we think, whether the injured person be merely a licensee or one lawfully entitled to use the track as of right. He ought to be required in all cases to exercise ordinary care for his own safety, and, where it is undisputed that such person exercised no care whatever, he, of course, must be held to have been guilty of contributory negligence. In the present case we do not think it can be said from the evidence that appellee exercised no care whatever for his own safety in entering upon appellant's track and continuing thereon until he was injured. In *Texas Midland R. R. Co. v. Crowder*, 25 Tex. Civ. App. 536, 64 S. W. 90, in which a writ of error was refused, it is said: "While the evidence fails to definitely show that *Crowder* looked and listened before stepping on the track, it is not doing violence to the evidence to assume that he saw the engine and cars at the south end of the switch, and concluded that they would not then be backed down at that time, or, if so, that a proper lookout would be kept, and that proper signals would be given to warn him in time to leave the track to prevent injury." *Crowder* was killed in that accident, which accounts for the presumption thus indulged. While here appellee was not killed, yet the fact appears to be undisputed that he was so injured that he was unable to recall anything connected with the transaction from the time he left his home in the morning until some days or weeks after the accident, so that we think the humane presumption that he did at least look and listen for approaching trains before entering upon appellant's track ought under the circumstances to be indulged, as was done in the *Crowder* Case. Besides, there is the further circumstance that he was in company with another who did to some extent at least look for an approaching train before going upon the track. In a general way, we think we are in line with the trend of the decisions in this state when we adhere to the rule that whether or not a person injured on a railroad is guilty of contributory negligence depends so largely upon an infinite variety of circumstances that it ought in all cases to be submitted to the jury as a question of fact, except in those cases where the undisputed evidence shows

that the injured person exercised no care whatever for his own safety. In the very nature of things, even to hold that one is guilty of contributory negligence when he might have selected a safe way is in some measure to invade the province of the jury, for the solution of that question depends at last upon whether or not a reasonably prudent person would have taken the safe way, and this, in turn, is determined by an infinite variety of circumstances, such as the proximity of the way, its condition, the condition of the railroad as a way, the frequency of its use by the public, the frequency of the passage of trains or cars on it, the probability of such trains or cars being then about to pass, the presence or absence of watchmen or signals, the diligence exercised in the matter of looking and listening for approaching trains, and other things too numerous to mention, which ought to and do influence human conduct every day. The rule is firmly and sanely held in this state that one using the tracks of a railway company may introduce evidence of the proximity of crossings, stations, and the like, and of the custom of the company to blow its whistles and sound its bells for such places upon the issue of his own contributory negligence in being on the track (*I. & G. N. R. R. Co. v. Woodward*, 28 Tex. Civ. App. 389, 63 S. W. 1051); and, further, that the failure to give such signals may, as to such person, constitute actionable negligence (*M. & T. Ry. Co. of Tex. v. Saunders* [Tex. Sup.] 106 S. W. 321, 14 L. R. A. [N. S.] 998). It is a fact known of all men that persons on a railway track are likely to take notice of the manner in which trains are required to be run, and, in fact, are run, and in some measure to depend upon the companies operating their trains in the usual manner, and thereby to rely upon the exercise of the usual precautions for the safety of those whose presence on the track is to be anticipated. From this well-recognized principle we think it necessarily follows that the issue of contributory negligence on the part of a person injured on a railroad track, whose very presence is thus largely influenced by his reliance on the known custom and usual conduct of the railway company to exercise care to avoid injuring him, is at last a question of fact for the determination of a jury. As applied to this case, the appellee, who is not conclusively shown not to have exercised any care for his own safety, but who presumptively did at least look and listen for the approach of appellant's train, relies upon the known duty of appellant to exercise ordinary care to keep a lookout for his presence along the well-beaten path on its track, and by reason of its failure in this respect is injured. We cannot say under such circumstances that he is guilty of contributory negligence as matter of law. So

that we conclude the trial court did not err in refusing to give a summary instruction for appellant.

We also conclude that the evidence is not such as to require us to set aside the verdict and judgment for want of evidence, and that the court committed no errors in his rulings on evidence or otherwise. The charge set out succinctly and clearly presented the material issues of the case, and sufficiently embraced the requested charges.

The judgment is therefore in all things affirmed.

DUNKLIN, J., not sitting.

CARPENTER et al. v. KONE et al.

(Court of Civil Appeals of Texas. March 3, 1909. Rehearing Denied April 7, 1909.)

1. VENUE (§ 71*)—CHANGE OF VENUE—EFFECT OF MOTION.

The court may determine whether the petition states a cause of action before acting on an uncontested motion by the plaintiff for change of venue to another county presided over by the same judge on the ground of local prejudice.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 92; Dec. Dig. § 71.*]

2. MANDAMUS (§ 19*)—ABATEMENT—TERMINATION OF RIGHT TO OFFICE.

The office of a writ of mandamus against an officer is to compel the performance of a personal duty resting upon the person to whom the writ is sent, and, on his retirement from his office, the writ must abate in the absence of statute permitting a substitution of his successor.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 52; Dec. Dig. § 19.*]

3. MANDAMUS (§ 153*)—ABATEMENT—TERMINATION OF RIGHT TO OFFICE.

There is no statute in Texas permitting the successor in office of a county judge to be substituted for the predecessor in a mandamus proceeding against the latter to compel the performance of an official duty, such as ordering an election under Acts 1903, p. 118, c. 93, art. 812, to determine the location of a county seat.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 294; Dec. Dig. § 153.*]

Appeal from District Court, Hays County; L. W. Moore, Judge.

Mandamus proceeding by O. M. Carpenter and others against Ed R. Kone and another. From a judgment dismissing the petition, petitioners appeal. Affirmed.

Dowell & Dowell, for appellants. R. E. McKie and Will G. Barber, for appellees.

FISHER, O. J. This is a mandamus proceeding instituted in the district court of Hays county by appellants originally against Ed R. Kone to require him, as county judge, to make and enter an order under article 812, Acts 28th Leg. 1903, p. 118, c. 93, for the purpose of holding an election in order to determine if the county seat of Hays county should be moved from the town of San Marcos to Hays City. The petition proceeds to allege that Kone refused to make such an

order as required by law for the purpose of holding the election, and alleges that during the pendency of the suit Kone resigned his office as county judge, and there was appointed and elected in his place John B. Wilson, the present county judge, who is made a party to this proceeding, and against whom it is prayed that the writ of mandamus be issued. The good faith of Kone in resigning is not in any manner questioned, and, as a basis for the relief against Wilson, the present county judge, the appellants rely upon the act of Kone in refusing to order the election. There is no averment that any request had been made of Wilson to order an election, or that he had refused to make such an order, or that the appellants have been deprived of any right by reason of any refusal of Wilson to grant any request that they could lawfully make.

As ancillary to this proceeding and dependent upon the same, there is also a prayer for a writ of injunction against Wilson, as county judge, and the commissioners' court of Hays county, and the parties with whom they have a contract for the construction and erection of a courthouse to cease the performance and execution of that contract until the election may be held and the matter of the removal of the county seat finally determined. In the trial court a general demurrer and special demurrers were urged by appellees to the appellants' petition, and the court, after hearing the same, sustained the general demurrer and some of the special demurrers, and, as recited in the decree, it was determined that the plaintiffs did not allege a cause of action against which the defendants were required to plead, and we take it from the manner in which the case is here presented and treated in the court below, although the judgment is silent upon that question, that plaintiffs' petition, after the demurrers were sustained, was by the court dismissed. There was no effort by the appellants to amend, so far as appears from the judgment, and here it is well to state that upon the point that we dispose of the case no amendment is possible.

Before the trial court acted upon the demurrers, the appellants filed an application for change of venue on the ground that there exists in Hays county a combination against them instigated by influential persons, by reason of which they could not in that county expect a fair and impartial trial. Appellants contend that the court erred in taking up and considering the demurrers before acting upon the motion for a change of venue. The bill of exception shows that the motion for change of venue was not contested or controverted in any manner. From what is stated in the bill and the explanation appended thereto it appears that the court concluded that, before granting the motion, it had the right to determine whether the petition stated a cause of action. Upon change of venue, the case would have gone to Cald-

well county, a county presided over by the same judge who disposed of the case; and the judge, in effect, said in the explanation that there was no necessity for merely changing the case to Caldwell county when he would there determine just as he has here that plaintiffs' petition presents no cause of action. We have found no authority directly upon this question, but it seems to be in consonance with reason to not require the transfer of a supposed case when none in law exists. It is true the appellants had filed in the district court of Hays county a petition for mandamus, but upon examination it was found to be fatally defective, in that it did not state a cause of action. If this is true, why should it be transferred to another county to ascertain this fact? The grounds alleged for the change of venue was the existence of a prejudice which might affect the appellants in the trial of the case and the ultimate result, but, if there was no case to be tried or no cause of action stated upon which there might be exercised the influence of this combination of influential persons, why remove it from Hays county? The court had not when it acted upon the demurrer entered the order transferring the case, and it still retained jurisdiction, and we see no good reason why the case should be sent to Caldwell county for the purpose of there determining that the plaintiff was not as a matter of law entitled to any relief whatever.

It is not necessary for us in affirming this judgment to discuss the points presented in the assignments of errors; and, in the view that we take of it, it would probably be improper for us to express our opinion upon the correctness of the ruling of the court in sustaining some of the demurrers, but we are clearly in accord with the trial court in the conclusion that the general demurrer should have been sustained, although it may be that we possibly do not agree with that court as to the grounds upon which that ruling should be based. The statute upon which this proceeding is based (article 812, Acts 28th Leg. 1903, p. 118, c. 98), in effect says that, when it becomes desirable to remove the county seat, it shall be the duty of the county judge of said county, or, on his failure or inability to act, then two of the commissioners, upon the written application of a certain number of freeholders and qualified voters, etc., to order an election for the purpose of determining the removal. This statute makes it the duty of the county judge—or, in other words, the individual who holds the office of county judge—to order the election. The petition for mandamus states that the application to remove was presented to Kone, who was then county judge, and states his refusal, and gives what purports to be his reasons why he refused to order the election. It also recites the fact that Kone, after the bringing

of the suit to compel him by mandamus to order the election, had resigned, and that Wilson had been appointed and elected in his stead. Wilson was made a party, and it seems was served with citation and has filed an answer, which, in determining the merits of the plaintiffs' case, it is not necessary that we should look to; but there is no averment whatever in the plaintiffs' petition that Wilson as county judge has refused nor does it appear that any request was ever made of him to order the election; but, as before said, the plaintiffs are seeking to procure the writ of mandamus against Wilson on the ground that his predecessor Kone refused to grant the application. No question is made about the good faith of Kone's resignation. In the syllabus to one of the cases cited these rules are stated. They are so pointed and terse that we take the liberty of copying them:

"(1) The office of a writ of mandamus against an officer is to compel the performance of a personal duty resting upon the person to whom the writ is sent.

"(2) On the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary.

"(3) A substitution of his successor in office as defendant will not avail.

"(4) A suit which has abated must be dismissed." *United States v. Boutwell*, 84 U. S. 604, 21 L. Ed. 721; *United States v. Butterworth*, 160 U. S. 602, 18 Sup. Ct. 441, 42 L. Ed. 873; *Warner Valley Stock Co. v. Smith*, 165 U. S. 82, 17 Sup. Ct. 225, 41 L. Ed. 623, and a number of other cases to like effect, which are collected and annotated in the notes of *United States v. Boutwell*, 21 L. Ed. 721. In the *Boutwell* Case it appears that a mandamus was asked against Secretary Boutwell to issue certain bonds under an act of Congress. An order was issued for the Secretary to show cause. Subsequently Secretary Boutwell resigned as Secretary of the Treasury, and Mr. Richardson was appointed as his successor. It was contended that the process could run against Richardson. In the cases cited and many upon this point referred to in the notes the language of Judge Strong in the *Boutwell* Case indicates their tenor: "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may, as is alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But, no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus is the personal obligation of the individual to whom it addresses the writ. If he be an officer and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The

writ does not reach the office. It cannot be directed to it. It is therefore in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that, previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand either in direct terms or by conduct from which a refusal can be conclusively inferred. *Tapp, Mandamus*, 283. Thus it is the personal default of the defendant that warrants impetration of the writ, and, if a peremptory mandamus be awarded, the costs must fall upon the defendant. It necessarily follows from this that on the death or retirement from office of the original defendant the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And, if a successor in office may be substituted, he may be mulcted in costs for the fault of his predecessor without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative. As might be expected, therefore, we find no case in which such a substitution as is asked for now has ever been allowed in the absence of some statute authorizing it." Some of the cases referred to point out the distinction between those cases when the purpose is to mandamus a municipality, or a collective body or an office, and that class of cases which merely complains of the individual that holds the office or of his official action.

Here it is clear that it is the conduct of Kone, the individual holding the office of county judge, that is complained of—his refusal to grant to the appellants a right which they claim they are entitled to. There is no privity between Kone and his successor, Wilson; and, if the conduct of the former was wrongful and resulted in a denial of a right to the appellants (which we do not, by the way, hold to be the case), why should Wilson be held responsible for it, when he had had no opportunity to prevent it, or refuse to perform it? The thing which they complain Kone refused to do was not one of the necessary incidents of the office which descended to his successor. But the refusal of Kone was personal, for which he alone could be held responsible; and, notwithstanding there is a conflict of authority upon the question,

the reasoning upon which rests the Boutwell Case and others to the same effect is unanswerable. There is no statute in this state that permits the successor in office to be substituted for the predecessor in a mandamus proceeding like this.

The question discussed is preliminary to all others that might arise in the case, for, if it is true that it affirmatively appears that the party against whom the writ should run is, by resignation or otherwise, in an attitude that the decree could not operate against him, it arrests the entire proceeding and it should be dismissed. Therefore we are inclined to think that it would be improper to consider the other questions, but, conceding that we could do so, it is not necessary that they should be considered. The injunction proceeding must necessarily fail on account of the judgment dismissing the petition for mandamus.

Judgment affirmed.

HICKS et al. v. STEWART & TEMPLETON.†
(Court of Civil Appeals of Texas. Jan. 23, 1909. Rehearing Denied Feb. 27, 1909.)

1. PLEADING (§ 279*)—SUPPLEMENTAL PLEADINGS.

A supplemental petition duly filed in reply to the answer is a part of the pleadings, though a subsequent amendment to the original petition is presented.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 279.*]

2. DIVORCE (§ 104*) — PROCEEDINGS — PLEADING—AMENDED PLEADINGS.

A husband's misconduct toward his wife subsequent to the filing of her suit for divorce is properly assigned in an amended petition as grounds for divorce, though he was provoked thereto by the filing of the original petition.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 330; Dec. Dig. § 104.*]

3. DIVORCE (§ 197*)—COUNSEL FEES OF WIFE.

The husband and wife are liable for reasonable counsel fees for services rendered to her in a suit against him for divorce on the ground of cruelty and for the recovery of property, which she has caused to be dismissed, if it appears that the suit was brought in good faith on her part and on the part of her attorneys, and that the facts alleged in her petition were probably true and constituted such cruelty as rendered cohabitation insupportable, and the attorneys are not required to show that the suit was necessary for the protection of her personal safety and for the preservation of her property rights.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 582, 583; Dec. Dig. § 197; * Husband and Wife, Cent. Dig. § 137.]

4. DIVORCE (§ 197*)—COUNSEL FEES OF WIFE—LIABILITY.

The right of attorneys to recover reasonable fees for prosecuting a wife's suit for divorce is based on the ground that such action was reasonably necessary for her protection, and, if this appears, both husband and wife are liable therefor, regardless of her mental capacity to contract at the time.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 582, 583; Dec. Dig. § 197; * Husband and Wife, Cent. Dig. § 137.]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by Stewart & Templeton against Charles E. Hicks and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Harris & Harris, for appellants. W. P. McLean, for appellee.

CONNOR, C. J. This is an appeal from a judgment in the sum of \$2,500 as the reasonable value of appellees' services as attorneys at law in a suit for divorce at the instance of appellant Mrs. Mary W. Hicks, and for the recovery of certain separate and community property, against appellant Charles E. Hicks, instituted on the 13th day of December, 1905. The petition filed upon that day alleged a series of assaults and abuses charged to have been committed by Charles E. Hicks upon his said wife, Mrs. Mary Hicks, during the period of several years previous to and up to the date of said 13th day of December, 1905, the day preceding the alleged employment of appellees by Mrs. Mary W. Hicks. On the 15th day of December, 1905, an amended petition was filed, charging that Charles E. Hicks on that day but subsequent to the filing of the suit was guilty of certain other outrages and misconduct and abuses toward his wife which were set up as additional grounds for the divorce. Appellees alleged in their petition in the present suit that they had fully complied with their contract of employment by Mrs. Hicks; that her cause of action was well founded; that they had acted in good faith, etc., but that for some cause unknown to them Mrs. Hicks abandoned the divorce suit, and returned to live with her husband, having the suit dismissed. The performance of their various services was alleged, which it was charged were reasonably worth the sum of \$2,500 less \$200 that had been paid by Mrs. Hicks on December 21, 1905. Appellants filed their second amended answer on December 7, 1906, pleading the general denial and specially to the effect that at the time of employment Mrs. Mary Hicks was weak in body and mind, incapable of contracting, and that there was no ground for the divorce. It was also specially pleaded that appellees knew of Mrs. Hicks' weakened condition, and, so knowing, induced their employment; that Mrs. Hicks had complained of her husband to them solely on the ground of infidelity, and specially instructed that no other ground for divorce should be charged; that she soon thereafter ascertained that her complaint in this respect was entirely groundless, and accordingly dismissed the suit; that appellees, contrary to their instructions, had charged the various assaults and outrages set up in the petition and amended petition for divorce. It was further specially plead-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

†Writ of error denied by Supreme Court April 7, 1909.

ed that, if Charles E. Hicks was guilty of the wrongful acts and outrages charged in the amended petition on December 15th, they were brought about by the wrongs of appellees in wrongfully bringing suit in violation of the terms of their employment, and hence should not be permitted to prove such acts as a probable cause for divorce and as a basis of plaintiffs' recovery in this suit.

We find nothing in this case requiring extended discussion. Complaint is made in the first assignment of the action of the court in permitting appellees to read as part of their pleadings to the jury the first supplemental petition filed by them in reply to appellants' answer. This supplemental petition was duly filed subsequent to the answer to which it was a reply, and, as such, constituted properly a part of the pleadings, notwithstanding appellees' presentation of a subsequent amendment to their original petition. Even if the action complained of was irregular, nothing in the statement under this assignment indicates that the action of the court could have been prejudicial.

The second, third, fourth, fifth, sixth, seventh, eighth, ninth, thirteenth, and fourteenth assignments of error in various forms present substantially the same question. It is insisted in support of these assignments that the outrages of Charles E. Hicks charged to have been committed on the day the petition for divorce was filed and set up in the amended petition cannot be considered as a basis for appellees' recovery. The contention is that the filing of the original petition for divorce was wrongfully done by appellees, that this action provoked the outrages complained of, and that appellees therefore should be estopped from taking advantage of their own wrong. No authorities are cited in support of any such contention, and we do not think the record gives color thereto. Not a circumstance is referred to in appellants' statement under the propositions to the assignments which indicates that appellees in filing either the original or amended petitions acted in bad faith, and we think it unnecessary to cite authority for the proposition that, if in fact Charles E. Hicks on the day of the institution of the suit committed the various scandalous and outrageous things charged to him, they could be properly assigned in an amended petition as grounds for divorce, and appellant Charles E. Hicks cannot be heard in a court of justice to defend on the ground that he was provoked thereto by the filing of the original petition, which came to his notice immediately prior to the conduct complained of. As to the hearsay character of the statements made by Mrs. Hicks to the appellees referred to in the thirteenth and fourteenth assignments, it is sufficient to say that they were admissible on the issue raised by appellants' plea of bad faith on appellees' part, and were expressly lim-

ited by the court's charge in favor of Charles E. Hicks.

Appellants' tenth assignment is as follows: "The court erred in not giving in charge to the jury defendants' special charge No. 4, requested, which is as follows: 'Before plaintiffs are entitled to recover any amounts against defendants or either of them, the plaintiffs must allege and prove by preponderance of the testimony in this case that the services rendered to Mary W. Hicks, if they rendered any, were at the time of their alleged employment, December 14, 1905, for the necessary protection of the personal safety of the said Mary W. Hicks and for the preservation of her property rights, and, unless plaintiffs have done this, you will find for the defendant.'" If Mary W. Hicks acted in good faith in bringing her suit against her husband, Charles E. Hicks, for a divorce and the recovery of property, and if the grounds alleged and set up in her petition were probably true, and if appellees also acted in good faith, all of which was fully and distinctly submitted to the jury in the court's charge, then both Mrs. Hicks and Charles E. Hicks were liable to appellees for whatever the evidence might show their services were reasonably worth. See Speer on Law of Married Women, § 66; McClelland v. McClelland (Tex. Civ. App.) 37 S. W. 359; Oecato v. Duetschman, 19 Tex. Civ. App. 434, 47 S. W. 739; Bord v. Stubbs, 22 Tex. Civ. App. 242, 54 S. W. 634; Dodd v. Hein, 26 Tex. Civ. App. 164, 62 S. W. 811, 812. The special charge referred to in the tenth assignment of error was therefore not the law, and the court properly refused it. The charge would have required a finding that the filing of the petition for divorce was necessary for the "protection of the personal safety of the said Mary W. Hicks and for the preservation of her property rights." All that was required was that the facts alleged were probably true, and constituted such cruelty as rendered their living longer together insupportable. The court's charge in fact submitted the issue presented in appellants' special charge No. 5, the rejection of which is complained of in the eleventh assignment of error, and their special charge No. 8, to the rejection of which complaint is made in the twelfth assignment, we think was properly refused as presenting an immaterial issue. This charge was that "if said Mary W. Hicks was in such a state of mind as to render her unable to know and contract for herself and on her own account at the time she engaged plaintiffs, if she did engage them, as alleged in the pleadings, then you will find for defendants." There was evidence tending to show that shortly before and after the petition for divorce was filed Mary W. Hicks was in a highly excited state of mind, rendering her possibly unable to contract, and the evidence therefore perhaps

raised the issue presented in this charge. It is to be observed, however, that appellees' action was not founded upon any contract. They sought merely to recover upon a quantum meruit for the reasonable value of their services, and if, as charged and as fully and fairly submitted to the jury, the grounds for petition were probably true, that there was reasonable cause for bringing the suit, and that the same was brought in good faith on her part and on appellees' part, it was authorized, regardless of the state of her mind. To hold otherwise would be to deny to persons mentally incapable of contracting the protection contemplated by the law. The right to recover reasonable compensation for their services in this case proceeds alone upon the ground that such action was reasonably necessary in the protection of the wife. If so, both husband and wife are legally liable for the reasonable value of the necessities so provided, regardless of the wife's mental condition.

The remaining assignment to the effect that the court erred in overruling appellants' motion for a new trial, "because said verdict and judgment are contrary to law and contrary to the evidence and without evidence and law to support the same," is altogether too general under the rules and numerous authorities to require consideration.

Believing, therefore, that all material issues were fully and fairly submitted by the court's charge, and that no reversible error has been pointed out, it is ordered that the judgment be affirmed.

DUNKLIN, J., not sitting.

MISSOURI, K. & T. RY. CO. OF TEXAS v. REDUS.†

(Court of Civil Appeals of Texas. March 13, 1909. On Rehearing, April 10, 1909.)

1. APPEAL AND ERROR (§ 1097*)—SUBSEQUENT APPEAL—LAW OF THE CASE.

The decision of the Court of Civil Appeals is the law of the case on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4358; Dec. Dig. § 1097.*]

2. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION.

The instructions must be considered as a whole with reference to their application to the pleadings and evidence in determining whether or not they are erroneous or misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 703; Dec. Dig. § 295.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—ERROR IN INSTRUCTIONS CURED BY OTHER INSTRUCTIONS.

Where in an action against a carrier for injuries to a passenger bound for G. in consequence of his alighting at the intermediate point R., under the belief that he had reached G., it was undisputed that he alighted at R., and the court charged that if he was negligent in not reboarding the train before it started from R., and that such negligence contributed to the injuries, there could be no recovery, the error in an instruction that if an ordinarily

prudent person would have discovered that he "was at G." before alighting, and the passenger attempted to reboard the train under circumstances constituting contributory negligence, there could be no recovery, etc., arising from the omission of the word "not" before the word "at" in the quoted phrase, was not prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. § 296.*]

4. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A carpenter 55 years old, with a life expectancy of 18½ years, healthy and strong, and earning from \$2.50 to \$3.50 per day, was injured, resulting in the amputation of his right leg. His capacity as a carpenter was practically destroyed. He was confined to his bed for five months, and suffered great mental and physical pain. *Held*, that a verdict for \$10,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

On Rehearing.

5. CARRIERS (§ 303*) — INJURIES TO PASSENGERS—NEGLIGENCE.

Where the conductor or auditor on taking up the ticket of a passenger gave him by mistake a check indicating an intermediate station as the point of his destination, and, on the train arriving at such intermediate station, the conductor, auditor, or other employé assisting in the operation of the train informed the passenger that he had reached his destination and that he should alight, the carrier was liable for the injuries sustained by the passenger alighting there under the belief that he had reached his destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1239; Dec. Dig. § 303.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by Dock Redus against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

See 107 S. W. 63.

Coke, Miller & Coke and Jno. T. Craddock, for appellant. Looney & Clark, for appellee.

TALBOT, J. This is an action brought by the appellee against appellant to recover damages for personal injuries alleged to have been sustained by him at Royse, Tex., while traveling as a passenger on one of appellant's trains from Dallas to Greenville, Tex. The defendant answered by a general demurrer, a general denial, and specially that appellee's injuries were caused and proximately contributed to by appellee's own negligence, in that he negligently alighted from the train at Royse without appellant's knowledge on the side opposite thereof from the depot and platform provided for the use of passengers; that at the time he so alighted from the train he was intoxicated, or partially so, from the voluntary use of intoxicating liquors; that being in such condition caused, or contributed to cause, him to alight from the train at Royse and on the side thereof opposite from the depot platform, and caused, or contributed to cause, him to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 19, 1909.

fall underneath the wheels of the car and receive the injuries of which he complains. The case was tried before the court and jury March 13, 1908, resulting in a verdict and judgment in favor of plaintiff for the sum of \$10,000, and the defendant appealed.

The evidence warrants the following conclusions of fact: Appellee was a carpenter and had been at work in Dallas. His home was in Greenville, and about 9 o'clock on the night of June 24, 1905, he purchased a ticket from appellant's agent at Dallas, and took passage on one of its passenger trains for Greenville. Shortly after leaving Dallas, the conductor or auditor on the train took up appellee's ticket and placed in his hat a white slip of paper or pasteboard used to indicate the station to which appellee was destined. The color of the slip of paper or pasteboard selected by the conductor or auditor on the night in question to indicate Greenville as the place of destination of the passenger was green, and by mistake he placed in appellee's hat a white slip, the white slip indicating Royse, a station between Dallas and Greenville, as his destination. After appellee's ticket was taken up he fell asleep, and, when the train reached Royse, one of defendant's employes on the train awakened him, and told him, in effect, that he had reached his destination, and to get off the train. Believing that he had reached Greenville, appellee hurriedly left the car, and, seeing the gates or way open on both sides of the car platform, got off the train on the opposite side from the depot house and platform. Previous to this appellee had made frequent trips from Dallas to Greenville, traveling on defendant's railroad, and was in the habit of getting off the train at Greenville on the side thereof opposite the depot and platform, which was a safe place to alight, and it was the custom for other passengers to do likewise. The depot and platform at Royse are on the same side of the railroad track that the depot and platform are at Greenville. Almost immediately after alighting from the train at Royse, and just as the train was leaving that station, moving slowly, appellee discovered that the place was not Greenville, and then attempted to get back on the train with a grip in his hand, when he stepped upon or caught his foot in a roughly cut or jagged piece of iron lying on the ground near the railroad track, which caused him to stumble and fall, so that his right foot and leg went on the railroad track, and were run over and crushed in such manner as to necessitate the amputation of the leg between the knee joint and hip. Appellant was negligent in permitting the piece of iron upon which the plaintiff stumbled or in which he caught his foot to remain and be upon the ground near its track, in placing in plaintiff's hat a wrong and misleading conductor's check that indicated that plaintiff's destination was Royse, in-

stead of Greenville, and in telling him he had reached his destination and to get off when the train arrived at Royse. The negligence of defendant's servants as indicated was the proximate cause of plaintiff's injuries, and he was not guilty of contributory negligence.

Appellant's assignments of error from the first to the eighth, inclusive, and the eleventh and twelfth, complain of the fifth paragraph of the court's general charge and the refusal of certain special instructions requested by it. The paragraph of the court's charge here objected to is that portion of the charge wherein the jury were instructed that, if they found the facts as therein grouped to exist, to find for the plaintiff, and the several special charges related to the different phases of contributory negligence on the part of the plaintiff as contended for by the defendant. The tenth assignment of error complains of the court's refusal to give a special charge asked by defendant to the effect that defendant had constructed a platform for the use of passengers in getting off of trains at Royse on the south side of its main track, and the evidence was not sufficient to show such use of the premises on the opposite side as required of defendant any duty to keep the same free from obstructions, etc., and the thirteenth, fourteenth, and fifteenth assignments charge that, for the several reasons therein stated, the court erred in overruling defendant's motion for a new trial. These assignments will be overruled. There is enough in the record before us to show, or from which it may be fairly inferred, that the questions raised by said assignments and propositions thereunder were upon pleadings and evidence in all respects substantially the same as the pleadings and evidence upon which the judgment from which the present appeal is prosecuted was rendered, decided adversely to appellant by the Court of Civil Appeals for the Third District on a former appeal of this case. *M., K. & T. Ry. Co. v. Redus*, 107 S. W. 63. The general rule of *stare decisis*, which is invoked by appellee in reply to these assignments, is stated by Mr. Wells in his work on *Res Adjudicata* and *Stare Decisis* thus: "It is a well-settled principle that questions of law decided on appeal to a court of ultimate resort must govern the case in the same court and the trial court through all subsequent stages of the proceedings, and will seldom be reconsidered or reversed even if they appear to be erroneous." In the case of *Frankland v. Cassady*, 62 Tex. 418, after careful consideration and a review of many of the authorities upon the subject, it was held that the rule should be applied when on the second appeal the facts are substantially the same as they were on the first, or rather when they do not materially affect the application of the law as announced; that only in exceptional cases will the Supreme Court

overrule decisions previously made in the same cause on a former appeal. That the rule applies with peculiar force to the Courts of Civil Appeals of this state is affirmed by the case of *M., K. & T. Ry. Co. v. Belew*, 26 Tex. Civ. App. 8, 62 S. W. 99. That was a case in which the question presented had been decided against the appellant on a former appeal by the Court of Civil Appeals for the Second District, and Judge Gill of the First District on a second appeal of the case, speaking for the court, says: "Should we, after a thorough review of the authorities, reach a conclusion different from that announced on the former appeal, it would necessitate a reversal of the judgment. The trial court at the next trial would be governed by our opinion. The next appeal would be to the Court of Civil Appeals of the Second District, and that court might adhere to their first conclusion. That course would result in another reversal, and thus the case would be tossed from one court to another, and a final adjudication indefinitely postponed." That such consequences might probably follow a failure to apply the rule by the Courts of Civil Appeals of this state under our present judiciary system, and that they should be avoided cannot well be denied. We conclude that this appeal presents a proper case for the application of the rule discussed and invoked by appellee in disposing of the assignments under consideration, and that, without regard to what our conclusion might have been upon the questions involved in the assignments as original propositions, we should be governed by the decision on the former appeal. We do not, however, desire to be understood as questioning the correctness of that decision. On the contrary, we think it is clearly right. But, however that may be, we are of opinion after a careful consideration of the several assignments mentioned and the evidence as it appears on the present appeal that the court did not err in any of the rulings complained of in said assignments.

Appellant's ninth assignment of error complains of the following paragraph of the court's charge, viz.: "If, however, you believe from the evidence that the plaintiff was not directed or caused to leave the train at Royse by any train employé of the defendant, or if you believe that he was caused to leave the train by reason of the negligence, if any, of the defendant's train employés, yet if you find from the evidence that an ordinarily prudent person would have discovered that he was at Greenville before leaving said train, or his attempt to reboard said train at the time, in the manner and under the circumstances in which he did, constituted contributory negligence on his part that proximately caused or contributed to his injury, or if you believe that at the time the plaintiff attempted to reboard the moving train (if he did so at-

tempt) he was intoxicated and was incumbered with a grip in his hand, and that this condition and manner, if you so find, in which he attempted to get aboard said train was negligence on his part, and that such negligence caused or contributed to his injury—then or in either event you should find for the defendant." The objections to this paragraph of the charge are: (1) That it is erroneous, misleading, and confusing, in that it submits to the jury whether or not under the circumstances in which appellee alighted from the train a person of ordinary care would have discovered that he was at Greenville; whereas, the question at issue was not whether such a person would have discovered that he was at Greenville, but whether or not such a person would have discovered that he was not at Greenville. (2) That it was in conflict with and contradictory of the special charge given at the request of appellant to the effect that, if the jury believed appellee was intoxicated, and that but for such intoxication he would not have alighted from the train at Royse, or that but for such intoxication he would have discovered that he was not at Greenville before alighting to find for appellant. We think it manifest from the evidence and other portions of the court's general charge and special charges given at appellant's request that the omission of the word "not" before the words "at Greenville" in this paragraph was a mere clerical error, and did not mislead the jury to appellant's injury. It is well understood that the charge of the court, which includes the general and special charges given, is to be considered as a whole and with reference to its application to the pleadings and evidence. There was no evidence to authorize the submission of the issue whether or not appellee discovered he was at Greenville. It was undisputed that he was not at Greenville when he alighted from the train, but that he was at Royse. This was the theory upon which the case was tried by both parties and upon which it was submitted to the jury, and they must have understood that the court intended to instruct them that if they believed plaintiff was caused to leave the train by reason of the negligence of defendant's employés, and that an ordinarily prudent person would have discovered that he was not at Greenville before leaving the train, to find for defendant. Special charge No. 7, given at the defendant's request, instructed the jury that if plaintiff was intoxicated, or partially intoxicated, and that but for such intoxication he would not have alighted from the train at Royse, or if he was intoxicated, or partially intoxicated, and was aroused by the auditor and told that that was his station and to get off, yet if, but for such intoxication of the plaintiff, he would have discovered that he was not at Greenville before alighting, to find for defendant.

Again, by special charge No. 18, requested by defendant, they were instructed as follows: "If you believe from the evidence that plaintiff got off the train at Royse, and that after he got off of it, if he did, that the train remained standing at the depot a time reasonably sufficient for a person of ordinary prudence after discovering that the train was not at Greenville to have reboarded the train while it was standing, and if you believe from the evidence that plaintiff was guilty of negligence in not reboarding the train before it started to move out of the station at Royse, and that such negligence caused or contributed to cause the plaintiff's injuries, you will find for the defendant." These special charges seem to bear directly on the particular phases of contributory negligence, especially, if not exclusively, relied on by appellant, and which were evidently intended to be covered by that paragraph of the general charge of which appellant complains. Hence the error in the general charge was cured by the special charge, or they so minimized such error that it is not at all probable that the jury was not misled by it. In *Railway Company v. Smith*, 65 Tex. 167, Judge Stayton said: "The charge must be taken as a whole in order to determine whether or not it was erroneous or misleading, and it must be construed in the light of the issues made by the pleadings and evidence." Again, in *Jacobs, Bernhelm & Co. v. Hawkins*, 63 Tex. 3, he says: "If we consider only detached portions of the charge given, they might be held objectionable; but a charge cannot be so considered. The whole charge must be looked to, and if, taken all together, it correctly gives the law applicable to the case, and there be nothing in it calculated to mislead, it is sufficient." In *Kauffman & Runge v. Babcock*, 67 Tex. 243, 2 S. W. 879, it is said: "The appellants complain that the charge of the court in one part of it authorized the jury to find exemplary damages, though there was probable cause for suing out the writ; and in another part authorized such finding, if there was no probable cause, though no malice was made to appear. The main charge taken alone may be susceptible of this construction, but the instructions given at the request of the appellants cured all errors in this respect. In these the jury was instructed, in effect, that malice and probable cause must both appear to entitle the plaintiff to a verdict for exemplary damages." We conclude there was no such error in the charge complained of or such conflict between it and the special charge given at appellant's request as would authorize a reversal of the case.

Nor do we think the verdict excessive. The plaintiff was a carpenter by trade, and, although 55 years of age at the time injured, he was healthy and strong and earning

from \$2.50 to \$3.50 per day. His right leg was crushed and amputated, and, as a result thereof, his capacity as a carpenter was practically destroyed. He was confined to his bed four or five months, and has suffered great mental and physical pain. His life expectancy was 18½ years, and there is nothing in the record to indicate that the jury was influenced by any improper motive.

The evidence supports the verdict, and, finding no reversible error in the record, the judgment is affirmed.

On Rehearing.

In appellant's motion for a rehearing, we are asked, in effect, to correct our conclusions of fact "that shortly after leaving Dallas the conductor or auditor on the train took up the appellee's ticket and placed in his hat a white slip of paper or pasteboard used to indicate the station to which the appellee was destined," and that, "after appellee's ticket was taken up, he fell asleep, and, when the train reached Royse, one of defendant's employes on the train awakened him, and told him in effect that he had reached his destination and to get off the train," and to find definitely that it was the auditor on the train who did those things. In deference to the request, we do not hesitate to say that the testimony warrants such finding; but whether the check was placed in appellee's hat and he was aroused and the statement referred to made to him by the conductor, auditor, or some other employe of appellant assisting the operation of the train is, in our opinion, immaterial in so far as a determination of the legal questions involved are concerned.

With respect to the grounds of the motion for a rehearing, it is sufficient to state that we see no good reason to change our views as to the law applicable to the facts of the case; and said motion is overruled.

DANIEL v. MODERN WOODMEN OF AMERICA.†

(Court of Civil Appeals of Texas. Feb. 6, 1909.
Rehearing Denied March 13, 1909.)

1. INSURANCE (§ 726*) — CONTRACTS — CONSTRUCTION.

An insurance certificate will be strictly construed against insurer and liberally in favor of insured; and, where the words thereof admit of two constructions, the one most favorable to insured will be adopted.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1870; Dec. Dig. § 726.*]

2. INSURANCE (§ 726*) — CONTRACTS — CONSTRUCTION.

The language of an insurance certificate must be construed according to the intent of the parties, derived from the words used, the subject-matter to which they relate, and the matters naturally incident thereto.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1870; Dec. Dig. § 726.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error dismissed by Supreme Court April 14, 1909.

3. INSURANCE (§ 726*) — CONTRACTS — CONSTRUCTION.

Since forfeitures are not favored by the law, language of an insurance certificate fairly susceptible of an interpretation which will prevent a forfeiture will be so construed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1870; Dec. Dig. § 726.*]

4. INSURANCE (§ 723*) — CONTRACTS — STATEMENTS IN APPLICATION — WARRANTY — "FAITH."

Statements of the applicant for insurance that he has never been intoxicated and that his deceased maternal grandmother was never insane are statements of opinion merely, and, where the applicant in good faith believes them to be true, their falsity will not vitiate the certificate warranting the truth of the applicant's answers, and stipulating that he agrees that the literal truth of each shall be a condition precedent to any contract issued on the faith of the answers; the word "faith" meaning a firm conviction of the truth of what is declared by another by way of testimony without other evidence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1862, 1863; Dec. Dig. § 723.*]

For other definitions, see Words and Phrases, vol. 3, p. 2652.]

5. EVIDENCE (§ 474*)—OPINION EVIDENCE—DRUNKENNESS—INSANITY.

The existence of the condition of drunkenness or insanity can only be proved by opinion of witnesses, and their opinion is not admissible unless they are experts or have had an opportunity to form an opinion from observation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2198; Dec. Dig. § 474.*]

Appeal from District Court, Eastland County; J. H. Calhoun, Judge.

Action by Etta E. Daniel against the Modern Woodmen of America. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

D. G. Hunt, for appellant. Stubblefield & Patterson, for appellee.

DUNKLIN, J. Etta E. Daniel sued the Modern Woodmen of America in the district court of Eastland county to collect an insurance policy in her favor for \$1,000 issued upon the life of her husband, Esco L. Daniel, and, from a judgment in favor of the defendant, the plaintiff has appealed.

The defendant was chartered under the laws of the state of Illinois as a fraternal beneficiary association, and obtained a permit to do business in Texas as such a corporation. The policy sued on was made payable to plaintiff upon the death of the assured, and was issued October 25, 1905, upon an application in writing signed by Esco L. Daniel, dated October 12, 1905. The application was for membership in the defendant's order and for a life insurance policy, designated "benefit certificate," for the sum of \$1,000 in favor of the applicant's wife, Etta E. Daniel. This application contained numerous questions to applicant and his answers thereto concerning his family history, his own history, health, occupation, and habits of life, and in response to two questions

the applicant stated that he had never been intoxicated, and that his maternal grandmother, who died at the age of 69, was never insane. It was expressly stipulated in the application and in the policy that the two instruments should be construed together as constituting the contract of insurance, and by the terms of the application and the policy the answers of the applicant were warranted to be true. He also warranted the truth of all answers made by the physician who examined him and whose report accompanied the application. Applicant's own answers were in 35 groups, aggregating approximately 100 in number, and the answers of the medical examiner numbered approximately 50. The questions to which all these answers were given took an exceedingly wide range, embracing questions as to color of hair and eyes of the applicant and inquiries concerning almost all the ills that "flesh is heir to," taken in alphabetical order, beginning with appendicitis and ending with tumors. And by the terms of the contract applicant warranted the exact ages, as well as good health, of all the members of his immediate family, that he resembled his mother in general characteristics, also warranted the correctness of the diagnoses given of the ailments which resulted in the deaths of his paternal grandfather and both his maternal grandparents. He also warranted the exact ages of those three grandparents at the respective dates of their deaths. However, it seems that the applicant was not required to warrant the age, health, or disposition of his mother-in-law. Applicant paid to the company all dues on the policy required of him up to the date of his death, which occurred July 17, 1906.

The case was submitted to the jury upon special issues, four of which, with the jury's answers thereto, were as follows:

"Question Second. Had the assured been intoxicated prior to the time he signed the application for membership in the defendant company October 12, 1905? Answer. He had been intoxicated.

"Question Third. If the assured had been intoxicated prior to October 12, 1905, the time he signed the application for membership and benefits in the defendant company, was his answer to the effect that he had never been intoxicated a misrepresentation as to a material matter? Answer. We fail to agree, and cannot agree. * * *

"Question Sixth. Had the grandmother of Esco L. Daniel (his mother's mother) been afflicted with insanity prior to the 12th day of October, A. D. 1905, the date that the assured signed the said application for membership in the defendant company? Answer. Yes.

"Question Seventh. If the grandmother of the assured had been afflicted with insanity

prior to October 12, 1906, was the answer or statement of the assured in said application then signed by him 'to the effect that she had not been so afflicted' a misrepresentation as to a material matter? Answer. We fail to agree, and cannot agree."

The jury further found that the death of the assured was not the result of the use of intoxicants, and it seems that appellee made no contention that he was ever insane, and the evidence shows that he was run over and killed by a railway train. Under these findings of the jury, the court rendered judgment in favor of the defendant, thus holding that the falsity of the statements made by the applicant that he had never been intoxicated, and that his maternal grandmother was never afflicted with insanity, were misrepresentations of facts which under the warranty clause of the contract of insurance rendered the policy void. In this ruling we think there was error which requires that the judgment should be reversed. In the case of *Brown v. Palatine Ins. Co.*, 89 Tex. 590, 35 S. W. 1090, involving the proper construction of a fire insurance policy, Justice Brown delivering the opinion of the court said: "Since the language calls for construction to determine what the parties intended, that construction must be governed by the following familiar rules of law: First. The language, being selected and used by the insurer to express the terms and conditions upon which it issued the policy, will be strictly construed against it and liberally in favor of the insured. If the words admit of two constructions, that one will be adopted most favorable to the insured. *Wood on Fire Ins.* § 60; *Bills v. Insurance Co.*, 87 Tex. 551, 29 S. W. 1063, 29 L. R. A. 706, 47 Am. St. Rep. 121; *Goddard v. Insurance Co.*, 67 Tex. 71, 1 S. W. 906, 60 Am. Rep. 1; *Insurance Co. v. Hazelwood*, 75 Tex. 347, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893. Second. The language used must be construed according to the evident intent of the parties, to be derived from the words used, the subject-matter to which they relate, and the matters naturally or usually incident thereto. *Wood on Fire Ins.* §§ 182-187; *Whitney v. Insurance Co.*, 72 N. Y. 117, 28 Am. Rep. 116. Third. Forfeitures are not favored by the law, and if the language used is fairly susceptible of an interpretation which will prevent a forfeiture, it will be so construed. 1 *Wood, Fire Ins.* § 181, p. 436." The statements of the applicant which the jury found to be false were not statements of facts, but of opinion merely; and, if the applicant in good faith believed them to be true, their falsity would not vitiate the policy. Insanity and drunkenness are conditions each of which is of different degrees, often difficult of ascertainment, and it is elementary that testimony to prove the existence of such conditions is that of opinion formed by the exercise of the reasoning faculties

from given circumstances, and is never admissible unless the witness is an expert, or else has had an opportunity to form an opinion from observations of the person whose condition in that respect is to be ascertained. This rule of evidence is not fixed by any arbitrary standard, but has as its basis a truth sanctioned by reason and common experience that it is impossible for any one to testify to more than an opinion on such issues. The legal significance of the answers of the applicant that he had never been intoxicated, and that his maternal grandmother had never been afflicted with insanity, is not changed by the fact that those answers were not made to questions propounded in a judicial proceeding then pending; and, since they are now to be judicially interpreted, no reason is perceived why they should be given a construction different from that above stated. *Supreme Ruling Fraternal Mystic Circle v. Crawford*, 32 Tex. Civ. App. 603, 75 S. W. 844; 1 May on Insurance, §§ 175, 296, 297. In section 296, supra, the author uses the following language: "A 'serious illness' must be one which permanently impairs the constitution, and renders the risk more hazardous. So if the inquiry be as to the prior existence of disease having a tendency to shorten life, or rendering an assurance upon it more than usually hazardous. An honest belief in the truth of his answer is all that is required of the applicant. * * * In such cases the rule seems to be that, if the inquiry call for an answer which involves a matter of opinion, the applicant is answerable only for the honesty of his opinion, although the answer be untrue in fact. So where it was untruly stated that the party had not had rupture."

That warranty clause in the application signed by Esco L. Daniel is as follows: "I have verified each of the foregoing answers and statements from 1 to 35, both inclusive, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete, and literally true, and I agree that the exact, literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any benefit certificate that may be issued on this application, and shall be deemed and taken as a part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I shall fail to comply with and conform to any and all of the

laws of the said Modern Woodmen of America, whether now in force or hereafter adopted, that my benefit certificate shall be void." The policy sued on, among other provisions, contains the following stipulations: "That the application for membership in this society made by the said member, a copy of which is hereto attached and made a part hereof, together with the report of the medical examiner, which is on file in the office of the head clerk, and is hereby referred to and made a part of this contract, is true in all respects, and that the literal truth of such application, and each and every part thereof, shall be held to be a strict warranty and to form the only basis of the liability of this society to such member, and to his beneficiary or beneficiaries, the same as if fully set forth in this benefit certificate. (2) That, if said application shall not be literally true in each and every part thereof, then this benefit certificate shall, as to said member, his beneficiary, or beneficiaries be absolutely null and void. (3) This certificate is issued in consideration of the warranties and agreements made by the person named in this certificate in his application to become a member of this society, and also in consideration of the payment made when adopted as a neighbor in prescribed form, and his agreement to pay all assessments, dues, and fines that may be levied during the time he shall remain a member of this society. * * * If his said application for membership, or any part of it, shall be found in any respect untrue, then this certificate shall be null and void and of no effect, and all moneys which have been paid, and all rights and benefits which may have accrued on account of this certificate, shall be absolutely forfeited and this certificate shall become null and void."

Some of the members of this court feel inclined to hold that each and all stipulations warranting the truth of the applicant's answers should be construed in connection with and controlled by the following language in the first portion of the warranty clause in the application quoted above, to wit: "And I agree that the exact, literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers." Following is the reasoning advanced to support this position: The definition of the word "faith" found in Webster's Unabridged Dictionary is: "A firm conviction of the truth of what is declared by another by way either of testimony or authority without other evidence; belief in what another states, affirms, or testifies simply on the ground of his truth or veracity; especially (as distinguished from mere belief) practical dependence on a person, statement or thing as trustworthy." Applying this definition to the word "faith" as used in the provision of the application last quoted, the correct construction of that stipulation would be that, in order for the insurance company

to defeat the policy by reason of misrepresentations contained in applicant's answers, it would be required to prove that its officers believed such answers to be true, and that such belief so formed was one of the inducements which led them to issue the policy. The case of *Sovereign Camp of Woodmen of the World v. Gray*, 26 Tex. Civ. App. 457, 64 S. W. 801, was a suit on a policy by the terms of which the answers of the applicant were warranted to be true, and, further, that the policy "shall be null and void and of no effect * * * if any of the statements or declarations in the application for membership and upon the faith of which this certificate was issued shall be found in any respect untrue." Delivering the opinion of the court in that case, Chief Justice Conner, in discussing the alleged falsity of a statement of the applicant and upon which payment of the policy was sought to be avoided, said: "If false, to avoid the certificate, it must be shown to be not only an answer relating to the insurance feature, but also one upon the faith of which the policy issues. The burden is certainly on the appellant to do this, and no proof to this effect is found in the record." See, also, *Etna Life Ins. Co. v. Winberly* (Tex. Civ. App.) 108 S. W. 783; *New Orleans Ins. Co. v. Gordon*, 68 Tex. 148, 3 S. W. 718; *Reppond v. National Life Ins. Co.*, 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981. The case of *Reppond v. National Life Ins. Co.*, cited above, was a suit by Annie Reppond to collect a policy upon the life of her husband, John T. Reppond, issued upon an application signed by the latter, containing the following terms: "The statements and agreements made by me in this application, as well as those I have made and shall make to the company's medical examiner, are hereby warranted by me to be full, complete, and true without suppression of any fact or circumstance which would tend to influence the company in issuing a policy under this application, and shall be the basis of, and as a consideration of, the contract." Having stated in response to questions propounded by the company's medical examiner that he had been afflicted with certain ailments, he was next asked to give the name and address of each physician who had treated him for those ailments, and, in reply to this question, he gave the name of one of his attending physicians, but omitted the name of another who had also treated him. The medical examiner's report of these answers was made a part of the application, and upon the application was the following: "I warrant on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder that I have carefully reviewed all answers made to the medical examiner in the foregoing examination, which answers have been written by said medical examiner at my request, and that said answers and each of them as hereinabove written are as answered

by me, and that each of the above answers are fully complete and true." In delivering the opinion of the court in that case Justice Brown said: "In Assurance Company v. Munger Co., 92 Tex. 297, 49 S. W. 222, Judge Denman defines warranty in insurance policies in the following clear and explicit language: 'A warranty in an insurance contract is a statement made therein by the assured which is susceptible of no construction other than that the parties mutually intended that the policy should not be binding unless such statement be literally true.' Guided by this definition, we will analyze this contract to ascertain what the parties really intended to contract for. The phrase, 'without suppression of any fact or circumstance which would tend to influence the company in issuing a policy under this application,' applies as well to the report of the medical examiner as to the stipulation in the application, and qualifies the language in each of those instruments by which it is sought to fix the character of warranty upon the answers and agreements in each. The meaning and intent of the parties in using the language was to say that, in making the statements and agreements expressed in the application as well as those that were made to the medical examiner, Reppond undertook in good faith to answer all of the questions that were propounded to him truthfully and fully, and not intentionally to suppress any fact the statement of which would properly be called for by such questions, and that would be material to the risk, or influence the company in issuing the policy. * * * The parties must have intended to give some effect to the language, 'without suppression of any fact or circumstance which would tend to influence the company in issuing the policy under this application'; and we can see no other effect that could be given to it except that it should qualify the statements and agreements which are set forth in the application and in the medical examination." The circumstances in evidence indicate that the application signed by Esco L. Daniel was printed in blank form when presented to assured, previously prepared by appellee in terms of its own selection, and this is certainly true of the policy issued thereon. To say that proof of falsity of some of the answers of the applicant would show breach of his contract of warranty and entitle the appellee to a judgment decreeing the policy void irrespective of any other consideration would be to ignore altogether the above-quoted stipulation in the application, "and I agree that the exact, literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers," which is wholly inconsistent with such a contention.

But, irrespective of the views last expressed, for the error in the ruling of the trial

court above noted, the judgment of that court is reversed, and the cause remanded for another trial.

FT. WORTH & D. C. RY. CO. v. SUTER.
(Court of Civil Appeals of Texas. Feb. 27, 1909.)

1. RAILROADS (§ 113*) — DITCHES AND CULVERTS — MAINTENANCE — STATUTORY PROVISIONS — DUTY OF RAILROAD.

Under Rev. St. 1895, art. 4436, providing that in no case shall any railroad company construct a roadbed without first constructing such culverts as the lay of the land requires for proper drainage, the duty of the railroad to maintain necessary culverts is absolute and not merely to exercise ordinary care to maintain the same, and for injuries to land caused by overflow the railroad company is liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 357; Dec. Dig. § 113.*]

2. RAILROADS (§ 114*) — DITCHES AND CULVERTS — FAILURE TO MAINTAIN — ACTION FOR DAMAGES — PLEADING — INSTRUCTIONS.

Where, in an action against a railroad company for damages from an overflow resulting from defendant's failure to maintain proper culverts, as required by Rev. St. 1895, art. 4436, the petition set up facts showing failure to comply with the statute, plaintiff's rights were not limited by the further unnecessary allegation that such failure was negligence; and hence defendant could not complain of an instruction making defendant's duty to maintain the culverts absolute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 371; Dec. Dig. § 114.*]

3. NEGLIGENCE (§ 6*) — NEGLECT OF STATUTORY DUTY.

The failure to perform a plain statutory duty resulting in injury to another is negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8; Dec. Dig. § 6.*]

4. TRIAL (§ 191*) — INSTRUCTIONS — ASSUMPTION OF FACTS.

In an action against a railroad for damages from an overflow alleged to have resulted from defendant's failure to maintain proper culverts, the court charged that it is the duty of a railroad in constructing its track to maintain necessary culverts to carry the waters of all streams it may cross and the surface waters resulting from rainfall as the natural lay of the land requires, so as not to divert such waters from their natural course. Held, that read in connection with such charge a further charge that, if the jury found for plaintiff, they could not find any damages which would have resulted from water which would have flowed over plaintiff's land if the track and roadbed had been constructed and maintained in the manner stated in the first part of the charge, but only such damages as resulted from failure to maintain the necessary culverts, etc., was not on the weight of the evidence, as assuming that defendant had failed to construct and maintain such culverts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 428, 429; Dec. Dig. § 191.*]

5. APPEAL AND ERROR (§ 1064*) — HARMLESS ERROR — INSTRUCTIONS.

Even if erroneous, defendant was not prejudiced; it being practically undisputed that the openings under the track were insufficient for the necessary drainage of plaintiff's land.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4221; Dec. Dig. § 1064.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. RAILROADS (§ 114*) — DITCHES AND CULVERTS—FAILURE TO MAINTAIN—ACTION FOR DAMAGES—INSTRUCTIONS.

Where, in an action against a railroad for damages from an overflow resulting from defendant's alleged failure to maintain necessary culverts in accordance with the statutory requirement, the court limited plaintiff's right to recover to damages resulting from defendant's failure to construct and maintain necessary culverts, a special charge that no damages could be allowed for overflows caused by a certain embankment was properly refused.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 371; Dec. Dig. § 114.*]

Appeal from District Court, Wichita County; A. A. Hughes, Special Judge.

Action by R. H. Suter against the Ft. Worth & Denver City Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Spoons, Thompson & Barwise, L. H. Mathis, and C. C. Huff, for appellant. J. T. Montgomery, for appellee.

SPEER, J. This is an appeal by the Ft. Worth & Denver City Railway Company from a judgment in favor of R. H. Suter for \$1,000 as damages growing out of an overflow alleged to have resulted from a failure of the railway company to maintain proper culverts for the escape of water.

It is first urged that the court erred in the following paragraph of his charge, to wit: "It is the duty of a railway company in constructing and maintaining its roadbed and track to provide and maintain the necessary culverts and sluiceways to carry the waters of all streams which it may cross and the surface waters resulting from rainfall as the natural lay of the land requires, so as not to divert such waters from their natural course." The proposition announced is that it is the duty of a railway company to use ordinary care to maintain the necessary culverts and sluices to carry off the water of streams and surface, whereas the court imposed upon appellant the absolute duty of doing so. The charge as given appears to be fairly within the statute (article 4436, Rev. St. 1895), and is abundantly supported by the authorities. *Austin & Northwestern Ry. Co. v. Anderson*, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350; *Clark v. Dyer*, 81 Tex. 339, 16 S. W. 1061; *Tex. & Pac. Ry. Co. v. Whitaker*, 36 Tex. Civ. App. 571, 82 S. W. 1051; *S. A. & A. P. Ry. Co. v. Gurley*, 87 Tex. Civ. App. 283, 83 S. W. 842. While appellee's petition alleges that appellant's failure to construct the necessary culverts and sluiceways was negligence, it nevertheless sets forth such facts as to show that appellant has not complied with the statute cited, and his rights are not thereby limited by the further unnecessary allegation that such failure was negligence. Moreover, the failure to perform a plain statutory duty resulting in injury to another is necessarily negligence.

The third paragraph of the court's charge

is next attacked as being upon the weight of the evidence. This paragraph reads as follows: "You are further instructed that, if you find for the plaintiff under the foregoing charge, you will not find for him any damages which you believe from the evidence would have resulted to plaintiff's land or crops by any water which would have flowed over or stood upon said land if the track and roadbed of the defendant had been constructed and maintained in the manner stated in the first section of this charge; but only such damages, if any, as you may find have resulted from the failure of defendant to construct and maintain the necessary culverts and sluiceways to carry off the water according to the natural lay of the land." But this charge, when read in connection with the paragraph to which it refers, cannot be said to assume that appellant had failed to construct and maintain the necessary culverts and sluiceways. But, if it did, the evidence is practically undisputed that the openings under the track were insufficient for the necessary drainage of appellee's land.

The third and only remaining assignment complains of the court's refusal to give a special charge instructing that the jury would not allow any damages for the overflows caused by a certain embankment along the north side of the public road. Appellee insists that the evidence did not raise such issue, but, whether it did or not, we think that paragraph of the charge last above quoted sufficiently limited appellee's right to recover to those damages only that resulted from appellant's failure to construct and maintain the necessary culverts and sluiceways.

We find no error in the judgment; and it is affirmed.

SUDERMAN-DOLSON CO. v. HOPE.

(Court of Civil Appeals of Texas. March 31, 1909.)

1. TRIAL (§ 192*) — INSTRUCTIONS — ASSUMPTION OF FACTS.

The court in its charge may assume a fact established by uncontradicted evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 432; Dec. Dig. § 192.*]

2. TRIAL (§ 256*) — REQUESTS — NECESSITY.

Where a charge as to the burden of proving a contract alleged, though obscure, could not have misled the jury, if the other party desired a clearer presentation of the question, he should have asked it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 631; Dec. Dig. § 256.*]

3. WORK AND LABOR (§ 4*) — QUANTUM MERUIT.

If work was done for defendant with its knowledge and it received the benefits thereof, it would be liable for the value of the work.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 3; Dec. Dig. § 4.*]

4. WORK AND LABOR (§ 22*) — ACTIONS — PLEADING—SUFFICIENCY.

Allegations that work was done at the solicitation of defendant's agent, and with its knowledge and consent, were sufficient to sustain a recovery against it on a quantum meruit.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 41; Dec. Dig. § 22.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO ISSUES.

Where the petition alleged that the work was done under a contract with defendant's agent, and, in the alternative, at its solicitation and with its knowledge, and the evidence showed that defendant originally employed another contractor to do the work, but, after he had abandoned it, defendant's agent contracted with plaintiff to do the work and accepted it, the contract with the other contractor had no place in the issues submitted.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 604, 606; Dec. Dig. § 252.*]

6. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR — PREJUDICIAL EFFECT — INSTRUCTIONS.

Where the verdict was correct under the evidence, errors in instructions were not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4225; Dec. Dig. § 1068.*]

7. APPEAL AND ERROR (§ 1027*)—HARMLESS ERROR — PREJUDICIAL EFFECT — JUDGMENT CORRECT ON MERITS.

Where the action was for work done under a contract with defendant's agent, and in the alternative, for the value of the work done with the knowledge and consent of its agent, and the jury found for plaintiff in the terms of the contract, any errors as to the question of quantum meruit could not have been misleading.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4033; Dec. Dig. § 1027.*]

8. CONTRACTS (§ 326*) — ACTIONS — RIGHT OF ACTION.

Even if defendant was not liable under the contract for work done by plaintiff, or on the quantum meruit, it was liable for a sum which plaintiff paid to his laborers, which sum defendant's agent expressly agreed to pay.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1549-1557; Dec. Dig. § 326.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by L. Hope against the Suderman-Dolson Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hogg, Gill & Jones, for appellant. R. W. Franklin, for appellee.

FLY, J. This is a suit for \$751.90, instituted by appellee against appellant, alleged to be due for work done by him and his partner in the construction of a portion of the road-bed of a railroad and in clearing up the right of way. It was alleged that the work was done under a contract made with the duly authorized agent of the company, and, in the alternative, that the work was done at the solicitation of said agent, and with his knowledge and consent. Appellant alleged that they had no contract with appellee, but that he and his partner had done the work as subcontractors under Delery & Co., with whom appellant had contracted for the work

to be performed. The jury returned a verdict for appellee for \$752.90, with 6 per cent. interest from January 1, 1907. The evidence developed that Delery & Co. had a contract of construction with appellant which they gave up, and appellant, through its agent, Waldo, contracted with appellee and one Epley to perform certain work on the right of way of the railway company, and the work was performed and accepted by appellant, and there was a balance due on said work of \$752.90 as found by the jury, which appellant refused to pay. Appellee was the owner of the claim against appellant.

The first assignment of error complains of the charge of the court because it assumed that Delery & Co. had forsaken their contract. All of the evidence, even that of Waldo, shows that Delery quit the job, and, in the language of the charge, "gave up the contract." The court did not assume that appellant assented thereto, but the jury was informed that appellee had so alleged. In this connection it may be stated that appellant has failed to make the statement required by the rules to follow each assignment of error. There is no statement of the substance of the evidence, but a mere reference to "statement of facts, p. 21 et seq." and "statement of facts, p. 16."

The second assignment of error is overruled. The charge of which complaint is made does not assume that Waldo, appellant's agent, made a contract with Hope & Epley. The charge is quite obscure, but we cannot see how it could have misled the jury. It was an attempt to inform the jury that appellee could not recover unless he had proved the contract alleged. We think an average juror would gain that information from it. The charge in question is made clear by other portions of the instructions. If appellant desired a clearer presentation as to the burden of proof, it should have asked it.

The charge complained of in the third assignment of error is not open to the attack made upon it. If appellant entered into the contract alleged, it was liable; and if it had made the contract and repudiated it, but the work was done with the knowledge of appellant and it received the benefit, it would be liable to appellee for the value of the work. The pleadings were sufficient to sustain a recovery on a quantum meruit. The contract with Delery & Co. was not in force, and had no place in the submission of the issues. It is difficult to see how under the evidence the jury could have returned a different verdict, and, if there were errors in the charge, they could not have injured appellant. The jury found for appellee in terms on the contract, and any errors as to the question of quantum meruit could not have misled them. If appellant was not liable on a contract or a quantum meruit, it was liable under the evidence for the amount of \$153.60 paid to la-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

borers who performed the work by appellee. Waldo, appellant's agent, swore that he promised to pay that sum. That was uncontradicted, and the court did not err in assuming that the fact had been proved.

The judgment is affirmed.

HOLLAND v. WESTERN BANK & TRUST CO. et al.

(Court of Civil Appeals of Texas. March 3, 1909. Rehearing Denied April 14, 1909.)

1. VENDOR AND PURCHASER (§ 127*) — CONTRACTS — REMEDY OF PURCHASER — RESCISSION — AWARD OF DAMAGES.

The right to rescind a contract being equitable, if damages as well as rescission are necessary to complete justice, both will be allowed, so that, while plaintiff could either disaffirm or rescind a contract for the purchase of land induced by false representations, or affirm it and sue for the difference between the value of the land as represented and as it was, and his election to rescind would prevent him from recovering damages for such difference, it would not prevent him from recovering money expended in attempting to utilize the land before he discovered the falsity of the representations.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 231; Dec. Dig. § 127.*]

2. JUDGMENT (§ 949*) — RES JUDICATA — PLEADING.

Where, in an action for damages for false representations inducing plaintiff to buy land, a plea in abatement alleging a prior action by plaintiff for rescission did not show that the action was prosecuted to judgment, the question of res judicata was not raised.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 949.*]

3. PLEADING (§ 106*) — PLEA IN ABATEMENT — ANOTHER ACTION PENDING.

A plea in abatement did not present the question of the pendency of another suit on the same cause of action, where, in an action for damages for false representations in inducing plaintiff to buy land, the plea alleged a prior action by plaintiff for rescission, but did not show that it was still pending.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 221-223; Dec. Dig. § 106.*]

Appeal from District Court, Robertson County; J. C. Scott, Judge.

Action by W. W. Holland against the Western Bank & Trust Company and others. From a judgment sustaining a plea in abatement, plaintiff appeals. Reversed and remanded.

W. W. Holland, Jr., and Bailey, Woods & Morehead, for appellant. Z. I. Harlan, for appellees.

KEY. J. W. W. Holland brought this suit against the Western Bank & Trust Company, Fred Flemming, and Guy M. Gibson, seeking to recover damages. He alleged in his petition that the defendants entered into a conspiracy for the purpose of cheating and swindling him, by inducing him, by means of false and fraudulent representations, to purchase certain lands in the republic of Mexico. It is not necessary to set out the

details of the petition. It not only alleged that there was a material difference in the actual value of the land and its value as represented by the defendants, but it was also alleged in the petition that, relying upon the false representations therein set out, and believing the statements therein to be true, the plaintiff had incurred certain expenses in attempting to utilize the land before he discovered the falsity of the statements referred to, and such items of expenditure were sought to be recovered as special damages. The defendants interposed a plea in abatement in due form, setting forth, in substance, that in another suit the plaintiff filed a plea asking for a rescission of the contract upon the same grounds of fraud alleged in this case. The trial court sustained that plea, and Holland has appealed, and that ruling is the only question presented for decision.

The court below held that the suit for rescission constituted an election to pursue that remedy, and estopped Holland from maintaining an action for damages. It is sometimes said that, when a contract is procured by fraud, the defrauded party has his choice of two remedies, one being rescission and the other damages, and that he cannot assert both. That statement is too broad, and the restriction stated has no application, and should not be made, when both rescission and damages are necessary to make the defrauded party whole. For instance, in this case, the plaintiff had the right either to disaffirm and rescind the contract, or affirm it and sue for the difference in the value of the land as fraudulently represented and as actually existed; but he was not entitled to both those remedies, and his action for rescission cut him off from the right to maintain an action for the difference in the value of the land. But his petition went further, and alleged that, on account of the fraudulent conduct referred to, he had been induced to incur certain expenses in attempting to utilize the land. If the consideration paid by the plaintiff for the land be refunded to him, or his obligations for the purchase money be canceled, of course, it would not be fair and just to allow him damages on account of any difference in the value of the land. In that regard, and in so far as that phase of the case is concerned, cancellation will make him whole; but not so as to the special damages sought to be recovered. Restoring to him the consideration paid for the land would not restore to him the money which he alleges he expended in attempting to utilize the property. Rescission is an equitable remedy. Complete and full justice is a fundamental doctrine of equity jurisprudence, and if damages, as well as rescission, are essential to accomplish full justice, they will both be allowed. Of the cases cited by the respective attorneys in this case, *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is nearest in point, and that suit was based and sustained upon the doctrine just announced.

The plea in abatement does not show that the suit for rescission was prosecuted to final judgment, or that it is still pending, and therefore it does not present either the question of *res adjudicata* or the question of pendency of another suit involving the same cause of action.

Our conclusion is that, as to the special damages, the court erred in sustaining the plea in abatement; and for that error the judgment is reversed and the cause remanded.

RICE, J., did not sit in this case.

MASSIE et al. v. MASSIE et al.

(Court of Civil Appeals of Texas. March 27, 1909.)

1. WILLS (§ 651*)—CONDITIONS—VALIDITY—PROVISION AGAINST CONTEST.

A provision in a will that if any of testator's children, among whom he divided his property equally, should contest the will, they should forfeit any right thereunder, is valid.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1542; Dec. Dig. § 651.*]

2. WILLS (§ 665*)—CONDITIONS IN DEVISE—CONTEST OF WILL—EFFECT.

Testator, treating land as his separate property, devised the same equally to his children, and provided that any child contesting the will should forfeit his right under the will. Held that, testator having disposed of property belonging to the wife, a child was put to his election, and where such child contested the will on the ground that it disposed of property belonging to his deceased mother, either as separate or community property, he elected to recover as an heir of his mother, and forfeited his rights under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1566; Dec. Dig. § 665.*]

3. PARTITION (§ 13*)—COMMUNITY INTEREST.

On the death of a wife, her children inherit her community interest subject to the homestead interest of the husband, and at the death of the latter the children are entitled to a partition of the land, and to have their interest set apart to them, subject to all equities arising under the community laws.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 36; Dec. Dig. § 13.*]

4. PARTITION (§ 95*) — JUDGMENT — SUFFICIENCY.

A judgment in partition should be so specific as to show on its face without the aid of the pleadings the land intended to be partitioned.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 304; Dec. Dig. § 95.*]

Error from District Court, Collin County; B. L. Jones, Judge.

Action by C. W. Massie and others against Sam J. Massie and others. There was a judgment granting relief, and defendants bring error, and plaintiffs assign cross-error. Reversed and remanded.

Abernathy & Mangum, for plaintiffs in error. C. W. Massie, for defendants in error.

RAINEY, C. J. This suit was brought by defendants in error against the plaintiffs in error to recover a certain tract of land, claiming it as the separate property of their mother, through whom they inherited, or, in the event they were mistaken in its being the separate property of their mother, then they claimed the land was the community property of their father and mother. They prayed for rents and for partition. Defendants answered by general denial, and specially that said land was paid for in part with the separate funds of their father, J. A. Massie, and that, after the death of Mary A. Massie, their father made valuable improvements on the land, and asked an accounting for same; that their father, J. A. Massie, died leaving a will in which he claimed the land as his separate property and stipulated therein that, if any one of his children should contest the same, the one so contesting should forfeit any right to said property by reason thereof; and that C. W. Massie had contested said will. C. W. Massie by supplemental petition replied that said will is unjust, unlawful, contrary to public policy, and not binding, in that he is suing for his mother's property, and said will does not attempt to cut him out of anything he inherited from his mother. The case was submitted on special issues, and, upon a verdict being returned, the court rendered a judgment decreeing the land to be community property and for partition. Both the plaintiffs in error and defendants in error ask a reversal of the case.

The plaintiffs in error assign as error the action of the court in not admitting as evidence certain records of the county and district courts relating to the probating of the will of J. A. Massie, offered by plaintiffs in error to show that C. W. Massie, one of the plaintiffs herein, contested the probating of the will. In this we are of the opinion that the court erred. The will treated the land as the separate property of the testator, J. A. Massie, and purported to dispose of all his property equally between his children, and it also provided that, if any of his children contested his said will, they should forfeit any right to any of the property so devised. This was a valid provision, and, if the said C. W. Massie contested the probating of the will in the county or district court, he forfeited all rights thereunder, and could not recover any of the property devised by virtue of said will. Besides, his contention in this suit had the effect to defeat the provisions of the will, and prevents a recovery by him of any of the property of his father, J. A. Massie, deceased. The will did not prevent him from asserting his right to the part of the land he inherited from his mother, if, in fact, she owned it, either as her separate

right or an undivided one-half as community property of herself and J. A. Massie. C. W. Massie could not recover both as heir of his mother and as devisee of J. A. Massie. J. A. Massie had no right to will the property of Mary A. Massie, his deceased wife, but having done so, and placed the forfeiture clause therein, it put C. W. Massie upon his election, and, having contested the will, he elected to recover as an heir of his mother, and in this relation only can he recover.

It is charged that C. W. Massie recovered both as heir of his mother and as devisee under the will. He was not entitled to recover in both capacities, and in this respect the court erred.

The defendant in error C. W. Massie complains of the court in not finding rents for him, and rendering judgment therefor in his favor. There is no statement in the brief showing the evidence, or a synopsis thereof, sufficient to enable this court to tell wherein the error of the court below. If any, lies. Rule 31, Court Civil Appeals (31 S. W. vii). Upon the death of plaintiffs' mother they inherited her community interest subject to the homestead interest of the father, and at his death they were entitled to a partition of the land, and to have their interest set apart to them. If there are any equities that arose by reason of our community laws, the same can be adjusted upon another trial. *Clift v. Clift*, 72 Tex. 144, 10 S. W. 338; *Rice v. Rice*, 21 Tex. 66; *Furrh v. Winston*, 66 Tex. 521, 1 S. W. 527.

Complaint is made of the uncertainty of the judgment in failing to describe the land so that from its face the land can be identified. With the aid of the pleadings, the land mentioned in the judgment might be identified, but we think the judgment should be sufficiently specific so as to show on its face what land is intended to be partitioned.

The judgment is reversed and cause remanded.

McGILL v. SITES.

(Court of Civil Appeals of Texas. March 3, 1909. Rehearing Denied April 7, 1909.)

TRESPASS TO TRY TITLE (§ 39*)—LEASES—COLLATERAL ATTACK—EVIDENCE.

Where, in trespass to try title, plaintiff asserted no claim to lands held by F. and the surveys to the latter were not involved in the suit, his title could not be collaterally attacked; and hence evidence that F. was not an actual settler and not entitled to lease the land was inadmissible to show that the land leased to him should have remained in another lease of the lands involved, and that therefore the amount remitted by the other lessee to the Commissioner of the Land Office was insufficient.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 39.*]

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Action by Lon McGill against J. T. Sites. Judgment for defendant, and plaintiff appeals. Affirmed.

For opinion on former appeal, see 103 S. W. 695.

Jenkins & McCartney, for appellant. C. E. Dubois, L. H. Brightman, W. A. Threadgill, and Hill & Lee, for appellee.

FISHER, C. J. This suit was brought by the appellant against appellee and one James Castleberry on July 7, 1902, in trespass to try title to sections 3, 4, and 5, Orphan Asylum lands, in Tom Green county. January 7, 1907, appellee filed an amended answer, disclaiming title to the S. ½ of section 4 and all of section 5, and pleaded not guilty to the N. ½ of section 4 and all of section 3, and by cross-action set up title in himself to the N. ½ of section 4 and all of section 3, Orphan Asylum lands. To appellee's cross-action the appellant pleaded not guilty. Thereafter the case was dismissed as to Castleberry, and appellant took a nonsuit, leaving the case for trial on appellee's cross-action and appellant's answer thereto.

In the court below verdict and judgment were in appellee's favor. In the opinion delivered by this court on the first appeal of this case, reported in 103 S. W. 695, will be found stated the nature of the case and the principal points involved in this controversy. The disposition made of the questions in that case, together with what was said by this court in *McGill v. Castleberry*, 111 S. W. 662, a companion case to this, in which a writ of error was refused, disposes of all the questions raised on this appeal adversely to the contention of appellant. The evidence in the record is sufficient to show that appellee, Sites, made settlement upon the land in question, and he abandoned the same upon a well-grounded fear of death or serious bodily injury at the hands of the appellant. The evidence also establishes the fact that the lease to the Lees was in full force and effect at the time that the Commissioner of the Land Office undertook to forfeit the same for the supposed failure to pay the rentals due. We reversed the case before on the ground that the evidence was not satisfactory showing that the amount remitted by Capt. Duggan, agent of Dale, who had acquired the rights of the Lees under the lease, was sufficient to cover the entire sum of rents then due. On this trial the evidence satisfactorily shows that the Commissioner of the Land Office, prior to the time that this amount was remitted, leased two sections of the land covered by the Lees' lease to one Franklin; and, subtracting from the lease the amount due upon these two sections, the amount remitted by Duggan was sufficient to cover and fully pay the lease money due

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the remaining sections included in the lease.

Appellant has an assignment of error in his brief, complaining of the action of the trial court in refusing to permit him to prove that Franklin was not the head of a family and was not an actual settler, or, in other words, not entitled to lease the land from the state at the time the lease was issued to him by the commissioner, contending that the lease was wrongfully issued to Franklin, and therefore the two sections should have remained in the Lee lease, and consequently the amount remitted by Duggan was not sufficient. We do not think there was any error in the ruling of the court upon this question. The appellant is not asserting any claim or interest in the lands so leased to Franklin, nor is he in any position to attack Franklin's title or right acquired under that lease. Those surveys are not involved in this suit. These surveys that were leased to Franklin were not included in the lease to the Lees when the transfer was made to Dale. The lands at that time were out of the lease to the Lees, and they and the state and all parties were then satisfied and contented with the disposition made of those two surveys by the Land Commissioner in leasing the same to Franklin. Franklin's title or right could not be collaterally questioned in this proceeding, and we fail to see what interest the appellant could have in the question as to whether the state was imposed upon by Franklin or not; for, as before said, the appellant is not asserting or claiming any interest in the lands held by Franklin.

It is unnecessary for us to take up in their order and dispose of each of the assignments of error presented in appellant's brief; for all the questions there raised were, as before said, disposed of by this court on the former appeal of this case and in *McGill v. Castleberry*. The questions of law are the same, and the facts are the same, except in the particular pointed out in this opinion.

We find no error in the record, and the judgment is affirmed.

Affirmed.

FIRST NAT. BANK OF STEPHENVILLE v. THOMAS et al.

(Court of Civil Appeals of Texas. April 8, 1909. On Rehearing, April 24, 1909.)

1. DEPOSITIONS (§ 84*) — SUPPRESSION — GROUNDS.

Plaintiff filed interrogatories to take the deposition of a witness, and defendant filed cross-interrogatories. Subsequently a commission issued, and the answers of the witness were regularly taken, returned, and filed. Subsequently defendant filed direct interrogatories to retake the deposition of the witness, which were crossed by plaintiff, and by agreement copies of the interrogatories were waived, and the deposition taken on the originals. Subse-

quently the deposition was suppressed because of irregularities. *Held*, that it was improper to retake the deposition on the same direct and cross-interrogatories on file, whether on originals or copies, without further notice.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. § 227; Dec. Dig. § 84.*]

2. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR—SUPPRESSION OF DEPOSITION.

Where the deposition of a witness, taken on direct and cross-interrogatories, was used in evidence, the suppression of a subsequent deposition of the witness was not reversible error, in the absence of a showing that the testimony of the witness in the deposition suppressed was in any material respect different from the testimony contained in the deposition used.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1043.*]

3. EXECUTION (§ 472*) — WRONGFUL EXECUTIONS—DAMAGES.

Where corporate stock, the separate property of a wife, was sold under execution against the husband, and purchased by the judgment creditor, the damages suffered by the wife from her failure to sell the stock to a third person as she had prior to the levy contracted to do were not too remote.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1403; Dec. Dig. § 472.*]

4. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMING FACTS.

Where, in an action by a wife for the conversion of corporate stock owned by her, by a sale thereof under execution against her husband, the question whether the stock was the separate property of the wife was for the jury under the evidence, an instruction authorizing a verdict for the wife, on the jury finding that she had contracted to sell the stock, and would have sold the same but for the levy and sale under the execution, was erroneous for failing to require the jury to find that the stock was her separate property.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 428; Dec. Dig. § 191.*]

5. TRIAL (§ 139*)—WITHDRAWAL OF QUESTION FROM JURY—WHEN AUTHORIZED.

Unless the evidence is of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it, the question is for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 332; Dec. Dig. § 139.*]

6. EXECUTION (§ 465*)—WRONGFUL EXECUTION—ACTION—CONDITION PRECEDENT.

Corporate stock, claimed by a wife as her separate property, stood in the name of the husband who had pledged the same to secure a note to a third person. The note was not paid, and a judgment creditor of the husband bought it and levied on the stock under the execution, and became the purchaser at the sale. *Held*, that the wife could sue for the conversion of the stock without paying the note or tendering the amount thereof.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 465.*]

7. FRAUDULENT CONVEYANCES (§ 159*)—CONVEYANCES TO WIFE.

A bill of sale of corporate stock by a husband to his wife, made to defraud his creditors, and not in satisfaction of a valid debt, does not pass the title to the wife if she knew of his fraudulent purpose.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 506; Dec. Dig. § 159.*]

S. HUSBAND AND WIFE (§ 262*)—SEPARATE PROPERTY—BURDEN OF PROOF.

A wife whose separate property, acquired during marriage by gift, has undergone various changes, must, in a controversy as to whether the property last acquired is separate or community property, trace the property through all the changes made, and clearly show that the last-acquired property is her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

Appeal from District Court, Delta County; T. D. Montrose, Judge.

Action by Pearl Warren Thomas and another against the First National Bank of Stephenville. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Martin & George and J. L. Young, for appellant. Looney & Clark and A. T. Steil, for appellees.

TALBOT, J. Appellant, First National Bank of Stephenville, held a judgment in the district court of Erath county, Tex., against R. J. Thomas of Delta county, Tex., upon which there was a balance due in the sum of \$2,490.74 on the 17th day of February, 1906. On the last-named date the appellant sued out an alias execution against R. J. Thomas, and sent the same to the sheriff of Delta county, who, on the 19th day of February, 1906, levied the same upon 241 shares of stock as the property of the said R. J. Thomas of the face value of \$25 per share; said shares of stock being shares in the Texas Long Distance Telephone, a private corporation, located at Cooper in Delta county. The levy was made in the statutory way by giving notice to the officers of the company. The stock stood on the books of the company in the name of R. J. Thomas. The stock was duly advertised, sold, and bought in by the appellant on the 3d day of April, 1906. Thomas gave notice at the sale that the property belonged to his wife, Pearl Warren Thomas, and on the 14th day of May, 1906, the latter, joined by her husband, the said R. J. Thomas, filed this suit against the appellant, the First National Bank of Stephenville, and the Texas Long Distance Telephone, charging a conversion of said stock, and also praying for exemplary damages. The petition charged that the stock in controversy was, on the date of the levy, the separate property of Mrs. Thomas; that notwithstanding it stood on the books of the telephone company in the name of R. J. Thomas, it was purchased with the separate property of Mrs. Thomas. It was also alleged that R. J. Thomas had, prior to the levy, absorbed Mrs. Thomas' separate property for the benefit of the community estate, and that thereafter, and before the levy, he by an instrument in writing transferred the stock in controversy to her in settlement of

her claim. It was further alleged that the stock was worth in the aggregate \$6,025, and as an element of special damages that R. J. Thomas, acting for his wife, had contracted and agreed to trade said stock to one S. M. Redburn for property situated in the state of Arkansas of the value of about \$8,000, which trade was defeated by the levy of the execution in favor of appellant, to Mrs. Thomas' damage in the sum of \$8,000. The defendant answered by plea in abatement, general and special exceptions, general denial, and specially pleaded that the alleged transfer by R. J. Thomas to Pearl Warren Thomas was in fraud of R. J. Thomas' creditors, and that the claim that it was bought with the separate property of Pearl Warren Thomas was fraudulent, that a portion of said stock never reached the possession of the defendant bank, and that the balance had been pledged by Thomas prior to the levy for borrowed money, which borrowed money Thomas had failed to pay, and that the appellant had thereafter purchased the note against Thomas, to which stock in controversy was attached as collateral security, and that Thomas had not paid the same off, and that he could not recover until this debt was discharged, or, if he could, he could only do so less the amount of the debt, and said bank further specially pleaded a purchase under its execution. The court sustained exceptions to the plea for exemplary damages, and a trial upon the other issues in the case resulted in a verdict and judgment in favor of Mrs. Thomas for the sum of \$2,500 against the appellant, and that she take nothing as to the Texas Long Distance Telephone. From the judgment against it appellant appealed.

Appellant's first assignment of error complains that the court erred in sustaining the plaintiffs' motion to suppress the deposition of S. M. Redburn, taken at its instance. It appears that the plaintiff first filed interrogatories to take the deposition of this witness, which were crossed by the defendant, and thereafter a commission issued, and the answers of said witness were regularly taken to both the direct and cross-interrogatories, and returned and filed in the case. After this the defendant filed direct interrogatories to retake the deposition of the witness, which were crossed by the plaintiff, and by agreement of the parties copies of said interrogatories were waived, and the deposition taken on the originals. This deposition, on January 13, 1906, and during a regular term of the court, was suppressed, upon motion of plaintiff, because of irregularities which are not shown. Upon the suppression of this deposition the cause was continued at the request of defendant, in order that it might again take the deposition of the witness Redburn. On the 22d

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

day of January, 1908, counsel for defendant asked for, and obtained from the court, the attorney for plaintiffs not being present, an order to retake the deposition which had been suppressed on the 13th day of that month. The next day, January 23d, counsel for plaintiffs, ascertaining that an order had been made by the court granting the defendant leave to retake said deposition, moved the court to rescind said order, which was done, the court at the same time stating to counsel that he was of opinion that, if the defendant desired to retake the deposition of the witness Redburn, he should propound other interrogatories to said witness, and serve notice thereof upon the plaintiff. In reply to this statement of the court counsel for defendant remarked that he did not so understand the law, and that he proposed to take out a commission and have the answers of the witness retaken upon the original direct and cross-interrogatories on file, without further notice to plaintiff. This he proceeded to do, and at the succeeding term of the court, when the case was called for trial, upon motion of plaintiff the deposition was again suppressed, because taken on the said original direct and cross-interrogatories, and because notice thereof had not been served upon plaintiff.

In support of appellant's contention that he had the right to retake the deposition of the witness in the manner stated, and that the court erred in quashing said deposition, we are cited to the case of *Boone v. Miller*, 73 Tex. 557, 11 S. W. 551. In that case the deposition of the witness was first taken by agreement, as in this case, upon the original direct and cross-interrogatories without copies. After being returned and filed in court, counsel for the plaintiff observed that the certificate of the officer who took the deposition was defective, and, without waiting to see whether or not such defect would be waived by the opposite party, detached the original interrogatories from the answers, and under a second commission had the deposition retaken and filed. The defendant moved to suppress the deposition last taken upon grounds similar to those urged by the plaintiff to suppress the deposition in the present case. The motion was overruled, and the ruling of the court assigned as error. In passing upon the question the Supreme Court said: "When the deposition of a witness has been defectively taken and is liable to be suppressed, it is proper for any party having an interest in it to proceed to have it retaken, without delaying to see whether the objection will be waived. We do not think it is a correct practice to withdraw and use a filed paper for that purpose, and it would have been in this instance proper to have used certified copies, instead of the original papers, but we do not think that irregularity affected the admissibility of the deposition; nor do we think that

the detaching of the interrogatories from the deposition, and attaching them to another deposition in the same case, prevented the second deposition from being properly read to the jury in connection with the interrogatories." We think the cases are distinguishable. In the case cited the deposition had not been suppressed, but the second commission was issued, and the original direct and cross-interrogatories were used in retaking the deposition, in anticipation of a motion to suppress because of the defective certificate of the officer thereto, whilst in the case at bar the second commission was taken out, and the original direct and cross-interrogatories, upon which the first deposition had been taken, detached and used in retaking the deposition of the witness, after the first deposition had been quashed, and in spite of the court's ruling that said interrogatories, which were filed papers in the case, and subject to the absolute control of the court, could not be withdrawn and used for that purpose; that if defendant desired to retake the deposition of the witness, he should propound new interrogatories, and serve notice on plaintiff, as in the first instance. Under these circumstances we are not prepared to say the court erred in quashing the deposition. In the case of *Boone v. Miller*, supra, it did not appear, as it does in this case, that the trial court had forbidden the withdrawal of the interrogatories to retake the deposition; and, while it was there held that the mere withdrawal and use of the interrogatories was not such an irregularity as to affect the admissibility of the deposition, yet the practice of so withdrawing and using a filed paper was condemned. We are unwilling to go beyond the scope of that decision, and believe we would do so were we to hold the court's action in suppressing the deposition under the facts of this case reversible error. Moreover, we are of the opinion that, when these depositions were quashed, the interrogatories became *functus officio*, and the agreement of counsel that said deposition might be taken, in the first instance, without the service of the statutory notice no longer binding.

In this view of the law we are sustained by the case of *Foster v. Smith*, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604. In that case, under a statute which seems to be substantially the same as our statute upon the subject, it is said: "When the deposition of the witness has been once taken upon such interrogatories, all the efficacy of such interrogatories and notice in giving the party the right to take the deposition is exhausted; and the party has no right to retake the deposition, for any cause, without refiling the original, or filing additional, interrogatories, and giving the opposite party the notice, as required by the section of the Code before referred to, and therefore the exception should have been sustained." But again the record shows that

the deposition of the witness Redburn had been previously taken upon direct and cross-interrogatories, and used in evidence on the trial of the case, and the bill of exception reserved to the court's ruling suppressing the deposition in question does not show the testimony of said witness in the two depositions to be materially different. If the testimony of the witness as contained in the deposition quashed was in any material respect different from, and more favorable to, appellant than that contained in the deposition used on the trial, such difference should have been pointed out by the bill of exception. This the bill fails to do. Now the admissibility of a second deposition of the same witness is within the discretion of the trial court; and, unless an abuse of such discretion, resulting in material injury, is shown, its refusal will not be reviewed on appeal. *White v. Railway Co.* (Tex. Civ. App.) 46 S. W. 382.

Appellant's eighth assignment complains of the court's action in overruling its special exception to that portion of plaintiff's petition alleging, as an element of special damage, that she through her agent had contracted and agreed to trade the stock in controversy to S. M. Redburn for certain property situated in the state of Arkansas, which trade was defeated by the levy of the defendant's execution, to her damage \$8,000. The contention is that the allegations show a claim for damages too remote, uncertain, and speculative to constitute the basis of a suit or a legal ground of recovery. In this contention we do not concur. According to the allegations of the petition the special damages claimed were too remote. They appear to be the direct result of the wrongful act alleged, and the demurrer was properly overruled.

The court instructed the jury as follows: "In this case, if you believe from the evidence that the property in controversy was purchased with the separate property, or the proceeds of the separate property, of Pearl Warren Thomas acquired by gift from her mother, or if you believe from the evidence that the husband of Pearl Warren Thomas, in consideration of money due her by him by reason of using her separate property, conveyed and transferred to her the property in controversy, and that the defendant, after having been notified of the fact that the same had been transferred or was her separate property, sold the same under execution, in the mode and manner as set up in the pleadings in this cause, and converted the same to its own use, or if you believe from the evidence that at the time said sale was made the said Pearl Warren Thomas, as alleged, had contracted and agreed to sell said property, and would have sold same, as set forth in her petition, for the hotel in Arkansas, and if you further believe from the evidence defendant bank knew of the pendency of said trade at the time said levy and

sale under execution was made, and you further believe from the evidence that, by reason of said levy and sale, plaintiff could not sell said property, and defendant bank converted same to its own use, then you will find for plaintiff. Unless you so find, you will find for the defendant." The second clause of this charge, by which it was sought to specifically submit to the jury the issue arising upon plaintiff's allegations of special damage, is objected to, on the ground that it authorized a verdict in favor of the plaintiff Mrs. Thomas if the jury believed she had contracted and agreed to trade the telephone stock involved in this suit for the hotel property situated in the state of Arkansas, regardless of whether or not said stock was her separate property. The objection is well taken. It will be observed at a glance that the clauses of the charge quoted present two distinct grounds of recovery. In the first clause a verdict in favor of Mrs. Thomas is authorized if the jury believed the telephone stock was her separate property, and the defendant knew that fact and converted the same to its own use. In the second clause a verdict in favor of Mrs. Thomas was authorized in the event the jury believed she had, at the time of the sale of the stock under the defendant's execution, contracted and agreed to sell said stock, and would have sold the same, as set forth in her petition, for the hotel in Arkansas but for the levy and sale of said stock under said execution, etc. In this clause of the charge the jury was not required to find that the stock was Mrs. Thomas' separate property. This was error. In no event, under the pleadings and evidence, was Mrs. Thomas entitled to recover, unless the telephone stock was her separate property. But it is insisted by appellee that the evidence shows beyond controversy that said stock was the separate property of Mrs. Thomas, and that the court would have been justified in directly instructing the jury to that effect. Therefore the error pointed out in the clause of the charge under consideration is immaterial. In this view we do not concur. We do not think the evidence was of such a conclusive character as that the court would have been warranted in holding, as a matter of law, that the said stock was in fact the separate property of Mrs. Thomas, and not the community property of herself and husband. To have authorized a withdrawal of the question from the jury the evidence must have conclusively established her separate and individual ownership of the stock. It has been repeatedly held that, unless the evidence is of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it, the questions involved must be submitted to the jury for their determination. Without detailing them we are of the opinion that the facts and circumstances in evidence, bearing upon

the question as to whether or not the telephone stock involved in this controversy was the separate property of Mrs. Thomas, required the submission of that issue to the jury. *Lee v. Railway Co.*, 89 Tex. 588, 36 S. W. 63; *Mynning v. Railway Co.*, 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804.

It is assigned that the court erred in refusing to instruct the jury, at the defendant's request, that the plaintiff could not recover because she had not paid, or tendered into court, the amount of the note for which the telephone stock, sold and appropriated by defendant, was pledged to secure. There was no error in this action of the court. The special charges requested and refused would have instructed the jury, in effect, to find for defendant on the whole case because no payment, or tender of money to pay the secured note, had been made. This, in our opinion, was not the law of the case. No complaint is made to the effect that the jury were instructed that in the event they found for plaintiff they should allow and deduct, from whatever amount awarded her, the amount of said note. The special charges were equivalent to peremptory instructions to find for defendant because of the failure on plaintiff's part to pay, or tender payment of, the note secured by the stock and held by defendant. Whether or not the defendant was entitled to have the amount of said note set off against any judgment rendered against it under the facts is a question we are not now called upon to decide; but, however that may be, it was not essential to plaintiff's recovery that she pay said note, or tender in advance the amount thereof.

We are also of the opinion the court erred in refusing to give the defendant's special charge No. 5, to the effect that the bill of sale executed by R. J. Thomas to his wife in September, 1904, upon its face was legally sufficient to pass the title to the telephone stock to her, but that, if such bill of sale was made fraudulently, for the purpose of hindering and delaying the defendant bank in the collection of its debt, and that such fraudulent purpose was known to the plaintiff Mrs. Thomas at the time of such transfer, and was not made in satisfaction of a valid and subsisting debt, said bill of sale would not pass the title to said stock to Mrs. Thomas. We think the evidence called for the giving of this charge.

In addition to its special charge No. 5, above referred to, defendant requested several special charges giving our statutory definition of separate and community property, and in different forms attempting to present the rule requiring the wife, when her separate property, acquired during marriage by gift, has undergone various changes and mutations, and a controversy arises as to whether the property last acquired was separate or community property, to trace through all the changes made, and clearly show that such last-acquired property was

her separate property. It is probable that none of these charges are entirely free from criticism, and that their refusal would not require a reversal of the case; but, in view of another trial, we take occasion to say that we think the evidence was of such a character as to require, in the event of a request thereof, the giving of an appropriate instruction upon this feature of the case.

On all questions of law presented in the briefs, except as otherwise indicated in this opinion, we rule against appellant upon them.

For the errors pointed out, the judgment is reversed and the cause remanded.

On Rehearing.

It is insisted in this motion that we were in error in stating in our original opinion, in the discussion of the assignment attacking the trial court's action in quashing the deposition of the witness Redburn, that counsel for the defendant, in reply to the remarks of the court that he was of opinion that, if defendant desired to retake the deposition of said witness, he should propound other interrogatories to him, and serve notice thereof upon the plaintiff, stated that he did not so understand the law, and that he proposed to have the answers of the witness retaken upon the original direct and cross-interrogatories on file, without further notice, and that he proceeded to do so; that as a matter of fact the deposition of said witness was retaken on copies of said original direct and cross-interrogatories. The bill of exception reserved to the court's action, in suppressing the deposition is very long, and probably contradictory on this point. It contains a copy of the plaintiff's motion to quash said deposition, in which motion it is stated that the deposition was retaken upon copies of the original direct and cross-interrogatories, but the bill further recites that "counsel for defendant stated that he did not understand that the law required him to propound other or new interrogatories to said witness, but that in his view of the law he had the right to take out a commission upon the interrogatories, direct and cross, which were already on file, * * * and that he proposed to take out said commission on said direct and cross-interrogatories to retake said witness' deposition." The bill of exceptions further recites that "thereafter, on the 29th day of January, 1908, counsel for the defendant applied to the clerk of the court in which this cause was then pending for a new commission to take the deposition of said Redburn upon the direct and cross-interrogatories, a copy of which is herein set out, and said commission was duly issued on said date with said *direct and cross-interrogatories attached.*" (Italics ours). But, conceding that the deposition of the witness was retaken upon copies of the original direct and cross-interrogatories on file, we see no good reason, because of that fact, to change the views heretofore expressed in reference to the law up-

on the question involved. Whether the deposition was retaken upon the original direct and cross-interrogatories or copies, we think the case is distinguishable on the other facts from the case of *Boone v. Miller*, 73 Tex. 537, 11 S. W. 551, and that there was no reversible error in quashing the deposition.

The motion for rehearing is overruled.

**WESTERN UNION TELEGRAPH CO. v.
POWELL.†**

(Court of Civil Appeals of Texas. March 17, 1909. Rehearing Denied April 14, 1909.)

**1. TELEGRAPHS AND TELEPHONES (§ 67*) —
NONDELIVERY OF MESSAGES—DAMAGES.**

A message requesting the sendee to meet the sender and his wife at a station was notice to the telegraph company that the purpose of the message was to have the father of plaintiff's wife meet the sender and wife at the station, and that the wife was ill. It also knew that it was stormy. It failed to deliver the message, requiring the sender to hire a livery to take his wife to her father's home. *Held*, that the company was liable for the injuries sustained by the sender and his wife from the inclement weather as the proximate result of the failure to deliver the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 67; Dec. Dig. § 67.*]

**2. TELEGRAPHS AND TELEPHONES (§ 65*) —
NONDELIVERY OF MESSAGE—ACTION—PETITION—EVIDENCE.**

Where the petition in an action for the nondelivery of a message, requesting the sendee to meet sender and his wife at a station, alleged that the company's agent was informed that the sender and his wife were on their way to the home of the sendee, who was the father of the wife; that the wife was sick; that it was desired that the sendee should meet them at the station with a conveyance, etc.—it was competent to show that the sendee knew from a letter received from the sender's wife that she had been sick, and that he was expecting a message notifying him to meet the sender and his wife, and that, had he received the message, he would have met them with a suitable conveyance.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 65.*]

**3. TELEGRAPHS AND TELEPHONES (§ 74*) —
NONDELIVERY OF MESSAGE—INJURIES—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

An instruction, in an action against a telegraph company for nondelivery of a message resulting in personal injury to the sender and his wife, that, if the conduct of the sender in failing to use ordinary care caused the injuries to himself and wife complained of, the verdict should be for the company as to all damages claimed for such injuries, though the company was negligent, properly submitted the issue of contributory negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 74.*]

Appeal from District Court, Robertson County; J. O. Scott, Judge.

Action by J. G. Powell against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. A. Hill, Geo. H. Fearons, and N. L. Lindsley, for appellant. Bailey, Woods & Morehead, for appellee.

RICE, J. This is a suit by appellee against appellant for the recovery of damages arising from a failure to transmit and deliver the following telegram: "Hempstead, Texas, Nov. 18, 1906. F. B. Long, Bremond, Texas. Meet us at 3:30 p. m. Ollie very sick. J. G. Powell." It was alleged: That plaintiff paid the customary toll thereon, informing the agent that the said Long was then living in the town of Bremond, and that he and his wife, who was sick, were then on their way to Bremond, and that he desired said Long to meet both himself and wife at the depot with a conveyance to take them to his home. That about a month before that time his wife had undergone a serious operation, from which she was convalescing, and that on the morning of November 18th, the weather being pleasant, he started with his wife from Houston, where he then resided, via the Houston & Texas Central Railway to Bremond, Tex., to visit her parents, said Long being her father. That, before reaching Hempstead, the weather turned cold, a wet norther having set in, which caused the sending of said telegram. That, after the delivery of said telegram to appellant's agent at Hempstead, plaintiff and wife continued their journey to Bremond, where they arrived the same afternoon, at which time it was very cold and raining. That after waiting a reasonable length of time at the station, expecting Mr. Long to come for them, he asked the agent if his telegram had been delivered to said Long, and was informed by him that no such telegram had been received, whereupon he went out through the rain to a livery stable, a distance of some 200 yards away, to procure a conveyance for himself and wife, but, finding no one at the stable, returned to the depot, after which he made a second trip to the stable, and finally obtained a conveyance with which he took his wife to the residence of her father, some quarter of a mile distant from the depot. That more than an hour elapsed from their arrival at the depot until they reached the residence of said Long. That, by reason of the failure of the defendant to transmit and deliver said message, the said Long failed to meet them, whereby plaintiff himself, in the effort to secure a conveyance, became wet on account of the exposure to the rain then falling, and that his wife was compelled to remain in the waiting room during the interim, she being weak from her recent severe illness, and that while waiting in said depot she became very cold and fatigued from having to sit up in said room, there being no place where she could lie down, and that, on account of the exposure, she became wet, contracted a severe cold,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 19, 1909.

and la grippe, and again suffered pain from the parts affected by the operation she had recently undergone, and from all of which she was made sick and confined to her room for several weeks, to plaintiff's damage \$750. Plaintiff further alleged that while out searching for said conveyance he became wet and chilled from said exposure, contracted a severe cold, which developed into la grippe and rheumatism, and for a month thereafter was confined to his bed, suffering intensely therefrom, and has ever since continually suffered, to his damage in the sum of \$800. It is alleged that he was a physician, capable of earning and was earning the sum of \$200 per month, and that because of said injuries he lost two months' time, to his further damage in the sum of \$400; that during the sickness of himself and wife he was compelled to expend the further sum of \$49.50 for medicines, for all of which sums, together with 25 cents paid for said message, plaintiff sued. The defendant answered by exceptions, general denial, and specially that said Long resided in the country about 10 miles from Bremond, and had so resided for many years, and that said fact was well known, and that, if said Long then resided in Bremond, he had recently removed there, and the fact of his removal was not known or if known was only known to a very few people in the town of Bremond, and likewise pleaded its rules and regulations concerning delivery of messages, beyond one-half mile limits of its office; further, that, on the arrival of said message, inquiry was made and answer given that Long lived 10 miles in the country, and thereupon its operator sent a service message to its Hempstead office, notifying it that said message was undelivered, as said Long lived in the country. Defendant further answered that plaintiff's telegram by its language did not put defendant upon notice that plaintiff or "Ollie" were traveling upon a railroad train, or on what railroad they were traveling, and that no such damages as alleged by plaintiff were in contemplation of the parties at the time of making said contract. Defendant also pleaded that plaintiff was guilty of contributory negligence in not going to a nearby hotel, and in failing to inform its agent of the fact that he wanted a buggy, who, if he had done so, would have procured one for him; and, further, that plaintiff was guilty of contributory negligence in voluntarily going out in the rain and exposing himself in an effort to secure a buggy. There was a jury trial, resulting in a verdict and judgment for the plaintiff for the sum of \$750, from which this appeal is prosecuted. The facts proven, as shown by the record, sustain the averments of the petition.

Appellant's first, second, third, fourth, and fifth assignments of error are predicated upon the supposed error of the court in giving the following charge to the jury, to wit: "You are further instructed that if you be-

lieve from a preponderance of the testimony that plaintiff delivered to defendant's agent at Hempstead, Tex., on or about the date alleged in the petition, a telegram in terms substantially as alleged in his petition, and you further believe that at the time of such delivery to said agent at Hempstead plaintiff advised and informed said agent that the purpose of such telegram was to have the said Long to meet himself, as well as his wife, at the depot in Bremond, Tex., and you further believe that said defendant failed to use ordinary care in the transmission and delivery of said telegram, and that plaintiff was not guilty of contributory negligence, as those terms are hereinbefore defined to you, and you further believe that the injuries or damages complained of by plaintiff, if any, were the proximate result of the negligence of defendant, if any, you will find for the plaintiff, and assess his damages in such sum as if paid now will reasonably compensate him for the physical suffering of himself and wife, if any you believe they suffered because of the failure to transmit and deliver said telegram, for such loss of time, if any, as you believe plaintiff sustained by reason thereof, for such expense, if any, for medicines for himself and wife by reason of such failure, if failure you believe there was, and for the sum of 25 cents paid for such telegram, but in this connection you are charged to exclude all other elements of damages from your consideration than those hereinabove enumerated, and also limiting your consideration of damages or injuries, if any, to those which you believe from the evidence to have resulted proximately from the defendant's negligence, if you believe it was negligent, as submitted in this charge. You are also instructed that unless you believe from a preponderance of the testimony that plaintiff advised and informed defendant's agent at Hempstead that the purpose of said telegram was to have said Long meet himself, as well as his wife, Ollie, at Bremond, you will not consider any injuries you may believe he suffered or sustained by reason of his own physical or mental suffering, or loss of time or expenses for medicine for himself, if any, but you will only consider such injuries or suffering, if any, of his wife, and such money, if any, expended for medicine for his wife, which was the proximate result of the negligence, if any, of defendant in the transmission and delivery of said telegram, and the price paid for said telegram." Appellant assails this charge so far as it authorizes a recovery on the part of plaintiff himself for injuries suffered by him, because it contends that no notice was given to it, either in the telegram or otherwise, that any such damage as sued for would result to plaintiff from a breach of said contract; nor that such damages as named in said charge were in contemplation of the parties at the time of the making of said contract. The telegram

itself shows that Long was requested to "meet us," evidently meaning both plaintiff and his wife. Plaintiff testified that he sent the telegram from Hempstead, and at the time he handed same to the operator he asked him if he could get the message through immediately, telling him that his wife was sick, and that he wanted her father to meet her at the train, to which he replied that "he could get it through." "That I said in the message meet us, myself and wife. I think my statement was to meet us at the train at 3:30 that evening." It was shown that the weather was pleasant when they left Houston, and that it got cold and began to rain before reaching Hempstead. From this it clearly appears that the company at the time of the receipt of the message understood both from the message itself, as well as from the statement of the plaintiff, that the purpose of sending it was to have said Long, the father of plaintiff's wife, to meet them at the depot. The operator was informed that his wife at that time was sick, and it further appears from the testimony of the operator that he understood that Powell was accompanying his wife on the train, which would reach Bremond at 3:30 that afternoon.

Appellant, it seems to us, is liable for such damages as might reasonably have been anticipated would have resulted from a failure of plaintiff's father to meet them at the train. It had notice of the fact that it was then cold and raining, and that plaintiff's wife was sick. Certainly it was within the contemplation of the parties to the contract that in the event of a failure to transmit and deliver the telegram plaintiff would undertake to do what any reasonable man would do under the same or similar circumstances; that is, to go to the livery stable for the purpose of obtaining a conveyance to take his wife to her father's home. He could not remain in the depot with his sick wife, and, if in taking her to her father's home he and she suffered injuries from the inclement weather then prevailing, the same were such damages as could be recovered, because they were the proximate result of such failure of duty on the part of defendant. *Western Union Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276, 81 S. W. 580; *Western Union Tel. Co. v. Karr*, 5 Tex. Civ. App. 60, 24 S. W. 302; *Western Union Tel. Co. v. Pruett* (Tex. Civ. App.) 35 S. W. 78. See, also, 27 Am. & Eng. Ency. Law (2d Ed.) p. 1059. The charge complained of was, we think, a clear and pertinent application of the law to the facts of the case, and directly instructed the jury that plaintiff himself could recover nothing for his individual injuries unless it was shown that defendant's agent was informed by him that the purpose of the telegram was to have said Long meet himself as well as

his wife. We therefore overrule these assignments.

We overrule the sixth and seventh assignments, because we think that under the allegations of the petition it was competent to show that Long knew from a letter received from his daughter that she had been sick, and was expecting a telegram notifying him to meet plaintiff and his wife, and that, had he received said telegram, he would have known on which train to have met them, and that he would have met them with a suitable conveyance, and have brought sufficient wraps for their comfort.

By its eighth and ninth assignments appellant urges that plaintiff was guilty of contributory negligence in failing to advise its agent upon his arrival at Bremond that it was necessary for him to obtain a conveyance, urging that, if he had done so, said agent would have caused its porter to procure a conveyance to take his wife to her father's, and also urging that plaintiff was guilty of contributory negligence in failing to take his wife to the Cottage Hotel, near by the depot, where he could have gotten some one to go for such conveyance, thereby preventing the injuries complained of. The court in this connection gave the following charge: "If you believe from the evidence that plaintiff went out in the rain and exposed himself to the weather after reaching Bremond, and procured a buggy and drove with his wife to the house of said Long, and you further believe that such conduct or any other conduct on the part of plaintiff caused or contributed to cause his own or his wife's sickness and suffering, as alleged in his petition, and you further believe that such conduct on the part of plaintiff was a failure on his part to use ordinary care, as that term has been hereinbefore defined to you, you will find for defendant as to all damages claimed for injuries and suffering of either himself or wife, and all moneys expended for medicines for either himself or wife, and for loss of time, although you may believe defendant was guilty of negligence in the transmission and delivery of said telegram." The question of contributory negligence is one of fact, and not of law, and we think was fully submitted to the jury by the above charge, and this issue was determined by their verdict against appellant. We therefore overrule these assignments.

The remaining assignments relate to questions that have been previously discussed and determined adversely to appellant, for which reason we deem it unnecessary to further consider them.

Finding no reversible error in the record, the judgment of the court below is affirmed. Affirmed.

BRANT v. LANE et al.

(Court of Civil Appeals of Texas. Jan. 30, 1900. Rehearing Denied March 13, 1900.)

1. CHATTEL MORTGAGES (§ 261*)—FORECLOSURE SALE—PRESENCE OF PROPERTY—NECESSITY.

Where the owner of property gave a trust deed thereon to secure payment of notes with power in a trustee to foreclose by sale, the mere fact that the property when sold by the trustee was in the possession of a sheriff did not prevent a passing of the general title remaining in the owner to the purchaser where delivery was not a condition precedent to the sale, and the lien of the trust deed was merged in the sale; the purchaser taking subject to the sheriff's right of possession.

[Ed. Note.—For other cases, see *Obattel Mortgages*, Cent. Dig. § 537; Dec. Dig. § 261.*]

2. VENUE (§ 26*)—NONRESIDENTS.

Where plaintiff sued the maker on a note and to foreclose a trust deed on property given to secure it, joining as defendants the residents of another county, one of whom had bought the property at a sheriff's sale, and the other who had bought it of the purchaser and held it in the county of his residence, alleging their conversion of the property, and it appeared that plaintiff's lien had been foreclosed by sale of the property under the trust deed, the nonresidents were improperly joined; plaintiff's action against them, if any, being triable in the court having jurisdiction of the property and of their persons.

[Ed. Note.—For other cases, see *Venue*, Dec. Dig. § 26.*]

3. JUDGMENT (§ 118*)—BY DEFAULT—RELIEF TO DEFENDANT.

Upon suit on a note and for foreclosure of a trust deed given to secure it, resulting in judgment by default against one defendant, who was the maker of the note and trust deed, plaintiff was entitled as against that defendant to the full amount of the debt claimed on the note and to foreclosure of the trust deed as prayed, and, though it appeared that the lien had been foreclosed and the property sold for a certain amount, it was error to grant a credit for the proceeds of the sale in favor of the defendant.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 234; Dec. Dig. § 118.*]

4. VENUE (§ 32*)—CHANGE OF VENUE—DUTY TO TRANSFER CAUSE.

Where a person had bought property alleged to be worth \$250, and subject to the lien of a trust deed at a sheriff's sale, and had sold it to another, who had taken it to his residence in another county, and they were sued by the lienor for conversion, in the wrong county, upon sustaining their pleas of privilege to be sued in another county, the court should have transferred the cause as against them to the county court of the county where the property was taken under Gen. Laws 1907, p. 248, c. 133, providing that, upon sustaining such a plea, the court shall order the venue to be changed to the proper court of the county having jurisdiction of the parties and the cause.

[Ed. Note.—For other cases, see *Venue*, Dec. Dig. § 32.*]

Error from Jack County Court; *Sh Stark*, Judge.

Action by D. C. Brant against J. T. Lane and others. From the judgment, plaintiff brings error. Reversed and remanded, with directions.

Sporer & McClure, for plaintiff in error.
Nicholson & Fitzgerald, for defendants in error.

CONNER, C. J. Plaintiff in error instituted this suit against J. T. Lane upon a promissory note for \$350 and to foreclose a lien, evidenced by a trust deed which had been duly recorded in Jack county, upon two mules, in which it was alleged defendants in error Webb and Rhoades were asserting some kind of right. Webb, among other things, answered that the plaintiff's lien had been foreclosed by a sale of the mules to plaintiff by virtue of the power given in the trust deed; that the sole purpose of the assertion of the lien was to improperly give the county court of Jack county jurisdiction over his person; that he, Webb, had bought the mules at a sale by the sheriff of Parker county, in whose possession the mules were at the time of plaintiff's said purchase by virtue of process against J. T. Lane, and he, Webb, pleaded to the jurisdiction of the court over his person and asserted his privilege of being sued in Parker county, where he resided. Defendant Rhoades answered substantially as Webb, and, further, that he had purchased the mules from Webb after the sheriff's sale, and urged his privilege of being sued in Hardeman county, where he resided. The trial was before the court without a jury, and judgment was rendered in plaintiff's favor against J. T. Lane, who made default, for the amount sued for, less the sum of \$150, the amount of plaintiff's bid at the sale and purchase under the trust deed, and in favor of Webb and Rhoades on their pleas of jurisdiction and of privilege.

There is no statement of facts, but we quote the court's findings, which are as follows:

"(1) I find that at the date of the institution of this suit, and also at this time, J. W. Webb was a resident citizen of Parker county, Tex., and that Mathie D. Rhoades is now a resident citizen of Hardeman county, Tex., and was at the date of this suit a resident citizen of Parker county, Tex.

"(2) I find that on February 5, 1907, J. T. Lane executed and delivered to plaintiff, D. C. Brant, his promissory note for \$350, drawing interest at the rate of 10 per cent. per annum from date until paid, said note being due on or before November 1, 1907, and at the same time, in order to secure payment of said above note, J. T. Lane made and executed to D. C. Brant a chattel mortgage on the following property: One pair of work mules, one of which was a black horse mule 9 or 10 years old and about 15 hands high, and the other a bay mare mule about 8 years old and 15 hands high, also one two horse wagon and set of harness, one gray pony mare and a one-fourth interest in crop of cotton grown on the K. E. Moore farm, all

of said property being situated in Jack county, Tex.—that said mortgage empowered trustee, at request of D. C. Brant, to sell and foreclose lien out of court by duly and legally advertising according to law; that said mortgage was duly filed for registration in Jack county, Tex., on March 21, 1907.

"(3) I find that on the 18th day of November, A. D. 1907, after due and legal notice had been given, plaintiff foreclosed the above-described chattel mortgage out of court according to terms of same, and caused to be sold by the trustee named in said chattel mortgage by and with the consent of the said J. T. Lane all of the property mentioned and described in said mortgage at the courthouse door in Jacksboro, Jack county, Tex., to the highest and best bidder, and that plaintiff became the purchaser of all of said property at said sale; that all the property except the field of cotton and the mules were present at said sale; that the cotton was ungathered and in the field near Giltown, Jack county, Tex., and at the time of sale said mules were in Parker county, in the possession of the sheriff of the last-named county, and all of which was well known to plaintiff, D. C. Brant, at the time of sale, said possession of sheriff being without consent of D. C. Brant.

"(4) I find that on the 18th day of November, 1907, the note in suit was credited with the proceeds of the foreclosure sale, except the amount for which said mules were sold; that same was as follows: Wagon and harness, \$39; gray pony, \$27; cotton, \$30; cotton, \$24—that plaintiff D. C. Brant took possession of all property, except the mules aforesaid.

"(5) I find that said mules were sold to plaintiff, D. C. Brant, at same time the other property mentioned in said mortgage was sold, and in the same way, and the price paid therefor was \$150, and that said mules were worth on the market \$200.

"(6) I find that after the foreclosure sale of said property in Jack county, Tex., as aforesaid, the said J. W. Webb purchased said mules at Weatherford, in Parker county, Tex., at a sale by the sheriff of said county, Tex., for the sum of \$160; that the said J. W. Webb afterwards in said county sold said mules to Mathie D. Rhoades; that said Mathie D. Rhoades carried same to his home in Hardeman county, Tex.

"Conclusions of Law.

"(1) I find that the foreclosure sale under the chattel mortgage in Jack county, Tex., was a legal sale, and that in the purchase of all property at said sale, including the mules, the plaintiff, D. C. Brant, became the owner of said property by reason thereof.

"(2) I find that J. T. Lane should have credit on the note in suit of \$150, the purchase price of said mules; that the said J. T. Lane is still indebted to plaintiff, D. C. Brant, in the sum of \$112.25, balance after

sale of all property mentioned in said mortgage; and that this amount the plaintiff, D. C. Brant, is entitled to his judgment for same against the said Lane alone.

"(3) I find that defendants J. W. Webb and Mathie D. Rhoades are not proper parties and are improperly joined in this suit, and that this court has no jurisdiction over their persons."

The first assignment of error is as follows: "The court erred in holding that the sale of the said mules under said chattel mortgage was a valid sale, and that the plaintiff in error became the owner of said mules by reason of said foreclosure." Under this plaintiff in error makes the following proposition: "As said property was not present at the time of said sale by the trustee under said chattel mortgage, the sale was invalid, and no title passed to the plaintiff by reason of said sale." The court's findings show that the mules were in possession of the sheriff of Parker county at the time plaintiff purchased them under the trust deed, and this is the sole fact relied upon in support of the above assignment and proposition. But we do not think this alone shows the invalidity of the sale under the trust deed. Plaintiff in error cites the case of *Fulghum v. Williams Co.*, 114 Ga. 643, 40 S. E. 695, 1 L. R. A. (N. S.) 1055, 88 Am. St. Rep. 48, in which it was held that a sale of chattels under a power of sale in a mortgage passed no title where it was shown that at the time of the sale the property was in the possession of a sheriff by virtue of an execution sued out by a third party. The decision proceeded upon the theory that the sale under the mortgage was a species of foreclosure of the lien, that the property was in custodia legis, and hence that a foreclosure was unauthorized. It is to be observed, however, that the plaintiff here presents no such case either by his proposition or statement. Nor has the court found beyond the mere fact that the mules were in possession of the sheriff at the time of the sale to plaintiff, and no evidence has been brought before us from which it can be said that the sheriff's possession was by virtue of any valid process, thus leaving us to determine from inferences only a fact necessary, as it seems to us, to fix the status of the mules as in custodia legis. The inferences, if any, are to be indulged in favor of the judgment, and, if necessary to our conclusion, we would perhaps be warranted in holding that it was not shown on the trial of this case that the mules were in custodia legis at the time of the sale under the trust deed. But we do not care to avoid the force of the decision upon such distinction. The opinion itself—on its own facts—has been criticised and weakened, we think correctly so, by the editor of the *Lawyers' Reports*, Annotated, in a note to the case (volume 1, p. 1055 [N. S.]), to which we refer for a more extended discussion. He observes generally, after a review of numerous authorities, that: "As to the sale of personal

property in custody of law, the weight of authority, as before stated, upholds the right of the owner to transfer it as if it had never been taken from him, and to pass title, subject to the incumbrance arising through lien and custody. He cannot, of course, make an actual delivery of the thing sold, because it is in the hands of the law, but in such case symbolical delivery will do, and the title goes to the buyer subject to the custody. If the lien springing from the custody is satisfied, the buyer's title becomes perfect." Mr. Tiedeman in his work on Sales (§ 84, p. 107), in discussing the subject of "transfer of title," says, among other things, that: "Delivery is not essential to the transfer of title, unless it be shown that the parties did not intend to pass the title before delivery." To the same general effect are the following authorities: *Griffin v. Chubb*, 7 Tex. 613, 614, 58 Am. Dec. 85; *Brewer v. Blarton & Devereaux*, 66 Tex. 532, 1 S. W. 572; *Hopkins v. Partridge*, 71 Tex. 606, 10 S. W. 214; *Robertson v. Hunt*, 77 Tex. 321, 14 S. W. 68; *Tome v. Dubois*, 73 U. S. 548, 18 L. Ed. 948; *Erwin v. Arthur*, 61 Mo. 386; *Tandler v. Saunders*, 56 Mich. 142, 22 N. W. 271. It was expressly held in *Gardner v. Bunn*, 182 Ill. 403, 23 N. E. 1072, 7 L. R. A. 729, that an owner might mortgage personal property at the time under the levy of an execution. To the same effect is the case of *Brown v. Allen*, 35 Iowa, 309; *Jones on Chattel Mortgages*, p. 115. And in the case of *Brown v. Loesch*, 8 Ind. App. 145, 29 N. E. 451, it was held that an owner might lawfully sell chattels in the possession of an officer by virtue of an execution. It was said that "the officer, having made a valid levy, has the right to retain possession and control of the property for the purpose of making it answer the demand of the writ. His special property and right of possession continue so long as the property is needed to satisfy the writ. *Freem. Ex'ns*, §§ 135, 267, 269. The absolute title or general property in goods levied on by virtue of a writ remains in the owner, who may sell them while so in the custody of the sheriff, such sale being subject to the lien of the creditor, the execution plaintiff, and subject to the officer's special title and right to retain possession for the purposes of the writ."

The right of Lane to the property in the mules in question was one that would undoubtedly have descended to his heirs in event of his death, notwithstanding the possession of the sheriff of Parker county, whether by virtue of legal process or not, and the authorities cited above we think support the view, which we entertain, that, in the absence of evidence showing that at the time of the sale to plaintiff in error delivery was a condition precedent to the sale, all the title that Lane had in and to the mules passed by virtue of the trustee's sale to plaintiff; and that hence the lien became merged in the final title thus brought about. True, this

title would not avail plaintiff to disturb the officer's possession, if he had any by virtue of legal process, but, if there was a valid levy and the officer held possession by virtue thereof, such levy may have been abandoned, or, if the possession was wholly unauthorized or by virtue of void process, we see no reason why plaintiff by virtue of the sale to him might not be permitted in any such event to assert his right in the proper court, or even after sale under valid process, if any, to assert the priority, if any, of his right against the purchaser at such sheriff's sale. We do not find any sound reason for holding that the case should be otherwise where the sale is made by virtue of an express authority from the owner to do so. The authorized agent, in this case the trustee, is not required, as in the case of a sale by an officer under execution, to make delivery of the property, and it seems to us that a sale by one authorized to make it is just as effective to pass the title as if the sale had been made by the owner. We feel the more confirmed in the view above expressed by reason of the further fact that the court finds that the trustee's sale was made by and with the consent of J. T. Lane, from which in aid of the court's judgment we are perhaps authorized to infer that Lane was present at the time and was in effect a party to the sale by the trustee. If, therefore, the sale under consideration was regular, as the court finds, the lien was certainly merged in the sale and title to the mules passed to plaintiff in error; for there is nothing in the record to show that delivery of the mules by Lane or the trustee was a condition of the sale.

It follows, we think, that if at the time of the institution of plaintiff's suit he was without the lien declared upon, and that, as we should impute from the court's judgment and findings, the assertion of the lien was for the sole purpose of giving the county court of Jack county jurisdiction over the persons of Webb and Rhoades, then Webb and Rhoades were properly given the benefit of their pleas to the jurisdiction and of privilege to be sued in the counties of their residence, for in such case they were not proper parties to plaintiff's suit against Lane, and his cause of action against Webb and Rhoades, if any, being altogether different from that against Lane, must be asserted in the proper court having jurisdiction over said defendants and over the subject-matter of the suit.

The record sustains plaintiff's further objection to the judgment, to the effect that the court erred in allowing J. T. Lane a credit of \$150 because Lane had filed no answer asking for such relief. Upon the entry of the judgment by default, plaintiff as against Lane was entitled to judgment for the amount of his debt with foreclosure of lien, as alleged, and to this extent the judgment must be reversed and remanded. In another respect, also, we find error. It seems un-

disputed from the record that the defendant Rhoades now claims the mules in question by virtue of a purchase from Webb, and that he took the mules to Hardeman county. Plaintiff's cause of action against Webb and Rhoades for the conversion of the mules, which were alleged to be of the value of \$205, is therefore triable in the county court of Hardeman county. Hence the court, upon sustaining the defendants' pleas of privilege, should have transferred the cause as against Webb and Rhoades for the alleged conversion to the county court of Hardeman county, as required by the act of the Thirtieth Legislature, approved April 18, 1907 (see Gen. Laws 1907, p. 248, c. 133). This act amends the Revised Statutes on the subject, and, among other things, expressly provides: "That whenever a plea of privilege to the venue to be sued in some other county than the county in which the suit is pending shall be sustained, that the court shall order the venue to be changed to the proper court of the county having jurisdiction of the parties and the cause."

The judgment of the court will accordingly be reversed, and the cause remanded, with direction to the county court of Jack county to enter judgment in plaintiff's favor as against J. T. Lane, as above indicated, with stay or order of sale, however, until the disposition of the cause against Webb and Rhoades, and in favor of Webb and Rhoades on their said special pleas, entering the proper order of transfer as to them to the county court of Hardeman county. See *B. H. Johnson, Plaintiff in Error, v. W. C. Lanford et al., Defendants in Error*, No. 5855 (decided by this court November 21, 1908), reported in 114 S. W. 693.

ALVORD NAT. BANK v. WAPLES-PLATTER GROCER CO.

(Court of Civil Appeals of Texas. Jan. 2, 1909.
On Rehearing, Feb. 27, 1909.)

1. EXCEPTIONS, BILL OF (§ 9*)—NATURE AND PURPOSE OF REMEDY.

The office of a bill of exceptions is to show the proceedings of the court which do not otherwise appear of record under rule 53, for the government of district and county courts (67 S. W. xxiv), providing that there shall be no bills of exception taken to the judgments of the court rendered upon those matters which at common law constitute the record proper in the case.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 11; Dec. Dig. § 9.*]

2. JUSTICES OF THE PEACE (§ 128*)—VACATION FOR FRAUD—PROCEEDINGS—QUESTIONS PRESENTABLE AFTER JUDGMENT.

In an action to set aside a justice's judgment in garnishment proceedings for fraud, the question of the validity of the affidavit for garnishment could not be raised after judgment finding the judgment based on the affidavit to be valid.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 128.*]

On Motion for Rehearing.

3. JUSTICES OF THE PEACE (§ 174*)—ANSWER—CONSTRUCTION—ISSUE OF FACT.

On appeal to the county court in an action to vacate a justice's judgment in garnishment proceedings for fraud, the only answer was one contending that the justice was without jurisdiction to render the judgment setting aside the former judgment, and that the later judgment was therefore void, and praying that the later judgment be decreed of no effect, and that judgment for the plaintiff in the former suit be rendered for the full amount of the former judgment or the justice be directed to execute the former judgment. *Held*, that the pleading was wholly in the nature of a demurrer, and raised no issue of fact, but the county court could only decide whether the justice as a matter of law had jurisdiction of the proceeding to vacate his former judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 174.*]

4. JUSTICES OF THE PEACE (§ 128*)—JUDGMENT—ACTIONS TO VACATE—JURISDICTION.

A justice of the peace, where a complaining judgment defendant, by fraud of the person in whose favor a judgment of the justice was rendered, was prevented from making his defense, has jurisdiction of a petition in the nature of a bill of review to set aside the former judgment and hear the case on the merits when seasonably presented; Rev. St. 1895, art. 1651, permitting a justice within 10 days after rendering judgment by default to set it aside for good cause shown, and under which a new trial cannot be granted after the 10 days, not applying to the institution of such a proceeding in the nature of a new suit to set aside a former judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 128.*]

Appeal from Wise County Court; C. V. Terrell, Judge.

Action by the Alvord National Bank against the Waples-Platter Grocer Company. A justice's judgment for plaintiff was reversed by the county court, and plaintiff appeals. Reversed and remanded for a new trial on rehearing.

McMurray & Gettys, for appellant. W. H. Bullock, for appellee.

Conclusions.

CONNER, C. J. So far as we have been able to determine from the confused and confusing state of the record in this case, we feel unable to say that reversible error affirmatively appears. While we would be inclined to hold that the justice's court could entertain and determine, as it appears was done, appellant's suit to set aside for fraud the judgment of June 11, 1906, and that on appeal to the county court appellant had an undoubted right to be heard on the merits of the issue of fraud so presented, yet we cannot say from the record that such hearing was denied. It is true that the bill of exceptions indicates that no evidence was heard in the county court, and that the case went off on the court's ruling upon appellee's demurrers, but there is no judgment entry to such effect. Rule 53, for the government of

district and county courts (87 S. W. xxiv) provides: "That there shall be no bills of exception taken to the judgments of the court, rendered upon those matters, which, at common law, constitute the record proper in the case, as the citation, petition, answer, and their supplements and amendments, and motions for a new trial, or in arrest of judgment, and final judgment." The office of a bill of exceptions is to show the proceedings of the court which do not otherwise appear of record. *Owens v. Railway Co.*, 67 Tex. 679, 4 S. W. 593. So that it may be well doubted whether we would be authorized to review the court's ruling upon a demurrer when his action is only presented by bill of exceptions; but, if it be conceded that the question is properly presented, then even it cannot be said to affirmatively appear that appellant was denied a hearing upon the merits of his plea of fraud in the rendition of the judgment of June 11, 1906. The bill is so modified by the court's explanation that nothing is presented by the bill save the petition of appellant praying for a new trial before the justice of the peace, the amended answer, and exceptions of appellee, and judgment of the county court, and the objections. While it may have been objected that no evidence was offered, this will not supply a statement of such fact in the bill of exceptions. All statements of fact in the bill indicating that the court's judgment was without a hearing upon evidence seem to have been disapproved by the court, while the judgment that the court actually rendered, as shown by the record, recites that the parties appeared, and "the court, having heard the evidence and argument of counsel, is of opinion that the plaintiff should recover." In the state in which we find the bill of exception before us, we think it must certainly be held at all events that the judgment recital controls. So concluding, we think the judgment of the county court must be construed as a finding upon the merits by the trial judge against appellee on his petition to set aside the judgment of the justice's court of June 11, 1906, on the ground of fraud, and as an adjudication that said judgment of the justice's court was in all things binding and of full force. This we think he was empowered to do, and it is immaterial that he further proceeded without authority to command the justice of the peace to execute the judgment. The court properly refused to take up and dispose of appellant's motion to quash the affidavit for garnishment, having held, as he did, that the original judgment based thereon was valid and in full force. The question, of course, could not be raised after judgment.

We finally conclude that all assignments of error should be overruled, and that the judgment of the county court, in so far as it maintains the validity and binding force of said judgment of the justice's court of

June 11, 1906, should be affirmed, and it is so ordered.

On Rehearing.

The proceedings that we are called upon to review on this appeal originated by a petition in the nature of a bill of review in behalf of appellant filed in the justice's court of precinct No. 1, Wise county, November 10, 1906. The petition sought to set aside a judgment of said justice's court theretofore rendered on June 11, 1906, in a garnishment proceeding by appellee against appellant. It was alleged, in substance, that said judgment of June 11th had been procured against appellant as garnishee by fraud, in that appellant had been prevented from appearing and answering by means of false and fraudulent promises and representations on the part of appellee and its attorney. On April 8, 1907, the justice upon hearing of the petition to vacate the judgment granted it as prayed for, and thereupon at once further proceeded to hear the original garnishment proceeding upon its merits, all parties being present and participating in the trial, which resulted in a judgment vacating the judgment of June 11, 1906, and in favor of appellant upon the merits in the garnishment suit decreeing that appellee take nothing thereby. From this judgment of the justice of the peace appellee appealed to the county court of Wise county which rendered the judgment from which this appeal has been prosecuted. The judgment of the county court declared the judgment of the justice's court of April 8, 1907, granting a new trial, to be null and void, and reinstated the judgment of said justice's court of June 11, 1906, declaring it to be in full force and effect, and ordering its execution.

On original hearing the contention was made, as is again urged on motion for rehearing, that the judgment of the county court was upon demurrer only; but inasmuch as there is no statement of facts, and inasmuch as the county court judgment recites that the court "heard the evidence," we concluded that the hearing of the county court was upon the merits of appellant's petition to set aside said judgment of June 11, 1906. The record in the cause is in a very confused state; but, on review of our former conclusions, we have been unable to find any answer on the part of the appellee that raised an issue of fact. There is in the record what purports to be an amended answer to appellant's petition to impeach and vacate the first judgment of the justice's court. It is as follows: "Now at this time comes the plaintiff, the Waples-Platter Grocery Company, and, amending the answer heretofore filed, says that the justice of the peace, precinct No. 1, Wise county, Tex., was without jurisdiction to render the judgment so rendered on April 8, 1907, against plaintiff setting aside the former judgment that had been rendered in plaintiff's favor against said Alvord National Bank on the day of, and that

said last-named judgment setting aside said former judgment was and is null and void. Wherefore plaintiff prays that said last-named judgment granting a new trial and setting aside said former judgment be decreed by this court to be null and void and of no effect, and that this court render judgment in favor of plaintiff for the amount of said former judgment and all costs; but, if this court should conclude that such is not the proper remedy, then plaintiff prays that said justice of the peace be directed, commanded, and enjoined to proceed to execute said former judgment against said Alvord National Bank, and to issue execution thereon as required by law and for general relief."

No answer other than the one quoted in behalf of appellee is to be found in the record, or is indicated in the transcript from the justice's court. This answer, we think, falls, as before stated, to raise an issue of fact, and is wholly in the nature of a demurrer, from which it follows, notwithstanding the recitation in the court's judgment, that the county court could only proceed on the theory that as a matter of law the justice's court was without jurisdiction, as urged in the answer, to entertain and determine the petition to vacate his former judgment; there being no pleading under which an issue of fact was determinable. That the court did so proceed is indicated by a bill of exceptions to be found in the record. If so, the conclusion reached was erroneous, for we entertain no doubt of the power of justice's courts, as to matters within their jurisdiction when seasonably presented, to determine petitions in the nature of bills of review alleging sufficient cause to set aside judgments for fraud, and we so indicated in the original disposition of this case. It is true that it has been several times decided that under the statute (Rev. St. 1895, art. 1651) a justice of the peace has no power to grant a new trial after the expiration of the 10 days allowed. *Adams v. Casey-Swasey Co.*, 15 Tex. Civ. App. 379, 39 S. W. 654; *Bond v. Rintleman*, 24 Tex. Civ. App. 298, 59 S. W. 48; *Carter v. Commissioners of Van Zandt County*, 75 Tex. 286, 12 S. W. 935. So under the practice act of the district and county courts it has often been decided that a new trial cannot be granted after the expiration of the term at which judgment was rendered, but the statutes on the subject of new trial have never, so far as we know, been held to preclude the institution of a proceeding in the nature of a new suit to set aside a judgment, where the complaining party has been prevented by fraud on the part of the person in whose favor the judgment was rendered from making his defense. In such cases, where an opportunity has not been afforded of moving for a new trial during the term, the equitable proceeding or action mentioned may be instituted to reopen the case and

have it disposed of upon the merits. See *Edleman v. McGlathery*, 74 Tex. 280, 11 S. W. 1100; *Roller v. Wooldridge*, 46 Tex. 485, and cases cited. In this respect we think there can be no difference between district and county courts and justice courts in matters within their jurisdiction. *Rose v. Darby*, 33 Tex. Civ. App. 341, 76 S. W. 799; *Brown v. Dutton*, 38 Tex. Civ. App. 294, 85 S. W. 454; *Crawford v. Sandridge*, 75 Tex. 383, 12 S. W. 833; *Gibson v. Moore*, 22 Tex. 611; Const. art. 5, § 19; Rev. St. 1895, art. 1568. There is no exception to appellant's petition filed before the justice on the ground of insufficiency, and it seems, at least in the absence of exception, to set forth an equitable cause for setting aside the judgment attacked, and we think appellant was entitled to a trial upon the merits thereof.

The motion for rehearing will accordingly be granted, and the judgment of the county court reversed, and the cause remanded for a new trial.

MISSOURI, K. & T. RY. CO. OF TEXAS v. DAVIS.

(Court of Civil Appeals of Texas. March 20, 1909. Rehearing Denied April 10, 1909.)

1. RAILROADS (§ 411*)—FENCING TRACK—LIABILITY FOR KILLING STOCK.

A railway company fencing its track is not liable for killing stock, unless it is negligent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1412; Dec. Dig. § 411.*]

2. RAILROADS (§ 443*)—FENCING TRACK—LIABILITY FOR KILLING STOCK.

In an action against a railway company for killing stock entering on the right of way through an open gate in the fence, evidence held not to show actionable negligence by showing that the fastening of the gate was defective.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1615, 1616; Dec. Dig. § 443.*]

3. RAILROADS (§ 413*)—FENCING TRACK—LIABILITY FOR KILLING STOCK.

A railway company, placing a gate in its right of way fence for the accommodation of landowners, is not required to see that the gate is closed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1465; Dec. Dig. § 413.*]

4. APPEAL AND ERROR (§ 1175*)—DISPOSITION OF CASE ON APPEAL.

Where the cause was fully developed in the trial court, and the uncontradicted evidence failed to establish a cause of action, the court, on appeal from a judgment for plaintiff, will render the proper judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4577, 4579; Dec. Dig. § 1175.*]

Appeal from Hunt County Court; J. W. Manning, Judge.

Action by W. M. Davis against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

Coke, Miller & Ooke, Jno. T. Craddock, and B. M. McMahan, for appellant. John A. Stone, Jr., Wm. Pienen, and T. D. Starnes, for appellee.

BOOKHOUT, J. This was a suit by appellee to recover of appellant the value of a mule claimed to have been killed by a locomotive or train of the defendant at a point about one mile north of Kingston in Hunt county, at or near a road crossing over the defendant's railroad. It was alleged that defendant's railroad track at said point was straight, and defendant's servants operating its train saw, or by the exercise of ordinary care would have seen, the said mule upon defendant's track in time to have checked the train and prevented injury to the mule; that defendant's track or right of way at the point where the mule was killed was unfenced, "in that the gate in the fence of the right of way was in a bad state of repair, in this: That said gate was without a latch or fastening of any kind, and stood open, so cattle or stock running at large could enter upon said right of way at will, and the said defendant negligently permitted said gate to stand open and unlatched, and to remain in a bad state of repair as above set out, and that, as a direct and proximate cause of defendant's negligence in the respects hereinabove set out, and through the negligence of its agents and servants, plaintiff's mule was struck and killed." Defendant answered by general demurrer, special exception, general denial, a special plea of contributory negligence, wherein it is alleged that defendant's railway track and right of way at the point where the mule was killed were fenced, and that plaintiff's mule entered upon the said right of way through a gate placed in the right of way fence for the accommodation, use, and benefit of the owner of the premises and his tenants, and that said gate was left open by the owner of said farm, or by his employes or tenants, or was left open by the plaintiff or those acting for him, and that the gate was provided with suitable and safe fastening, and it was not, at the time of the accident, open through any fault or negligence of defendant. A trial resulted in a verdict and judgment for plaintiff in the sum of \$210, to reverse which defendant perfected this appeal.

Conclusions of Fact.

W. M. Davis was engaged in working the public roads of Hunt county. He, with the consent of the owner of the land, established his camp about a half mile north of Kingston on a place owned by Jesse Clark. The field in which he was camped contained a pool or tank of water. The plaintiff got in and out of the field in which he was camped by going south from his camp through a gate leading out of the inclosure into the public road. This public road runs east and west, and extends from Celeste to Kingston. The

railroad track and right of way runs through the farm of Jesse Clark from the northwest in a southeasterly direction, and is fenced. About 70 yards southeast of Davis' camp there is a gate in the west right of way fence. Appellee also used this gate in reaching the public road. There is also a gate in the east fence of the railroad right of way. These gates had been there for five or six years, and were put there by the railroad at the request of Jesse Clark, the owner of the farm. The gate in the right of way fence on the west side stood open part of the time, and part of the time it was shut. There was a farm crossing over the railroad between these gates. The gate in the west right of way fence was swung to the south post, and opened towards the right of way. It had a chain attached to it with baling wire, with which the gate was to be fastened. The fastening consisted of two nails driven in the gate post, one a tenpenny nail and the other much larger. The chain was not long enough to reach the larger nail, but was of sufficient length to reach the tenpenny nail, to which it could be fastened. The plaintiff worked eight mules, and at night they were tied to the feed wagon. On the night of October 27, 1907, one of his mules became untied and wandered through the gate in the west side of the right of way fence and upon the right of way, and was killed by a locomotive or train going north. The next morning plaintiff found the mule lying on the west side of the right of way, and about 75 yards north of the farm crossing, dead. He testified that it was lying 25 or 30 yards north from where it was struck. There is no testimony that appellant's operatives of the locomotive or train discovered the mule on the right of way before striking him. The mule was shown to be worth \$210.

Opinion.

Appellant assigns as error the court's refusal to give its requested charge instructing a verdict for defendant. It is contended that (1) the uncontroverted evidence shows that plaintiff's mule entered upon the defendant's right of way through a gate in the right of way fence which had been placed there by the defendant at the request of the owner of the premises for the convenience of the owner of the premises and his tenants and servants in passing between the lands and premises of the landowner, which at that point lay on both sides of the defendant's right of way and track; (2) that the uncontroverted evidence shows that at the time of the accident plaintiff was a tenant, probably a tenant at will, of the owner of the premises, and that plaintiff, at and before the time of the accident, was using said gate for his own convenience, and was acquainted with its situation and condition; (3) that there was no evidence showing, or tending to show, that the gate through which plaintiff's mule entered, or the latch or fastening of the gate,

was insufficient, out of repair, or in bad condition, but, to the contrary, the evidence did show that the latch or fastening to the gate was the kind ordinarily used in that community, was sufficient, and was in good condition; (4) that the uncontradicted evidence shows that defendant's servants endeavored to keep the said gate closed, but that the landowner, his tenants, and plaintiff himself, voluntarily and habitually left the said gate open, and that plaintiff himself passed through the said gate the day before the mule was killed, and left the gate open; (5) that the uncontradicted evidence shows that the mule was killed during a dark night, and the evidence failed to show at what hour, or by what train, the mule was struck, and failed to show the defendant's servants operating the train saw the mule; and (6) that there is no evidence showing, or sufficient to raise a presumption, that defendant's servants operating the locomotive that struck the mule failed to exercise ordinary care, or that such servants of defendant by the use of ordinary care could or would have discovered plaintiff's mule on the right of way in danger in time to have avoided the killing of the mule. These contentions are fairly supported by the record. The railway company, having fenced its track, could not be held liable for killing the mule, unless the evidence showed negligence on its part. *Railway Co. v. Hanacek*, 93 Tex. 446, 55 S. W. 1117; *Railway Co. v. Hanack*, 23 Tex. Civ. App. 394, 56 S. W. 938. The pleadings charged that the fastenings to the gate were defective, and that such defect constituted negligence. While the evidence showed that the chain for the fastening of the gate was too short to reach the larger nail in the post, it was long enough to reach the tenpenny nail, which had been driven in the post to fasten the gate to. There is no evidence that this nail was insufficient to hold the gate if the chain had been fastened to it. The evidence tending to show that the fastening was defective amounted to no more than a suspicion that it was defective.

Again, it seems there was no attempt by plaintiff or others using the gate to close the same. It is held that it is not the duty of the railway company in this character of crossing to see the gates are kept closed. *Railway v. Hanack*, 23 Tex. Civ. App. 394, 56 S. W. 938. Appellee testified that the gate was always standing open. The plaintiff used the gate, and George Smith, who lived east of the railroad in a house belonging to the owner of the farm, also used it in taking his stock to water. The plaintiff testified he passed through the gate the day preceding the night on which the mule was killed, and it was open. He did not attempt to close it. It follows that the trial court erred in failing to instruct a verdict for defendant. The cause seems to have been fully

developed, and, the uncontradicted evidence failing to show negligence on the part of appellant, it becomes our duty to render such judgment as should have been rendered by the trial court. *Patrick v. Smith*, 90 Tex. 267, 38 S. W. 17; *Henne & Meyer v. Moultrie*, 97 Tex. 216, 77 S. W. 607; *Bondies v. Ivey*, 15 Tex. Civ. App. 290, 39 S. W. 156; *Railway v. Hollingsworth*, 29 Tex. Civ. App. 306, 68 S. W. 724.

The judgment is reversed, and judgment here rendered for appellant.

Reversed and rendered.

DOBSON v. ZIMMERMAN.†

(Court of Civil Appeals of Texas. March 18, 1909. On Rehearing, April 22, 1909.)

1. APPEAL AND ERROR (§ 713*)—BILL OF EXCEPTIONS—MATTERS IMPROPERLY SHOWN BY—RULINGS ON PLEADINGS.

Under District and County Court Rule 53 (20 S. W. xv), providing that bills of exception shall not be taken to rulings on matters constituting part of the record proper, the rulings on special exceptions to the petition are improperly shown by bills of exception.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 713.*]

2. EXCEPTIONS, BILL OF (§ 39*)—TIME FOR FILING.

Bills of exception filed more than 20 days after the adjournment of court cannot be considered.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 54; Dec. Dig. § 39.*]

3. APPEAL AND ERROR (§ 564*)—RESERVATION OF EXCEPTIONS—METHOD.

An exception to the admission of testimony can be reserved in the statement of facts when the latter has been agreed to by the parties, but in such cases, to authorize consideration of exceptions, the statement should be filed within the time within which a bill must be filed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 564.*]

4. VENDOR AND PURCHASER (§ 350*)—CONTRACT TO CONVEY—SUIT FOR BREACH—BURDEN OF PROOF.

One suing for breach of a contract to convey has the burden to show the breach.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 350.*]

5. VENDOR AND PURCHASER (§ 129*)—CONTRACT TO CONVEY—SUFFICIENCY OF TITLE.

Under a contract to convey good title to land acquired by the vendor after his wife's death with funds received from his father's estate, where the community had no interest in the property, he was not bound to procure a probate order authorizing the sale, even if, acting under a mistake, he agreed to do so.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 129.*]

6. VENDOR AND PURCHASER (§ 86*)—CONTRACT TO CONVEY—ABANDONMENT BY PURCHASER—RIGHTS OF VENDOR.

The purchaser under a contract to convey having withdrawn the deposit made under the contract, the vendor could treat the contract as abandoned and sell to others on such terms as he saw fit.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 86.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court June 2, 1909.

On Rehearing.

7. VENDOR AND PURCHASER (§ 351*)—CONTRACT TO CONVEY—BREACH—DAMAGES—MEASURE.

Generally, the measure of damage for breaking a contract to convey is the amount paid as purchase money, but, if the breach by the vendor is willful or fraudulent, the purchaser can recover, in addition, for the loss of any bargain; and where the title is merely defective the purchaser cannot reject it and sue for loss of bargain, his remedy being to rescind the contract and recover any payment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1047-1058; Dec. Dig. § 351.*]

8. VENDOR AND PURCHASER (§ 351*)—CONTRACT TO CONVEY—BREACH—DAMAGES.

That one contracting to convey knows that he has no title is not such fraud as authorizes recovery by the purchaser in excess of purchase money paid, and it is immaterial what the parties had in mind when they contracted respecting the making of a perfect title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1047-1058; Dec. Dig. § 351.*]

9. VENDOR AND PURCHASER (§ 129*)—"PERFECT TITLE."

A "perfect title" is one that is merchantable or marketable; one that is good and valid beyond reasonable doubt.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 129.*]

10. VENDOR AND PURCHASER (§ 350*)—REMEDY OF PURCHASER—EVIDENCE—SUFFICIENCY.

Evidence in an action for breach of a contract to convey held to show that a firm of brokers was trustee for both parties, and not an exclusive agent of the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 350.*]

Appeal from District Court, Glasscock County; James L. Shepherd, Judge.

Action by T. A. Zimmerman against R. C. Dobson. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

A. J. Prichard and Todd & Hurley, for appellant. Jeff D. Ayers and B. P. Ayers, for appellee.

HODGES, J. This suit was instituted by the appellee against the appellant in the district court of Glasscock county to recover damages for the alleged breach of a contract to convey a certain tract of land. The case was tried before the court without a jury, resulting in a judgment in favor of the appellee for \$960.

Findings of Fact.

The following are the facts as shown by the evidence introduced: The appellant, Dobson, owned a section of school land situated in Glasscock county not then fully paid out, which had been purchased from the state. In October, 1906, he and the appellee entered into an agreement by which appellant, Dobson, sold to the appellee, upon terms hereinafter stated, all the right that he had in the section of land mentioned. The written contract which evidences the

terms of the agreement and upon which this suit is based is as follows:

"\$500.00. Garden City, Texas, October 24th, 1906. Received of T. A. Zimmerman of the County of Jones, State of Texas, the sum of \$500.00 earnest money, to close sale to himself, of the following described lot, tract or parcel of land, to-wit: 640 acres of land, all of Survey No. 18, block No. 34 Tp. 3 south, situated in the County of Glasscock, State of Texas, from R. C. Dobson, of Glasscock County, Texas, acting by and through his duly authorized agents, Gregg Brothers, at Garden City, Texas, at a total sale price of \$4800.00 bonus, to be paid as follows, to-wit: The sum of \$2500.00 cash, on or before the first day of January, 1907, when possession is to be given, the sum herein receipted for to be taken as a credit on said first payment and the execution and delivery by the said T. A. Zimmerman to the said R. C. Dobson, of six certain promissory vendor's lien notes, said notes are to be of even date with the deed transferring the property, and are to be of the principal sum of \$383.33 each, and due and payable on or before one, two, three, four, five and six years from date respectively and to bear interest from date at the rate of 8% per annum from date until paid, payable at Garden City, Texas, \$2500.00 is to be paid as stated above upon the delivery of a proper deed, transferring the said property in accordance with the agreement herein. It is further understood that the title to said property is to be perfect or to be made perfect within a reasonable time from the date hereof, or the money is to be refunded to the said Zimmerman, the parties hereto are allowed until the first day of January, 1907, to consummate the details of this trade, and if the same are not consummated or finished by that time the earnest money is to be refunded, if the default of the said R. C. Dobson, whereupon the said Zimmerman, may then proceed to establish his rights according to law, but if the default be that of the said Zimmerman, then the amount so received as earnest money is to be forfeited and at once to become the property of the said R. C. Dobson, and his agents Gregg Brothers, are authorized to turn the same over to him less their commission and expenses incurred in the matter, and upon the said forfeiture being declared the said T. A. Zimmerman shall thereupon become released from any further liability by reason of this contract. Witness our hands this 24th day of Oct. A. D. 1906. Gregg Brothers, By Guilon Gregg. I accept the terms and conditions of the above contract and agree to abide by its terms. R. C. Dobson."

It is further shown that Gregg Bros., whose names appear signed to the foregoing instrument, were land agents, and were instrumental in bringing the parties together

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and in the consummation of the deal above referred to. At or about the time this written contract was executed the appellee deposited with Gregg Bros. the \$500 mentioned, and Dobson, the appellant, also executed, acknowledged, and delivered to Gregg Bros. for the appellee a deed of general warranty conveying to the latter the land in controversy and described in the contract, in accordance with the terms of the agreement. While the evidence does not show that this deed was actually tendered to Zimmerman, it is sufficient to warrant the conclusion that the latter knew of its existence, and that Gregg Bros. held it for him, and that he could get it by paying the purchase money and executing the notes in accordance with the terms stipulated. Zimmerman, however, was unwilling to accept this deed as a perfect title, claiming that it was necessary for Dobson to get some sort of an order from the probate court authorizing him to make the sale of the land in controversy. At the time of the transaction mentioned, Dobson's wife was dead and had left some minor children surviving her. The uncontradicted evidence is that neither Dobson's deceased wife nor his children ever had any interest in this tract of land or the funds with which it was purchased. He bought the land after the death of his wife, and with funds received by him from his deceased father's estate. These funds were never in any way mingled with any community funds belonging to Dobson and his deceased wife, either before or after her death. Dobson testifies that he acquainted Zimmerman with those facts at the time the contract of sale was entered into. Zimmerman admits as much, but says that he did not believe Dobson's statements, and that was the reason why he insisted upon the latter's obtaining an order from the probate court. On several occasions after the execution of this written agreement, and prior to the 1st of January, 1907, Zimmerman demanded of Dobson to know what he intended to do with reference to perfecting his title. In reply, Dobson told him that he did not intend to do anything more than he had done, evidently referring to the execution and delivery of the deed for Zimmerman to Gregg Bros. This not being satisfactory to Zimmerman, on or about the 20th of January, 1907, he called upon Gregg Bros. and withdrew the deposit of \$500 which he had previously made with them in compliance with the terms of the written contract, stating that he needed the money for use in his business. He at the same time delivered to Gregg Bros. a receipt showing that he had withdrawn the deposit, and in which he also contracted to indemnify Gregg Bros. against any damage they might sustain by reason of liability to Dobson for surrendering the amount of the deposit. After Zimmerman had withdrawn this deposit, and upon ascertaining that fact, Dobson also withdrew from Gregg Bros. the deed to Zimmer-

man which he had deposited with them. Zimmerman never at any time tendered to Dobson the balance of the purchase money or any of the notes provided for by the terms of the contract, nor did he ever demand of Dobson the deed of conveyance which had been deposited with Gregg Bros. Zimmerman however, expressed a willingness to pay the remainder of the purchase money and perform the balance of the terms of his contract, if Dobson would get an order from the probate court authorizing him to sell the land. After the withdrawal of the deposit by Zimmerman and the deed by Dobson, it is claimed that the latter sold the land to other parties. It is also shown by the evidence that the land in controversy advanced in price between the making of the contract of sale and the 1st of January following. The difference caused by that advance between the market value of the land at the time the contract was breached and the price Zimmerman was to pay is made the basis of the damages claimed in this case.

Conclusions of Law.

The first, second, third, and fourth assignments of error complain of the action of the court in overruling some special exceptions to the plaintiff's original petition, the action of the court in admitting parol testimony to explain certain portions of the written contract, and of the findings of fact made by the court in the judgment rendered. Aside from bills Nos. 1 and 2, the record contains no evidence of any ruling of the court on the special exceptions. This method of reserving exceptions to rulings of that character is not in accord with the rules of practice adopted in this state. Rule 53 (20 S. W. xv) for district and county courts; *Waco, etc., Co. v. Wiggins* (Tex. Civ. App.) 32 S. W. 58. All of the bills, however, were filed more than 20 days after the adjournment of court, and for that reason, if for no other, cannot be here considered.

It was insisted by counsel for appellant, in the oral argument made in this case, that the exception to the admission of the parol testimony had been sufficiently reserved in the statement of facts to authorize a consideration by the court of the objection made. It is true that an exception to the admission of testimony can be reserved in the statement of facts when the latter has been agreed to by the parties. *K. C. S. Ry. Co. v. Rosebrook-Josey Grain Co.* (recently decided by this court), 114 S. W. 486, and cases there cited. But we think in such cases it is essential, to authorize the exceptions to be considered, that the statement of facts should be filed within the time provided by law for the filing of bills of exception. *Morris v. Rhine* (Tex.) 8 S. W. 317; *Willis v. Smith*, 17 Tex. Civ. App. 548, 43 S. W. 331. The act of May 25, 1907, permitting statements of fact to be filed at any time within 30 days after the adjournment of the term of court

did not include bills of exception within its provisions. Acts 1907, p. 509, c. 24. The latter are governed by the provisions of the act of May 14th, passed at the same session. Acts 1907, p. 446, c. 7. This last-named act provides that the court may, by an order entered to that effect, permit the filing of bills of exception within 20 days after the adjournment of the term. The file mark upon the statement of facts in this case shows that it was not filed till more than 20 days had elapsed after the adjournment of the court for that term. For these reasons, the objection raised by that assignment cannot be considered.

There are a number of other assignments which in various forms attack the judgment rendered upon the ground that it is not supported by the evidence. The right of the appellee to recover in this case can be justified only by a finding that the appellant failed or refused to make and deliver a deed or deeds transferring the land in accordance with the terms of the contract of sale. Those terms provided that "the title to said property is to be perfect or to be made perfect within a reasonable time." It will be conceded, for the purposes of this case, that the parties contemplated that the appellee was to have a title perfect in all respects, and free from all clouds and incumbrances except that which existed in favor of the state for the unpaid balance of the purchase money. The question then is, does the evidence warrant the conclusion that the appellant has failed to comply with his contract? The burden of showing that he has so failed rested upon the appellee. 29 Am. & Eng. Ency. p. 620. It is not contended that appellant refused to make a deed in proper form conveying his title to the land. The evidence shows that such a deed was made and deposited with Gregg Bros. for the appellee, and that the latter knew it was there, and that it might have been had for the asking upon a compliance with the terms of the instrument. But he appears to rest his cause of action upon the refusal of the appellant to do more than this—to get an order from the probate court authorizing him to sell the land. It seems that the appellee was under the impression that the minor children of the appellant owned an interest in the land, or at least had an apparent interest, and that it was necessary for Dobson to obtain authority from the probate court to make the sale before he could pass a perfect title. The court permitted him to testify that at the time the written contract was made Dobson agreed that he would go into the probate court and make him a perfect title; that they then drew up and executed the written contract hereinbefore set out. The written contract does not in terms require this to be done, but only calls for a perfect title. The evidence is uncontroverted that the land in question was purchased by Dobson after the death of his wife, with funds received from

his father's estate; that these were in no way mingled with the community funds of himself and his deceased wife, as he says, for the reason they had no community funds. The testimony also shows that Dobson told the appellee of those facts at the time the contract was entered into. Appellee admits as much, but says he did not believe it. So far as the record before us discloses, he has not attempted to contradict any of the statements made by Dobson as to his exclusive ownership of the land, and the manner in which he claims to have acquired it; and those facts, therefore, come before us as undisputed. If those facts be true, it logically follows that Dobson's children had no actual or apparent interest in the land, and there were no conditions which cast even a cloud upon his title. Without setting up a state of facts diametrically opposed to what the evidence here shows to have been the rights of himself and children with reference to the land, Dobson could not have stated a subject-matter over which the probate court could exercise jurisdiction. Neither was there anything which a court of equity could undertake to relieve against. We may admit that the parties, acting under a mistaken view of the law or the facts, did make an agreement such as is testified to by Zimmerman; but a failure to comply with that agreement cannot be made the basis for a judgment for damages under the pleadings in this case. The contract sued on is that embraced in the written instrument, and does not require Dobson to go into the probate court for an order, or for any purpose. It simply binds him to make a perfect title, or to perfect it within a reasonable time. If the title he did make and the one appellee refused to take was perfect, or was not subject to the objections urged by the appellee as a reason for refusing it, then the judgment in this case is without evidence to support it. While the court filed no separate findings of fact and conclusions of law, he makes this recitation in the judgment: "The court is of the opinion that the contract entered into * * * was not complied with by the defendant, but was breached, and no perfect title was presented by defendant to plaintiff for examination." Neither the written contract nor any parol agreement is shown by the evidence under the great latitude permitted by the court in the introduction of testimony, in which the appellant made any such an undertaking as that upon which the court based his judgment. In fact, the appellee himself admits that the appellant did not agree to furnish him an abstract for inspection, but that an abstract was prepared to which he might have had access. We think the judgment in this case is without any support. The testimony shows that the title tendered by the appellant was perfect, or at least absolutely free from any of the objections which a probate court would have authority to remove; and further shows

that the sole excuse urged by the appellee for withdrawing his deposit of a part of the purchase-money was without justification. After he had so withdrawn it the appellant had the right to assume that the contract was abandoned, and that he could thereafter sell the land to other parties upon such terms as he saw fit.

The judgment is reversed, and here rendered in favor of the appellant.

On Rehearing.

As stated in the original opinion disposing of this case, this is a suit to recover damages for an alleged breach of a contract to convey land. It is true there are some expressions in the pleadings of the plaintiff which indicate a purpose to charge the failure of the appellant, Dobson, to convey by a particular kind of title—that is, by what he terms a perfect title—as a basis of the claim for damages. The character of the damages alleged is sufficient to determine the nature of the suit. It is not claimed that the appellant's title was defective, or that he offered to or did convey an imperfect title, but that "he failed and refused to perfect said title and accept said cash payment and said promissory vendor's lien notes and make proper conveyance of said land to plaintiff." The damage which he seeks to recover is the difference between the contract price of the land and its market value on the 1st day of January thereafter, the date when it is charged the conveyance should have been made. Clearly the appellee is suing for the loss of a bargain only, and not for damages by reason of being compelled to accept an imperfect title, or one defective, or for the failure of a title in whole or in part. There is in the petition an entire absence of any charge that the appellant was not the sole owner of the land and that he for that reason was unable to convey a title perfect in all respects. In this state the general rule is that the proper measure of the damages which the vendee may recover for a breach of a contract to convey or make title to land is the amount he has paid as purchase money. *Roberts & Corley v. McFadden et al.*, 32 Tex. Civ. App. 47, 74 S. W. 105, and cases there cited. The only exceptions which appear to have been made to this rule are where the vendor either willfully or fraudulently fails or refuses to comply with his contract to convey. In these last-named instances only can the vendee recover for the loss of his bargain in addition to what he may have paid as purchase money. If the vendor presents or tenders a conveyance or title which is merely defective by reason of the existence of some cloud or apparent imperfection, the vendee has no right to refuse to accept it and sue for the loss of the bargain; but at most he would only be entitled to have a rescission of the contract and the recovery of whatever he may have paid. *Roberts & Corley v. McFadden et al.*, supra.

Applying those principles to the facts here involved, we have concluded that, even if it be held that the original petition states a cause of action for the damages claimed, the facts do not warrant a judgment. If at the time the contract offered in evidence was made Dobson had no title, and for that reason was unable to make a good conveyance, the most which the appellee could recover would be the amount he had deposited as earnest money with Gregg Bros. Hall v. York's Adm'r, 22 Tex. 642; *Wheeler v. Styles*, 28 Tex. 242. This is the prevailing rule, unless there be additional circumstances of fraud and special damages resulting to the vendee. The mere fact that the vendor, at the time of binding himself to convey, knew that he had no title, is not such fraud as would authorize such additional recovery. See authorities last cited. There was no occasion for the appellee in this instance to lose his bargain. The evidence shows conclusively that he might have acquired the deed conveying all of the title which Dobson owned, either at the time the contract of conveyance was made or at the time it was sought to be enforced. When the appellee withdrew his money which he had deposited in the hands of Gregg Bros., he had the option of accepting the warranty deed which Dobson had deposited with Gregg Bros. for his benefit. He elected to reject the deed and withdraw the purchase money, and he must abide the consequences of his own choice. It is immaterial, so far as the right to recover the damages here sought is concerned, what the parties had in mind when they contracted with reference to making a perfect title to the land. We do not undertake to say that under proper allegations and proof the appellee could not recover damages for a failure on the part of the appellant to do what he claims in his testimony the latter agreed to do. But that question is not here involved, because no injuries on account of such failure are either alleged or proven; neither is it alleged or shown that Dobson's deed of general warranty—that which he had placed at the disposal of the appellee—was not in itself a perfect title. A perfect title is one which is merchantable or marketable. *McClearly v. Chipman*, 32 Ind. App. 489, 68 N. E. 320; *Ross v. Smiley*, 18 Colo. App. 204, 70 Pac. 763; *Birge v. Bock*, 44 Mo. App. 69. It is also defined as one which is good and valid beyond a reasonable doubt. *Reynolds v. Borel*, 86 Cal. 538, 25 Pac. 67; *Sheehy v. Miles*, 93 Cal. 288, 28 Pac. 1047. In this case the evidence fails to cast even a shadow upon the title of Dobson. The testimony of the appellee himself indicates nothing inconsistent with what Dobson says about the perfect reliability of his title.

We must decline the request of the appellee to find as a fact that Gregg Bros. were, at the time they were holding the deed and the earnest money deposited by the parties, acting as the exclusive agents of the appel-

lant, Dobson. The Greggs had brought the parties together, and were undoubtedly the agents of Dobson in negotiating the terms of the sale as finally agreed upon; but in their undertaking to accept and hold the earnest money which Zimmerman agreed to deposit they departed from their exclusive agency for Dobson, and became trustees charged with the performance of certain duties due to both parties. If we are to treat Gregg Bros. as the sole agents of Dobson, then we must regard the deposit of the money by the appellee as a payment direct to Dobson. This could not be, for the reason that it was specially stipulated that, in the event Dobson failed to comply with his contract, Gregg Bros. were to deliver this money back to him. In this respect they were unquestionably charged with a trust for the benefit of appellee, and which Dobson had no right to control. How, then, can it be said that they were Dobson's agents, and yet were charged with the performance of duties over which Dobson had no control? While acting as a stakeholder, they were acting for both parties—for one as much as for the other.

The motion for a rehearing is overruled.

BELT et al. v. CETTI et al.

(Court of Civil Appeals of Texas. Jan. 2, 1909.
On Rehearing, March 13, 1909.)

1. APPEAL AND ERROR (§ 638*)—STATEMENT OF FACTS—FILING—NECESSITY FOR.

A statement of facts, not bearing the file mark of the trial clerk, will not be considered, though no motion is made to strike it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 638.*]

On Rehearing.

2. APPEAL AND ERROR (§ 654*)—STATEMENT OF FACTS—DEFECTS—AMENDMENT.

Where a statement of facts is not subject to consideration, for failing to show filing in the trial court, appellant should be permitted to correct the record to show a filing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2819-2822; Dec. Dig. § 654.*]

3. APPEAL AND ERROR (§ 750*)—REVIEW—INSUFFICIENT ASSIGNMENTS OF ERROR.

Where the findings do not support a judgment appealed from, the Court of Civil Appeals will not refuse to consider assignments of error, though they merely attack the judgment, as unsupported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 750.*]

4. HUSBAND AND WIFE (§ 276*)—ADMINISTRATION OF COMMUNITY—BONDS—DEFENSES.

The existence of valid and unpaid claims against a community estate does not bar recovery by the heirs, on a bond given by the deceased husband as administrator.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 276.*]

5. HUSBAND AND WIFE (§ 276*)—ADMINISTRATION OF COMMUNITY—BONDS—DEFENSES.

It is no defense to liability on the bond of a deceased husband as administrator of the

community estate that the succeeding administrator received and inventoried one-half of the property in kind belonging to the community estate when decedent qualified.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 276.*]

6. HUSBAND AND WIFE (§ 276*)—ADMINISTRATION OF COMMUNITY—ACTIONS—EVIDENCE—SUFFICIENCY.

Evidence, in an action on an administrator's bond of three releases of vendor's lien notes, made by various parties to an administrator, reciting payment by him of the "sum of _____ dollars, which releases bore date after the death of his wife," is insufficient to support a finding that he paid specified sums for releases of specified vendor's lien notes.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 276.*]

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Action by Agnes Belt and another against Zane Cetti and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Coke, Miller & Coke, for appellants. Orlick & Terrell and W. R. Sawyers, for appellees.

SPEER, J. From an inspection of the record in this case we find what purports to be a statement of facts, but which nowhere bears the file mark of the clerk of the court before which the case was tried. While there is no motion to strike out such statement of facts, we nevertheless deem it to be our duty under the circumstances to refuse to consider the instrument as a proper part of the record. In *Brown v. Orange County* (Tex. Civ. App.) 107 S. W. 607, the matter is treated as one which may be waived by the appellee, but in *Matthews v. Boydston* (Tex. Civ. App.) 31 S. W. 814, it is said: "The practice of disregarding a statement of facts filed after the end of the term of the court, and not authorized to be made up and filed by an order of the court contained in the record, whether brought to the attention of the court by action of counsel, or discovered by the court from investigation of the case, is too well established by our Supreme Court to justify a doubt as to our duty to disregard the statement of facts in this case." The Supreme Court cases of *Raleigh v. Cook*, 60 Tex. 440, *Ross v. McGowan*, 58 Tex. 603, *McGuire v. Newbill*, 58 Tex. 314, and *Ry. Co. v. McAllister*, 59 Tex. 349, are cited for this holding. To the same effect is *Dennis v. Neal*, 71 S. W. 387, an opinion by the Court of Civil Appeals for the Third District. We are the more inclined to follow the rule as laid down by these cases for the reason that such has been the practice of this court, as will be seen from an examination of the cases of *Smith v. Pecos Valley & Northeastern Ry. Co.*, 43 Tex. Civ. App. 204, 95 S. W. 11, and *Cockerell v. Walkup*, 44 Tex. Civ. App. 564,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

90 S. W. 443, in each of which cases the statement of facts not properly filed within the time required by law was stricken out upon the court's motion.

There are no assignments of error which can be considered in the absence of a statement of facts, and it therefore becomes our duty to affirm the judgment of the district court upon his findings of fact contained in the record.

Affirmed.

DUNKLIN, J., not sitting.

On Rehearing.

SPEER, J. On a former day of the term we disregarded the statement of facts because not filed in the court below, and affirmed the judgment. We are now asked to grant a rehearing, and to permit a correction of the record to show that the statement of facts was duly filed in the district court, and we are of the opinion the motion should be granted. We, therefore, proceed to consider the case on its merits. The case has been once before appealed to this court, a report of which will be found in 91 S. W. 1098, and in that opinion we affirmed a judgment in favor of the present appellees, stating: "In the view we take of the case no other judgment than the one rendered by the court could be sustained." We expressly affirmed the judgment, however, on a question of limitation, upon which question the Supreme Court, in a writ of error granted to our judgment, reversed our decision, as will be seen from the further report of the case in 93 S. W. 1000. There were findings of fact filed by the district judge, before whom the case was tried on the first trial, and these findings are also set out in the report of the Supreme Court decision. After the order of the Supreme Court reversing the case and remanding it for trial, the district judge again rendered judgment for the appellees, from which this appeal is prosecuted.

The findings of fact filed by the trial judge are as follows:

"(1) That the defendants in open court abandoned so much of their pleadings as raised the question of bar of the statute of limitations.

"(2) That on the 16th day of August, 1889, Mrs. Mary A. Roche died, leaving surviving her Thomas Roche and their two children, Agnes and Honora.

"(3) That in August, 1889, Agnes Roche was nine years old, and Honora Roche was seven years old.

"(4) That on the 20th day of December, 1899, Agnes Roche married O. J. Belt, and on the ——— day of September, 1902, Honora Roche married H. E. Sears.

"(5) That at the time of the death of Mrs. Mary A. Roche she and her husband were possessed of a large community estate, consisting of the items shown in Exhibit A to

the amended original answer of defendant C. J. Swasey, filed October 26, 1903, which said property, together with the notes listed in said exhibit, were of the value of \$234,032, from which should be excepted the note of A. G. Rintleman, \$1,000, which was paid before the death of Mrs. Roche, leaving the value \$237,032. That the community property was all the property then owned by them or either of them.

"(6) That on the 16th day of September, 1889, Thomas Roche made application to the county court of Tarrant county, Tex., to be appointed community administrator of the estate of himself and his deceased wife.

"(7) That on the same day Thos. Roche was by said court appointed community administrator of said estate of himself and wife, and duly qualified as such on the 27th day of September, 1889, giving bond as required by law, and conditioned as required by law, in the sum of \$235,385.

"(8) That the sureties on said bond were Zane Cetti, C. J. Swasey, E. W. Taylor, E. E. Chase, and M. L. Lynch.

"(9) That E. E. Chase died insolvent before the beginning of this suit.

"(10) That said bond was approved duly by the court on October 10, 1889, and Thomas Roche then took charge of the community property under his appointment.

"(11) Thos. Roche disposed of property of the community estate of the value of \$68,145.33, exclusive of the Tom Green county sections, and including \$11,500 rents collected, and including \$2,000 on the McLemore survey, item 5 of the T. Roche inventory. Some of the above properties brought more than inventory values, and one piece, item 39, \$300 less, by items as follows:

Item 5.	40 acres McLemore, chg. cash....	\$ 2,000 00
7.	1/2 N. 1/2 lots 2 and 3 Daggett 2nd addition	2,333 25
11.	Lot 3, Blk. 8, Hirschfield.....	6,300 00
13.	Sec. No. 26, Blk. 8, Taylor Co....	2,560 00
20.	Sec. No. 11, Blk. 8, Callahan Co..	2,890 00
29.	1/4 int. in 49 1/2 ft. Blk. 50.....	9,500 00
44.	Part Smith & Hirschfield.....	1,700 00
46.	Part Texas & Pacific.....	2,500 00
29.	1/4 int. in 9 Lots, Blk. 4.....	15,750 00
53.	About 340 head steers.....	6,000 00
56.	21 shares oil mill stock.....	2,100 00
57.	Electric Light stock.....	875 00
	Notes \$2,647 less Rintleman \$1,000	1,647 00
	Rents collected.....	11,500 00
		<hr/> \$68,145 33

"(12) The Tom Green county sections, 13 in number, of the value of \$8,320 at the time of the death of Mrs. Roche, and when disposed of, though inventoried at \$16,640, were by Thomas Roche traded for some property in Des Moines, Iowa. The 40 acres of the McLemore survey, item 5 of the T. Roche inventory, were sold to E. E. Chase for \$2,000 cash and \$6,000 in notes. The notes were turned over to J. J. Roche, administrator of the estate of Thos. and Mary A. Roche, and suit brought thereon, and the whole property was bought in and taken possession of by

said administrator, and sold by him as the property of said estate of Thos. and Mary A. Roche by proper orders of the county court of Tarrant county, Tex.

"(13) Thos. Roche mortgaged two pieces of the community property, to wit, items 1 and 12 of said Exhibit A, of the then value of \$39,560, for \$18,000.

"(14) That Thos. Roche, after the death of his wife, had no business other than that of the community, and all of his time was given to its affairs, and all of his dealings were had and done for the benefit of the community estate.

"(15) That Thomas Roche, while community administrator, kept a book showing the receipts and disbursements for and on behalf of the community, which book was lost years after the death of Thos. Roche, and years before the beginning of this suit, the same having been in the possession of J. J. Roche, administrator hereinafter referred to.

"(16) That on the 10th day of July, 1891, Thos. Roche died.

"(17) That after the death of Thos. Roche, application was made to the county court of Tarrant county, Tex., a court of competent jurisdiction, by J. J. Roche for letters of administration on the estate of Thomas Roche and of the community estate of Thomas and Mary A. Roche, and letters were granted on said estates, and J. J. Roche duly qualified as required by law, his bond being approved on November 7, 1891.

"(18) That on his qualification J. J. Roche received and inventoried, and had appraised and administered by order of the court, Zane Cetti being one of the appraisers, as the community property of Thomas and Mary Roche, the following properties, of the following values, to wit: Real estate which was on hand on the death of Mrs. Roche, and still on hand at the time of the death of Thos. Roche, undisposed of, which was, at the time of the death of Mrs. Roche, of the value of \$154,641.66. Exempt personal property and Ryland mining stock in identical kind on hand at the death of Mrs. Roche, and on hand at the death of Thos. Roche, undisposed of, which at the time of the death of Mrs. Roche was of the value of \$16,850, the real estate above being, at the death of Thos. Roche, and when received by the administrator, of the value of \$146,950. The personal property and stock above, at the death of Thos. Roche, and when received by the administrator, of the value of \$35. Cash, \$8,016. Notes taken from community property sold, which were collected by the administrator of the community estate of Thomas and Mary Roche, \$12,459.50. This includes Chase's note of \$6,000 on which the 40 acres (McLemore) was taken back. The balance was paid in cash. Real estate acquired after the death of Mrs. Roche, when taken by the administrator, was of the value of \$37,850. This was taken by the administrator of the community estate of

Thos. and Mary A. Roche, and administered by him, except the Des Moines property shown below. Notes and choses in action acquired after the death of Mrs. Roche, when taken by the administrator, was of the value of \$5,441.67. These notes were taken and administered as the real estate just above. Of the item \$37,850, real estate, the property in Des Moines, the equity in which was of the value of \$30,000 was included. This property was that which was received for the Tom Green county sections, and took its place in the community estate. That the property mortgages for \$18,000 by Thos. Roche went to the administrator incumbered for that amount, the property was of the value, at the time of the death of Mrs. Roche, of \$39,560, and at the time of the death of Thos. Roche, and its receipt by the administrator, of \$35,000.

"(19) That Thos. Roche was not responsible for any of the decreases in values, but they occurred from causes beyond his control.

"(20) That Thos. Roche paid out, while acting as community survivor on account of the community estate, sums of money, for which he is entitled to credit amounting to \$59,044.87. The item of credits includes \$12,649 paid out on account of notes of Elser, Lake, Cetti, and Roche, and \$10,000, being commissions at the legal rate on receipts and expenditures and household expenses. The above \$59,044.87 is itemized as follows:

Attorney's fees.....	\$ 250 00
Taxes	1,122 87
Tombstone	1,125 00
Burial expenses.....	400 00
Improvements D4.....	2,000 00
Insurance	2,500 00
Commissions	750 00
Factory Building.....	15,000 00
Note, Ft. Worth Nat. Bank.....	2,000 00
Note, Merchants' Nat. Bank.....	1,721 00
Loving release.....	2,500 00
Daggett release.....	666 00
Carb release.....	2,500 00
Notes, Elser, Lake, Cetti and Roche.....	12,649 00
	<hr/>
	\$49,044 87
	10,000 00
	<hr/>
	\$59,044 87

"(21) That the trade involving the Tom Green county land, traded for the Des Moines, Iowa, property, was ratified by plaintiffs, and Thomas Roche should not be charged with that item, but the Des Moines property should be taken in its place. The Des Moines property was sold by the guardian of the children, and the proceeds were accounted for in settlement with them.

"(22) That the administration on the estates of Thos. Roche and the community estate of Thos. and Mary Roche is still open and pending in the county court of Tarrant county, Tex., on account of litigation and other causes, and J. J. Roche is still the administrator.

"(23) That there are now live and unsatisfied debts of the community estates of Thos. and Mary A. Roche amounting to over \$200,-

000, subject to payment, by the administrator of the community estate of Thos. and Mary A. Roche, out of such assets as may be on hand.

"(24) That all assets of the community estate of Thos. & Mary A. Roche have been sold, and the estate has been finally administered, with the exception of a small balance about \$3,000 on hand, which is the only fund available with which to pay the said \$200,000 of community debts.

"(25) That at the time of the death of Mrs. Roche there were in existence community debts, and there were community debts in existence at the time of the death of Thos. Roche.

"(26) That of the community property turned over to the administrator, J. J. Roche, the plaintiffs Agnes and Honora Roche received the following, to wit:

The homestead of the value of.....	\$10,000
The household and kitchen furniture, which was in identical kind, but seems to have been, at the time of its receipt, of no substantial value, though it was of the inventory value of \$2,000 at the time of Mrs. Roche's death.	
Live stock of the value of.....	35
This was in identical kind but had depreciated in value from \$350.	
Cash	2,300
	\$12,335

"(27) That the minors had a guardian of their persons and estates, one J. F. Tierney, who was appointed about the same time as the administrator, and who frequently appeared for them in the administration proceedings, and who continued to act until the minors reached their majority, when he settled with them. He was appointed by the county court of Tarrant county, Tex., a court of competent jurisdiction, and qualified and acted under such appointment.

"(28) That the defendant Swasey and Taylor were duly adjudicated bankrupts in 1890. That no liability on the bond in suit was scheduled. That J. J. Roche, administrator of the community estate of Thos. and Mary A. Roche, had notice of the bankruptcy proceedings from their inception, as well as of the discharge. That Agnes and Honore Roche and J. F. Tierney, their guardian, did not know of the proceedings in bankruptcy aforesaid."

In the light of the decision of our Supreme Court on the former appeal we are constrained to hold with appellants upon their first and second assignments of error, to the effect that the court erred in rendering judgment in favor of appellees under the evidence. While it is true these assignments attack the judgment as being contrary to the evidence, and not specifically that it is not supported by the findings of fact, yet we are unable, for this reason, to refuse to consider the assignments, because we are of the opinion the findings of fact do not support the judgment. If the findings were

sufficient, we might not go behind them, except upon an assignment specifically making that attack, and, in view of this, we perhaps erred in not reversing the judgment on the original hearing. It is unnecessary to detail the evidence, but the findings show that, at the death of appellants' mother, Mrs. Mary A. Roche, she and her husband were possessed of a large community estate of the value of about \$235,000. The findings further show that during his administration Thomas Roche disposed of property of the community of the value of \$68,145, and that he paid out, on account of such community estate, the sum of \$59,044.87, for which he is entitled to credit. Accepting these findings the court, it would appear, should have rendered judgment in favor of appellants; but he evidently proceeded on the theory that because, as found by him (finding 23), "there are now live and unsatisfied debts of the community estate of Thos. and Mary A. Roche amounting to over \$200,000, subject to payment by the administrator," the appellants could in no event recover. But we are constrained to hold that this question was determined adversely to appellees on the former appeal. An examination of the report of the case in 93 S. W. 1000 will show that the trial court there found "that there are now in existence unpaid debts in excess of \$100,000, which are valid community debts of the estate of Thos. and Mary A. Roche;" and that the administration was then, as it is now, still pending. It will also appear that, even this \$100,000 was far in excess of any probable liability of the appellees as bondsmen for the devastavit of their principal, Thomas Roche. If the contention were sound that the existence of valid and unpaid claims against the estate would constitute a bar to appellants' recovery, the decision of the Supreme Court would necessarily have been one of affirmation of our former judgment, even though that court had disagreed with us on the question of limitation discussed in both opinions. In other words, the Supreme Court would not have reversed and remanded the case for trial if the judgment of the district court was right upon the findings made. So that we take it to be settled that the twenty-third finding to the effect that there are now live and unsatisfied debts amounting to over \$200,000, subject to payment by the administrator of the community estate of Thomas and Mary A. Roche, is upon an immaterial issue, and constitutes no defense to appellants' right of recovery.

If we are right in the above, the same reasoning also answers appellees' further contention that they were relieved from further liability when J. J. Roche, as administrator of the community estate of Thomas and Mary A. Roche, received and inventoried one-half of the property in kind belonging to such community estate at the date of the qualification of Thomas Roche. This

contention was also urged in support of the judgment on the former appeal, but we did not then, nor do we now, attach any importance to it.

The fifth assignment of error is also sustained, wherein it complains of the insufficiency of the evidence to support the finding as to the items of the Loving, Daggett, and Carb releases. Evidence that "three releases of vendor's lien notes, made by various parties to Thomas Roche, reciting the payment by Thomas Roche of the sum of ——— dollars, which releases bore date after the death of his wife," is not sufficient to support the eleventh, twelfth, and thirteenth items of the court's twentieth finding.

The only other findings attacked are the fourteenth and twenty-first, and these we sustain as being supported by the evidence.

The motion for rehearing is therefore granted, the original statement of facts is ordered to be filed, and the judgment of the district court is reversed, and the cause remanded.

DUNKLIN, J., not sitting.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. BROWNING.†

(Court of Civil Appeals of Texas. March 20, 1909. Rehearing Denied April 10, 1909.)

1. MASTER AND SERVANT (§ 112*)—MASTER'S LIABILITY FOR INJURIES—APPLIANCES FOR WORK—RAILROAD CARS.

The furnishing by a railroad company of a defective hand car to convey sectionmen to and from their work is negligence on the part of the railroad company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 218-223; Dec. Dig. § 112.*]

2. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Evidence held to show that the furnishing of a defective hand car was the proximate cause of injuries of a section hand.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-976; Dec. Dig. § 276.*]

3. MASTER AND SERVANT (§ 210*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—DEFECTIVE APPLIANCES.

Where plaintiff was employed by the defendant as a section hand, and with other hands was furnished a defective hand car to take them to and from their work, and plaintiff was thrown on the car and injured, he did not assume the risk of injury from the use of the defective car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 554-556; Dec. Dig. § 210.*]

4. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—PERSONAL EXAMINATION OF PARTY.

Plaintiff was examined by defendant's physician after he was injured, and the physician testified fully upon the trial, and it did not appear that a further examination was necessary to enable the physician to state the character of plaintiff's injuries. While testifying, plaintiff exhibited to the jury the injured parts of his

body. Held, that a refusal of a request by defendant to allow its physician to examine plaintiff's injuries before the jury and testify in regard to the nature thereof was harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.*]

5. TRIAL (§ 253*)—INSTRUCTIONS.

In an action against a railroad company for injuries to a section hand while operating a defective hand car, an instruction that if while plaintiff and the other sectionmen were operating the hand car, the bull wheel gave way by having been previously broken or worn, and the giving way of the wheel caused plaintiff to be injured, and that defendant in equipping the car with defective bull wheel was guilty of negligence, which was the proximate cause of plaintiff's injury, they should find for the plaintiff, but otherwise to find for the defendant, is not objectionable as on the weight of the evidence in assuming that defendant equipped the hand car with a defective wheel, and in submitting only the question whether defendant equipped its car with a defective wheel when the pleadings and proof raise the issue whether defendant negligently permitted a car with a defective wheel to be operated.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 253.*]

6. TRIAL (§ 133*)—HARMLESS ERROR—ARGUMENTS OF COUNSEL.

In an action for personal injuries against a railroad company, plaintiff's attorney said: "This railroad company prefers negroes to white men, and gives the jobs to negroes when white men want them." And, when he was informed that defendant's attorney had taken exceptions to these remarks, he stated that he desired to withdraw them, and the jury was instructed to disregard the remarks. Held, that defendant was not prejudiced by the remarks.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

7. APPEAL AND ERROR (§ 1060*)—HARMLESS ERROR—REMARKS OF COUNSEL.

In an action by a railroad employé to recover for injuries plaintiff's attorney in addressing the jury said that plaintiff has testified for whom he has worked for the last five or six years, and, if he was not telling the truth, the railroad company would search for the men he worked for, and would have brought them to contradict the plaintiff. Held that, while the remarks might have been improper, they were not sufficiently so to warrant a reversal of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

8. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERMANENT INJURIES.

Where there was testimony showing that plaintiff sustained serious injuries from which he suffered much mental and physical pain, and which would cause him to continue to suffer in the future and impair his capacity to labor and earn money, a verdict of \$1,500 is not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Appeal from District Court, Hunt County; B. L. Porter, Judge.

Action by Connie Browning against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

In his argument to the jury counsel for plaintiff said: "It is true plaintiff is a negro,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 19, 1909.

but this railroad company prefers negroes to white men, and gives the jobs to negroes when white men want them, [and] plaintiff has testified that he was a regular and industrious worker, and has testified for whom he has worked for the last five or six years and about how he was hurt. If he was not telling the truth, this railroad company would go search the whole country for the men he worked for and for the sectionmen who worked with him, and would have brought them here to contradict the plaintiff."

E. B. Perkins, D. Upthegrove, and Templeton, Crosby & Dinsmore, for appellant. B. Q. Evans, for appellee.

TALBOT, J. This is a suit for damages on account of personal injuries sustained by appellee while working for appellant as a section hand. The defendant company answered by general and special demurrers, a general denial, and by special pleas of assumed risk and contributory negligence. The case was tried before the court and a jury, and resulted in a verdict and judgment in favor of the appellee for the sum of \$1,500, and the railway company appealed.

Conclusions of Fact.

Appellee was in the employment of appellant, working as a section hand. He had been at work for about three weeks previous to the date of the accident which resulted in the injuries of which he complains. The section gang, of which he was a member, when engaged in working on the railroad track at different places, were conveyed over the track to and from their work on hand cars. On August 16, 1907, while appellee and three other members of the section gang were operating a hand car in the discharge of their duties, the bull wheel of the car, because of having been previously broken or badly worn, gave way, and caused appellee to be thrown on the car with great violence, injuring the spermatic cord and members thereof, and causing him to have and suffer with a disease known as varicocele. As a result of appellee's injuries, which are to some extent probably permanent, he has suffered mental and physical pain and will probably suffer such pain in the future. The furnishing of said hand car with the broken or worn bull wheel to convey appellee to and from the different places on its track in order that he might perform the service required of him was negligence on appellant's part and such negligence was the proximate cause of appellee's injuries. Appellee did not assume the risk of injury from the use of said defective car, and was not himself guilty of contributory negligence.

Conclusions of Law.

While the plaintiff was upon the witness stand testifying in his own behalf, at the suggestion of his counsel, he exhibited to the

jury the injured parts of his body, after which defendant introduced Dr. C. E. Cantrell, its local physician and surgeon, and requested that Dr. Cantrell be permitted to examine plaintiff's injuries before the jury, and testify in regard to the nature and extent thereof. To the proposed examination plaintiff's counsel objected on the ground that the evidence showed that Dr. Cantrell had examined plaintiff about three days before the trial, and the objection was sustained. This action of the court is made the basis of appellant's first assignment of error. It has been held in this state, in effect, that when the plaintiff, in an action for personal injuries, in the course of his testimony exhibits the injured parts to the jury, the defendant upon proper request is entitled to have a medical expert of his own selection to examine the parts in the presence of the jury and testify in relation thereto. *Railway Company v. Langston* (Tex. Civ. App.) 47 S. W. 1027; *Id.*, 92 Tex. 714, 50 S. W. 574, 51 S. W. 331. But we are of the opinion there was no material error in refusing the defendant's request in this instance. The testimony shows, and in explanation of the ruling upon the question, the trial judge in a statement appended to the bill of exceptions reserved says: "Dr. C. E. Cantrell was the first man to examine him [plaintiff] after he was injured, examining him on the same evening when he was injured. The proof also showed that Dr. Cantrell was the last man that had examined him before the trial; he having examined him the day before the trial." In further explanation of his ruling the judge says: "The request was made near the close of the case, and I did not compel the parties to submit to the examination because I regarded the question as coming too late, and because I believed that the railway company had had ample opportunity for Dr. Cantrell, a local surgeon, to examine him." Dr. Cantrell, it seems, testified fully upon the trial, and it does not appear that a further examination of the plaintiff by him was necessary to enable him to more definitely and accurately state the character and extent of plaintiff's injuries. No such claim was or is made by appellant. The plaintiff, at the times stated by the court in his explanation appended to the bill of exceptions willingly submitted to the examination made by Dr. Cantrell, and no obstacle was interposed by him or encountered in said examination to a thorough examination and ascertainment of the exact nature of plaintiff's injuries in so far as a knowledge of them could be acquired by such an examination as the skill of the doctor would enable him to make. It not appearing that the examination requested was necessary to a full or fuller presentation of all the facts in relation to plaintiff's injuries, appellant has sustained no substantial injury by the court's action, and it therefore furnishes no good reason for a reversal of the case. The case

is clearly distinguishable in the facts from the case cited. In that case the question was whether or not the plaintiff, whose legs had been amputated, was then or would be able in the future with proper care and treatment to wear or use artificial limbs. The physician offered by the railway company to make the examination before the jury had not previously examined the plaintiff, and stated that, if they were permitted to examine her, they could with reasonable certainty determine whether the stumps of her limbs would ever get well enough for her to wear artificial limbs. A physician for plaintiff had testified that she could not use artificial limbs, and under those circumstances the court said the proposed examination should have been allowed.

Appellant's second assignment of error complains of the following paragraph of the court's charge, viz.: "Now, if you find from the evidence that on that date, while plaintiff and three other men were engaged in operating a hand car on the defendant's road east of Greenville, going to their work, the bull wheel of the hand car gave way, and if you further find that it gave way by having been previously broken or by having been worn, and if you further find that the giving away of the bull wheel, if it did, caused plaintiff to be thrown on the car with great violence, and he was thereby injured as claimed in his petition, and if you further find that the defendant in equipping the hand car with a bull wheel which was defective or worn, as claimed in the petition, if you find that it was defective or worn, was guilty of negligence, as that term is defined in the first paragraph of this charge, and if you further find that such negligence, if any, was the proximate cause of plaintiff's injuries, if any, then you will find for the plaintiff, but, unless you so believe, you will find for the defendant." This clause of the charge is objected to on the ground (1) that it is upon the weight of the evidence, in that it assumes that the defendant equipped the hand car with a bull wheel which was defective or worn when there was no evidence tending to show that the defendant had equipped said car with a defective or worn bull wheel; (2) that the charge fails to submit to the jury the question of negligence as made by the pleadings and proof in this, the pleadings and proof raised the issue, whether the defendant negligently permitted a hand car having a broken or worn bull wheel to be operated, but that the court submits to the jury as a matter of negligence only the question, whether the defendant equipped its hand car with a defective or worn bull wheel. The charge was not upon the weight of the evidence, nor do we think appellant has suffered any injury by reason of the particular question of negligence on appellant's part, submitted for the determination of the jury or the manner in which it was submitted. We are unable to see any material difference in the issue submitted to

the jury, and that which appellant contends should have been submitted. The substance of the issue made by plaintiff's petition, and the evidence offered by him was that appellant furnished him a defective hand car to be used in the discharge of his duties, which was negligence on its part, and that, by reason of such negligence, he was injured. This was the gravamen of the charge, and the testimony was amply sufficient to authorize the submission of the issue to the jury. Plaintiff alleged in substance that the defendant furnished the section gang of which he was a member three hand cars which were used, and necessary for the purpose, to carry the men to and from their work, and to carry the tools and material to the different points along the railroad; that, while he and other sectionmen were engaged in operating one of said cars for the purpose of carrying the men to their work, the bull wheel of the car gave way by having been previously broken or having been worn, etc., and he was thereby thrown upon the car and injured. Appellant was undoubtedly responsible for the equipment of the car, and the undisputed evidence shows, as we understand it, that the bull wheel was broken or defective by reason of having been badly worn previous to the day the accident occurred. So that the jury was authorized to find that appellant had equipped the car furnished appellee with a bull wheel which was defective or worn, and that in so equipping and furnishing said car appellant was guilty of negligence. The jury in our opinion was in no way misled by the form of the charge, and the assignment complaining of it will be overruled.

The third and fourth assignments complain, respectively, of certain remarks made by counsel for appellee in his closing argument to the jury. The record shows that plaintiff's attorney, after he had concluded his argument, and upon being informed that exceptions had been taken to the remarks complained of in the third assignment, again addressed the jury, and stated to them that said remarks may have been unjustifiable, and that he desired to withdraw them, and, in addition thereto, the jury was instructed by the court to disregard said remarks. This, in view of the character of the remarks, justifies the conclusion that appellant was not prejudiced by them. And if, in view of the evidence, it can be said that the remarks complained of by the fourth assignment were improper, still we are not prepared to say that they so far exceeded the bounds of legitimate argument as to warrant a reversal of the judgment.

Nor do we think this court would be justified in holding that the verdict is excessive. There was testimony from which the jury could conclude that appellee sustained serious injuries, from which he suffered much mental and physical pain, and which will, by reason of their injurious effects, cause him to continue to so suffer in the fu-

ture, and impair his capacity to labor and earn money.

Finding no reversible error in the record, the judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. CLAYTON.†

(Court of Civil Appeals of Texas. March 20, 1909. Rehearing Denied April 10, 1909.)

1. WATERS AND WATER COURSES (§ 168*) — CONSTRUCTION OF RAILROAD—DIVERSION OF WATER BY DITCHES.

Where a railroad is built across a stream with a culvert through which the stream flows, and the company subsequently digs ditches at the side of the railroad and causes the water from the stream to be diverted through the ditches upon the adjoining land, damaging the land and the crops grown thereon, the company is liable.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 230; Dec. Dig. § 168.*]

2. LIMITATION OF ACTIONS (§ 55*)—INJURIES FROM DIVERSION OF WATER COURSE—ACQUAVAL OF RIGHT OF ACTION.

Where plaintiff's property is injured by water being diverted from a stream through ditches dug on the railroad right of way, the right of action accrues when the land is actually damaged by the overflow, and not when the ditches are dug.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 306; Dec. Dig. § 55.*]

3. VENDOR AND PURCHASER (§ 218*)—INJURIES TO PROPERTY—RIGHT OF PURCHASER TO RECOVER DAMAGES.

A purchaser of land has a right of action for injuries to the land caused by the overflow of water diverted from a stream by ditches on a railroad right of way, though the ditches were constructed before the purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 456; Dec. Dig. § 218.*]

4. WATERS AND WATER COURSES (§ 178*) — CONSTRUCTION OF RAILROAD—FLOWAGE OF LAND—DAMAGES.

Where the evidence in an action against a railroad company for injury to land by overflowing it with water shows permanent injury to the land, the measure of damages is the difference between the market value just before and just after the injury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 255; Dec. Dig. § 178; * Damages, Cent. Dig. §§ 276½, 282.]

Appeal from District Court, Henderson County; B. H. Gardner, Judge.

Action by R. C. Clayton against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Perkins, D. Upthegrove, R. S. Neblett, and W. R. Bishop, for appellant. Miller & Royall, for appellee.

BOOKHOUT, J. This suit was instituted on the 15th day of July, 1907, by appellee. On the 5th of February, 1908, amended petition was filed, upon which the case was tried.

The appellee sought to recover damages caused by the destruction of crops grown upon about 40 acres of land described in plaintiff's petition, and also sought to recover damages for depreciation in the land. The damages to the land and to the crops were alleged to have been caused by overflow brought about through the negligence of appellant in diverting the water from a creek running through appellee's land, and carrying the same off in ditches which were improperly and negligently constructed.

It was alleged that the railroad company had for years maintained a culvert in the channel of said creek where the said railroad crosses same, but that defendant during the two years immediately preceding the institution of the suit intentionally and negligently caused the dirt to be removed on each side of said culvert or bridge and railroad track, and opened up ditches on each side of said railroad track running in the direction of said railroad, but that said ditches were insufficient to carry the water, and that by reason of said excavation and the cutting of said ditches, and their insufficiency, the water flowing in said creek through its natural channel was caused to leave the same and flow over and across plaintiff's said land and crops washing the soil therefrom, which resulted in deep gullies being made through plaintiff's said land and depositing white sand from said branch or its tributaries on said land, and caused the water to remain on said land and crops for long periods of time, especially during the months of January, February, March, April, May, June, and July, 1907. A trial resulted in a verdict and judgment in favor of plaintiff for \$250. Defendant's motion for new trial having been overruled, an appeal was perfected.

Conclusions of Fact.

Appellee owns 40 acres of land in Henderson county through which the St. Louis Southwestern Railway Company of Texas constructed its railroad, the same running east and west through said land. Twenty acres of the land is cleared, and in the years 1905, 1906, 1907, and 1908 were fenced, and had crops growing thereon. Twenty acres of the land was not cleared. About 13 acres of the cultivated land lies south of the railroad and the remainder lies north of it. There is a branch running through the land in a northerly direction. When the railroad was constructed, a culvert was built under the track through which this branch flowed from the south side of the railroad to its north side. The appellee acquired the land after the railroad and culvert were constructed. The agents, servants, and employes of the appellant at various times dug its ditches on the north and south side of the railroad, and caused the water from the branch during

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 19, 1909.

wet seasons to be diverted through these ditches upon the land of appellee, overflowing the same at different times in 1905, 1906, 1907, and a part of 1908, destroying his growing crops thereon. The water thus diverted washed gullies in the land, and caused dirt and sand to be deposited thereon, permanently injuring the land. The appellant was guilty of negligence in causing these ditches to be dug and in diverting the water from the branch upon the property of appellee. By these acts appellee has sustained damage in the amount of the verdict and judgment.

Conclusions of Law.

Appellant assigns as error the court's refusal to give its special charge No. 5, as follows: "Gentlemen of the Jury: You are instructed at the request of the defendant that if you believe from the evidence that the defendant more than four years prior to the 15th day of July, 1907, by any of the acts alleged in plaintiff's petition, caused the water to leave the natural outlet through the creek and flow over the land of plaintiff and damage same, then you cannot find for plaintiff any damage to his land, if there was damage to his land, even though you believe from the evidence that the damage, if any, was done less than four years before the 15th day of July, 1907." The proposition presented is that the act of the defendant in minimizing the natural outlet of the water of the creek which flowed through plaintiff's land, and diverting the same through ditches illegally and negligently constructed, was unlawful, and an invasion of the rights of the landowner, and the cause of action accrued when the acts were done, and would be barred in two years from date, even though the actual overflow which caused the damage occurred less than two years before the institution of the suit. This proposition is not sustained. The ditches were dug on the railroad right of way, and not on the property of appellee. The injury to appellee resulted not from the digging of the ditches, but from the diversion of the water from the branch through these ditches, causing the same at times to overflow appellee's land, depositing sand and dirt thereon, and washing gullies therein, and destroying crops growing thereon at the time of such overflows. The appel-

lant had the right to dig the ditches on its right of way. The appellee's cause of action did not arise until his land was overflowed and damaged and his crops destroyed. This occurred within two years prior to the bringing of the suit. *Waterworks v. Kennedy*, 70 Tex. 234, 8 S. W. 36; *Railway Co. v. Goldman* (Tex. Civ. App.) 28 S. W. 267.

The appellant requested and the court refused its special charge No. 7 as follows: "Gentlemen of the Jury: The proof shows that the ditch on the south side of the railroad was constructed before the plaintiff purchased the land. Now, if you believe from the evidence that such construction of the ditch caused the water to overflow the land of plaintiff and damage the same and damage his crops, then you will find for the defendant." It is contended that the court erred in refusing said charge. This contention is not sustained. The fact that the ditches were dug before appellee acquired the 40-acre farm furnishes no defense to his suit, since appellant could not acquire a permanent right to injure the property as against purchasers acquiring it subsequent to the digging of the ditches. *T. & P. Ry. v. Maddox*, 26 Tex. Civ. App. 297, 63 S. W. 134.

Error is assigned to the twelfth paragraph of the court's charge, reading as follows: "You will also allow plaintiff the difference between the market value just before and just after the injury of any land of plaintiff, if any, which the evidence shows to be permanently damaged, if any, as the proximate result of defendant's negligence, if any." There was evidence that the land was injured in value by the deposit of dirt and sand thereon and the washing of ridges or gullies therein. The witnesses for the plaintiff testified that the land was worth \$100 per acre prior to the injuries complained of, and since the damage the land is worth only one-half that amount. Where the evidence shows permanent injury to the land, the measure of damages is the difference between the market value just before and just after the injury. *Railway Co. v. Maddox*, 26 Tex. Civ. App. 297, 63 S. W. 134; *Railway Co. v. Elam*, 1 White & W. Civ. Cas. Ct. App. § 445. The charge was correct.

No reversible error having been pointed out in the record, the judgment is affirmed.

**BANK OF PINE BLUFF et al. v.
LEVI et al.**

(Supreme Court of Arkansas. April 5, 1909.)

**1. JUDICIAL SALES (§ 31*)—CONFIRMATION—
OPERATION AND EFFECT—COLLATERAL AT-
TACK.**

An order confirming a judicial sale has the force of a final judgment, and cannot be collaterally attacked except for fraud practiced on the court in the procurement of the order.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 66; Dec. Dig. § 31.*]

2. JUDICIAL SALES (§ 31*)—CONFIRMATION.

Irregularities and misconduct and unfairness in a judicial sale may be shown before the confirmation to set aside the sale, but, after confirmation, irregularities in the conduct of the sale are cured, and every presumption will be indulged in favor of its fairness and regularity.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 66; Dec. Dig. § 31.*]

**3. APPEAL AND ERROR (§ 115*)—ORDERS AP-
PEALABLE.**

An appeal lies from an order confirming a judicial sale.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 794; Dec. Dig. § 115.*]

**4. JUDGMENT (§ 443*)—EQUITABLE RELIEF—
GROUNDS—FRAUD.**

The fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, and may not consist of any fraudulent act or testimony the truth of which might have been in issue before the court, but must be a fraud practiced on the court in the procurement of the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 785; Dec. Dig. § 443.*]

**5. JUDGMENT (§ 443*)—COLLATERAL ATTACK—
FRAUD.**

The acts of the attorney of an administrator in procuring the institution of a suit to foreclose a mortgage executed by decedent, and in assisting in the preparation of the decree of foreclosure against the estate of decedent, and in failing to notify creditors of the estate of the decree of foreclosure and of the date of sale, do not constitute a fraud on the court in the procurement either of the decree of foreclosure or the decree confirming the sale.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 785, 836; Dec. Dig. § 443.*]

**6. EXECUTORS AND ADMINISTRATORS (§ 115*)—
SALES—RIGHT TO PURCHASE.**

Neither the administrator nor his attorney can purchase property in the course of litigation, of which property they have the management, or in which litigation they are interested.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 467, 468; Dec. Dig. § 115.*]

**7. MORTGAGES (§ 518*)—FORECLOSURE BY AC-
TION—SALE—RIGHT TO PURCHASE.**

The heirs of a deceased mortgagor occupying no relation of trust toward decedent or any of his creditors may purchase the mortgaged premises at foreclosure sale, and they are unaffected by any constructively fraudulent conduct of the administrator or of his attorney.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1518; Dec. Dig. § 518.*]

**8. MORTGAGES (§ 529*)—FORECLOSURE—INAD-
EQUACY OF PRICE.**

Where mortgaged lands variously estimated as worth from \$3,800 to \$5,000 were sold for \$3,500, the price was not sufficiently inadequate

to justify setting aside the sale on the original hearing of the report of the commissioner.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1540; Dec. Dig. § 529.*]

**9. APPEAL AND ERROR (§ 1012*)—FINDINGS
—REVIEW.**

Findings of the chancellor not against the preponderance of the evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8990; Dec. Dig. § 1012.*]

Appeal from Jefferson Chancery Court; John M. Elliott, Chancellor.

Suit by the Bank of Pine Bluff and others against Minnie Levi and others. From a decree dismissing the complaint for want of equity, complainants appeal. Affirmed.

White & Althelmer, for appellants. Irving Reinberger, for appellees.

FRAUMENTHAL, J. The appellants are a part of the creditors of the estate of Hanchi Bloom, deceased, and they instituted this suit, by an original bill in equity, to set aside an order of the Jefferson chancery court confirming a sale of land made under a decree of foreclosure of a mortgage in that court in a cause wherein Eugene C. Arnold et al. were plaintiffs and Sidney Well, administrator of said estate, et al., were defendants. Hanchi Bloom departed this life intestate on November 2, 1905, and left surviving her two children, the appellees Minnie Levi and Edna Straus. The other appellee, Sidney Well, was appointed administrator of her estate. On June 14, 1905, Hanchi Bloom executed a mortgage upon two lots in the city of Pine Bluff, Ark., to Eugene C. Arnold, in order to secure the payment of a note for \$3,000 and interest executed by her, to Rufus Arnold, trustee. After her death Eugene C. Arnold and Rufus Arnold, trustee, as plaintiffs instituted suit in the Jefferson chancery court against Sidney Well as administrator of said estate, and Minnie Levi and Edna Straus as heirs of Hanchi Bloom, deceased, for the foreclosure of said mortgage. A decree was duly entered in their favor for the amount of said note and subjecting said land to the payment thereof, and to that end decreeing the sale of said lots. Edward Brewster was appointed commissioner to make the sale, and, after due advertisement by published notice as prescribed by law, he sold the lots to said Minnie Levi and Edna Straus for \$3,500 on December 27, 1906, and on the same day filed his written report of the sale in the said chancery court. On December 28, 1906, the said chancery court by decree confirmed said sale, and said decree, amongst other things, states: "And, it further appearing to the satisfaction of the court that said sum is a fair consideration for said property, the said report is in all things approved and the sale herein is confirmed." Thereafter, in pursuance of said sale, the commissioner executed a deed for said lots to

said Minnie Levi and Edna Straus, which was approved by and duly acknowledged in said Chancery court. On January 25, 1907, this suit was instituted to set aside said decree confirming said sale, for the reasons as alleged in the complaint, that the price is inadequate, and the sale was not conducted in a fair manner, that there was collusion between the seller and buyer and bids were stifled, and also because there were certain irregularities in the making of said sale. Complainants offered to refund the full amount of the bid, and asked that the deed to the purchasers be canceled and a resale of the land be made. The appellees denied all the material allegations of the complaint in their respective answers. Upon a hearing of the cause upon the pleadings and testimony, the chancery court dismissed the complaint for the want of equity, and from that decree this appeal is prosecuted.

The cause that is now presented on appeal to this court is not an appeal from the order or decree of the chancery court confirming the sale of the land, but it is an effort by an original proceeding to set aside that decree. The order confirming a judicial sale is in the nature of a final judgment or decree, and has the same force and effect as any other final decree or judgment. In the original suit wherein the decree of sale is made there is some measure of discretion, both as to the manner and conditions of a sale as well as to ordering or refusing a resale. The chancellor will always make such provisions as to notice and other conditions as will protect the rights of all interested; and, after the sale has been made, he will before confirmation see that no wrong has been accomplished in and by the manner in which it was conducted. But the purpose of the law is that such sales shall be final; and, to insure reliance upon such sales, it is essential that no sale be set aside for reasons that are not cogent, or on account of matters which ought to have been attended to by the complaining parties before the sale. And so it has been held that, even before confirmation of sale, a party is not entitled to have the sale set aside upon an offer of a large advance upon the purchaser's bid if the land brought its market value. *Colonial & U. S. Mortgage Co. v. Sweet*, 65 Ark. 152, 45 S. W. 60, 67 Am. St. Rep. 910; *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732. Before the confirmation of the commissioner's sale, irregularities may be shown that the sale was not made in accordance with the provisions of the decree, or any misconduct or unfairness may be shown, in order to set aside such sale. And upon all these matters the chancery court passes when it makes its decree of confirmation. And from such order or decree of confirmation an appeal lies. *Rorer on Judicial Sales*, § 182. But, after a confirmation of the sale has been made by order of the court, all defects and irregularities in the conduct

of the sale are cured, and every presumption will be indulged in favor of its fairness and regularity. *Waldo v. Thweatt*, 64 Ark. 126, 40 S. W. 782; *Du Hadaway v. Driver*, 75 Ark. 9, 86 S. W. 807; *Culver Lumber Co. v. Culver*, 81 Ark. 102, 99 S. W. 391, 118 Am. St. Rep. 17; *Updegraff v. Marked Tree Lumber Co.*, 83 Ark. 154, 103 S. W. 606. Such a decree is, in effect, the judgment of a superior court which may be set aside on appeal, but the validity of which cannot be attacked except on account of fraud. But the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause. It must not consist of any false or fraudulent act or testimony, the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment that is thus assailed. It must be a fraud practiced upon the court in the procurement of the judgment. *Scott v. Penn*, 68 Ark. 492, 60 S. W. 235; *James v. Gibson*, 73 Ark. 440, 84 S. W. 485; *Boynton v. Ashabanner*, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20; *Parker v. Bowman*, 83 Ark. 508, 104 S. W. 158; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Moffat v. United States*, 112 U. S. 24, 5 Sup. Ct. 10, 28 L. Ed. 623.

Now, it is not contended in this case that any fraud was practiced in the procurement of the original decree of foreclosure in the case of *Arnold et al. v. Weil, Adm'r, et al.*, under which the sale was made. The only attack that is made is on the decree or order of confirmation of that sale. In the making of this sale, Brewster was commissioner, and represented the court as the vendor. There is no contention, and not even a suggestion by appellants, that the commissioner was guilty of any act of omission or commission, or of any connivance with the purchasers or any other party in the conduct of the sale that was fraudulent or that had the semblance of fraud. He advertised the sale in the manner and for the time prescribed by the decree and the law. He conducted the sale in an open, public, and fair manner. He made report in writing of every act done in the conduct of the sale. Upon the hearing of this report of sale, these acts and the manner of the conduct of the sale were in issue. Every alleged irregularity in the sale was in issue. The adequacy of the price and the bid was inquired into, and all these issues were determined by the court when it entered its decree. The appellees, Minnie Levi and Edna Straus, had a legal right to bid and become purchasers at the sale; and their bid was reported to and passed on by the court. If by inattention to or lack of knowledge of the time of sale the appellants did not attend the sale, this could not effect the regularity or fairness of the sale or the invalidity of the order confirming it. The published notice was all the notice that the provisions of the decree or the law required, and all that was necessary.

It is contended by appellants that the attorney of the administrator of the estate of Hanchi Bloom procured the institution of the foreclosure suit. That is controverted, and the finding of the chancellor is against that contention. But the decree of foreclosure itself is not attacked by defendants. The plaintiffs in the foreclosure suit had the right to bring the suit, no matter at whose suggestion. It is conceded that their debt and mortgage were honest, and that the decree of foreclosure is just and correct.

It is insisted that the attorney of the administrator assisted in the preparation of the decree of foreclosure against the estate, and failed to notify these appellants, who were creditors of the estate, of the decree of foreclosure or of the date of the sale, and that his acts in being instrumental in and his activity for these foreclosure proceedings were inconsistent with his duties as such attorney of the administrator. The attorney insists that his acts were not inconsistent with his duties, that other attorneys instituted the foreclosure suit; and, though he suggested the suit and assisted in the preparation of the foreclosure decree, still that was not inconsistent with his duties to the estate, inasmuch as the debt and mortgage were just and there was no defense thereto. But, in whatever view the acts and conduct of the attorney of the estate may be looked upon, they did not constitute a fraud upon the chancery court in the procurement either of the decree of foreclosure or the decree of confirmation. The plaintiffs in that suit had the right to foreclose the mortgage and to procure the sale of the land thereunder, no matter at whose suggestion, and no fraud was practiced on the court when this was done.

Now, if the administrator of the estate or the attorney of such administrator had been the purchaser at the sale, then a different question would arise. "No one can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of the purchaser." And so the policy of the law and of justice will not permit the administrator or the attorney of the administrator to buy property in the course of litigation, of which property they have the management or in which litigation they are engaged. A trustee and the attorney of a trustee cannot deal with trust property in any manner for his own benefit. *Montgomery v. Black*, 75 Ark. 184, 86 S. W. 1006; *West v. Waddill*, 33 Ark. 575; *Wright v. Walker*, 30 Ark. 44. But in this case the administrator of the estate and the attorney of the administrator did not purchase at said sale, and were not interested in any manner in said purchase. The appellees Minnie Levi

and Edna Straus were the sole purchasers at the sale, and no other person was directly or indirectly under the evidence interested with them in the purchase. They occupied no position or relation of trust or confidence towards the estate or any of the appellants. They had the right to purchase at said sale as any person who was a stranger to the proceedings could have done. They were not affected by any act or conduct of the administrator or of his attorney, even if such act could be held to have been constructively fraudulent. Under the evidence, we do not find that there was any concert of action or any combination between these purchasers and the administrator or his attorney by which their purchase can be impeached for fraud either in fact or by construction. The plaintiff in the foreclosure suit proceeded, as he had a right to do, to secure the sale of the lots under the provisions of the law. The appellees Minnie Levi and Edna Straus had a right to purchase; and in such purchase, under the evidence, they were not connected directly or indirectly with the administrator or his attorney. Under the testimony they paid a reasonably fair price for the lots. The lots were variously estimated as being worth from \$3,800 to \$5,000, and they paid \$3,500 therefor. Even if it could be found that this price was inadequate, it was not sufficiently inadequate to set aside the sale upon an original hearing of the report of the commissioner. *George v. Norwood*, 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143.

The appellants refer to some other matters which they claim effect the merits of the case. They urge that there is evidence of stifling of bids, but we do not think they are sustained in this by the testimony. They suggest that the lots were sold jointly, that the notice of sale did not fix the hour of the sale, and some minor defects, all of which, if shown by the evidence, were cured by the decree of confirmation. The issues of fact involved in this suit were presented to the chancellor, and some of them on two occasions. Some of them were presented when the original decree confirming the commissioner's sale was entered; and all of them when the decree in this case was entered. On both occasions he found that the evidence justified the confirmation of said sale. Upon a careful examination of the evidence we cannot say that the finding of the chancellor is against the preponderance of the evidence. Under such circumstances his finding on appeal will not be disturbed. *Whitehead v. Henderson*, 67 Ark. 200, 56 S. W. 1065; *Hinkle v. Broadwater*, 73 Ark. 439, 84 S. W. 510.

The decree is therefore affirmed.

PRIEST v. HODGES et al.

(Supreme Court of Arkansas. April 5, 1909.)

1. APPEAL AND ERROR (§ 1001*)—VERDICT—SUFFICIENCY OF EVIDENCE—REVIEW.

The court on appeal in determining whether there is sufficient evidence to sustain the verdict must take that view of it which is most favorable to the successful party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3923-3934; Dec. Dig. § 1001.*]

2. CHATTEL MORTGAGES (§ 235*)—PAYMENT OF DEBT SECURED—EVIDENCE.

On the issue whether a chattel mortgage debt was paid by the delivery of cotton to the creditor, the evidence held not to show payment of the debt.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 235.*]

3. SALES (§ 1*)—CONTRACTS—INTENTION OF PARTIES.

To constitute a sale of a chattel, there must be an intention and an offer to sell, and an acceptance of the offer and an intention to buy, and the court in determining whether title to a chattel has passed must consider the intention of the parties and the assent of both parties to a sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

4. SALES (§ 208*)—PASSING OF TITLE.

Where, by the contract of sale, there remains something to be done as between the seller and buyer to ascertain the quantity or price of the article, the title does not pass; but, where it was the intention of the parties that the article should be considered as having been delivered, the intention will govern, though there remains something to be done to determine the quantity or value thereof.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 561-564; Dec. Dig. § 208.*]

5. SALES (§ 212*)—ACTS CONSTITUTING SALE.

A seller of cotton considered it necessary to weigh it before the sale thereof was complete, and he placed it at scales to be weighed and interviewed the buyer about the weighing. The buyer was unable to attend to the matter, and did nothing to indicate an acceptance of the property. Held, that the sale was not complete, and title did not pass to the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 569; Dec. Dig. § 212.*]

6. SALES (§ 212*)—ACTS CONSTITUTING SALE.

The fact that a seller has performed all he can do does not show a sale, but it is necessary to show that the buyer actually accepted the chattels, and, until the buyer does some act evincing an intention to accept, the title remains at the risk of the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 569; Dec. Dig. § 212.*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by W. R. Priest against E. R. Hodges and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Thos. C. Trimble, Jr., for appellant.

FRAUENTHAL, J. This is a replevin suit, which was instituted by the plaintiff,

W. R. Priest, against the defendant E. R. Hodges for the recovery of the possession of a mule. The plaintiff claimed the property by virtue of a mortgage which had been executed to him by one W. I. Rainey to secure the payment of a note for \$40 and interest. The defendant claimed to be the owner of the property by purchase from parties who had obtained it from said mortgagor; and, upon his motion, W. I. Rainey was made a party defendant to the suit. The defendants admitted the execution and validity of the mortgage and note, but alleged that all the indebtedness mentioned in the mortgage, except \$5, had been paid, and in their answer made tender thereof. They also alleged that plaintiff had released the mule from the mortgage. The jury returned a verdict for the defendants; and, from the judgment rendered thereon, plaintiff prosecutes this appeal.

The only question presented by this appeal is whether or not there is sufficient evidence to sustain the verdict of the jury. The only witnesses who testified in the case were the defendant Rainey and the plaintiff, Priest. We must in determining whether there is sufficient evidence to sustain the verdict take that view of it which is most favorable to the defendants. From the testimony of the defendant Rainey it would appear that he executed the note and mortgage to plaintiff, and that the mortgage conveyed the mule in controversy and one bale of cotton. On December 24th Rainey brought to town a bale of cotton, and threw the same on the scales on the platform at the depot where the plaintiff had his cotton weighed. He supposed that the scales were public scales, though plaintiff had his cotton weighed there. He then went to plaintiff's store and spoke to plaintiff of the cotton; and plaintiff, being busy with his customers, told him that he could not attend to it. He then left, and returned the same evening in order to weigh the cotton, but plaintiff was still busy, and nothing was done or said relative to the cotton. During the night the depot and cotton were destroyed by fire. He did not take any weight of the cotton, and no price for the cotton was mentioned, and plaintiff did not see the cotton, so far as the testimony shows, nor did plaintiff tell Rainey where to put the cotton, and did not speak to him relative to it, except to tell him that he had no time to attend to the matter. A few days before he brought the bale of cotton in, Rainey told plaintiff that he had traded the mule, but that he still had the cotton; and the plaintiff then told him that the cotton was what he wanted, and that if he would bring him the cotton and pay the indebtedness before Christmas, he would knock off the interest. This is the entire evidence in its most favorable aspect for defendants. From this we do not find any evi-

dence which sustains the contention that plaintiff released the mule from the mortgage. Rainey traded the mule before speaking to plaintiff about it, and, after he had thus traded, he then told him that he had traded it, and, in order to placate him, told plaintiff that he still had cotton. The plaintiff did not say that he consented to the trading of the mule; but, like one who had by this information become anxious for the payment of his debt, he told Rainey that, if he would bring him cotton and pay the debt, he would knock off the interest. Neither by his words nor by act did plaintiff indicate that he gave his consent to the trading of the mule which had been done by Rainey, or that he released the mule. The above was all the testimony of any conversation or circumstance relative to the release of the mule; and we do not think that it is sufficient to sustain a finding that plaintiff released the mule from the mortgage.

It is contended by defendants that Rainey paid the mortgage debt. The only payment that it is claimed that he made is by the alleged sale of the bale of cotton to plaintiff. The undisputed evidence is that the amount of the debt was \$40 and some interest. There is no evidence at all as to the weight of the bale of cotton or as to its quality or value. There is no testimony showing whether it was worth the amount of the debt. It is true that the answer of defendant tenders the sum of \$5 which he claims he still owes on the indebtedness, but there was no testimony as to this. So that, even if Rainey sold the bale of cotton to plaintiff, the evidence is not sufficient to show that the mortgage indebtedness was thereby paid in full.

The question now recurs as to whether or not Rainey sold the cotton to plaintiff. It is an elementary principle of law that it is essential to the sale of a chattel, like in every contract, that there must be a meeting of the minds and an agreement by both of the parties to the sale and purchase; that is to say, upon the one part there must be an intention and offer to sell, and on the other part an acceptance of such offer and an intention to buy. The intention of the seller to sell and his offer of the property is not alone sufficient to constitute a contract of sale. The purchaser must also intend to buy and also accept the offer before there can be a completed sale. So that, in determining whether the title to a chattel has or has not passed, the primary consideration is the intention of the parties and the assent of both parties to the sale. 24 Am. & Eng. Ency. Law (2d Ed.) 1047; *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868.

It is urged by counsel for appellant that, when something remains to be done as between the vendor and vendee in relation to the chattel, the title will not pass; and so it is urged in this case that, inasmuch as the quantity and the price of the chattel were

not agreed on, it was necessary before the title passed that the cotton should have been weighed and the price determined. This is correct in cases where by the contract or from the intention of the parties there remains something to be done as between the vendor and vendee of personal property, as, for instance, in order to ascertain the quantity or the price of the chattel. But, if it clearly appears that it was the intention of the parties that it should be deemed and considered that the property has been delivered and the ownership of the property has been abandoned by the one and accepted by the other, and the title has actually passed, then such intention will govern, although there remains something to be done to determine the total quantity or value of the article. *Fagan v. Faulkner*, 5 Ark. 161; *Chamblee v. McKenzie*, 31 Ark. 155; *Gans v. Holland Adm'r*, 37 Ark. 483; *Shaul v. Harrington*, 54 Ark. 305, 15 S. W. 835; *Lynch v. Daggett*, 62 Ark. 592, 37 S. W. 227. In this case the testimony of Rainey, the seller, indicates that he considered it necessary to weigh the cotton, because on the morning when he brought the cotton in he placed it at certain scales, and then went to see the plaintiff about the weighing of it, and, finding the plaintiff unable to attend to the matter, he left, and then returned in the evening in order to weigh the cotton; so that his testimony would indicate that it was the intention of the parties that the cotton should be weighed before the completed sale thereof should be made.

But, although this should be considered persuasive and not conclusive in the case, still there is another element necessary to a completed sale which is lacking in this case. It is essential that there must be an intention on the part of the alleged vendee to accept the property before the title passes. It is not sufficient to show that the vendor has performed all that he can do, that he has been willing to or has placed the property in such position as to turn it over to the vendee; but it is necessary to go farther, and show by evidence that the vendee has actually accepted the property. And, until the alleged vendee does some act or evinces an intention to appropriate or accept the property, the same will be and remain at the risk of the vendor. *Kaufman v. Stone*, 25 Ark. 336; *Jones v. Pearce*, 25 Ark. 545; *Tierman v. Jackson*, 5 Pet. (U. S.) 580, 8 L. Ed. 234. Now in this case there is no testimony or circumstance going to show that the plaintiff accepted the cotton or considered the cotton as belonging to him, or intended that the title should be in him. The evidence of the appellee is to the contrary. By his testimony it is shown that plaintiff never saw the cotton; that the only thing said about the cotton was relative to weighing it; and that he declined paying any attention to it. This shows that the plaintiff not only did not accept the bale, but intended

that some other act should be done before he did accept it. It shows that plaintiff did not assume ownership over it, but indicates that he intended that it should be weighed and the price fixed before he did assume ownership over it. The evidence shows that Rainey did not abandon his control over the cotton because he left with the intention of returning in order to weigh the property and then to make all necessary transactions relative to the completion of the sale of the bale of cotton. But, no matter what the intent of Rainey may have been, the evidence in the case wholly fails to show that the plaintiff accepted the property, or that he intended that the ownership thereof should be in him. The evidence therefore does not show such a delivery as to pass the title to the property to the plaintiff. The simple hauling of the cotton to the depot platform and there placing it on the scale was not sufficient. The evidence must further show that the plaintiff also accepted the cotton and intended that it was then his property. There is no evidence that shows this. Giving the evidence its strongest probative force in favor of the appellees, it does not show that there was a completed sale of the bale of cotton.

It follows, therefore, that there is not sufficient evidence to sustain the verdict of the jury.

The judgment is reversed, and the cause remanded for a new trial.

GANTT et al. v. HILDRETH et al.

(Supreme Court of Arkansas. April 5, 1909.)

HOMESTEAD (§ 118*)—INCUMBRANCE—JOINDER OF HUSBAND AND WIFE.

A mortgage of the homestead wherein the wife expressly relinquishes all her rights of homestead and executed by her, though her name does not appear in the granting clause, satisfies Kirby's Dig. § 3901, avoiding a mortgage of the homestead of a married man, unless his wife joins in its execution.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 208; Dec. Dig. § 118.*]

Appeal from Columbia Chancery Court; E. O. Mahoney, Chancellor.

Action by N. J. Gantt and others against Ola Hildreth and others. From the decree in their favor, plaintiffs appeal. Affirmed in part, and reversed in part and remanded, with directions.

Bridges, Wooldridge & Gantt, for appellants. Stevens & Stevens, for appellees.

BATTLE, J. N. J. Gantt and T. P. Gantt, partners doing business under the firm name and style of the Gantt Mercantile Company, and A. B. Henderson, trustee, instituted a suit against Ola Hildreth, the widow, and Bertha Hildreth, Chester Hildreth, and Dewey Hildreth, heirs at law of Will B.

Hildreth, deceased, to foreclose a deed of trust executed by Will B. Hildreth in his lifetime and by Ola Hildreth, his wife, to secure the payment of two promissory notes that were executed by Will B. Hildreth to the Gantt Mercantile Company. The deed of trust conveyed certain lands of Will B. Hildreth, which constituted his homestead, to A. B. Henderson in trust to secure the payment of the notes. It was executed on the 3d day of March, 1906. At that time Ola Hildreth was his wife, and joined with him in executing the deed, but not in the granting clause. The deed concludes as follows:

"And I, Ola Hildreth, wife of the said Will B. Hildreth, for and on my part and behalf, and for the consideration and purposes herein expressed do hereby freely and fully relinquish and release unto the said A. B. Henderson as trustee, all my rights of dower and homestead in and to the aforesaid granted and bargained lands and premises. * * *

"In witness whereof, we hereunto set our hands and seals.

"[Signed] Will B. Hildreth. [Seal.]

"Ola Hildreth. [Seal.]"

They acknowledged the deed; the wife, in the absence of her husband, declaring that she had of her own free will signed and sealed the relinquishment of dower and homestead for the consideration and purposes therein contained and set forth without compulsion or undue influence of her husband.

Will B. Hildreth died on the 10th day of August, 1906, leaving surviving him Ola Hildreth, his widow, and the defendants Bertha, Chester, and Dewey Hildreth, his children and heirs at law. The lands conveyed by the deed constituted his homestead at the time of his death, and his heirs and children were minors. He purchased one of the tracts constituting his homestead from one Manees at the price of \$200, and the Gantt Mercantile Company furnished the money to pay the same, and it was secured with other indebtedness by the deed.

The court dismissed the complaint as to the lands, except the tract purchased from Manees, and as to that held and decreed that the plaintiffs had a lien for the \$200 advanced to pay for it, and interest thereon, and ordered that it be sold to satisfy the lien. The plaintiffs appealed.

The court found that Ola Hildreth did not join in the execution of the deed of trust, nor acknowledge the execution of the same, and that the deed was void as to all the land, except the tract for which the \$200 was paid. This finding was based upon section 3901 of Kirby's Digest, which provides: "No conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity except for taxes, laborer's and mechanics' liens, and the pur-

chase money, unless his wife joins in the execution of such instrument and acknowledges the same."

In considering this statute in *Pipkin v. Williams*, 57 Ark. 242, 246, 21 S. W. 433, 434, 38 Am. St. Rep. 241, this court said: "The requirements of the act are two: First, that the wife shall join in the execution of the deed; and, second, that she acknowledge it. It demands substantive acts only, and prescribes no particular manner of performing them. If she actually join in executing the deed, and then acknowledges its execution before an officer authorized to certify acknowledgments, she has done all the substantive acts required, and, as the statute prescribes no form or manner of doing them, there can be no noncompliance with its provisions for matter of form merely. Whenever a substantial compliance appears, the statute is satisfied, and the deed will be valid."

In speaking of the deed in question in that case, the court further said: "It is in form a deed poll, and its premises indicate that M. F. Lake is the sole grantor. The name of his wife does not appear in the granting part nor elsewhere in the body of the deed. It appears only after the usual covenants of warranty in a clause which declares that she releases to the grantee all her right or possibility of dower. If this clause were not in the deed, it would perhaps be proper to hold that the fact of her signing it evidenced an intention to join in its execution, and give it whatever effect might legally result from her executing it; but it expressly declares what her purpose was, and restricts the operation of the deed as against her to the release of her dower."

In *Bluff City Lumber Co. v. Bloom*, 64 Ark. 492, 43 S. W. 503, a conveyance of a married man's homestead was involved. The wife relinquished to the grantee her right of dower in the land, but did not join in the granting part of the deed. Mr. Justice Riddick, delivering the opinion of the court in that case, said: "But at the time her mortgage was executed the land mortgaged was the homestead of Floyd, and his wife did not join in the granting clause of the deed, as required by statute in mortgages or other conveyances of a homestead. Sand. & H. Dig. § 3713. By reason of the failure to comply with the statute in this respect the mortgage upon the homestead was, to quote the language of this court in a similar case, 'a nullity, and left the title as though it had never been made.' *Pipkin v. Williams*, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241."

Sledge & Norfleet Co. v. Craig, 112 S. W. 802, also involved a conveyance of a homestead of a married man. In that case the court said: "We find, however, from an inspection of the deed, which is copied in the transcript, that she did join in the execution

and acknowledge the same before an officer authorized by law to take acknowledgments. It is true that her name is not mentioned in the granting clause of the deed along with the names of the other grantors, nor in any part of the deed, but the deed concludes with the statement that 'the parties of the first part have hereto set their hands and seals,' etc., and her name appears subscribed thereto with the names of the other grantors. The deed contains no clause relinquishing the wife's dower, and, in order to give effect to her signature, it must be construed to evidence an intention to join in the grant. *Pipkin v. Williams*, 57 Ark. 247, 21 S. W. 433, 38 Am. St. Rep. 241."

There can be no controversy as to the acknowledgment of the deed in this case. If defective, it was cured by a subsequent statute. Act 1907, p. 354. So the only question in this case is: Did the wife join in the execution of the deed in the manner required by the statute. The object of the statute is to prevent the alienation of the homestead of a married man without the consent of the wife. There is no efficacy in the requirements of the statute except for that purpose. It would seem, therefore, that the effect of the execution of a conveyance of a homestead by the husband and wife depends upon the intent of the wife as shown by the deed. *Pipkin v. Williams*, and *Sledge & Norfleet Co. v. Craig*, supra, so decide.

In the deed in this case the wife expressly relinquishes and releases all her rights of dower and homestead, showing clearly and unequivocally that her intention was to join her husband in the conveyance of the homestead, and such was the effect of her execution of the deed.

The decree is reversed as to so much thereof as dismisses the complaint, and affirmed as to the tract of land ordered to be sold, and the cause is remanded, with directions to the court to enter a decree in accordance with this opinion.

HOLLOWAY v. STATE.

(Supreme Court of Arkansas. April 5, 1909.)

1. FORGERY (§ 44*)—EVIDENCE—SUFFICIENCY. Evidence held insufficient to connect accused with forgery of a bond staying judgment.

[Ed. Note.—For other cases, see Forgery, Dec. Dig. § 44.*]

2. FORGERY (§ 44*)—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

Where a forgery is established, accused may be connected therewith by circumstances.

[Ed. Note.—For other cases, see Forgery, Dec. Dig. § 44.*]

3. FORGERY (§ 4*)—DELIVERY OF INSTRUMENT UNNECESSARY.

To constitute forgery, delivery of the instrument is unnecessary; the elements of the offense being the false making or alteration of a written instrument, apparently valid, with fraudulent intent to use it to another's injury,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and hence it is immaterial to one's guilt of forging a bond to stay judgment that the bond was not filed with the clerk, as required by statute.

[Ed. Note.—For other cases, see *Forgery*, Dec. Dig. § 4.*

For other definitions, see *Words and Phrases*, vol. 3, pp. 2900-2909; vol. 8, p. 7665.]

4. FORGERY (§ 16*)—“UTTERING FORGED INSTRUMENT”—WHAT CONSTITUTES.

To utter a forged instrument is to put it in circulation, or to offer to do so, with fraudulent intent to injure another.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. § 51-53; Dec. Dig. 16.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7251, 7252.]

5. FORGERY (§ 34*)—INDICTMENT—VARIANCE—MATERIALITY.

In a trial for forging a bond to stay judgment, variance between the bond set out in the indictment and the bond proven, in that the bond pleaded recited that the obligors “undertake and bond” themselves, etc., whereas the bond proven used the word “bind” for “bond,” was immaterial, being manifestly a clerical error.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. § 94; Dec. Dig. § 34.*]

6. FORGERY (§ 7*)—ELEMENTS—NATURE OF INSTRUMENT.

Under Kirby's Dig. § 1714, providing for the punishment of one who forges a writing to fraudulently obtain possession of another's money or property, or to cause him to be injured in his estate or lawful rights, it is an offense to forge a bond to stay judgment.

[Ed. Note.—For other cases, see *Forgery*, Dec. Dig. § 7.*]

Appeal from Circuit Court, Phillips County; Hance N. Hutton, Judge.

H. W. Holloway was convicted of forgery, and he appeals. Reversed and remanded.

Fink & Dinning, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. The defendant, H. W. Holloway, was indicted by the grand jury for the crime of forgery, alleged to have been committed by forging a bond staying a certain judgment of the circuit court of Phillips county, rendered in favor of E. M. Turner against the Dixie Mutual Fire Insurance Company. The instrument of writing alleged to have been forged is set out in full in the indictment, and the sufficiency of the indictment has not been questioned by demurrer or otherwise. A trial resulted in a verdict of conviction, and the court rendered judgment accordingly, and subsequently overruled defendant's motion for new trial. He brings the case here by writ of error.

The bond in question purports to have been signed by the judgment debtor and by certain sureties. The only evidence tending to establish defendant's guilt is this: The sheriff of Phillips county, to whom the bond was delivered, testified that he had no positive recollection as to what person deliv-

ered the bond to him, and could not swear who delivered it to him, but thought that it was done either by Judge Fink, the attorney for the insurance company, or by the defendant, and that he believed it was by the latter. Judge Fink testified that he prepared the bond as attorney for the insurance company; but the court would not permit him to state to whom he delivered it. The persons whose names appear as sureties on the bond testified that they neither signed it nor authorized the signatures, and one of them testified to a conversation with the defendant after he was informed that there was such a bond in the hands of the sheriff; but there was nothing in the conversation tending to incriminate the defendant. This evidence was not sufficient to connect the defendant with the alleged forgery. There is nothing in the evidence to show that he had anything to do with the instrument except to sign it. There is no proof whatever either that he signed the names of the sureties or that he delivered the bond to the sheriff. Of course, where the forgery is established, the accused may be connected with the crime by circumstances. But here we have no circumstances to connect the defendant with it, except the bare fact that he was one of the obligors in the bond, and that he was interested in the insurance company, and had employed Judge Fink to represent it in the litigation with Turner. This is not sufficient to justify a finding that the defendant forged the instrument, and for this reason the judgment must be reversed.

The indictment was based upon the following statute: “If any person shall forge or counterfeit any writing whatever, whereby fraudulently to obtain the possession or to deprive another of any money or property, or cause him to be injured in his estate or lawful rights, or if he shall utter and publish such instrument, knowing it to be forged and counterfeited, he shall, on conviction, be confined in the penitentiary not less than two nor more than ten years.” Kirby's Dig. § 1714. It is contended on behalf of the defendant that, even if he forged the names of the sureties and delivered the bond to the sheriff, the offense was not complete, for the reason that it was not filed with the clerk as required by statute, and therefore never became operative for any purpose. This contention involves a misconception as to the distinction between the crime of forgery and of uttering a forged instrument. A delivery of the forged instrument is not necessary to constitute and complete the crime of forgery. The elements of that offense are the false making or alteration of an instrument of writing which is apparently valid, with the fraudulent intent to make use of it to the injury of another. 19 Cyc. 1373; Clark on Crim-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

inal Law, p. 333 et seq. To utter a forged instrument is to put it in circulation, or to offer to do so, with such fraudulent intent. *Elsey v. State*, 47 Ark. 572, 2 S. W. 337.

It is also contended that there is a fatal variance between the writing set out in the indictment and the bond introduced in evidence, in that it uses the word "bind"; whereas, the instrument set out in the indictment uses the word "bond" at the place where it states that the parties and sureties "undertake and bind" themselves, etc., to pay the judgment. This is manifestly a clerical error in the preparation of the indictment, and does not constitute a material variance.

It is also contended that there is no evidence tending to show that the defendant forged the instruments for the purpose of cheating and defrauding Turner, the plaintiff in judgment. We are of the opinion that the evidence would be sufficient for that purpose if it connected the defendant with the crime. The statute is broad in its terms, and declares that it shall be unlawful for any person to forge any writing to fraudulently obtain possession or deprive another of property, or to cause any person "to be injured in his estate or lawful rights." Now, a bond executed pursuant to the terms of the statute for the purpose of staying a judgment has the effect, if valid, of delaying the enforcement of the judgment, and this injures the judgment creditor in his estate and also in the enforcement of his lawful rights. We are of the opinion that a forged stay bond, whether it accomplishes its purpose or not by delaying the enforcement of a judgment, falls within the letter as well as the spirit of the statute, and renders the person who commits the act guilty of a crime.

We find no other error in the record; but, on account of the insufficiency of the evidence to connect the defendant with the commission of the crime, the judgment is reversed, and the cause is remanded for new trial.

GREER v. WHITE.

(Supreme Court of Arkansas. April 5, 1909.)

1. LIBEL AND SLANDER (§ 2*)—INTENT OF DEFENDANT—EFFECT.

It is immaterial to one's liability for slander what meaning he intended to convey by the language used if it is, in fact, slanderous.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 109, 110; Dec. Dig. § 2.*]

2. LIBEL AND SLANDER (§ 7*)—CHARGE OF ARSON.

A charge that plaintiff had burnt defendant's house charged the crime of arson, and was slanderous per se.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 29; Dec. Dig. § 7.*]

3. DAMAGES (§ 91*)—EXEMPLARY DAMAGES—RIGHT TO.

Exemplary damages cannot be based on mere negligence, however gross, it being essential that the injury result from willful wrong or its equivalent—conscious indifference to results.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 200; Dec. Dig. § 91.*]

4. LIBEL AND SLANDER (§ 120*)—EXEMPLARY DAMAGES—RIGHT TO.

If defendant in accusing plaintiff of arson believed that he was speaking to or about another person, his conduct as to plaintiff was not more than gross negligence; and hence nothing more than compensatory damages are recoverable.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 350, 351; Dec. Dig. § 120.*]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by H. S. White against G. B. Greer. Judgment for plaintiff, and defendant appeals. Partly affirmed, and partly reversed and dismissed.

White & Althelmer, for appellant. Bridges, Wooldridge & Gantt, Taylor & Jones, and Daniel Taylor, for appellee.

MCCULLOCH, C. J. Plaintiff, H. S. White, instituted this action against defendant, G. B. Greer, to recover damages on account of alleged slanderous words spoken about him in his presence and in the presence of others. The words were spoken in response to a request made by a Mr. Core for permission for the plaintiff to ride in a conveyance with defendant, and are as follows: "No, sir; no such man as that can ride with me at all. He burnt my house down. I shot him out of my house once. Let him walk to town—let him mud it." It is alleged in the complaint that the defendant in speaking the words meant that the plaintiff had committed arson in burning the defendant's house, and that such charge was false. The circumstances under which the words were spoken are about as follows: Plaintiff lived at England in Lonoke county, and the defendant lived at the city of Pine Bluff. The latter owned a plantation near England, and on the day of this occurrence had come to England on the train and driven out to his farm in a two-seated vehicle with a Mr. Cobb. Mr. Core also owned a farm in the same locality, and on the day in question the plaintiff, a driver for a liveryman in England, carried Core and a Mr. Rose out to the farm in a buggy. The parties met at one Kaufman's store, which is also in the same neighborhood. When they were ready to return, Core requested Cobb, who was in the conveyance with defendant, to let the plaintiff ride back with them, whereupon the defendant spoke the words referred to concerning the plaintiff in the presence of those assembled there. Plaintiff was standing with-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in 12 or 14 feet of the vehicle in which defendant was seated when the words were spoke, and testified that he heard them and felt greatly humiliated thereby. He testified that, after they got back to England, he approached defendant and asked him why he had made use of the insulting language; that defendant, who was standing with one foot on the step of the train, in the act of boarding it, merely replied: "I don't want to talk to you." He also testified that he had met the defendant about six months before that time, and bought some goods from him; that there had never been any ill feeling between them; that he had never done anything to defendant, and knew of no reason why defendant should speak to him or about him in that way. There was no other evidence tending to show any malice or ill feeling on the part of defendant toward plaintiff. Defendant testified that he was not acquainted with plaintiff, had never seen him before, and that, when he made the remark, he thought he was speaking about a man named Locke, with whom he was slightly acquainted, and who had done him great injury. He gave the following account of his alleged trouble with Locke, which he said he had reference to when he made the remark in question: "There was a fellow named Locke who worked on the levee on my place, and there was a little old cabin that they were to tear down, and I told them not to tear it down, and we agreed that I was to move it if it had to be moved, and I told him he must not tear it down, and they brought the horse up there and put a rope around the shed room and pulled it down, and it made some racket, and they then put it around the farm house, and I told them to stop it—that I had already sent up here to get a restraining order. Well, after I went out in front of the house and motioned for them to get out, they all run out, and I shot bird shot in the door, and then I went to the post office, and after a while a couple of young men went by and said there was a big smoke over there, but they did not stop. I saw the house was burning up, and I went down there. It was a little cabin. A negro woman lived in it, but they had moved her things out, and, when I undertook to investigate the matter, they said the chimney pulled down, and it might have caught fire from that. * * * It never struck me that anybody burnt it, only that it caught from the chimney. I never thought of having anybody arrested. The little old cabin wasn't worth very much. They pulled down part of it, and then it was burnt, and that was all there was to it." There was also evidence which tended to show that plaintiff did not resemble Locke at all. The jury returned a verdict in favor of plaintiff for \$500 compensatory damages and \$500 exemplary damages.

The court instructed the jury that the words spoken by defendant to and concerning

the plaintiff charged the latter with the crime of arson, and were slanderous per se and actionable. This instruction is assigned as error. Mr. Newell says that "the rule which once prevailed, that words are to be understood in *mitiori sensu*, has been long ago superseded, and words are now to be construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them." Newell on Slander & Libel, p. 304. See to the same effect, 25 Cyc. 335, and cases cited. The following statement, which seems to be well sustained by authority, is made on this subject: "Defamatory language must be interpreted as it would be understood by the reader or hearers, taking into consideration accompanying explanations and the surrounding circumstances which were known to the hearer or reader." 25 Cyc. 357. This implies that attending circumstances not known to the hearers are not to be considered in determining whether or not the words spoken are slanderous in themselves. It is immaterial what meaning the speaker really intended to convey by the language used if the words spoken are, in fact, slanderous. "If a man in jest," says Mr. Newell, "conveys a serious imputation, he jests at his peril. Or he may have used ambiguous language which to his mind was harmless, but to which the by-standers attributed a most injurious meaning. If so, he is liable for the injudicious phrase he selected. What was passing in his own mind is immaterial, save in so far as his hearers could perceive it at the time." Newell on Slander & Libel, p. 301.

Now, the real question in the case is whether or not the words used by the defendant to the effect that the plaintiff had burnt his house down amounted, in their common acceptance, to the charge of having committed the crime of arson. We think that they do, and that the learned circuit judge was correct in so informing the jury. This language is ordinarily susceptible of no other meaning, and it would be a strained construction of it to say that it merely meant that the person spoken of had by his negligence or inadvertence caused the destruction of the house by fire. The words, when considered in their ordinary acceptance, are not even ambiguous; and the ordinary hearer would not understand them as meaning anything except that a charge of willful burning was intended. An early case in Kentucky (*Logan v. Steele*, 1 Bibb, 593, 4 Am. Dec. 659) is very much in point. There the defendant said about the plaintiff: "I have every reason to believe he burnt said barn." The court held the language to be slanderous per se, and in the opinion said: "It is now settled that words are to be taken in that sense in which they would be understood by those who hear or read them. The judge will neither torture them into guilt nor explain them into innocence, but take them in their usual ac-

ception, and understand them according to their obvious import and meaning. Tested by this doctrine, the words in question are clearly actionable. They carry with them an evident imputation of guilt, and it requires the most forced and far-fetched construction to give them an innocent meaning." The following cases are also closely in point, and sustain the views herein expressed: *Tuttle v. Bishop*, 30 Conn. 80; *Nailor v. Ponder*, 1 Marvel (Del.) 408, 41 Atl. 88; *Frank v. Dunning*, 38 Wis. 270. In the last-cited case the defendant accused plaintiff of burning his own house without stating the purpose for which it was done; and the court held that without the averment that the house was insured, and that the burning was done with the intent to defraud the insurance companies, the charge implied no unlawful act. The reasoning of the court, however, clearly indicates that, if the charge had been that of burning the house of someone else, these words in their ordinary acceptation would have amounted to a charge of arson. The jury might well have found that the defendant in this case did not really intend to make a charge of arson against the plaintiff, whom he took to be Locke, but merely that the house was burned by reason of the negligence of Locke. These circumstances, however, were unknown to the plaintiff and the other hearers, and they could not have understood the language otherwise than as meaning a charge of arson.

The court, at the request of plaintiff, gave the following instruction: "Although you should find that defendant, when speaking to or of plaintiff, believed him to be another person, yet if you find that defendant made the statements alleged by plaintiff, and that they were false as to him, and that he exercised so little care to know or ascertain that plaintiff was the person concerning whom he intended to make such statements as to show a reckless and wanton disregard of plaintiff's rights, feelings, and reputation, then you may award plaintiff punitive damages, as well as if the statements had been made by defendant through actual malice towards plaintiff." The effect of this instruction was to tell the jury that, notwithstanding the fact that the defendant believed at the time that he was speaking to or concerning Locke, yet, if he was guilty of gross negligence in reaching that conclusion as to the identity of the two men, a verdict for exemplary damages would be justified. This court has heretofore announced, and steadily adhered to the rule, that mere negligence, however gross, will not justify the infliction of exemplary damages. The injury must result from a willful wrong, or, what is its equivalent, conscious indifference to results, before such damages should be awarded. *Railway Co. v. Hall*, 53 Ark. 7, 13 S. W. 138; *St. L., I. M. & S. Ry. Co. v. Stamps*, 84 Ark.

241, 104 S. W. 1114; *St. L., I. M. & S. Ry. Co. v. Dysart* (Ark.) 116 S. W. 224. Now, if the defendant honestly believed, as recited in this instruction, that he was speaking to or about Locke, then his conduct, so far as plaintiff is concerned, could not at most have amounted to more than gross negligence. Therefore it did not call for infliction of anything more than compensatory damages. But, even if the instructions in this case had been correct, we are of the opinion that the evidence did not sustain a finding of such elements as would justify infliction of exemplary damages. There is not a particle of proof that the defendant entertained any actual malice or ill will towards plaintiff, nor any circumstances from which that could be inferred. The evidence is undisputed that there was a very slight acquaintance, if any at all, between the two men, and that nothing of an unpleasant nature had ever occurred between them. It is manifest that it was purely a mistake on the part of the defendant in confusing the identity of the plaintiff with some other man, for there was nothing in the attending circumstances which called for an insulting remark from the mere request on the part of Coxe for the plaintiff to be allowed to ride in the vehicle with defendant.

The judgment as to compensatory damages will be affirmed, there being no error in the record as to this part of the recovery; but the judgment for exemplary damages will be reversed, and the case as to that feature will be dismissed. It is so ordered.

ST. LOUIS, I. M. & S. RY. CO. v. PATE.
(Supreme Court of Arkansas. April 5, 1909.)

1. CARRIERS (§ 246*)—CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—EVIDENCE—SUFFICIENCY.

Evidence in an action for the death of plaintiff's intestate in alighting from a train held to sustain a finding that he was a passenger at the time.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1284; Dec. Dig. § 246.*]

2. DEATH (§ 99*)—EXCESSIVE DAMAGES.

Where a passenger, received injuries resulting in his death, was conscious for 30 or 40 minutes after he was injured, and in that time suffered intense pain, and the injuries he received were shocking in the extreme, a verdict of \$1,000 in favor of his estate was not excessive.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 127; Dec. Dig. § 99.*]

3. TRIAL (§ 41*)—RECEPTION OF EVIDENCE—EXCLUSION OF WITNESSES—DISCRETION OF COURT.

Under Kirby's Dig. § 3142, providing that the judge may exclude from the courtroom any witness not at the time under examination, the exclusion of witnesses when not under examination is within the discretion of the court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 101; Dec. Dig. § 41.*]

Appeal from Circuit Court, Conway County; Hugh Barham, Judge.

Action by Edna Pate, administratrix of the estate of James A. Pate, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lovick P. Miles, for appellant. Wm. L. Moore and Chas. C. Reid, for appellee.

BATTLE, J. On the 4th day of July, 1907, James A. Pate, in alighting from a train of the St. Louis, Iron Mountain & Southern Railway Company at Morrilton, Ark., fell and received injuries which caused his death. Edna Pate, as his administratrix, brought this action against the railway company to recover damages on account of such injury and death. She alleged in her complaint that James A. Pate boarded a train of the defendant at Morrilton for the purpose of going thereon to the town of Atkins; that after boarding the train, and before it left the station, her intestate concluded not to go to Atkins, but to remain at Morrilton; and that while in the exercise of due care he was leaving the train, when it was moving slowly, he stepped upon a plank in the platform of the station at Morrilton, which on account of it having been negligently permitted to become decayed, broken, uneven, and loose, gave way under her intestate, and caused him to slip under the moving train and receive injuries which caused his death.

The defendant answered and denied all the material allegations of the complaint, and pleaded that the intestate, James A. Pate, was guilty of contributory negligence which caused or contributed to his injury and death, and that defendant owed him no duty at the time he was injured, and that he assumed all the risk of injury in alighting from the train at the time, place, and in the manner he did.

A jury were impaneled to try the issues in the case, and after hearing the evidence and instructions of the court returned a verdict in favor of the plaintiff in the sum of \$1,000 for the estate and in the sum of \$3,000 for the widow and next of kin; and judgment was rendered accordingly, and the defendant appealed.

At the beginning of the trial the defendant moved the court to exclude witnesses from

the courtroom during the time they were not testifying, and the court denied the motion.

One of the appellant's defenses to the action was that the deceased was not a passenger at the time he was injured. This question was submitted to the jury upon instructions, and they found he was. The evidence adduced tended to prove that Pate was upon the platform while a train of the appellant was standing at the station, and a conversation between him and a passenger on the train, about a game of poker, took place, and the passenger offered to pay Pate's expenses to Atkins, if he (Pate) had as much as \$50, and that Pate, in apparent acceptance of the offer, boarded the train, and remained there until the train commenced moving, when he attempted to alight, when the train was moving very slowly, and was fatally injured. There was no evidence to show that there was any necessity for his going upon the train, unless he intended to become a passenger. There was evidence to sustain the verdict upon this issue.

As to the defective platform, there was evidence tending to prove the allegations of the complaint. The evidence as to the manner in which Pate alighted is conflicting. There was enough, however, to show that no negligence of Pate, if any, contributed to his injury, or, at least, to leave that fact in doubt, and a question for the jury.

Appellant contends that \$1,000 damages assessed for the benefit of the estate was excessive. But the evidence shows that Pate was conscious for 30 or 40 minutes after he was injured, and the pain he suffered in that time was intense, excruciating, and almost beyond endurance for the shortest time, and the injuries he received were shocking in the extreme. Under these circumstances it does not appear that the damages were excessive.

The excluding of witnesses from the courtroom when not under examination is within the discretion of the court. Kirby's Dig. § 3142. No reason for excluding the witnesses in this case, that does not apply to all cases, is shown. The hearing of the testimony of witnesses by a witness before testifying does not disqualify him, but may affect his credibility. We see no reversible error in the refusal to exclude witnesses in this case. *Hlass v. Fulford*, 77 Ark. 607, 92 S. W. 862.

Judgment affirmed.

HOBBS v. STATE

(Supreme Court of Tennessee. Nov. 5, 1908.)

1. CRIMINAL LAW (§ 1141*)—APPEAL—REVIEW—PRESUMPTIONS.

The Supreme Court will, as against an objection made for the first time on appeal, presume that the jury were sworn; nothing to the contrary appearing in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3024; Dec. Dig. § 1144.*]

2. CRIMINAL LAW (§ 1035*)—OBJECTIONS—WAIVER.

An objection to the failure to swear the jury must be presented to the trial court, or it is waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2637; Dec. Dig. § 1035.*]

3. CRIMINAL LAW (§ 1030*)—OBJECTIONS—WAIVER.

Objections going only to such irregularities as could have been corrected on the attention of the trial court having been called thereto must be made in the trial court, or they are waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2619; Dec. Dig. § 1030.*]

Appeal from Circuit Court, Sequatchie County; Byron Pope, Special Judge.

William Hobbs was convicted of violating the liquor law, and he appeals. **Affirmed.**

Stewart & Stewart, for appellant. The Attorney General, for the State.

BEARD, C. J. This is an appeal from a judgment pronounced on the verdict of the jury, finding plaintiff in error guilty of selling intoxicating liquor without license. It is unnecessary to set out the evidence upon which the conviction rests. It is sufficient to say we are satisfied that the jury were warranted by the evidence in finding the plaintiff in error guilty of the offense charged within 12 months prior to the presentment in the case.

The ground, however, on which it is earnestly insisted a reversal should be had, is that the minute entry showing the arraignment, trial, and verdict failed to recite that the jury were sworn.

This objection is made for the first time in this court. If the fact was that the jury were not sworn, and this had been called to the attention of the court below, there is no doubt a new trial would have been promptly granted. That this was not done raises at least a presumption that they were sworn, but by a clerical omission the fact was not made a part of the minute entry. In addition, the failure to swear the jury would have been so great a departure from orderly procedure that it is hardly possible for this at the time to have escaped the attention of the court and of counsel. This being so, with the presumption, which exists in this court, of the regularity of judicial proceedings of trial courts, nothing appearing in the record of an affirmative character to the contrary, we are satisfied that the omission

pointed out does not authorize a reversal of this case.

The principle controlling in this case will be found illustrated in *Clark v. State*, 8 Baxt. 591, and *Robertson v. State*, 4 Lea, 425. In the first of these cases the prisoner had appealed from a death sentence upon a conviction for murder, and it was earnestly pressed upon the court as reversible error that the record failed to show that the officer in charge of the jury was duly sworn. Notwithstanding the established rule that the jury in a felony case, on retiring, must be in charge of a sworn officer, and if the record attempts to set out the form of the oath it must be stated correctly, yet it was held in that case, in the absence of a recital in the record, it would be presumed that the officer was sworn and that the proper oath was administered to him. In the course of the opinion it was said: "We have no evidence in this case that the officer was not sworn, and we may safely rest the case upon the legal presumption in favor of the regularity of judicial proceeding." In the latter of these cases there was a conviction for voluntary manslaughter, and it was insisted on appeal that the case should be reversed, because, while the record showed that the jury upon their retirement was placed in charge of an officer properly sworn, yet it failed to state that upon the next day they returned into court in charge of that officer. To this insistence, however, the court replied: "There is no error in this. It is not necessary that the record should affirmatively show that the officer did his duty. In the absence of anything to the contrary, this will be presumed."

But it is not necessary to rest our conclusion in this case upon a mere presumption. We place it upon the stronger ground that the objection now urged was not made in the court below, and it comes, therefore, too late. Failing to present it at the proper time, we think, both on reason and authority, that it was waived. In the *Encyclopedia of Pleading and Practice*, vol. 12, p. 519, it is said: "Irregularity in the administration of the oath to the jury, or in the form of the oath, may be waived by going to trial without objection. When a party desires to avail himself of irregularity in the administration of the oath to the jury, the attention of the court should be called to it at the time the oath is taken, and he cannot sit by silently and take chances of a favorable judgment, and subsequently have advantage of objections to such irregularity."

Again, it is said in volume 2, on page 518, of the same work: "Where a party fails to object below to a proceeding, he is presumed on appeal to waive contention as to its validity."

The text of this work is abundantly sup-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ported by cases, both criminal and civil, found in reports of many states. In our own court, in the civil case of *Looper v. Bell*, 1 Head, 376, an objection was made to the manner in which the jury were sworn, and a reversal was asked on the ground of irregularity in this regard. The answer, however, was: "The defendant and his counsel were present when the jury were sworn, and did not then complain, and cannot now be heard in this court upon the question." The soundness of this rule was recognized in the case of *Preston v. State*, 115 Tenn. 343, 90 S. W. 856.

In *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318, the minute entry did not set out the form of oath to be administered to the trial jury, as required by the statute of that state. On appeal, in answer to the insistence that this omission was fatal to the judgment of the lower court, in the course of its opinion, the Supreme Court said: "A still more conclusive answer on this point is that no objection was made to the form of oath when it was administered, or any time prior to its presentment in this court. If there was any irregularity in this respect, it should, and probably would, have been objected to at the time it occurred. It is quite unlikely that there was any departure from the form of oath so well understood, and which is in universal use in all the courts of the state; but, if the form of the oath was defective, the attention of the court should have been called to it at the time the oath was taken, so that it might have been corrected. A party cannot sit silently by, and take the chances of acquittal, and, subsequently, when convicted, make objections to an irregularity in the form of the oath."

This case was subsequently taken by Baldwin, the prisoner, by a writ of error to the

Supreme Court of the United States, where it was urged that the jurors were not sworn according to the form of oath of Kansas, and that the prisoner, in effect, had been tried by an unsworn jury, and that, therefore, the jury was not a legally constituted tribunal, so that, if the judgment of the Supreme Court of Kansas was permitted to stand, the prisoner would be deprived of his life without due process of law. On the hearing of the case, in an opinion delivered by Blatchford, Justice, and reported under the title of *Baldwin v. Kansas*, 129 U. S. 52, 9 Sup. Ct. 193, 32 L. Ed. 640, the reasoning and holding of the Supreme Court of Kansas on this question were approved. See, also, the case of *Smith v. State*, 63 Ga. 168.

Cases to the contrary may be found; but we are satisfied, upon examination, it will be seen that they rest upon statutes peculiar to the states in which they originated. We have no statute in this state, called to our attention, which requires us to reverse a cause, either civil or criminal, where the merits have been reached, because of some irregularity, which would have been easily corrected upon the attention of the trial court being called to it, but presented for the first time on appeal. Objections going only to such irregularities must be made in the trial court, and, if not, they will be considered as waived by this court.

Bass v. State, 6 Baxt. 579, which seems to announce a contrary view, was overruled by this court at Nashville, December term, 1906, in the case of *Arthur Pearson v. State*, from Wayne county (not reported).

There is no error in the record, and the judgment of the circuit court is therefore affirmed.

WHEAT et al. v. COMMONWEALTH.
(Court of Appeals of Kentucky. April 20, 1909.)

1. HOMICIDE (§ 255*)—MANSLAUGHTER—EVIDENCE.

Evidence held to justify a conviction for voluntary manslaughter, notwithstanding the evidence of accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 540; Dec. Dig. § 255.*]

2. HOMICIDE (§ 169*)—EVIDENCE—ADMISSIBILITY.

Where, on a trial for homicide, the evidence showed that the difficulty began after decedent had reprimanded accused by stating to him that he ought not to behave in the way he did, evidence that 15 or 30 minutes before accused made an indecent exposure of his person was competent to explain the circumstances inducing decedent to reprimand accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 343; Dec. Dig. § 169.*]

3. HOMICIDE (§ 122*)—DEFENSE OF ANOTHER.

A person attempting to excuse his killing of one on the ground that it was done in defense of a third person must show that the third person was without blame, and was in such a position that the law would have excused him if he had done the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 177-181; Dec. Dig. § 122.*]

4. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CONSTRUCTION.

The instructions must be considered as a whole, and, when they present the entire law of the case when so considered, they are sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1990; Dec. Dig. § 822.*]

Appeal from Circuit Court, Boyle County.
"Not to be officially reported."

Thomas Wheat and another were convicted of voluntary manslaughter, and they appeal. Affirmed.

Jno. W. Rawlings and Robt. Harding, for appellants. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. Thomas and Sam Wheat, the appellants, under an indictment charging them with the murder of Rolla Davis, were convicted of voluntary manslaughter and their punishment fixed at confinement in the penitentiary for a term of 11 years. They ask a reversal upon the ground that the court erred in the admission of evidence and in giving instructions.

Briefly, the facts are these: Tom Wheat and Rolla Davis were bystanders at a game of baseball in progress at Perryville, Ky. Sam Wheat, a brother of Tom, was playing second base. Tom Wheat was very drunk and disorderly, and Davis, who was standing near the home base, said to him: "You ought not to behave in this way. You have had better raising." And thereupon Tom said to Davis: "You are a G—d—cowardly s—o—b—if you don't hit me." When this most offensive of epithets was applied to Davis, he struck Tom in the face with his

open hand or fist, and continued to strike or attempt to strike Tom as he backed away from him. This altercation only lasted a few minutes, as the combatants either quit quarrelling and fighting or were separated. While this quarrel was in progress, Sam Wheat left the second base where he was stationed, and came near the place where Tom and Davis were, but did not take any part in the affray at that time. Soon after this Tom Wheat again approached Davis, who was near the home base, and renewed the trouble by making some remark to Davis and striking him in the face. When he struck Davis in the face, Davis hit him, and probably knocked him down—at any rate, Tom backed or ran out in the diamond, Davis following him, striking or attempting to strike him with his hand or fist. When they had gone in this way some 60 or 70 feet from the home base, Tom retreating and Davis following him, Sam Wheat left the second base with a bat in his hand and started towards them. From this point on there is marked conflict in the testimony. The witnesses for the commonwealth say that, when Sam left his base, some one in the crowd hallooed to Davis "to look out, Sam was coming," and that, when Davis looked around to see where Sam was, Tom Wheat, who had a baseball bat in his hand, struck him on the head with it, and knocked him down, and while he was down on his knees and elbows Sam came up and hit him an awful blow on the head with the bat that he had in his hand, and that Tom told Sam to kill him. On the other hand, Sam Wheat and the witnesses in his behalf testify that Tom did not hit Davis with a bat or have a bat in his hand at all until after Sam had struck Davis. They further testify that Davis had an open knife in his hand, and was standing up in the act of cutting or striking Tom with the knife when Sam hit him with the bat. Sam states that he struck Davis with the bat in order to prevent him from cutting or stabbing his brother. All of the witnesses agree that Davis had a knife in his hand, but there is difference of opinion as to when he took it out of his pocket, and whether or not it was open. Looking at the testimony from the standpoint of the commonwealth, the difficulty was provoked and commenced by the conduct of Tom Wheat, and the striking of Davis by Sam was inexcusable. On the other hand, if the testimony of the Wickets and in their behalf is true, Tom Wheat did not strike Davis with a bat, and Sam only struck him in an effort to save the life of his brother. It is not, however, necessary that we should undertake to explain or reconcile this conflicting evidence. That was a matter entirely for the jury. They had the right to believe the story of the fight as told by the witnesses for the commonwealth, or the story as told by the

witnesses in behalf of appellants. As they found the appellants guilty, it is evident that they accepted as true the testimony for the commonwealth in preference to that offered in behalf of the accused. There is no insistence that there is not sufficient evidence to support the verdict; and so, if no error of law was committed, the finding of the jury must be approved.

Witnesses for the commonwealth were introduced who testified that some 15 or 30 minutes before Davis said: "You ought not to behave in this way. You have had better raising." Tom had exposed his person in the presence of the crowd, among which were several ladies. This evidence was introduced over the objection of appellants, who insist that it had no connection with the difficulty, and its admission was prejudicial error. In our opinion the argument against the admission of this evidence is not well taken. It was the drunken disorderly conduct of Tom Wheat that brought on the difficulty, and caused Davis to make the appropriate remark that was the commencement of it. The observation of Davis was not offensive or calculated to provoke a difficulty, but was evidently induced by the bad conduct and misbehavior of Tom Wheat, and a desire on the part of Davis to prevail on him to act in a decent and becoming manner. Considering the previous misconduct of Tom, it was an appropriate reprimand; and, as it appears to have been the first words spoken between them, it was entirely competent to permit the commonwealth to show why Davis made the remark. If Tom had not been guilty of any previous misconduct, the criticism of Davis was uncalled for and unnecessary, and might be said to have been sufficient to anger or provoke Tom. But, when explained by the causes that brought it forth, the remark could not be construed in any other way than as a friendly admonition to Tom to behave himself. The indecent acts of Tom were so closely connected with the difficulty and had so much to do with bringing it about that it was proper to permit the commonwealth to explain the circumstances that induced Davis to make the remark that seems to have been the beginning of the trouble.

It is insisted in behalf of Sam Wheat that, as his entire defense was rested upon the proposition that he had the right to strike Davis to prevent him from killing or doing his brother great bodily harm, the trial court did not give an instruction that fairly presented this phase of the case to the jury. The court instructed the jury, in substance, that if they believed from the evidence that, at the time the defendants or either of them struck and killed Davis, they or either of them had reasonable ground to believe that the one or the both were then and there in

danger of death or the infliction of great bodily harm at the hands of Davis, and that it was necessary or believed by the defendants or either of them in the exercise of a reasonable judgment to be necessary to strike and kill Davis in order to avert the danger, real or apparent, they should find them not guilty. This view of the law was qualified by the further statement that if the jury believed beyond a reasonable doubt that the defendants, one or both of them, when neither was in danger or apparent danger of death or great bodily harm, began the difficulty by coming on to or near to Davis with a bat or bats, and striking him, or making demonstrations to do so, they could not be excused on the ground of self-defense. They were further told that either of the defendants had the right to act for the other at any period of the difficulty if such other would be justified in doing such act or acts; but that anything done by one for and on behalf of the other was done at his peril in the sense that what he did must have been excusable if done by the one for whom he acted. The law is that, when a person attempts to excuse his act upon the ground that it was done in the defense of another, that other must himself be without blame; or, to put it in another way, be in such a position that the law would excuse him if he had done in his own behalf what the other did for him. The act of the intermeddler will be judged by the same rule that would be applied to the party in whose defense he acts, or to whose aid he comes. If the party to whose assistance the intermeddler comes would himself be excusable or justifiable at the time in taking the life of his assailant, then the third party will also be excusable and justifiable; otherwise, not. The instructions submitted this phase of the law in such a manner that the jury could not well have misunderstood it. If the jury had believed from the evidence that Tom Wheat's life was in danger at the time Sam struck Davis, they could not do otherwise than have acquitted Sam under the instructions given. The criticism of instruction No. 2 would be well taken if that instruction must be considered alone and apart from the others given; but, reading it in connection with and as a part of the other instructions, which presented the theory of the defense, it is not open to the objections urged against it. It is not practicable or necessary that each instruction should be complete in itself or contain the whole law of the case applicable to the phases that it treats of. The instructions are to be considered as a whole; and if, when so considered, they present the entire law of the case, it will be sufficient.

Perceiving no error to the substantial prejudice of the accused, the judgment is affirmed.

LOUISVILLE RY. CO. v. KUPPER.

(Court of Appeals of Kentucky. April 20, 1909.)

1. CARRIERS (§ 283*)—CARRIAGE OF PASSENGERS—PERFORMANCE OF CONTRACT OF TRANSPORTATION.

A carrier is liable for the acts of the servant in charge of or having control over the passengers, amounting to a breach of the duty of transporting the passengers safely.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1119-1124, 1140, 1141; Dec. Dig. § 283.*]

2. CARRIERS (§ 283*)—PERSONAL INJURIES—ASSAULTS BY EMPLOYÉ.

Plaintiff, a passenger on defendant's street car, was knocked from the car by the conductor, the assault being continued in the street, and on the approach of an officer the conductor directed him to arrest plaintiff, which he did. Held, that the whole affair was but a single transaction, and that defendant was liable for both the assault and the arrest if unlawful, and it was not error to omit from the instructions the question whether or not the conductor was acting within the scope of his employment at the time he directed the arrest.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 283.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "Not to be officially reported."

Action by Henry L. Kupper against the Louisville Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fairleigh, Strans & Fairleigh and Howard B. Lee, for appellant. Edwards, Ogden & Peak, for appellee.

CLAY, C. Plaintiff, Henry L. Kupper, instituted this action against defendant Louisville Railway Company to recover damages for an unlawful assault alleged to have been committed by defendant's conductor, and for a false arrest alleged to have been brought about by defendant's conductor. The jury returned a verdict in favor of plaintiff in the sum of \$250, and the defendant appeals.

It appears from the record that while plaintiff was a passenger on defendant's car on Fifteenth street, in the city of Louisville, a discussion arose between him and the defendant's conductor as to whether or not he had spit on the floor of the car or through a crack in the floor onto the street. This discussion ended a few moments prior to the time that the assault took place. Just before the car approached Maple street, where the assault and arrest occurred, plaintiff asked of one Mr. Phillips, who was a passenger on the car, the question: "Is that your dog?" When this question was asked, the conductor began to look for the dog. As a matter of fact there was no dog on the car, and the passengers, entering into the joke, began to laugh at the conductor. This remark was evidently made for the purpose of teasing the conductor. The latter became incensed. According to the tes-

timony for plaintiff, the conductor struck him in the face while he was standing on the steps, with his hand upon the railing. In falling plaintiff dragged the conductor from the platform into the street. There the fight was continued, several blows being struck on each side. While the fight was in progress, a police officer who was on the car came out. When he reached the plaintiff and the conductor, the latter directed him to arrest plaintiff upon the ground that he was drunk. According to the testimony for the defendant, the plaintiff first assaulted the conductor, and plaintiff was arrested merely because he was engaged in a difficulty, and not because of any direction given by the conductor.

The only error complained of is the giving of the following instruction: "(2) I further instruct you, gentlemen of the jury, that if you believe from the evidence that the plaintiff, Kupper, was arrested by the police officer for disorderly conduct, and such arrest was made by the police officer by reason or as a result of the representations and at the demand of the conductor of the car, and would not have been made by him but for such representations and demand by the conductor, and was not made by the police officer in the line of his duty and upon the information which he had other than the information and the demand of the conductor, and if you further believe from the evidence that there was no reasonable ground for the officer to believe at the time that the plaintiff was guilty of disorderly conduct or violation of the law, then the law of the case is for the plaintiff as to the false arrest, and you should so find." There was evidence to the effect that plaintiff intended to get off the car at the point where he was assaulted by the conductor, and, as the direction given to the policeman to arrest him was given by the conductor after plaintiff was off the car, it is insisted that plaintiff was no longer a passenger, and defendant cannot be held responsible.

In the case of *Wise v. Covington & Cincinnati Street Ry. Co.*, 91 Ky. 537, 16 S. W. 351, the rule is thus stated: "If he was compelled or was justified in leaving the car on account of the abuse of the driver, and the driver followed him, continuing the abuse, or for the purpose of beating him, it must all be regarded as one continuous wrong, and the company is as much liable as if the beating took place on its car. It is the duty of the driver to protect the passenger from insult and harm, unless the passenger is himself the aggressor, and when he insults the passenger, and then at once pursues him and beats him, returning again to his car, it is all one tort, and cannot be so separated by the acts done as to relieve the company from liability." It is also well settled that an act which amounts to a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

breach of duty on the part of a carrier towards a passenger, whether an assault, false arrest, insult, or abusive language, etc., makes the carrier liable for the acts performed by the servant who is placed in charge of or has control over the passengers. The law makes no distinction in the kind or character of the wrong done if such wrong amounts to a breach of the undertaking to transport the passenger safely. *Mulligan v. Railroad Co.*, 129 N. Y. 506, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. Rep. 539; *Lafitte v. Railway Co.*, 43 La. Ann. 34, 8 South. 701, 12 L. R. A. 837; *Stewart v. Railway Co.*, 90 N. Y. 588, 43 Am. Rep. 185. It is insisted, however, for defendant that, while the rule stated applies to assaults where the assault is begun on the car and continued after the passenger leaves it, it is not applicable to a case of this kind, where the direction to make the arrest was made after the passenger ceased to be a passenger. The evidence in this case shows that plaintiff was a passenger when the assault was first committed. The tort was then begun. The fight between the plaintiff and the conductor was continued on the street. It lasted but for a short time. When the officer approached, the direction to make the arrest was given. The conductor then returned to his car, and the plaintiff was arrested. He was tried the next day in the police court, and discharged. It is manifest that the whole affair of the assault and arrest was but one single transaction. We are unable to see upon what reasoning it can be said that the plaintiff was a passenger while the assault was going on, and not a passenger when the direction to arrest him was given by the conductor. If, as the plaintiff's evidence tended to prove, he was unlawfully assaulted and knocked from the car, and the assault was continued, and the order to make the arrest was immediately given, the company was liable both for the unlawful assault and for the unlawful arrest; and it was not error to omit from the instructions the question whether or not the conductor was acting at the time within the scope of his employment.

Finding no error in the record prejudicial to the substantial rights of appellant, the judgment is affirmed.

NEWELL v. BURNSIDE BANKING CO.

(Court of Appeals of Kentucky. April 23, 1909.)

1. ESTOPPEL (§ 38*)—DEED—SUBSEQUENTLY ACQUIRED PROPERTY.

A deed, conveying with general warranty land which the grantor does not own, passes the land by estoppel on the grantor subsequently acquiring title thereto.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 99-107; Dec. Dig. § 38.*]

2. ESTOPPEL (§ 12*)—DEED—SUBSEQUENTLY ACQUIRED PROPERTY.

Estoppels are not favored, and a deed will never be construed to operate by way of estoppel beyond the clear meaning of the words used.

[Ed. Note.—For other cases, see *Estoppel*, Dec. Dig. § 12.*]

3. ESTOPPEL (§ 47*)—MORTGAGE—PROPERTY CONVEYED—SUBSEQUENTLY ACQUIRED PROPERTY.

A mortgage conveyed property described as "one-eighth undivided interest in the estate of" decedent, consisting of a farm containing 270 acres. One-half of the farm belonged to the estate of decedent, and one-half belonged to the mortgagor's uncle, who subsequently died, leaving a will devising the land, so that the mortgagor received another one-eighth of an undivided half of the farm. *Held*, that the mortgage, though containing a general warranty, conveyed only the interest which the mortgagor had in the land at the time of the execution of the mortgage, and did not pass the interest received under his uncle's will.

[Ed. Note.—For other cases, see *Estoppel*, Dec. Dig. § 47.*]

Appeal from Circuit Court, Pulaski County.
"Not to be officially reported."

Action by the Burnside Banking Company against S. D. Newell. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Virgil P. Smith, for appellant. O. H. Waddie & Son, for appellee.

HOBSON, J. On June 30, 1903, S. D. Newell had overdrawn his account with the Burnside Banking Company in the sum of \$3,600, and to cover the overdraft he executed to it a note and a mortgage to secure the note. He was a son of John B. Newell. The mortgage thus described the property conveyed as far as it is here material: "Also (1/8) one-eighth undivided interest in the estate of John B. Newell, deceased, consisting of one farm with improvements thereon, said to contain 270 acres, more or less, lying on the waters of the Cumberland and South Fork rivers near Burnside, Ky. For a further description see records of county clerk's office, Somerset, Ky." The farm of 270 acres belonged one-half to John B. Newell and one-half to Samuel Newell, who was his bachelor brother. This was known to both the parties when the mortgage was executed. After the mortgage was made Samuel Newell died, leaving a will by which he devised to his brother's children his half of the farm, so that at the date of the mortgage S. D. Newell owned an undivided one-eighth of one-half of the land, and after it was executed and before the suit was brought he received under his uncle's will another eighth of an undivided one-half of the land. The bank insists that, as the mortgage contained a general warranty, the interest which S. D. Newell received under his uncle's will passed to it by reason of

the warranty. The circuit court so held, and S. D. Newell appeals.

There are numerous cases holding that, if a man conveys with general warranty that which he does not then own, but subsequently acquires, the after-acquired title will pass to his vendee by estoppel. See *Perkins v. Coleman*, 90 Ky. 611, 14 S. W. 640. But the deed in this case does not convey an undivided one-eighth of the tract of land. The language is "one-eighth undivided interest in the estate of John B. Newell, deceased, consisting of one farm with improvements thereon, said to contain 270 acres, more or less." The thing that is conveyed is S. D. Newell's undivided interest in the estate of John B. Newell, deceased, in the farm. The deed purports to convey, not an undivided one-eighth of the farm, but an undivided one-eighth of the estate of John B. Newell in it. It is manifest from the language of the deed that the parties had in mind only the interest in the land which S. D. Newell had inherited from his father. The deed does not purport to convey any other interest. The warranty only refers to the interest conveyed. It does not enlarge the operation of the granting clause. The deed does not refer to any interest in the land owned by Samuel Newell, or to be received by S. D. Newell from him. To make this deed cover anything more than one-eighth of the estate of John B. Newell in the land would be to extend its terms beyond their fair meaning. Estoppels are not favored, and a deed will never be construed to operate by way of estoppel beyond the clear meaning of the words used. If the parties had contemplated a conveyance of an undivided one-eighth of the land, there was no need to insert in the deed the words "the estate of John B. Newell, deceased." To hold that this deed covers anything more than S. D. Newell's interest in his father's estate in the land would be to reject these words entirely from the deed, and make it read as though they were not in it. We therefore conclude that the deed only covers the one-eighth interest in the land which S. D. Newell inherited from his father.

Judgment reversed, and cause remanded for a judgment as above indicated.

CAMDEN INTERSTATE RY. CO. v. LESTER.

(Court of Appeals of Kentucky. April 20, 1909.)

1. RELEASE (§ 55*)—INJURIES TO SERVANT—BURDEN OF PROOF.

In an action by an injured servant on a contract, whereby defendant master, in consideration of a release from liability, agreed to pay him a stated sum daily until defendant's physician certified that he was able to resume work, the burden of showing that the certificate, if

given, was falsely or fraudulently made, was on plaintiff.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 94-100; Dec. Dig. § 55.*]

2. RELEASE (§ 56*)—INJURIES TO SERVANT—EVIDENCE.

In an action by an injured servant on a contract, whereby defendant master in consideration of a release agreed to pay him a stated sum daily until defendant's physician certified that he was able to resume work, evidence as to the extent of plaintiff's injuries and of his condition when the certificate was alleged by defendant to have been given was admissible on the issue as to whether the certificate was falsely or fraudulently made.

[Ed. Note.—For other cases, see Release, Dec. Dig. § 56.*]

3. TRIAL (§ 61*)—ADMISSION IN CHIEF OF EVIDENCE PROPER IN REBUTTAL.

Though evidence should have been introduced in rebuttal, its introduction in chief was not error where it did not prejudice defendant's substantial rights.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 147; Dec. Dig. § 61.*]

4. APPEAL AND ERROR (§ 882*)—INVITED ERROR.

An instruction, though erroneous, is not ground for reversal where identical with an instruction offered by the complaining party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

Appeal from Circuit Court, Boyd County.
"Not to be officially reported."

Action by W. L. Lester against the Camden Interstate Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Brown & Martin, for appellant. Dinkle & Prichard and Malin & Malin, for appellee.

CLAY, C. Plaintiff was employed by the defendant as a lineman. His duty was to climb poles and string electric wires. On July 24, 1901, he came in contact with one of defendant's wires, and was thrown to the ground, and his head, back, and spine injured. On August 1, 1901, he entered into a contract with the defendant, whereby it agreed to pay him \$2 per day for all working days until its physician certified that he was able to resume his duties. In consideration thereof the plaintiff agreed to release defendant from all claims or demands against it growing out of the injuries which he received. The defendant carried out its agreement by paying to the plaintiff \$2 for each working day until the 23d day of September, 1901, when it ceased to pay, claiming that its physician had certified that plaintiff was able to resume his work. This action was instituted on December 23, 1904. Plaintiff charged in his petition that, while an employé of defendant, he had been injured by its negligence, and then set forth the contract referred to above. He further stated that at the time of the filing of the petition he was not, and had not theretofore

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

been, able to resume his duties; that, if a certificate to the effect that he was able to resume his duties had been made by defendant's physician, the same was false and untrue, and made with the fraudulent purpose of preventing plaintiff from receiving from defendant \$2 per day during the time he was unable to resume his work with the defendant. The defendant denied that the injuries were caused by its negligence, and admitted the execution of the contract, but denied that the certificate made by its physician was false or untrue, or made with the purpose or attempt to prevent plaintiff from receiving his wages from the company. It also denied that he had been unable to resume his duties, and pleaded affirmatively that on the 23d day of September, 1901, its physician had certified that plaintiff was able to resume his duties, and that between the time of his injuries and the time of making said certificate the defendant had paid to plaintiff his wages of \$2 per day for all working days. The affirmative allegations of the answer were denied by reply. The trial resulted in a verdict in favor of plaintiff in the sum of \$615, subject to a credit of \$115, and, from the judgment based thereon, this appeal is prosecuted.

According to the proof of plaintiff, the latter, at the time defendant's physician certified that he was able to resume his duties, was as a matter of fact unable to work, and at the time of the filing of the suit he was still unable to work. No certificate from defendant's physician to the effect that plaintiff was able to resume his duties was introduced in evidence. The defendant's physician testified that he did not know whether it was made orally or in writing. There appears in the record a letter addressed to plaintiff from defendant's general manager, dated September 17, 1901, in which he stated that he was in receipt of a letter from the company's physician advising him that plaintiff would be able to resume his work on September 23d.

In support of his case the plaintiff offered in chief evidence of the extent of his injuries and of his condition at the time the certificate is said to have been made to the company. It is insisted by defendant that the court erred in admitting this evidence in chief; that, under his contract, the plaintiff was entitled to be paid for all working days until the company's physician certified that he was able to resume work; that the only issues to be decided were whether or not the company had made the payments until the physician had given his certificate, whether a certificate was made, and whether this certificate was false or fraudulent; that the burden on all these issues was upon the defendant. The trial court admitted evidence of the extent of plaintiff's injuries and of his condition, with the admonition to the jury that it was admitted only for the

purpose of bearing upon the issue as to whether or not the certificate of the company's physician was falsely or fraudulently made. Under these circumstances, the evidence was certainly admissible. Of course, the burden of showing that the certificate, if one had been given, was falsely or fraudulently made, was upon the plaintiff. Under the circumstances we are unable to see how the introduction in chief of the evidence complained of, even though it should have been introduced in rebuttal, could have in the least prejudiced the substantial rights of the defendant.

It is next insisted that the court erred in giving to the jury the following instruction: "The court instructs the jury that they shall find for plaintiff \$2 for each working day from August 1, 1901, until plaintiff was able to resume his duties with defendant company, subject to a credit of \$115; but the finding shall not exceed the sum of \$2,000. But, if the jury shall believe and find from the evidence that Dr. A. H. Moore certified to the defendant that the plaintiff was able to resume his duties to it, then the jury shall not find for the plaintiff for any working days after Dr. Moore so certified, unless they shall believe and find from the evidence that the said Moore in so certifying was guilty of fraud or such gross mistake as necessarily implied bad faith, or the failure to exercise an honest judgment." The defendant contends that this instruction is erroneous in two particulars: First, in arbitrarily fixing the credit to which was entitled at \$115; second, in allowing a recovery in case of "such gross mistake as necessarily implied bad faith," when there was no plea of mistake. Upon the first point it is said that from July 24, 1901, until September 23, 1901, were included 62 days. At \$2 per day this would make the credit \$124. It will be observed, however, that the contract provides for \$2 per day for each working day. There is nothing in the record to show that Sundays were to be considered working days. Eliminating the Sundays, the amount of the credit did not exceed \$115 allowed in the instruction referred to. Even if it had exceeded that amount by a few dollars, the sum involved would be too insignificant to justify a reversal of this case. As to the second point, that a recovery was allowed for "such gross mistake as necessarily implied bad faith" without a plea of mistake, it is sufficient to say that the language employed in this instruction is almost identical with the language of an instruction offered by counsel for defendant. Even if the instruction be erroneous in the respect referred to, it would not justify a reversal of this case; for counsel will not be permitted to lead the court into error, and then secure a reversal for the very error which they themselves brought about.

Judgment affirmed.

RICE et al. v. RICE.

(Court of Appeals of Kentucky. April 21, 1909.)

1. WILLS (§ 602*)—CONSTRUCTION—ESTATES CREATED—"DIE WITHOUT CHILDREN."

A will made certain devises to testator's two sons, and provided that if either should die without legal heirs then his portion should go to the other, or his children, if any, and that neither should have power to sell unless the proceeds should be invested in other real estate. *Held*, that in view of the provision for sale the phrase "if either should die without children" referred to the death of either son at any time before or after testator's death, and each son took a defeasible fee, which would be defeated by the death of the devisee at any time without issue then living.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1351; Dec. Dig. § 602.*]

For other definitions, see Words and Phrases, vol. 3, p. 2057.]

2. DOWER (§ 13*)—INTERESTS SUBJECT TO DOWER—DEFEASIBLE FEE IN LAND.

The interest of the deceased devisee being a defeasible fee which the issue of his wife would have inherited as his heir, his wife was entitled to dower therein.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 44; Dec. Dig. § 13.*]

Appeal from Circuit Court, Boyle County: "To be officially reported."

Action between M. B. Rice and others and J. A. Rice. From the judgment, M. B. Rice and others appeal. Affirmed in part, reversed in part, and remanded.

Breckinridge & Breckinridge and Fox & Jackson, for appellants. Geo. E. Stone, Robert Harding, and C. H. Rodes, for appellee.

NUNN, J. One R. B. Rice died in Boyle county, Ky., the place of his residence, leaving a will which was executed in 1896. He left a widow and two children. By his will he made provisions for the settlement of his debts and for the benefit of his wife, which she afterwards renounced, and then devised to his two boys, John Andrew and James Howard Rice, certain lands. In making these bequests, he used the following language: "I will to my son John Andrew Rice the east end of my land with general boundary as follows: [Describing it] containing two hundred and fifty acres. I will to my son Joe Howard Rice the balance of the Ephram Smith tract of land containing 190 acres and the Blas Smith tract of 144 acres. If either should die without legal heirs then his portion shall go to the other, or his children if any. Neither shall have power to sell and convey except the proceeds shall be invested in other real estate." These sons married. John Andrew is alive and has living children. James Howard is dead. He left a widow, M. B. Rice, one of the appellants, but left no children surviving him. James Howard Rice became indebted to ap-

pellant Garr, Scott & Co., and, with his wife, executed a mortgage to this company to secure the payment of the indebtedness, and it brought this action to enforce its mortgage lien. N. K. Tunis, the administrator, intervened by a pleading and sought to have the 190 and 144 acres sold for the purpose of paying the debts of J. H. Rice. Appellant M. B. Rice sought to have dower allotted to her in the land referred to. John Andrew Rice presented his petition and was made a party to the action, in which he claimed to be the owner in fee simple of the land by virtue of the provisions of his father's will above copied. He alleged that his brother, John Howard, took the land under his father's will and died without issue having been born. The lower court sustained his contention.

Appellants contend: That James Howard Rice took the fee-simple title to the land devised to him; that the words, "if either should die without children" referred to the death of either in the lifetime of their father, the testator; that he outlived his father, and therefore took the absolute title. We cannot agree to this construction of the will. The testator had reference to the death of either taking place at any time, either before or after his death. This is evident, according to the sentence immediately following limiting their right to sell the land to the extent that if they sold it they were required to reinvest the proceeds in other real estate. The will speaks from the date of the death of the testator, and they did not own the land or have any power to sell it until after the death of their father.

In the case of *Harvey v. Bell*, 118 Ky. 512, 81 S. W. 671, the court undertook to classify all the cases with reference to the construction of wills. The will under construction in the case at bar comes under the fourth class referred to in that opinion. The court in that case said: "On the other hand, where there is no intervening estate, and no other period to which the words 'dying without issue' can be reasonably referred, they are held, in the absence of something in the will evidencing a contrary intent, to create a defeasible fee which is defeated by the death of the devisee at any time without issue then living." In the case of *Smith v. Ballard*, 117 Ky. 179, 77 S. W. 714, the language construed was as follows: "In the event of Low Bell Ballard's death without bodily issue then her portion of my estate shall be equally divided between Martha Hitt," etc. In construing this clause the court said: "When a devise is made to one person in fee, and in case of his death to another in fee, courts interpret the devise over as referring only to death in the testator's lifetime. The courts were led to so interpret such devises, because of the absurdity of speaking of the one event which is sure to occur to every one

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

living as uncertain and contingent. 2 Jarman, Wills, c. 43. The rule is different, however, when the death of the testator [evidently the word 'devisee' was the one meant to be used instead of 'testator'] is coupled with other circumstances which may or may not take place, as, for instance, death without children. In such case the devise over takes effect according to ordinary and literal meaning of the words, 'upon death,' under the circumstances indicated, at any time, whether before or after the death of the testator. 2 Jarman, Wills, c. 49; Sale v. Crutchfield, 8 Bush, 649. In Thackston v. Watson, 84 Ky. 206, 1 S. W. 398, the same doctrine is recognized. The death of Lou Ballard was not uncertain, but the event of her death 'without bodily issue' was uncertain, for it might occur with or without bodily issue. So under the plain language of the will, if her death occurred either before or after the death of the testator, then the estate devised to her goes to the persons designated in the will."

Under these authorities the court properly adjudged that John Andrew Rice took the land under his father's will. But under the opinions of this court in the cases of Northcut v. Whipp, 12 B. Mon. 65, Fry v. Scott, 11 S. W. 426, and Webb v. Trustees of First Baptist Church, 80 Ky. 117, 13 S. W. 362, the court wrongfully adjudged that M. B. Rice, the widow of John Howard Rice, had no dower interest in the land. These cases expressly determine that she has such an interest. In the case of Fry v. Scott, supra, the court, after quoting the statute with reference to dower, said: "In Northcut v. Whipp, 12 B. Mon. 65, it was expressly held that the widow of a husband who had a defeasible fee in land was entitled to dower. In that case the question was fully considered and the rule laid down, which has since been adhered to, that in all cases where the husband is seised of such an estate in land as that the issue of the wife may inherit, if any she have, as heir to the husband, the widow is dowerable out of such estate." Appellee's counsel presents a strong argument and asks that the court overrule the decisions referred to. There may be a great deal said upon either side of the question, which is a very close one; but the construction of the statute giving the widow, in such cases, a dower interest, was established by this court more than 50 years ago, and has been consistently followed to the present time. Therefore we decline to change the rule of construction.

For these reasons, the judgment of the lower court is affirmed as to appellants Tunis, the administrator, and Garr, Scott & Co., and reversed as to appellant M. B. Rice, and remanded for further proceedings consistent with this opinion.

MEADE v. RATLIFF.

(Court of Appeals of Kentucky. April 21, 1909.)

1. CHAMPERTY AND MAINTENANCE (§ 7*)—GRANTS OF LAND HELD ADVERSELY.

A deed conveying land held adversely is not void as being within the champerty statute, but only voidable at the instance of the parties in adverse possession, and one claiming under a subsequent deed from the grantor cannot recover the land on the ground that no title passed by the former deed.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 54; Dec. Dig. § 7.*]

2. CHAMPERTY AND MAINTENANCE (§ 7*)—GRANTS OF LAND HELD ADVERSELY.

A deed conveying lands held adversely is champertous, though made in good faith and for valuable consideration; but the parties may rescind it, and this right is not affected by St. 1909, § 216 (Russell's St. § 1783), declaring that neither party to a contract made in violation of the statute shall have any right of action thereon, which applies only to contracts or conveyances made in consideration of services to be rendered in the prosecution or defense of any suit, whereby the thing sued for is to be taken for such services.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 54, 55; Dec. Dig. § 7.*]

3. CHAMPERTY AND MAINTENANCE (§ 7*)—GRANTS OF LAND HELD ADVERSELY.

The sufficiency of evidence introduced by the plaintiff in ejectment to show that a champertous deed by his ancestor was rescinded by the parties is a question for the jury.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 62-65; Dec. Dig. § 7.*]

4. ADVERSE POSSESSION (§ 97*)—EFFECT—EXTENT OF POSSESSION.

An entry, without color of title, on a parcel of land embraced within a patent boundary claimed by another, who is in actual possession of the whole, does not oust him from the possession thereof, except to the extent of the actual inclosures made by the person making such entry.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 537; Dec. Dig. § 97.*]

Appeal from Circuit Court, Pike County.

"To be officially reported."

Action by John L. Meade against John Ratliff. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

E. D. Stephenson, F. W. Stowers, Jno. L. Meade, and Hazelrigg & Hazelrigg, for appellant. York & Johnson, for appellee.

NUNN, J. Appellant sued appellee in ejectment to recover about 100 acres of land. On the trial the lower court gave a peremptory instruction to the jury to find for appellee. The only question necessary to be considered is whether there was any evidence introduced by appellant sustaining his claim to the land. It appears that in the year 1844 there was issued by the commonwealth a patent to Chas. Trout covering about 300 acres of land. This patent has a well marked and defined boundary. Appellant's testi-

mony shows that this patent boundary includes the land in contest. Appellant introduced as evidence this old patent and the conveyances intervening between the patentee and the one which conveyed the land to Rhodes Meade, the father of appellant. In 1881 Rhodes Meade conveyed to appellant, his son, the whole of this patent boundary. The testimony, without contradiction, shows that the patentee and the intervening purchasers thereof lived within the patent boundary and claimed to the extent thereof from soon after the date of the patent to the time of the trial in the lower court. Their inclosures, however, did not include any part of the land in controversy. About the year 1871, one Ratliff, father of appellee, entered within this patent boundary and erected a cabin and inclosed four or five acres of land around it, and at another point inclosed about three acres. Since that date no part of the land in contest has ever been cleared or inclosed. Immediately prior to the year 1871, Rhodes Meade conveyed the land in contest to one Ferguson, who instituted an action against Ratliff, father of appellee, to recover it. Ratliff interposed a plea of champerty and succeeded in defeating Ferguson in the lower court, and no appeal was ever taken. No further proceedings were had to oust Ratliff, nor was there any other conveyance made of the land, until Rhodes Meade made the conveyance to his son in 1881. The father remained in possession of the land with his son until 1896, at which time the father died. This action was brought in 1906 by appellant to oust appellee from the possession of the 100 acres. Appellee denied the ownership of the land by appellant, and alleged ownership in himself, and interposed a plea of champerty as to his title of actual adverse possession of the land for more than 15 years, and pleaded the former judgment in the case of Ferguson, the vendee of Rhodes Meade, against the father of appellee, as a bar to this action. Appellee concedes that this last defense cannot apply to this case, for neither appellant nor his father, Rhodes Meade, were parties to that action.

We are not called upon nor can we determine whether or not appellee is the owner of the land in contest, for he was not put to the necessity of introducing testimony on the trial to show by what right he claimed to own the land. What we have stated with reference to the property appears from appellant's testimony alone. Appellee also claims: That, when Rhodes Meade conveyed this 100 acres of land to Ferguson, the title passed from him to Ferguson, although the deed was afterwards declared void in the action of Ferguson against appellee's father; that when he attempted to convey to appellant, his son, in 1881, he had no title to pass to him, and therefore the lower court properly instructed the jury to find for appellee. Appellant contends that, as the deed was

champertous and void, no title passed, and therefore remained in Rhodes Meade. Some of the cases tend strongly to support this theory, but other and later cases construing the statute establish what we conceive to be a better principle. These opinions properly hold that the champerty statute, in so far as it applies to the sale and conveyance of real estate, was enacted for the benefit of those in the adverse possession and claiming the land. It leaves the vendor and vendee in the position they placed themselves by the sale and conveyance.

In the case of *Ft. Jefferson Improvement Co. v. Dupoyster*, 108 Ky. 792, 51 S. W. 810, 48 L. R. A. 537, the court, in considering the effect of a champertous conveyance, said: "Taking this view of the case, counsel contends that the deed is therefore absolutely void, as being within the champerty statute, and respectable authority is cited sustaining counsel's position; but, construing the statute as a whole, and in view of the decision of this court in the case of *Luen v. Wilson*, 85 Ky. 503, 3 S. W. 911, we are of opinion that the deed is not void, but only voidable at the instance of the parties in adverse possession." In the case of *Luen v. Wilson*, 85 Ky. 503, 3 S. W. 911, the court said: "It has been held by this court in more than one case that, if one who has previously sold land to another seeks to recover it, he cannot maintain his action upon the ground that the sale was champertous. The champertous contract must be abandoned or rescinded in good faith before he brings his action. *Hobson v. Hendrick* (November 12, 1885) 7 Ky. Law Rep. 362; *Harman v. Brewster*, 7 Bush, 355. * * * In such case the appellant can rely upon the still existing champertous contract. The law of champerty was intended as a shield to the possession, and not as a weapon of offense, as a defense to the remedy sought by a plaintiff, and a grantor after he has conveyed property adversely held cannot, without first rescinding or abandoning the contract in good faith, be heard to say that it was champertous, and it cannot therefore affect him. This is the right of the occupant, and his protection was clearly the aim of the statute."

This construction of the statute is a just one. Often such conveyances are made in the best faith, and the purchaser pays a valuable consideration. Nevertheless the conveyance is champertous if there be an adverse claimant in possession. The parties in such cases should be allowed to rescind and put themselves in statu quo. Section 216, Ky. St. (Russell's St. § 1783), declaring that "neither party to any contract made in violation of the provisions of this chapter shall have any right of action or suit thereon," has no application to a case like the one last stated. The section referred to applies only to contracts or conveyances made in consideration of services to be rendered in the prosecution or defense, or the aiding in the

prosecution or defense, in or out of court, of any suit, whereby the thing sued for, or any part thereof, is to be taken or received for the services or assistance. The testimony in the case at bar did not show that the conveyance from Rhodes Meade to Ferguson was of the character described. It was such a conveyance as could be rescinded or abandoned. We do not want to be understood as holding that there was sufficient evidence introduced by appellant to show that this deed was rescinded or abandoned by the parties. This was a question for the jury to determine. It is sufficient to say there was some evidence introduced to that effect. Green Meade, a brother of appellant, who has never had any interest in the matter in controversy, stated that, soon after the trial of the case of Ferguson against Ratliff, Ferguson told him that he would have nothing more to do with the matter, that he stated, in effect, that he had no interest in the land, and that Rhodes Meade could sue for it if he wanted to. This tended to show a rescission or abandonment of the conveyance made by Rhodes Meade to Ferguson. Rhodes Meade, afterwards, in the year 1881, conveyed the land to appellant. He claimed the land as his until this conveyance to appellant, his son, and the court erred in not submitting this question to the jury for its determination. Under the proof as introduced by appellant, his father and those under whom he was claiming had had the actual possession of the whole of the Trout patent boundary, which includes the land in contest, before appellee or his ancestors obtained possession of any part of the land in controversy. If this be true, the entrance by Ratliff, father of appellee, upon the land sued for, did not have the effect to oust Meade from the possession thereof, except to the extent of the actual inclosures made by Ratliff, unless it appears that he had a superior title to Meade.

It is our opinion that appellant's testimony made out a case for him which should have been submitted to the jury, and the court erred in giving the peremptory instruction. See *Miller v. Humphries*, 2 A. K. Marsh. 447, *Shrieve v. Summers*, 1 Dana, 239; *Moss v. Currie*, 1 Dana, 266. Many others and more recent decisions to the same effect could be cited.

For these reasons the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

EDWARDS v. KEVIL.

(Court of Appeals of Kentucky. April 20, 1909.)

1. LIBEL AND SLANDER (§ 93*)—PLEA OF PRIVILEGED COMMUNICATION—SUFFICIENCY.

In slander the words charged to have been spoken were: "I reckon E. (plaintiff) is satis-

fied now, he burned this out. I received word some time ago that he intended to burn them." And when asked what he meant: "Well, I heard that he (E.) was going to burn them." The answer averred that the words were spoken under circumstances making them privileged, and that the words used were: "I reckon E. is satisfied now my house is burned. I was notified he intended to burn it. I couldn't think he was mean enough to do it, but I took additional insurance." Held, that the words admitted to have been spoken, though not the identical words charged, were in effect the same, and actionable, and the answer good within the rule that a defendant in slander, pleading that the words spoken were privileged, must admit that he spoke the words charged, or words of similar import in themselves actionable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 218; Dec. Dig. § 93.*]

2. LIBEL AND SLANDER (§ 45*)—PRIVILEGED COMMUNICATIONS—ORIGIN OF FIRE.

A statement confidentially and in good faith, by a person whose property has been destroyed by fire, of one whom he suspects to be the incendiary, in an effort to get advice and assistance from a friend whose property also has been injured, is a privileged communication.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 45.*]

3. LIBEL AND SLANDER (§ 123*)—ACTIONS—QUESTIONS FOR JURY.

Whether a charge of having set fire to a building was made under such circumstances as to constitute it a privileged communication held for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 362; Dec. Dig. § 123.*]

4. LIBEL AND SLANDER (§ 103*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

In slander for having charged plaintiff with burning a building, the defense of privileged communication was made, and evidence introduced of statements by plaintiff indicating an intention or desire to burn or have burned the building, and that such statements were communicated to defendant previous to the fire. Held, that evidence by plaintiff that he had not, in fact, made such statements, was properly excluded, for if defendant in good faith believed what was communicated to him, and it was such as a reasonably prudent man would believe, it was immaterial for the purposes of his defense whether plaintiff made the statements or not.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 281; Dec. Dig. § 103.*]

Appeal from Circuit Court, Caldwell County.

"To be officially reported."

Action by Ed Edwards against M. R. Kevil. Judgment for defendant, and plaintiff appeals. Affirmed.

Ward Hedley and S. D. Hodge, for appellant. R. W. Lisanby, for appellee.

CARROLL, J. This action in slander was instituted by the appellant, who was plaintiff below, against the appellee, defendant below. The actionable words, which were charged to have been spoken during a fire that destroyed a building owned by appellee, are these: "I reckon Ed Edwards is satisfied now, he burned this out. I received word some time ago that he intended to burn them." When asked what he meant by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

this language, he replied: "Well, I heard that he (Edwards) was going to burn them."

In the first paragraph of his answer, the appellee denied speaking the words charged; and, in the second paragraph, set up that the appellant previous to the fire had threatened frequently to burn the building, and during the fire he (appellee), in a conversation with G. C. Dollar, the owner of a building that was injured by the fire, communicated to Dollar in confidence, and for the purpose of aiding him and securing his assistance and co-operation in investigating the origin of the fire, the information he had received concerning the threats of appellant, and, in the course of the conversation with Dollar, said to him without malice, and for the sole purpose of procuring his aid in ascertaining the author of the fire, "I reckon Ed Edwards is satisfied now my house is burned. I was notified he intended to burn it. I couldn't think he was mean enough to do it, but I took additional insurance." It will thus be observed, that appellee, while admitting he spoke substantially the language charged, claimed that it was under the circumstances a privileged communication. The point is made, however, that appellee, if he desired to justify or to claim that the words were spoken under circumstances that amounted to a privilege, must admit speaking the identical words charged in the petition.

The rule is that, when the defendant, in an action for slander justifies, or when he pleads that the words spoken were a privileged communication, he must admit that he spoke the words charged, or words of similar import that would in themselves be actionable. It is not necessary that the defendant should admit speaking the precise words charged in the petition. It will be sufficient if he admits the substance of the words, or so much of them as would sustain an action for slander. Thus, in *Shipp v. Patton*, 123 Ky. 65, 93 S. W. 1033, the words upon which the action was based were these: "Miss Nellie, when she was employed as a clerk in my store, dishonestly took away goods from the store that did not belong to her. I found in her grip a lot of goods that she had dishonestly taken from my store and put in the grip, and I accused her of dishonesty taking these goods, and she broke down and cried and begged me not to discharge her because it would disgrace her, and I kept her a few days longer in the store, and then discharged her. I would say this to anybody, because I can prove it, and I wouldn't hesitate to go into her own family and say just what I have said to you." The defendant in that case filed an answer, in which, after admitting that he spoke the words as charged, except that he did not use the word "dishonestly," denied that he spoke them maliciously, and further averred that they were spoken under circumstances that made them a privileged communication. The lower court required the defendant, before permitting him to rely

on the defense that the words were privileged, to admit speaking the identical words charged in the petition. In criticising this ruling of the lower court, this court said: "To say that a defendant in a slander suit must admit all the words charged, before he is allowed to plead a qualified privilege, places the defendant in a dilemma. If he denies the speaking of the words, the plaintiff will often prove the substance of them and recover. If he is compelled to admit all the words to plead the privilege, then he must often admit that which is not true in fact, and enough to show that he was actuated by malice, which will defeat him. The plea of the defendant in this case was in its nature a plea of confession and avoidance, and, while denying the use of the word 'dishonestly,' confessed enough to give 'color' to appellee's petition; that is, left uncontroverted enough of it to give her a cause of action." Adhering to the ruling of the court in the *Shipp Case*, which we believe to be correct, it follows that in an action for slander, when the defendant pleads that the words spoken were privileged, he may deny that they were spoken maliciously and set out the exact language used by him, although it may not be identical with that charged in the petition; but it must be so nearly similar to it, and admit enough of the language charged to maintain an action. Applying this principle to the case before us, it is manifest that the words admitted by appellee to have been spoken were actionable, and, although not the identical words charged, they were in substance and effect the same, and so the court did not err in holding the answer to be good.

Nor is there any doubt that, if the words were spoken under the circumstances described by appellee in his answer and evidence, they were privileged in the sense that appellee has the right to show the facts surrounding their publication as an excuse or justification for the utterance. A person whose property is destroyed by fire may in a confidential way confide to his neighbors and friends whom he suspects as the incendiary, if his suspicions are based upon reasonable information or grounds, and his declarations are made in good faith. *Faris v. Starke*, 9 Dana, 128, 33 Am. Dec. 536; *Grimes v. Coyle*, 6 B. Mon. 301; *Harper v. Harper*, 10 Bush, 447; *Campbell v. Banister*, 79 Ky. 205; *Nix v. Caldwell*, 81 Ky. 293, 50 Am. Rep. 163; *Townsend on Slander & Libel*, p. 440. There was sharp conflict in the evidence as to the circumstances under which the words were spoken. According to the evidence for appellant, they were not spoken confidentially, or in good faith, or in an effort to advise and consult with friends concerning the origin of the fire. On the other hand, the appellee testified that, in confiding his suspicions to a fellow sufferer at the fire, he believed that the information previously conveyed to him that ap-

pellant was the incendiary was true, and used the language imputed to him in an effort to get advice and assistance from his friend, whose property was also injured. It is however, sufficient to say, in respect to this conflict in the evidence, that it was a matter for the jury, under proper instructions, to decide which story they would accept as true. If the version of appellant and his witnesses was believed by the jury, the communication complained of was not a privileged one; but the jury evidently accepted appellee's account of it as correct.

On the trial of the case the appellee introduced several witnesses, who testified that previous to the fire they heard appellant make remarks that indicated an intention or desire upon his part to burn or have burned the building of appellee, and that previous to the fire they communicated to appellee these threats. After this evidence was introduced, the appellant offered to show by his own testimony that he had not made any of the statements attributed to him by the witnesses; but the trial judge refused to permit him to deny that he had made these statements, putting his ruling upon the ground that it was immaterial, so far as the question of privilege was concerned, whether he in fact made the statements or not, if the statements previous to the fire had been communicated to appellee as coming from him. Of this ruling serious complaint is made. In our opinion the decision of the trial court upon this point was correct. For the purposes of appellee's defense, it was not material whether or not appellant made use of the language attributed to him by the informants of appellee. If the appellee in good faith believed what was communicated to him, and it was such as a man of reasonable prudence would believe, he had the right to act upon the assumption that it was true, although as a matter of fact it may have been false. *Shipp v. Commonwealth*, 124 Ky. 643, 99 S. W. 945, 10 L. R. A. (N. S.) 335. If appellant had been permitted to deny the remarks, the effect would be to inject into the case a question of veracity that threw no light upon the issues being tried. Under circumstances like those developed in this case, when information, such as a reasonably prudent man would believe, is communicated to him, he is not required, before acting upon it in a natural and reasonable way, to investigate its truthfulness.

The judgment of the lower court is affirmed.

SPEARS et al. v. SPAW.

(Court of Appeals of Kentucky. April 23, 1909.)

1. ASSIGNMENTS (§ 8*)—VALIDITY—EXPECTANCY.

A deed by which the grantors assumed to convey their interest in land which their mother owned in fee during the mother's life, subject

to her use for life, with the mother's consent, was void, both at law and in equity, as against public policy.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 13; Dec. Dig. § 8.*]

2. ASSIGNMENTS (§ 8*)—EXPECTANCY.

Where a deed by which the grantors assumed to convey their interest in land owned by their mother in fee during the mother's lifetime was void, as against public policy, a covenant of warranty contained therein was void also.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 13; Dec. Dig. § 8.*]

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by Isabella Spears and others against A. J. Spaw. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

T. Z. Morrow and Simpson Phelps, for appellants. Sharp, Bethurum & Cooper, for appellee.

NUNN, J. In 1907 Mrs. Fanny Spaw died, the owner of a tract of land containing about 200 acres, situated in Pulaski county, Ky. She left surviving her three children, appellants, Isabella Spears and Sarah A. Whiles, and appellee, A. J. Spaw, as her only heirs at law. Soon after her death Isabella Spears and Sarah A. Whiles instituted this action for the purpose of having the land sold and the proceeds divided among the three children. A. J. Spaw, appellee, answered, denying their ownership of any interest in the land, and alleged that he purchased their interests in the lifetime of their mother at the price of \$250 each, and that their mother consented to the sale and conveyance. The lower court, considering that appellee obtained title to appellants' interests in the land, dismissed their petition, and they have appealed.

It appears, without contradiction, that this conveyance was made and executed in the lifetime of their mother, who held the fee-simple title to the land, and that she verbally consented to the sale and purchase. The only question to be determined is: Was this conveyance valid for any purpose? The following language occurs in the deed, to wit: "The parties of the first part (meaning appellants) hereby convey their interest, being two-thirds of the said Fanny Spaw estate, subject to her lifetime estate, and at the death of said Fanny Spaw to be in full force and effect, * * * to have and to hold the same, together with all the appurtenances thereunto belonging, unto the party of the second part, his heirs and assigns, forever; and the said parties of the first part hereby covenant with the said party of the second part that they will warrant the title to the property hereby conveyed unto the said party of the second part, and their heirs and assigns, forever."

It is certain that this conveyance passed nothing to appellee but appellants' expect-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ancy in the land. They had no interest in the land at that time. The mother's verbal consent to the sale of the land did not prevent her from afterwards disposing of it by will or descent. It remained within her power to prevent any of her children from receiving any part of this land or her estate. The result was that appellants had nothing to sell, and, therefore, appellee received nothing by reason of his deed. The rule is that it is essential to the legal validity of a contract that the thing sold have an actual or potential existence, and that a mere possibility or contingency, not founded on a right or coupled with an interest, cannot be the subject of a sale or assignment. In the case of *Wheeler's Executors v. Wheeler*, 2 Metc. 474, 74 Am. Dec. 421, the court held that a son, who had executed a deed purporting to convey his interest in his father's estate, the father then being alive, to his brother, was notwithstanding that fact entitled to recover the interest in the estate which his deed purported to convey. At common law such contracts were declared to be void; and this court in several cases, and many other courts have also, declared them to be void.

In the case of *McCall's Adm'r v. Hampton*, 98 Ky. 166, 32 S. W. 406, 33 L. R. A. 266, 56 Am. St. Rep. 335, this court said: "If it is wholesome to declare such contract invalid, why should courts of equity enforce such contracts in defiance of the law and a wise public policy? If this is to be the practice of courts of equity, then the common law on this subject is a dead letter and inoperative. Why should the common law declare such contracts invalid and void if courts of equity have the power to vivify and enforce them? If this is to be the rule, why not declare the common law not in force on this subject? It seems to us to be a travesty upon common sense for the law to declare a contract void, and yet say that it is enforceable in a court of equity. Some courts hold that the expectancy of an heir to inherit his father's estate is not an interest capable of assignment in equity, any more than at law, and we agree with such courts upon the question. It seems at this late day it is needless to discuss the wisdom and policy of a law which has been sanctioned for so many generations, and we do not feel that we are called upon to defend it. A strict adherence to it will save multiplying contentions, protect the improvident children and heirs at law from fraud and deceit, and save free and untrammelled the actions of the possessors of estates in their distribution."

Appellee contends that as the deed contains a general warranty of title, and that as appellants have become possessed of the property by descent, their mother having died, the warranty of title is binding upon them, and that the title to the land is in him by reason thereof. The contract and convey-

ance being void, the warranty is also. As stated, the conveyance of a thing not in being—i. e., an expectancy—is invalid, and the whole contract with reference thereto is void.

A reversal of this case will not create any great hardship upon appellee, as the land is worth much more than it was at the time of the making of the deed to him, and as he has obtained and sold timber trees from the land of the value of several thousand dollars; but this does not affect the legal question.

For these reasons, the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

LOUISVILLE RY. CO. et al. v. GAUGH.

(Court of Appeals of Kentucky. April 22, 1906.)

1. DAMAGES (§ 158*)—PLEADING—ISSUES, PROOF, AND VARIANCE.

In an action against a street railroad company to recover for injuries received while crossing defendant's track, evidence that plaintiff's sense of hearing had been injured was not admissible under a complaint charging injury to her head, except, perhaps, for the purpose of showing the extent of the injury to her head, not as a cause for which damages could be allowed.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 441-446; Dec. Dig. § 158.*]

2. DAMAGES (§ 143*)—PLEADING—PERSONAL INJURIES.

In personal injury cases, plaintiff should so describe his injuries that defendant from an inspection of the pleading may have reasonable notice of the injuries for which a recovery will be sought.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 410; Dec. Dig. § 143.*]

3. STREET RAILROADS (§ 113*)—ACTIONS FOR INJURIES—EVIDENCE—ADMISSIBILITY OF COMPANY'S RULES.

In an action for injuries by being struck by defendant's car while crossing its track, the rules of the company regulating its employees in the operation of its cars are not admissible in evidence, as the question of negligence of defendant's employees cannot be tested by the manner in which they have followed the company's rules, but such negligence must be tested by the rules of law.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 113.*]

4. STREET RAILROADS (§ 118*)—ACTIONS FOR INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

Plaintiff was injured while attempting to cross a street railroad track by being struck by a car and being thrown in front of a car going in the opposite direction. The court instructed as to the care required of the operators of the cars, as well as by plaintiff, and gave an instruction defining "contributory negligence" that would defeat a recovery. *Held*, that the court should also have instructed that if plaintiff, after she saw the car approaching, undertook to cross the track so close to the car that the motorman in charge of it could not, by the exercise of ordinary care with the means at his command, stop the car or check its speed in time to avoid striking plaintiff, and that plaintiff after being struck fell in front of the other car so close to the same that the motorman in charge could not, by the exercise of ordina-

ry care with the means at his command, prevent striking plaintiff, then the law is for the defendants, unless the jury believe that the inability of the motorman in charge of either of the cars to stop the cars was due to the unusual, dangerous, or reckless speed at which said cars or either of them were running at the time.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 118.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division. "To be officially reported."

Action by Emma C. Gaugh against the Louisville Railway Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Fairleigh, Straus & Fairleigh, David W. Baird, and Howard B. Lee, for appellants. Bennett H. Young and Gregory & McHenry, for appellee.

CARROLL, J. The appellant railway company has two tracks on Payne street in the city of Louisville, at the point where it intersects with Spring street. At the time appellee was injured, the interurban car that runs from La Grange to Louisville was going west into the city on one of the tracks of the railway company under an arrangement with that company, and a Crescent Hill car of the railway company was coming east on the other track. The appellee, who was on Spring street at its intersection with Payne street, desiring to take the Crescent Hill car, found it necessary to cross the two tracks at Spring street, so that she might be at that corner at which the Crescent Hill car stopped to take on passengers. As she was in the act of crossing the tracks, she was struck by the west-bound interurban car and knocked in front of the east-bound Crescent Hill car, and as a result was severely injured. The negligence complained of consisted in the fact that the cars at the time they struck appellee were running at a high rate of speed, and that no gong was sounded or bell rung or notice given of the approach of either of them to the crossing. The petition further avers that she was greatly injured in her "head, sides, hips, shoulders, breast, back, limbs, and internally." Upon the trial of the case before a jury, a substantial verdict was returned in favor of appellee against both the companies. Of a judgment entered upon this verdict they complain and ask a reversal: (1) Because the verdict is not sustained by sufficient testimony and establishes conclusively that appellee's contributory negligence brought about the accident and injuries resulting therefrom; (2) because the court erred in permitting appellee to testify that her hearing on the left side had been destroyed by the injury she received in the collision with the cars; (3) for error in permitting the rules of the company regulating and governing their employees in

the operation and control of the cars to be read in evidence; and (4) for error in giving and refusing instructions.

In respect to the first assignment of error, it is sufficient to say that, although the evidence was very conflicting, there was sufficient to take the case to the jury, and we are not prepared to say that the verdict was so flagrantly against the evidence as to authorize a reversal upon this ground. Further comment upon the evidence would not be proper in view of the fact that there will probably be a retrial of the case.

During the examination of appellee, she was permitted, over the objection of counsel for appellant, to state that her hearing was partially destroyed as a result of the injuries she sustained. The point is made that this evidence was incompetent because outside of, or at least not embraced by, the injuries described in the petition. The averments of the petition describing the injuries received by appellee covered every part of her person, including her head; and the argument is made that, under the allegation that her head was injured, appellee had the right to recover for injury not only to the head strictly speaking, but to any of the organs of sense located in the head, as to illustrate, seeing or hearing. A charge that a person has received injuries on or about the head will ordinarily only convey notice to the adverse party that a recovery will be sought for injuries to the head as that part of the body is ordinarily understood in speaking of it. The sense of hearing, as well as the sense of sight, is located in the head; but, if a person should say that his head was injured, it would scarcely convey information that his hearing was diminished or his eyesight impaired. The purpose of a pleading is to give notice to the adverse party of the grounds upon which a recovery will be sought against him, and in personal injury cases the plaintiff should so describe his injuries as that the defendant, from an inspection of the pleading, may have reasonable notice of the injuries for which a recovery will be sought, and thus be prepared to meet the evidence tendered by the plaintiff in support of his pleading. It is true that, if the pleading is indefinite or obscure, the defendant may move the court to require the plaintiff to make the allegations more specific; but the duty of preparing the petition in such a manner that it will inform the defendant with reasonable certainty concerning the injuries received is upon the plaintiff. The pleader is supposed to be informed with reference to the injury his client has sustained, or, at any rate, he can readily obtain this information; and so it would seem that justice to the adverse party requires that the petition in cases of personal injury should set out with reasonable certainty the particular injuries received.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed. We do not hold that it is necessary to specify with minute particularity all the injuries for which a recovery will be asked, but only that the petition shall give to the defendant reasonable information touching the injuries complained of for which damages will be sought and concerning which evidence will be offered. In many cases remote or consequential injuries may follow from the direct blow or wound received and be directly traceable to it, and yet it could not be said that they were the natural or probable result of the injury. To illustrate, rheumatism might follow an injury to the leg, and as a consequence of the injury; but we should say that, if it was sought to recover damages on account of the rheumatism, the pleader should specify it. And so loss of memory might result from an injury to the head, but it could not well be said that this misfortune was a reasonable or natural sequence of the injury. In short, without attempting, except in this general way, to formulate any rule, we may say the plaintiff can introduce evidence concerning and recover damages not only for the specific injury complained of, but for such other injuries as might reasonably and naturally be presumed to result from it without pointing out such injuries; but, unless the resultant injuries are such as would reasonably and naturally be presumed to follow the injury specified, a recovery cannot be had for them.

Although there is a wide difference in the opinions of the courts of last resort touching the question under consideration, the views we have presented are in accord with the rulings of this court upon similar questions as found in *Louisville Railway Co. v. Ellerhorst*, 110 S. W. 823, L. & N. R. R. Co. v. Roney, 108 S. W. 343, and L. & N. R. R. Co. v. Richmond, 67 S. W. 25. And, also, in *Atchison Ry. Co. v. Willey*, 57 Kan. 764, 48 Pac. 25; *Montgomery v. Lansing City R. Co.*, 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287.

It should further be said, as illustrated in the cases mentioned, that "where specific injuries are sued for, any external symptoms which are evidence of the injury may properly be admitted, for it is only by the external symptoms that an internal injury may be judged"; but, when evidence is offered to show that injuries described in the petition have manifested themselves in symptoms not described in the pleading, the court should instruct the jury that the testimony relating to the symptoms not pointed out is admitted only as evidence of the injuries described. It follows from this that the court should have excluded the evidence offered to show that appellee's hearing was impaired; or, if it was permitted to be introduced, should have instructed the jury that the testimony concerning her hearing was only admitted for the purpose of showing the extent of the injury to her head, and

not as a cause for which damages could be allowed.

In permitting the rules of the company regulating and governing its employees in the operation and control of cars to be read to the jury, over the objection of appellants, the court in our opinion erred. The care employees of companies must exercise in the operation of cars, so far as the general public is concerned, is to be determined by the principles of law, and not by the rules adopted by the company for the guidance of its employees. The measure of the company's duty to appellee was not to be judged by any rule of the company, but by the rules established by this court, in the absence of a statute, regulating the care that the persons in charge of a car must exercise to prevent injury to passengers or persons upon the street. If the rules adopted by the company imposed a less degree of care upon employees than the law exacted, the company could not shield itself from liability upon the ground that the rules it established were being obeyed when the accident complained of occurred; and so, if the rules of the company imposed a higher degree of care than the law demanded, the measure of the company's responsibility would be tested, not by its rules, but by the law. The appellee did not, so far as this record shows, know anything about the rules of the company. So far as she was concerned, it was wholly immaterial whether any rules had been adopted or not. Not being in the service of the company, she had no right and was under no duty to depend upon the rules for protection. *C. & O. Ry. Co. v. Barnes* (Ky.) 117 S. W. 261. Whether the employees violated or observed them did not in any wise affect or change the liability of the company, or lessen or increase its duty or responsibility to appellee. Nor did their observance or nonobservance of the rules relieve appellee of the duty she was under to exercise care for her own safety. It would therefore seem clear that the rules had no place in the case. They did not explain or illustrate any phase that was relevant or pertinent to the issue being tried. *Fonda v. St. Paul City R. Co.*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341; *Alabama Great Southern R. Co. v. Clark*, 136 Ala. 450, 34 South. 917.

The next error complained of is in respect to the giving and refusing of instructions. The instructions given did not conform to those directed to be given in this class of cases in *Louisville Ry. Co. v. Gaar* (Ky.) 112 S. W. 1130, and *Louisville Ry. Co. v. Byer's Adm'r* (Ky.) 113 S. W. 463, and for this reason are open to the objections urged against them. The defense of the company was that appellee came upon the track of the interurban car so suddenly and so close to the approaching car that it was impossible for the motorman to stop the car or slacken its speed in time to avoid strik-

ing her, and that she was thrown in front of the other car too near to it to prevent injury. The trial court gave the usual instructions as to the care necessary to be exercised by the operators of the cars, as well as the appellee, and also one defining correctly the "contributory negligence" upon the part of appellee that would defeat a recovery, but declined to give an instruction presenting the view that if appellee, after she saw the car approaching, undertook to cross the track so close to the car that the motorman in charge of it could not by the exercise of ordinary care and the means at his command stop the car or check its speed in time to avoid striking the plaintiff, they should find for the defendant. The facts of this case are almost identical with the facts of the Byer Case, and the court should have given an instruction similar to that approved in the Byer Case; in other words, the court should have told the jury that: "If they believed from the evidence that plaintiff, after she saw the interurban car approaching, undertook to cross the track in front of it, and so close to the front end of the approaching car that the motorman in charge of the same could not, after discovering her peril, by the exercise of ordinary care and the means at his command, stop the car or check its speed in time to avoid striking her, and further believe from the evidence that the plaintiff, after being struck by said car, fell in front of the other car, so close to the same that the motorman in charge of said car could not by the exercise of ordinary care and the means at his command prevent striking or running upon the plaintiff, then the law is for both of the defendants, and the jury should so find, unless they believe from the evidence that the inability, if any, of the motorman in charge of either of the cars to stop the cars, was due to the unusual, or dangerous, or reckless speed at which said cars, or either of them, were running at the time." And so, the other instructions should be modified to conform to the views expressed in the Gaar Case.

The judgment is reversed, with directions for a new trial in conformity with this opinion.

CHOTEAU TRUST & BANKING CO. v. SMITH et al.

(Court of Appeals of Kentucky. April 21, 1909.)

1. BILLS AND NOTES (§ 356*) — CHECKS — "HOLDER IN DUE COURSE."

Where a bank in the usual course of business took a check in good faith and without notice of any infirmity in it, paying the holder part of the proceeds and depositing the remainder to his credit, the bank was a "holder in due course" under St. 1909, § 3720b, subsecs. 51, 52

(Russell's St. §§ 1920, 1921), defining such a holder.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 906; Dec. Dig. § 356.*

For other definitions, see Words and Phrases, vol. 4, p. 3320.]

2. BILLS AND NOTES (§ 363*) — HOLDER IN DUE COURSE—ACTIONS.

Under St. 1909, § 3720b, subsec. 57 (Russell's St. § 1926), providing that a holder in due course holds the instrument free from any defect of title of prior parties and from defenses available to prior parties among themselves, and may enforce payment for the full amount thereof against all persons liable thereon, a bank which was the holder in due course of a check received from an indorser could upon the dishonor elect to sue the maker and indorsers or any one of them for the full amount of the check.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 790; Dec. Dig. § 363.*]

3. BILLS AND NOTES (§ 363*) — CHECK — BONA FIDE HOLDER — RIGHT OF ACTION AGAINST MAKER.

Though a bank was a bona fide holder of a check for value when it acquired it, it could not recover thereon against the maker if the maker should plead and show that the bank had parted with its interest and was simply suing for the benefit of an indorser who had paid back to the bank the money it had paid him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 790; Dec. Dig. § 363.*]

Appeal from Circuit Court, Scott County.

"To be officially reported."

Action by the Choteau Trust & Banking Company against O. T. Smith and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Jas. B. Finnell and Jas. F. Askew, for appellant. Bradley & Bradley, for appellees.

HOBSON, J. On October 31, 1906, O. T. Smith gave to H. B. Kinsolving a check for \$380 on the Deposit Bank of Sadleville, Ky. Kinsolving indorsed the check to J. B. Dunn, and Dunn indorsed it to the Choteau Trust & Banking Company. The check when presented for payment was protested by the direction of Smith, and the Choteau Trust & Banking Company brought this suit against Smith to recover on the check in the Scott circuit court. W. A. Hinton on his petition was made a party defendant to the action. He and Smith in defense of the suit charged that the check had been obtained by fraud, and denied that the bank was a bona fide holder for value. By an amended answer they pleaded that the bank was fraudulently conniving with Kinsolving and Dunn to assist them in collecting the check and to use the name of the bank as plaintiff for the fraudulent purpose of preventing them from relying upon their defenses to the paper as against the original payee. The case was heard before a jury, who entered a verdict in favor of the defendants. Judgment was entered on the verdict, and the plaintiff appeals.

Choteau is a small town in Indian Ter-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ritory. In October, 1906, the Howey Realty & Financing Company had a sale and drawing of lots there and ran an excursion from Lexington, Ky., out to the drawing; the realty company paying the expenses of any person who bought 10 lots at \$45 each. Kinsolving was an agent of the company. Smith and Hinton were on the train. On the way out Kinsolving persuaded Hinton to buy 10 lots. His traveling expenses were deducted from the amount the lots cost, and Hinton then got Smith to give Kinsolving his check for \$380, as Hinton was in some doubt that he had this much to his credit in bank. When they got to Choteau, and Hinton saw the lots, he became dissatisfied and demanded the return of his check. In the meantime, however, Kinsolving had indorsed the check to Dunn, and Dunn had indorsed it to the plaintiff. When Kinsolving refused to return the check, Smith telegraphed the bank at Sadieville not to pay it, and for this reason the check was not paid when it finally reached there. The evidence is very conflicting as to what took place between Kinsolving and Hinton on the train; but there was sufficient evidence to submit to the jury the question whether the check was obtained by fraud, under the rule in this state that where there is any evidence the question is for the jury; but the evidence is conclusive that the bank took the check in good faith and without notice of any infirmity in it, and that at the time it paid Dunn \$125, he depositing the remainder with it. He checked this out a day or so afterwards and before the check was protested. The bank had no interest in the sale of the lots or in the realty company, and the transaction with Dunn was in the usual course of business. It does not appear from the record where Dunn lived, although it may perhaps be inferred from some of the proof that he lived in St. Louis. It is said that he was solvent, and there is no evidence to the contrary. The defendants showed by a number of Kentucky bankers that by the usual course of banking, when a check which had been received was dishonored, the bank would look to the person who had indorsed the check to it, if he was solvent, rather than to the maker of the check, and upon this evidence the court gave the jury the following instruction: "The jury are instructed to find for the plaintiff, the Choteau Trust & Banking Company, unless they believe from the evidence that the plaintiff conspired with H. B. Kinsolving and J. B. Dunn, the payee and indorser of said check, respectively, to defraud the defendant Hinton by depriving him of any right or rights he had to resist and refuse payment of said check, because of misrepresentations made, if any were made, to Hinton by the agent or agents of the Howey Realty Company concerning the lots alleged to have been purchased by said

Hinton from said company. Then they ought to find for defendant."

It is evident from the proof that the bank was a holder of the check for value; but it is insisted that its not looking to Dunn for the money, and insisting on collecting it from Smith, is evidence that it is no longer a holder of the paper for value, and that the suit is brought under an arrangement with Dunn to defraud Smith and Hinton, by depriving them of their right to show the check was obtained by fraud. Section 3720b, subsecs. 51, 52, 56, 57, Ky. St. (Russell's St. §§ 1920, 1921, 1925, 1926), provides as follows:

"The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument." Subsection 51.

"A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Subsection 52.

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Subsection 56.

"A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." Subsection 57.

As the plaintiff is a holder in due course, it has a legal right under the statute to enforce payment of the instrument for the full amount of it against all parties liable thereon. When the plaintiff has the right to sue all or any of the makers of an instrument at his election, the person who is sued cannot complain that others equally liable are not sued. If six persons sign a promissory note, and the payee sues one of them, he cannot complain that suit was not brought against the other five. The exercise of a legal right cannot be made the basis of a defense to an action. If Dunn is good, and Smith has to pay this check to the bank, he can then sue Dunn for the money which he has paid; but he cannot demand of the bank that it shall forego its action against him, and bring an action against Dunn before it requires him to pay the debt. The purpose

of the statute is to give the holder of the paper an election as to whom he will sue. A large part of the business of the country is done on checks. Checks are taken as money, and pass from hand to hand as such, because it is understood that an innocent holder can enforce payment against the maker without regard to any defense he may have against the payee; but if the rule were laid down that the banks who cash checks must in the first place look to the indorser, or that their failure to look to the indorser is evidence of a fraudulent conspiracy, the whole value of checks for commercial purposes would be destroyed, and the manifest intention of the statute would be defeated. We had a similar question before us in *Sabel v. Planters' Bank*, 110 Ky. 299, 61 S. W. 367. The bank there had cashed a draft to which a bill of lading was attached as security. The drawee refused to accept the draft and then undertook to attach the goods covered by the bill of lading, insisting that the bank was not a holder for value and was only prosecuting the suit to cut off his defense against the drawer. It was held that the attachment could not prevail. To hold that the failure of the bank to follow the custom of looking to the indorser is evidence of a fraudulent conspiracy with him to defeat the equities of the maker would be to require the bank to follow the custom in order to be safe in its suit, and the result in the end would be practically to deny to it the right to look to any or all of the parties at its election. The statute is only declaratory of the common law and the rule heretofore in force in this state: "A bona fide holder for value of negotiable paper is one who has acquired title in the usual course of business, for a valuable consideration, in good faith, from one capable of transferring it or from one in possession of the paper with an apparent right to transfer it and without notice or knowledge of defenses or circumstances which should put him on inquiry." 7 Cyc. 924. "Defenses available against the real party in interest may be set up, although the action be brought by a nominal party." 8 Cyc. 25. "The real party in interest is the person beneficially entitled to the proceeds of the bill or note. As a rule the holder is presumptively the owner, and as such is the real party in interest and entitled to bring suit." 8 Cyc. 69. "At common law the holder of a bill might bring several simultaneous actions against all or any of the prior parties liable to him. He could not, however, maintain a joint action against parties severally liable. By statute in many of the United States, in England, and in Canada the holder of a bill of exchange or promissory note may bring suit against the drawer or maker, acceptor or indorser, any or all, in the same action." 8 Cyc. 92.

If the purchaser of the paper is a bona fide holder for value when he acquires it, he may enforce the payment of the paper, unless the defendant pleads and shows that he is not the real party in interest. If the defendant here had pleaded and shown that the bank had no actual interest in the collection of the note, or that it was simply bringing the action in its own name for the benefit of Dunn, who had already paid back to it the money it had paid him, the principle relied on by counsel would apply; but there was an entire failure to establish anything of this sort, and, on the conclusion of the evidence, the court should have instructed the jury peremptorily to find for the plaintiff.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

UNITED STATES HEALTH & ACCIDENT INS. CO. v. JOLLY.

(Court of Appeals of Kentucky. April 21, 1909.)

1. WITNESSES (§ 164*)—COMPETENCY—DECEASE OF OTHER PARTY TO CONTRACT.

In an action on a health and accident policy of insurance, evidence by plaintiff that he did not make certain statements in the application for the policy was error, where the agent who took the application was dead.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 683-686, 688-695; Dec. Dig. § 104.*]

2. EVIDENCE (§ 817*)—HEARSAY—STATEMENT BY PERSONS OTHER THAN WITNESSES.

In an action on a health and accident policy, evidence by plaintiff's physician as to what a chemist reported to him concerning pus taken from plaintiff's thigh and submitted to the chemist is inadmissible as hearsay.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

3. EVIDENCE (§ 509*)—OPINION EVIDENCE—TESTIMONY OF CHEMIST.

If a chemist is shown to be a competent expert, he may testify that he made an examination of pus taken from plaintiff's hip, and may also state what his examination showed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2312, 2313; Dec. Dig. § 509.*]

4. TRIAL (§ 208*)—RECEPTION OF EVIDENCE—CAUTIONING JURY AS TO IMPROPER EVIDENCE.

Where the court excludes certain evidence, and it is repeated by the witness, the witness should be cautioned as to the previous ruling, and the jury should be admonished not to consider the statement.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 504; Dec. Dig. § 208.*]

5. INSURANCE (§ 255*)—AVOIDANCE OF POLICY—EFFECT OF MISREPRESENTATION.

Where the misrepresentations by a person applying for health and accident insurance are such that, if true answers had been given, the insurer, acting in accordance with the usual practice among such companies, would not have taken the risk, such misrepresentations will avoid the policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 548; Dec. Dig. § 255.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Breckinridge County.

"Not to be officially reported."

Action by R. M. Jolly, Jr., against the United States Health & Accident Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, 101 S. W. 1179.

Barnes & Kincheloe and Murray & Murray, for appellant. John P. Haswell, Jr., for appellee.

HOBSON, J. The United States Health & Accident Insurance Company issued to R. M. Jolly, Jr., a policy by which it agreed to pay him an indemnity of \$40 a month after the first week that he was necessarily and continuously confined in the house and regularly visited by a legally qualified physician by reason of illness contracted and beginning after the policy had been maintained in continuous force for 30 consecutive days. The latter part of January, 1905, he was taken sick, and claimed the indemnity. The company denied liability, and this suit followed. On the first trial of the case, there was a verdict and judgment in his favor for \$251. On appeal to this court it was held that the verdict was palpably against the weight of the evidence. It was also held that Jolly was not a competent witness as to what took place between him and the agent of the company when the application was made, as the agent was dead. See United States Health & Accident Insurance Company v. Jolly, 101 S. W. 1179. On a return of the case to the circuit court, it was tried again; Jolly recovering a judgment and verdict for \$240. The company appeals.

The evidence on the second trial no more supports the verdict than the evidence on the first trial. The verdict is palpably against the evidence. On the trial the court allowed Jolly, as a witness for himself, to state that he had made none of the statements in the application after No. 8. This was error. As the agent was dead, Jolly could not testify as to anything that occurred between him and the agent when the application was taken, and to allow him to say that he did not make certain statements contained in the application is in effect to allow him to state that certain things did not occur between him and the agent, or to testify to what did occur between him and the agent. The court should have sustained the defendant's objection to this evidence and should not have allowed Jolly to state anything as to what he stated or did not state to the agent when the application was taken.

The court also allowed Dr. L. B. Moreman to state, over the defendant's objection, that he had sent some pus from the plaintiff's thigh to a chemist in Louisville, that the latter had examined it under a microscope,

and had reported to him what the examination showed. He was allowed to tell what the report was. The chemist may tell that he made the examination, and what his examination showed, if he is shown to be competent to speak as an expert; but his report to Dr. Moreman is not competent as evidence of what his examination showed. This would be to allow hearsay. All the evidence as to this examination should have been excluded. The witness several times spoke of examinations made by other insurance companies. The court excluded the evidence, but when it was repeated he should have cautioned the witness as to his previous ruling, and should have admonished the jury not to consider the statement.

On the last trial of the case the court gave the same instructions to the jury as he had given on the first trial. This seems to have been done because this court in the former opinion said nothing of the instructions. The reason that nothing was said as to the instructions was that the court could not anticipate what the evidence would be on another trial. What the instructions should be must necessarily depend on the evidence before the jury. When we exclude the evidence of the plaintiff as to what took place between him and the agent, there is nothing in the record to base instructions 2 and 3 upon; for Dr. Moreman, the only other witness introduced, shows distinctly he does not know what took place between Jolly and the agent. Instructions 2 and 3 therefore should not have been given. In lieu of them, the court should have told the jury: (1) That, if the plaintiff's illness was not contracted or did not begin after the policy had been maintained in continuous force for 30 consecutive days, they should find for the defendant. (2) In another instruction he should have set out the answers in the application relied on by the defendant and should have told the jury that, if these answers were untrue, and if true answers had been given the insurer, acting naturally and reasonably in accordance with the usual practice among health and accident insurance companies, would not have taken the risk, they should find for the defendant. *Providence Savings Life Assurance Co. v. Wayne*, 93 S. W. 1049.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

COX v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 20, 1909.)

1. HOMICIDE (§ 255*)—MANSLAUGHTER—EVIDENCE.

Evidence held to support a conviction of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 540; Dec. Dig. § 255.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW—FINDING OF FACTS BY JURY.

The verdict of a jury upon the facts in a criminal case will not be disturbed on appeal except in the absence of proof to support it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

3. CRIMINAL LAW (§ 720*)—TRIAL—ARGUMENT OF COUNSEL.

Much latitude is of necessity allowed a commonwealth attorney in the prosecution of his case; the only limitation being that he must confine himself to the facts in evidence and the fair and reasonable deductions and conclusions to be drawn therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.*]

4. CRIMINAL LAW (§ 720*)—TRIAL—ARGUMENT OF COUNSEL.

In a murder case, where accused, who left the house where a quarrel was in progress with a pistol in his hand to notify the proprietor of the lumber camp and have him stop the disturbance, testified that he gave the proprietor the pistol to keep the disorderly persons at the house from getting it, but it was not clear from his testimony or from the proprietor's deposition what the proprietor had done with the pistol after he received it, it was not improper argument for the commonwealth attorney to state that the proprietor had it in his hand when he returned to the house with accused, where decedent was killed, since it could not be said that such an inference was unauthorized by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.*]

5. CRIMINAL LAW (§ 941*)—NEW TRIAL—CUMULATIVE EVIDENCE.

A new trial on the ground of newly discovered evidence was properly refused, where the evidence was at most merely cumulative, especially where the application was not supported by the witness' affidavit, and the affidavit of accused and his counsel failed to show requisite diligence to discover the evidence sooner.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328-2330; Dec. Dig. § 941.*]

Appeal from Circuit Court, Larue County.
"Not to be officially reported."

William Cox was convicted of voluntary manslaughter on a charge of murder, and appeals. Affirmed.

Jno. C. Friend, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, C. J. The appellant, Wm. Cox, killed Harlan Goode by striking him upon the head with a stick, or piece of timber. The indictment under which he was tried charged him with the crime of murder. The trial resulted in a verdict finding him guilty of voluntary manslaughter and fixing his punishment at confinement in the penitentiary seven years. Judgment was entered in accordance with the verdict. Having been refused a new trial, appellant now asks of this court a reversal of the judgment.

The homicide occurred in a house situated

at a lumber camp in Larue county. The house seems to have been owned at one time by the deceased, Harlan Goode; but at the time of his death was under the control of appellant, though much if not all of the furniture therein was owned by Goode. However, the latter, his two sons, one Jasper Hogue, and other hands at work in the lumber camps were boarding in the house with appellant. On the afternoon of the homicide, the boarders of appellant having obtained some whisky, many of them, including appellant and Harlan Goode, drank of it freely, and several of them became intoxicated. This was true of Goode, and perhaps of appellant. In the evening several of the boarders, including the two sons of Harlan Goode and Hogue, went to some sort of an entertainment in the neighborhood. Harlan Goode, being unwell, retired at an early hour; his bed being in the same room occupied by appellant, his wife, and little daughter. Late in the night the boarders who had attended the party returned; Willie Goode going up to the room occupied by his father, appellant, and his wife and daughter. The returning boarders, including Willie Goode, were still drinking and hilarious. After Willie reached his father's room, the two had some conversation about Hogue, in which his father accused Hogue of having stolen certain articles about the house, and perhaps advised his son to tell Hogue of it. Following this conversation Hogue entered, or was called by Willie Goode into the room where his father was in bed. Soon after entering the room, Hogue and Willie Goode got into an altercation, and later a fight. After a vain effort to stop the difficulty by calling to the belligerents from the bed, Harlan Goode got up and went to them, pulled his son away from Hogue, ordered the latter from the room, and slapped him in the face. This seemed to increase the disorder, and just then appellant jumped from his bed and with pistol in hand approached the disorderly persons, ordered them to be quiet, and threatened them with the pistol. Failing to restore order, appellant, with the pistol still in his hand, left the room with the avowed purpose of getting Norman Tucker, the proprietor of the camp, to go to the house and stop the fighting and disorder. Tucker slept in an office building some yards from the house occupied by appellant and his boarders. Appellant soon returned to the house with Tucker, and when they got to the door they found there Harlan Goode, his son Willie, and Jasper Hogue. Harlan Goode came out of the door, and, according to the several witnesses of the commonwealth, appellant stepped from behind Tucker and, picking up from the ground a large stick of timber, struck Harlan Goode on the head with it, knocking him down. Goode got up, walked a few steps, and again fell. When others

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

went to him, they found him unconscious, and, taking him into the house, laid him on a bed. In a few hours he died. According to the three witnesses of the commonwealth, the deceased neither made, nor attempted to make, an attack upon appellant when the latter struck him, and was not expecting the blow. On the other hand, appellant testified that, before he left the house to get Tucker, deceased threatened to take his life, and when he and Tucker met deceased at the door Willie Goode was holding and trying to keep him from leaving the house, but that deceased broke loose from him, and as he came out of the door had a chair in his hands, which appellant believed he was going to strike him with, as he was coming towards him. That acting upon this belief, and having reasonable grounds to apprehend that his life was in danger at the hands of deceased, he struck and killed him. Tucker was not present when appellant was tried, but the latter obtained the benefit of his testimony by setting it forth in his own affidavit, which was admitted by the court and read as a deposition. The testimony thus attributed to Tucker was in the main corroborative of appellant's account of the killing.

Counsel for appellant insists that the verdict of the jury is contrary to law and unsupported by the evidence. We see no force in this claim. No complaint is made of the instructions, which fairly and correctly gave the law of the case, and the record presents no reason for saying that the verdict is contrary to or unsupported by the evidence. There were three witnesses for the commonwealth, John Goode, Willie Goode, and Joseph Hogue, whose testimony tended to establish appellant's guilt. They were contradicted only by appellant and the deposition of Tucker. In view of this situation, we can well understand how the jury reached the conclusion expressed by the verdict. This court will not disturb the verdict of the jury upon the facts of a criminal case, except in the absence of proof to support it.

We can see nothing prejudicial in the statements of the commonwealth's attorney that Tucker, upon returning with appellant to the place where deceased was killed, had the pistol appellant carried to him. The latter said he gave it to Tucker at the office to keep the disorderly persons at the house from getting it, but it was not clear from his testimony or the deposition of Tucker what the latter did with the pistol, after he received it. Therefore it cannot be said that the statement of the commonwealth's attorney that Tucker had it in his hand when he went with appellant to the house was an inference unauthorized by the evidence. As said by this court in *Housman v. Commonwealth*, 110 S. W. 236: "Much latitude is, of necessity, allowed an attorney in the presentation of his case; the only limitations being

such as require him to confine himself to the facts introduced in evidence, and the fair and reasonable deductions and conclusions to be drawn therefrom and the application of the law, as given by the court, to the facts proven. Controlled, regulated, and bounded alone by these limitations, an advocate may with perfect propriety appeal to the jury with all the power, force, and persuasiveness which his learning, skill, and experience enable him to command, and of this character of argument the accused may not complain, even though he feels that his conviction may be traceable more directly to the argument of counsel than to the facts proven."

We find no error in the refusal of the court to grant a new trial on account of the alleged newly discovered evidence of Mrs. Underwood. At most, it is merely cumulative, and, besides, this ground was unsupported by the affidavit of the alleged new witness. Moreover, the affidavit of appellant and his counsel failed to manifest such diligence as should have been used to earlier discover the new witness and the facts in her possession.

Being of opinion that appellant received a fair trial, the judgment is affirmed.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT v. DOWNEY.

(Court of Appeals of Kentucky. April 22, 1909.)

1. MUNICIPAL CORPORATIONS (§ 822*) — DEFECTIVE STREETS — INJURIES — NEGLIGENCE — INSTRUCTIONS.

Where the officers of a city for several months prior to the accident had knowledge of the general defective condition of the street at the point where plaintiff was injured which knowledge was contradicted, the court would have been warranted in treating it as admitted, and hence the city was not prejudiced because the court omitted to charge that the city was entitled to reasonable time to make needed repairs after knowledge of the defect, though it was not shown that defendant had knowledge of the existence of the particular hole that caused the accident in question.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 822.*]

2. TRIAL (§ 192*) — INSTRUCTIONS — ASSUMPTION OF UNCONTROVERTED FACT.

An instruction is not objectionable because it assumes an uncontroverted fact or one conclusively proved.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

3. DAMAGES (§ 185*) — PERSONAL INJURIES — EVIDENCE.

In an action for injuries, evidence held to sustain a finding that plaintiff's condition was the result of the injury sued for.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 185.*]

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Action by Joanna Downey against the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Board of Councilmen of the City of Frankfort. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. Cromwell, for appellant. B. G. Williams, for appellee.

LASSING, J. Appellee sued to recover damages for an injury sustained by being thrown from her buggy while driving over one of the streets in the eastern part of the city, the petition alleging that, by reason of one of the wheels of her buggy running into a rut or hole in the street, the axle of the buggy was broken, and she was thrown violently upon and over the dashboard and severely and seriously injured; that the defective condition of the street was known, or could have been known by the city officials by the exercise of ordinary care; and that but for its said defective condition the accident and consequent injury would not have occurred. The city answered, joining issue on each material allegation of the petition, and upon the issue so formed the case was tried by a jury, which returned a verdict in favor of appellee for \$1,125.

To reverse this judgment the city appeals. Several grounds are set up in the motion for a new trial, but only two of which are seriously considered by counsel in his brief. These are, first, that the verdict is flagrantly against the evidence; and, second, that the jury was not properly instructed, in that the court failed to state in the instruction that, after notice of the defective condition of the street had been brought home to the city, it should have a reasonable time within which to repair same before liability would attach for an injury resulting to one because of such defective condition.

The evidence shows that the street in question for a considerable distance on each side of where the accident occurred was in a very bad condition. The mayor stated that his attention had been called to this bad and defective condition of the street at that point as much as two or three months before the date of the accident. The city engineer and others of the city officials likewise had knowledge of this defective condition brought home to them, and, while there is no testimony showing that any of said officials knew of the existence of the particular hole which caused the breaking of the axle, still they all knew that the entire street at that point was in a dangerous, unsafe, and defective condition. It appears that its condition was so bad at that time and place that three other vehicles were either stalled or broken down at almost the same point where the accident to appellee's buggy occurred. There is no proof in the case to the contrary. This evidence as to the existence of these defects in the street at that point for such a length of time being uncontradicted, the court was warranted in treating it as a fact admitted, and appellant was certainly not prejudiced because the

instruction failed to state that appellant was entitled to be given a reasonable time in which to make the needed repairs after knowledge of the defective condition of the street had been brought home to the city. This principle was recognized in the case of L. & N. R. R. Co. v. Morris' Adm'x, 20 S. W. 539, in which this court said: "An instruction is not objectionable because it assumed an uncontroverted fact, or one which is admitted or conclusively shown by the evidence." And again in the case of L. & N. R. R. Co. v. Earl's Adm'x, 94 Ky. 368, 22 S. W. 607: "An uncontroverted fact may properly be assumed in an instruction." The city authorities having admitted that the defective condition of the street had been known to them for the length of time shown by the evidence, and there being no testimony to the effect that any effort had been made to repair same within that time, the court was warranted in declaring as a matter of law that if the jury believed from the evidence that the street was in the condition which the witnesses had described it to be, and this fact was known to the city officials, as they admitted it was, and appellee's injury was caused by such defective condition, then the city was liable. Under the evidence in this case the instructions, as given by the court, were as favorable to the appellant as it was entitled to have them.

We come next to a consideration of the other ground relied upon for reversal, to wit, that the verdict is not sustained by the evidence. Appellee is past 60 years of age, has borne 12 children and raised 11 of them. Prior to the date of the accident she had enjoyed good health, and been able to attend to her household and other duties. She states that since the accident she has suffered continuously with pains in the back, is nervous, and her ankle, which was wrenched at the time of the injury, has given her much trouble. Her physician testifies that this nervous condition, accompanied by pains in the back, is due to an injury to the bladder and womb. Other physicians who were appointed by the court to examine her testify that they found the womb in an unnatural condition. Of course, whether this condition was produced by the fall at the time of the accident or by other cause they were unable to say, and, in fact, the family physician who examined appellee the day following the accident was unable to state positively whether the condition in which he found appellee's womb was due to the accident or to other cause; but there is no testimony tending in the slightest to contradict the statement of the appellee and other of her witnesses to the effect that prior to that day she was a strong, healthy, robust woman, and that since that time her health has been impaired to a considerable extent. She has been constantly under the care of a physician, and undoubtedly, if the troubles with which she is now suffering were the result of

the accident, a verdict for a much larger sum would not be unreasonable. As to whether or not the accident brought about and produced this condition it was the province of the jury to determine. They saw and heard the witnesses, and accepted the contention of appellee that she was seriously if not permanently injured when she was thrown from her buggy, as alleged in her petition.

We have carefully considered the record, and fail to find any error prejudicial to appellant's substantial rights in the conduct of the trial; and the judgment is therefore affirmed.

BURTON'S ADM'R v. SELPH.

(Court of Appeals of Kentucky. April 22, 1909.)

GUARDIAN AND WARD (§ 148*)—ACCOUNTING—PAYMENTS BY GUARDIAN'S SURETY.

Where defendant's intestate, on his resignation as plaintiff's guardian, and the appointment of one of plaintiff's brothers as guardian, with another brother as surety, failed to make a valid transfer of plaintiff's estate to his successor, defendant, on being called to account, was not entitled to credit for payments, made for plaintiff's benefit by the succeeding guardian's surety from mere brotherly kindness, but was only entitled to credit for such sums as had been expended for plaintiff's benefit, either by the succeeding guardian, or his surety, by the direction or authority or with the consent of such guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 497; Dec. Dig. § 148.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"Not to be officially reported."

Action by Ile N. Selpb against George W. Burton's Administrator. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. L. Burton and Barrett & Barrett, for appellant. O. A. Wehle, D. H. French, Henry L. Stone, and Albert S. Brandeis, for appellee.

CARROLL, J. In this action the appellee, Selpb, sought to recover from his former guardian several hundred dollars alleged to be due upon settlements. A judgment was rendered in his favor for the sum of \$882.20, with interest from February 9, 1893. The administrator of the guardian, who died several years ago, prosecutes this appeal, asking a reversal of the judgment because the amount awarded is more than appellee was entitled to recover.

To understand the grounds upon which a reversal is asked it will be necessary to state the substantial facts shown by the record. Burton, now deceased, was appointed guardian of the appellee, Selpb, about 1874. At that time Selpb was only two years old. He continued to act as guardian until 1888, at which time he resigned, and Frank Selpb, a

brother of appellee, was appointed guardian in his stead, and qualified with John Selpb, another brother, as surety. When Burton resigned, there was in his hands as guardian \$857.50. The appellee became of age in 1893, and soon thereafter instituted this suit against his former guardian Burton to recover the amount shown to be in his hands at the time he resigned the trust. This action proceeded to a judgment that resulted in a dismissal of his petition by the lower court. On appeal to this court, it was held in an opinion that may be found in 68 S. W. 407, that the transfer of the estate by Burton to Frank Selpb was void, and that Burton was liable to the appellee for the amount in his custody at the time he resigned his trust. In the course of the opinion the court said that, although appellee was entitled to recover from Burton the amount stated, yet Burton was entitled to credit by any sums appellee received from Frank Selpb after he qualified as his guardian.

The lower court found that appellee had received from Frank, between September, 1888, and July 1, 1889, \$111, and allowed Burton credit by this amount, and also for \$40.81 commission. The Burtons contend that there was expended by Frank Selpb and his surety, John Selpb, in educating and maintaining appellee, after the appointment of Frank as guardian, the sum of \$480.50, in place of \$111, and it is insisted that Burton should have credit by this sum in place of \$111, and also that he should be allowed \$95 commission in addition to the \$46.81 allowed. There is really no serious dispute about the fact that John Selpb, the surety of Frank, and a brother of appellee, did expend, in educating and maintaining appellee after Frank's appointment as guardian, as much, if not more than, \$480.50; and, whether he expended this sum, at the instance or request of the guardian, or with the expectation of being reimbursed by Frank, or expended it as an act of brotherly kindness, without any direction from Frank, or expectation or prospect that it would be repaid, is really the principal issue in the case.

It is argued by counsel for the Burtons that Burton should have credit by any sums expended by John in educating and maintaining appellee, although John may not have had any direction from Frank to expend the money, or have expected that he would repay it; and this, upon the ground that, as John was the surety of Frank, and an action had been brought by appellee against Frank and John on the guardian's bond, the surety would be subrogated to any claim that the guardian might have and entitled to credit by any sums he as surety paid out for the use and benefit of the ward. We do not, however, regard this position as tenable. If John, merely as an act of brotherly kindness, educated and maintained appellee with-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

out promise of reward from Frank, or any agreement or understanding upon the part of Frank that he would pay the sum expended, neither Frank nor John could assert the amount so paid out as a credit, if suit had been brought against them on their bond by appellee. Neither the surety of a guardian, nor any other person, will be permitted, in the absence of a request or direction by the guardian, or some showing that it was necessary in order to protect the life or health of the infant, or protect him from want if he is helpless, to charge the infant's estate with money expended in his behalf. At the time Frank was appointed guardian for appellee, he was 16 years of age, presumably, and, so far as this record discloses able to earn his own living; and clearly under these circumstances no person, in the absence of authority from the guardian, had the right to furnish him education or maintenance. If the rule insisted on by counsel for appellant was adopted, then any person, without asking the consent or advice, or having authority from the guardian, could maintain and educate the ward, and present a claim for the amount expended against his estate. The result of this would be that the estates of wards would often be wasted, and the guardian, although responsible, helpless to protect either his own or his ward's interests. We are therefore clearly of the opinion that Burton is only entitled to credit for such sums as were expended by the direction or authority, or with the consent, of Frank while he was acting as guardian. We have carefully examined this record, and do not find any evidence that Frank, after July, 1889, furnished anything for the education or maintenance of appellee; but, on the contrary, the evidence is virtually uncontradicted that all that was expended after that time was expended by John without any expectation of being reimbursed by Frank, and solely out of a desire to assist his brother. Under these circumstances, however great the hardship may be on the former guardian Burton, there is no escape from the conclusion that he is not entitled to credit for any sums paid out by John in assisting the appellee.

It does not appear that Burton charged, or intended to charge, any commission for his services as guardian, and we are not disposed to disturb the allowance made by the lower court, although there is some force in the suggestion of counsel that the commission allowed should have been credited as of the date when the settlement was made, in place of 1893. But, in view of the fact that it is doubtful if a guardian is entitled to commission when his delinquency makes it necessary that his ward should sue him, we are not disposed to interfere with the adjustment of commissions as made by the lower court.

Wherefore the judgment is affirmed.

BURTON v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Court of Appeals of Kentucky. April 20, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 15*) — MAINTENANCE OF TELEPHONE SYSTEM—LIABILITY FOR INJURIES.

One maintaining along the edge of a highway telephone poles must see that they are sound and serviceable, and must prevent them from becoming dangerous to travelers by defects, either originally inherent or subsequently occurring through decay, and is liable for injuries to a traveler by the falling of a defective pole.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 9; Dec. Dig. § 15.*]

2. TELEGRAPHS AND TELEPHONES (§ 15*) — MAINTENANCE OF TELEPHONE SYSTEM—LIABILITY.

One maintained without permission from the fiscal court reasonably safe telephone poles in the outer edge of a highway. A severe windstorm blew down a tree, and it fell on a pole, breaking it off and causing it to fall into the highway. He did not know of the fall, and could not by the exercise of reasonable diligence discover it before an injury to a traveler on the highway in running over the pole. Held, that he was not liable for the injuries to the traveler, as the fact that the poles were maintained without authority was not the proximate cause, and as the windstorm and the falling of the tree was the proximate cause.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 9; Dec. Dig. § 15.*]

3. NEGLIGENCE (§ 60*) — LIABILITY—REMOTE CAUSE.

A prior and remote cause doing nothing more than furnishing the condition or the occasion by which an injury is made possible cannot be made the basis of an action.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 73; Dec. Dig. § 60.*]

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Action by Lonnie Burton against the Cumberland Telephone & Telegraph Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Rob't Hardison, Jr., for appellant. Belcher & Sparks and Newton Belcher, for appellee.

BARKER, J. The appellant, Lonnie Burton, while driving along the Greenville and Central City road, near Brownsville, Muhlenberg county, Ky., was thrown from his buggy by the vehicle's being overturned in running over one of the appellee's poles and the wires strung thereon, which had fallen or been blown into the public highway. The accident inflicted on appellant severe bodily injuries, to recover damages for which he instituted this action, claiming that they were caused by the negligence of the appellee. The appellee by its answer denied all of the material allegations of the petition, and a trial subsequently by a jury

resulted in a verdict in favor of appellee (defendant). From the judgment dismissing his petition predicated upon the verdict, this appeal has been prosecuted.

The facts out of which the accident grew are briefly, as follows: Some time prior to its occurrence the appellee had obtained the verbal permission of the county judge of Muhlenberg county to erect its poles along the outer edge of the public highway in question. The poles were not erected in the roadway, but were placed beyond the drainage ditch running parallel with the roadway and at points on the right of way where they in no wise obstructed the public travel. The pole in question was erected in the edge of the woods through which the highway ran, and was, as we understand it, placed among the trees, or quite close to them. Just before the accident a very severe windstorm arose, which blew down one of the trees, and this, falling upon the telephone pole of the appellee, broke it off near the ground, and the tree and pole together fell into the highway. This happened but a short time before the accident and after it had become quite dark. It is not contended that the appellee knew of the falling of its pole, or could by the exercise of reasonable diligence have discovered it before the injury which accrued to appellant.

The only ground seriously urged for a reversal of the judgment is the refusal of the court to give instructions 1 and 2a, tendered by him, and the giving of instructions 1 and 2. The latter instructions are as follows:

"(1) The court instructs the jury that if they shall believe from the evidence that the defendant company negligently maintained its telephone line along the Greenville and Central City public road in such a dangerous condition that said public road, by reason of said line being so maintained along said road, was not reasonably safe for public travel, and if the jury shall further believe from the evidence that the said telephone line fell in the public road on the occasion in controversy by reason of the negligent manner in which the same was maintained by the defendant company and as the direct and natural result thereof, and if the jury shall further believe from the evidence that the buggy in which the plaintiff was driving on the occasion in controversy collided with the defendant company's said line, and that plaintiff was thrown from said vehicle by the force of said collision and injured, then and in that event the jury should find for the plaintiff such compensatory damages, if any, as they may believe from the evidence was thereby caused to him, not exceeding \$5,000, the amount claimed.

"(2) Unless the jury shall believe from the evidence that the defendant company's

telephone line fell in the public highway at the place in controversy as the direct and natural result of the negligence of defendant company in maintaining the same in such a dangerous condition that said public highway was not reasonably safe for public travel, then and in that event the jury should find for the defendant."

It is insisted by appellant that, inasmuch as the county judge had no authority to grant appellee the privilege of erecting its poles along the outer edge of the right of way as was done in this instance, the action of appellee in so erecting its poles was wrongful and resulted in the creation of a public nuisance, and that, this being true, the appellee must be held to that high degree of diligence and care which would practically result in its being insurers of the public against injury from its poles. We cannot give our assent to this statement of the law. It may be (and for the purposes of this case we shall assume) that the appellee was technically a trespasser upon the outer edge of the highway; but while the public authorities of Muhlenberg county could at any time have required it to remove its poles, it does not follow that their maintenance in the edge of the highway made it an insurer of the safety of the traveling public. It is perfectly apparent that the fact that the telephone pole in question stood a foot or two inside of the right of way, instead of a foot or two on the outside thereof, in no wise increased the danger to the traveling public from its falling. The pole fell, not because it was on the edge of the highway, but because a tree entirely outside of the highway was blown down by a storm, and in falling broke the pole. Precisely the same thing would have happened if the pole had stood on the outside, instead of the inside, of the imaginary line which marks the boundary of the highway. The original theory of the appellant was that his injuries were caused by the appellee's maintaining along the edge of the highway a telephone pole which was so decayed and defective as to make it unfit for the uses to which it was put, and dangerous to the traveling public because of its liability to fall, and nearly all of his evidence was directed to this point. Undoubtedly it was the duty of the appellee to maintain sound and serviceable poles, and to abstain from allowing them to become decayed or unsafe; and, if the pole in question was in a dangerous condition by reason of defects, either originally inherent or subsequently occurring, and fell because of such defects, then the appellee was liable to appellant for any injury which was inflicted upon him by reason of its negligence. It is conceded that this phase of appellant's case was fully submitted to the jury in the instructions given by the court; and upon this issue the jury found adversely to the appellant.

The only question remaining, then, is whether the mere fact that appellee's pole was without the authority of the fiscal court placed in the outer edge of the right of way of the public road imposed upon it a higher standard of diligence and care, or a greater liability than would have accrued to it had it obtained the permission of the authorities to so place its poles. It is manifest that the want of the permission of the authorities in no wise increased appellant's danger from the falling pole. If the fiscal court had granted permission to appellee to place its pole where it did, that would in no wise have affected the safety of appellant. What happened to him would have happened precisely in the same way, with or without the permission in question. The absence of the permission of the fiscal court was not, then, the proximate cause of appellant's injuries. If the pole fell because of defects of which appellee knew, or could have discovered by ordinary care, then it would have been liable to appellant for the injuries received, but, as said before, this issue he failed to maintain before the jury. If, however, the pole fell, not because it was unsound, but because it was broken down by the falling of a tree, or blown down by an unusual storm—neither of which was in the control of appellee—then the responsibility for appellant's injuries was not upon appellee. The mere fact that the pole was at the place where it was situated, and a falling tree broke it off and caused it to fall in the highway, does not render the appellee liable for appellant's injuries. The windstorm and the falling tree were the proximate causes of the injuries accruing to the appellant.

The rule we have announced above is well stated in 29 Cyc. 496, as follows: "A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause." The foregoing text is supported by a citation of many authorities in a note by the editors. Assuming the pole in question to have been such as is ordinarily used by telephone companies, and that it was reasonably safe as it stood, we are unable to perceive why appellee should be held liable because the windstorm blew down a forest tree near it, which, in falling, broke the pole and threw it into the highway. The proximate cause was the vis major, and not the negligence of appellee.

As we are of opinion that the instructions given by the court fully covered the law of the case, it is not necessary to discuss those

offered by appellant and refused by the court.

For the reasons given, the judgment is affirmed:

EILERMAN et al. v. FARMER.

(Court of Appeals of Kentucky. April 22, 1909.)

1. NEGLIGENCE (§ 138*)—ELEVATORS—INJURIES TO STORE PATRON—INSTRUCTIONS.

Plaintiff fell down an elevator shaft in defendants' store as he was about to descend with a clerk to the cellar, and testified that, as he entered the store some distance from the elevator, he was directed to take the elevator, and that the clerk on opening the elevator gate turned to plaintiff, and beckoned him to step in. The court charged that it was defendants' duty to exercise the highest care usually exercised by prudent persons in the operation of such elevators, and that if plaintiff entered defendants' store, and in the exercise of ordinary care attempted to enter the elevator to go to the cellar by invitation of defendants' servant, or when the acts of the servant were such that a person of ordinary prudence would reasonably infer an invitation, and the plaintiff failed to discover that the elevator was not in place, and by defendants' negligence plaintiff fell and injured himself, he was entitled to recover. Held, that such instruction was not misleading as authorizing a recovery, even if the only invitation was that given when plaintiff first entered the store.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 354; Dec. Dig. § 138.*]

2. APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—PREJUDICE.

Where plaintiff was injured by falling down an elevator shaft in defendants' store, and his eyes were his only means of knowledge as to the position of the elevator, unless defendants' employes told him that the elevator was not in position, of which there was no evidence, an instruction on contributory negligence containing the words "that plaintiff saw or might by the exercise of ordinary care, have seen," instead of the words "that plaintiff knew or might by the exercise of ordinary care have known," was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

3. NEGLIGENCE (§ 138*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where plaintiff testified that he did not see certain signs on the elevator into the shaft of which he fell, and stated that he could "see pretty well," plaintiff claims that his failure to see was due to the fact that there was not much light about the elevator, and there was no proof that his eyesight was defective, the court did not err in refusing to charge with reference to plaintiff's defective eyesight.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 361; Dec. Dig. § 138.*]

4. NEGLIGENCE (§ 139*)—ELEVATORS—INJURIES—INSTRUCTIONS.

Where plaintiff was injured by falling down the shaft of an elevator used both for freight and passengers, and the court only required defendant to use the highest care usually exercised by prudent persons in the management of such elevators, the court did not err in refusing an instruction distinguishing between the care required for the operation of freight and passenger elevators.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 372; Dec. Dig. § 139.*]

5. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS.

Evidence of a conversation between plaintiff and one of the defendants after the accident, in which plaintiff stated that it was not his fault, to which the defendant addressed stated that he supposed plaintiff did not think, was inadmissible as merely self-serving.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1068; Dec. Dig. § 271.*]

6. APPEAL AND ERROR (§ 1050*)—EVIDENCE—HARMLESS ERROR.

In an action for injuries in an elevator shaft, the erroneous admission of self-serving declarations in which plaintiff stated that he was not at fault, and one of the defendants that he supposed that the elevator operator "didn't think," was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

7. DAMAGES (§ 132*)—EXCESSIVENESS—INJURIES.

Plaintiff at the time of his injury, though 68 years old, was a strong, vigorous ship carpenter, and caulker of fairly good skill. Some time prior to the accident he had been an expressman earning from \$18 to \$20 per week. He fell down defendants' elevator, sustaining an oblique fracture of the upper thigh bone, and injured his spinal column. The injured limb was three inches shorter than the other and two inches less in circumference. Plaintiff suffered severe pains to the time of the trial, nine months after the accident, and still walked on crutches. His injuries were permanent and his physician's bill at the time of the trial was \$322. *Held*, a verdict for \$5,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 378; Dec. Dig. § 132.*]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Richard Farmer against Herman Ellerman and others. Judgment for plaintiff, and defendants appeal. *Affirmed*.

Aubrey Barbour, for appellants. Arthur C. Hall, for appellee.

CLAY, C. The defendants, Herman Ellerman and others, own a clothing store in the city of Newport, Ky. The plaintiff, Richard Farmer, walked into their elevator shaft when the elevator was not in position to receive passengers, and fell to the floor below. He instituted this action to recover damages for the injuries which he received. The jury awarded him a verdict in the sum of \$5,000. From the judgment based thereon, this appeal is prosecuted.

The record discloses the following facts: The appellants conduct a wholesale and retail clothing business, occupying several floors of a building. The business is conducted mainly on the first floor. In the basement of the store there were some dry goods boxes which appellants usually disposed of by wholesale, but which they sometimes sold by retail as a matter of accommodation. Appellee, desiring to purchase some of these boxes, went to appellants' store on the occasion of his injury. Appellee was a man

68 years of age, and was accompanied by his grandson, a boy 13 years of age. He asked an employé of appellants, who was standing on the sidewalk near the entrance, if they had any boxes for sale, and was told to go inside. On entering the store, he inquired of one of the clerks about the boxes, and was referred to Michael Winstel, another clerk. According to the testimony of appellee, the latter told Winstel that he wanted to get some boxes, and Winstel said, "All right, kept them in the cellar," at the same time directing them to take the elevator. According to the testimony of Winstel, he, upon being informed of appellee's wishes, simply said to him, "Step back." Winstel then proceeded to the door of the elevator, followed at a distance of from 8 to 15 feet (variously estimated by different witnesses) by appellee and his grandson. The elevator in use in the store was for the accommodation of both freight and passengers. No particular man was in charge of the elevator. It was operated by such clerks as had occasion to use it. In order to operate the elevator, it was necessary for one to open the gate of the shaft, reach in, and take hold of the ropes controlling the elevator. It was the custom of the clerks, when the elevator was not at the floor where were located the parties who intended to use it, to open the door of the shaft and first shake the control ropes in order to warn any one that might be on the elevator at another floor, and then, by a pull of the control ropes, bring it to the desired position. When Winstel reached the elevator, he opened the door of the shaft. At this point the evidence is very conflicting. According to the testimony of appellee and his grandson, Winstel, upon opening the gate, turned to appellee and beckoned him to step into the elevator. When this was done, appellee passed through the gate, stepped into the opening, and fell to the cellar below. On the other hand, however, the testimony for appellants is to the effect that, when Winstel reached the shaft, he grasped the control ropes of the elevator, shook them to give warning to those above, and, having received the words "All right" from the clerk above, pulled the ropes for the purpose of causing the elevator to descend; that while standing there, with his back toward appellee, watching the descent of the elevator and retaining his grasp upon the two ropes with both hands in order to check the elevator when it should arrive at the first floor, appellee stepped past him and fell into the elevator shaft.

The court instructed the jury as follows:

"(1) The court instructs the jury that it was the duty of the defendants in the operation and management of its elevator to exercise the highest degree of care and skill usually exercised by prudent persons in the same business in the management and operation of elevators of the kind and character

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

as shown by the proof, and if the jury believe from the evidence that the plaintiff entered the storehouse of defendant, and in the exercise of ordinary care attempted to enter the elevator cage in the storehouse to go to the cellar by invitation of defendants' servant, or when the acts of the servant were such that a person of, ordinary prudence would reasonably infer such an invitation, and the plaintiff, in the exercise of ordinary care, when he attempted to enter the elevator, failed to discover that the elevator cage was not in the proper position, and by reason of the negligence of the defendants the plaintiff fell down into the elevator well, injuring himself by the fall, the law is for the plaintiff, and the jury should so find.

"(2) If the jury find for the plaintiff, they will award him such a sum in damages as will reasonably and fairly compensate him for his mental and physical suffering, if any of either, the reasonable expense, if any, in the matter of medicines and physicians' bills incurred by him, and for the permanent impairment, if any, of his ability to earn money that may have directly resulted to plaintiff from his injuries, if they were caused by the negligence of defendants' servants, but the damages altogether should not exceed the sum of \$15,150.

"(3) The court further instructs the jury that it was the duty of the plaintiff to use ordinary care for his own safety when attempting to enter the elevator cage or shaft, and if the jury believe from the evidence that the plaintiff saw, or might by the exercise of ordinary care have seen, that the elevator cage was not in the proper position in the elevator shaft, and thereby have prevented the injury, and he failed to do so, and so contributed to his own injury, and but for his own negligence and carelessness the accident and injury complained of in the petition would not have happened, then the law is for the defendants, and the jury should so find.

"(4) Ordinary care as used in these instructions is such care as an ordinarily prudent person would ordinarily use under the same or similar circumstances; and negligence is the failure to use such care."

It is insisted by counsel for appellants that, while instruction No. 1 is almost a verbatim copy of an instruction approved by this court in the case of *Phillips & Co. v. Pruitt*, 83 S. W. 114, it is incorrect as applied to the particular facts of this case. The argument is made that there were, according to the testimony for appellee, two invitations to take the elevator—one when appellee first entered the store, and the other at the elevator; that, according to appellee's petition, his cause of action was based upon the invitation extended to him at or near the elevator; that the instruction in question, however, authorized a recovery even if the invitation were given at the front door. In our opinion, however, the instruction is not susceptible of the

interpretation placed upon it by counsel for appellant. The jury must have understood that the invitation referred to or the facts from which an invitation could have been inferred were those connected with the entrance of appellee into the elevator cage. The first invitation took place at the front door, when appellee was many feet distant from the elevator. He certainly did not attempt to enter the elevator when he was 50 or 75 feet away. The fact that the language employed could be distorted so as to refer to the invitation given near the door is not sufficient to make the instruction misleading. Nearly every instruction can be so interpreted as to mean something different from that intended by the court. It is only when it will be so understood by men of ordinary common sense and prudence that the instruction should be regarded as misleading. Applying this rule to the instruction in question, we cannot say that the jury were misled thereby. The language of the instruction, read and interpreted in its natural and everyday significance, refers only to the invitation given at the elevator itself. That being the case, we are of the opinion that the instruction properly presented the issues to the jury.

Appellants also complain that the instruction on contributory negligence contains the words, "that the plaintiff saw or might, by the exercise of ordinary care, have seen," instead of using the words, "that the plaintiff knew or might, by the exercise of ordinary care, have known." While ordinarily negligence or contributory negligence is predicated in terms of knowledge or the duty to know, the use of the words, "saw or might, by the exercise of ordinary care, have seen," is not objectionable in this instance. Seeing was the only means of knowledge that he had, unless appellants' employees gave him information of the conditions existing. There is no contention that this was done. The instruction, therefore, was not prejudicial.

The court did not err in refusing to give an instruction in regard to the defective eyesight of appellee. There was no proof upon which to base such an instruction. It is true appellee claims not to have seen certain signs on the elevator, and that he used the expression that he could "see pretty well"; but he claims that his failure to see was due to the fact that there was not much light about the elevator. There was no proof whatever of defective eyesight. The instruction was properly refused.

Appellants also offered an instruction making a distinction between the degree of care required in the case of a freight elevator and that required in the case of a passenger elevator. If, under the facts of this case, any such distinction existed, we think the idea embraced in the instruction offered was sufficiently presented in instruction No. 1 by the use of the language, "to exercise the highest degree of care and skill usually exercised by

prudent persons in the same business in the management and operation of elevators of the kind and character as shown by the proof."

It is next insisted that the court erred in permitting appellee to detail a conversation which he claims to have had with one of the appellants. After stating that the appellant had called to see him, he claims this conversation took place: "Mr. Ellerman, I said, 'I wouldn't think so much about this. I wouldn't care so much about it, if it was the least bit my fault in the world.' I says, 'It wasn't my fault.' Mr. Ellerman immediately replied: 'Well, I suppose he didn't think, that gentleman didn't think.'" This conversation, of course, should not have been permitted to go to the jury. The first part of it consisted of self-serving declarations. None of the conversation, however, was very material. We are of opinion that the admission was not prejudicial to the substantial rights of appellant.

But it is insisted that the verdict is excessive. While appellee was 68 years old at the time he was injured, it appears that he was a strong and vigorous man, and was a ship carpenter and caulker of fairly good skill. At the time of the accident, and for some time prior thereto, he was engaged as an expressman, and earned from \$18 to \$20 per week. Since the accident he has not been able to do work of any kind. Appellee suffered very severe pains up until the time of the trial, which took place about nine months after the accident. At the time of the trial he was still walking on crutches. He sustained an oblique fracture of the upper thigh bone, and his spinal column was bruised and injured. The injured limb is three inches shorter than the other, and two inches less in circumference. There can be no doubt that appellee's injuries are permanent. His physician's bill up to the time of the trial amounted to \$322. We cannot say that a verdict for \$5,000, for an injury which manifestly resulted in great physical and mental suffering, and which involves the permanent reduction of the strength of a broken leg, is so excessive as to make it appear that the jury were influenced in their action by passion or prejudice. *Maysville & Lexington R. R. Co. v. Herrick*, 13 Bush, 122.

Perceiving no error in the record prejudicial to the substantial rights of appellant, the judgment is affirmed.

HILLER v. NELSON et al.

(Court of Appeals of Kentucky. April 20, 1909.)

1. DOWER (§ 46*) — RIGHT — MORTGAGE BY WIFE.

Under Ky. St. § 2135 (Russell's St. § 4645), providing that a wife shall not be endowed in land sold in good faith after marriage to satisfy a lien or incumbrances created by a deed in which she joined or to satisfy a lien for

the purchase money, but, if there is a surplus after the lien is satisfied, she may have dower out of such surplus, unless it was received or disposed of by the husband in his lifetime, where the wife joined in a mortgage of the homestead and it was sold under foreclosure after the husband's death, she was entitled to dower in the surplus.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 46.*]

2. MORTGAGES (§ 594*) — REDEMPTION — PERSONS ENTITLED — MORTGAGOR'S WIDOW — "REPRESENTATIVES."

Under Ky. St. § 2364 (Russell's St. § 80), providing that, if property sold on mortgage foreclosure does not bring two-thirds of its appraised value, defendant and his representatives may redeem within a year by paying the purchaser the original purchase money, and 10 per cent. interest, the mortgagor's widow, who joined in the mortgage and was entitled to dower in the surplus proceeds on foreclosure sale, could redeem; she coming within the term "representatives."

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 594.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6110-6115; vol. 8, p. 7785.]

3. DESCENT AND DISTRIBUTION (§ 152*) — REDEMPTION OF MORTGAGED PROPERTY — CONTRIBUTION.

Since the redemption of mortgaged property by the mortgagor's widow to satisfy her dower right would inure to the benefit of the mortgagor's infant children and heirs, she was entitled to contribution from them if they desired to enjoy the benefits of the redemption; and that the purchaser claimed to have purchased on foreclosure for the benefit of the children did not affect the widow's right to contribution.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 521, 522; Dec. Dig. § 152.*]

4. MORTGAGES (§ 605*) — REDEMPTION — COMPELLING ACCEPTANCE OF MONEY.

Where one entitled to redeem mortgaged property has paid over to the county clerk the full amount of the redemption money, it is the purchaser's duty to accept it, and the court should require her to do so if she refuses.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 605.*]

Appeal from Circuit Court, Laurel County.
"Not to be officially reported."

Proceedings to redeem mortgaged property by Belle Nelson Hiller against Earl Nelson and others by their guardian, etc. From a judgment for defendants, plaintiff appeals. Reversed and remanded for further proceedings.

E. H. Johnson, for appellant. W. L. Brown and Geo. G. Brock, for appellees.

BARKER, J. John W. Nelson died intestate at his home in Laurel county, Ky., leaving a wife, the appellant, Belle Nelson Hiller, and two infant children by a former wife. Prior to his death he borrowed \$540 from the East Bernstadt Banking Company, for which he and his wife executed their joint note, and to secure the payment of which they executed and delivered to the bank a mortgage upon the homestead in East Bernstadt which belonged to the husband. Before he died, he made a payment

of \$40 upon the note. After his death the bank, by proper proceeding in the Laurel circuit court, obtained a judgment on the note and enforced its mortgage lien. Under this judgment the homestead was sold by the commissioner and purchased by Mattie Nelson, the guardian of the two infant children of the decedent, for the amount of the debt, interest, and costs. Before the sale, as by law required, the property had been appraised; the appraisers fixing its value at \$1,000. The price at which the purchaser obtained the property at judicial sale was less than two-thirds of the appraised value. Since the death of her former husband the widow has again married, and is now the appellant Belle Nelson Hiller. The two children of the decedent are with his relatives, and seem to be completely estranged from their stepmother. Within a year after the judicial sale the appellant tendered to the purchaser the full amount of the purchase price, with interest as by law required, and sought to redeem it. The tender was refused, and thereupon the appellant paid over the sum tendered to the county clerk as provided by statute. Over the protest of the appellant, who, by affidavit, set up the facts above set forth, the chancellor awarded a deed to the purchaser, refusing to require her to accept the tender of appellant, from which judgment this appeal is prosecuted.

The question arising upon this record is whether or not the widow of the decedent has a right to redeem the property under the circumstances above stated in order to claim dower in the land. This is resisted on the part of the purchaser on the theory that the right to redeem the property sold at judicial sale is a personal privilege to the debtor or his representatives, and the wife has no right to redeem. It is also said that, where the wife joins with her husband in a deed or mortgage, she loses her dower, and therefore has no interest in the land sold. This last position is based upon section 2135, Ky. St. (Russell's St. § 4045), which is as follows: "The wife shall not be endowed of land sold, but not conveyed by the husband before marriage, nor of land sold, in good faith, after marriage, to satisfy a lien or incumbrance created before marriage or created by deed in which she joined or to satisfy a lien for the purchase money; but, if there is a surplus of the land or proceeds of sale after satisfying the lien, she may have dower out of such surplus of the land or compensation out of such surplus of the proceeds unless they were received or disposed of by the husband in his lifetime." And the argument is supported by a citation of *Schweitzer v. Wagner*, 94 Ky. 458, 22 S. W. 883, and several other cases which construe the above statute, and hold that, as against the mortgage creditor, the wife loses her right of dower where she joins in the instrument. There

is no doubt of the soundness of the appellee's view of this statute and of the authorities cited, to the extent that the wife has no right of dower as against the creditor. But we are not dealing with the creditor here. It has its money, and the question is whether the purchaser can hold the property which has been sold at judicial sale for less than two-thirds of its appraised value. It will be observed that the foregoing statute, while it takes from the wife dower as against the creditor, where she joins in a mortgage securing his debt, especially invests her with dower in the surplus proceeds of the sale, if one be made to satisfy the lien created. So that by the very terms of the law upon which appellee rests her right to deny the widow dower in the land purchased by her, as above set forth, she is given dower in the surplus proceeds of the sale, and has a direct interest in the property bringing more than the debt, interest, and costs of the creditor.

So much of section 2364, Ky. St. (Russell's St. § 80), as we deem necessary to set forth, is as follows: "If the real estate which may be sold in pursuance of such judgment or order does not bring two-thirds of such valuation, the defendant and his representatives shall have the right to redeem the same within a year from the day of sale, by paying the purchaser or his representatives the original purchase money, and ten per centum per annum interest thereon." Now, the appellant's rights seem to fail directly within the language of this statute; certainly within its equity. The widow is embraced in the word "representatives" used in the statute above. The word "representatives" was intended to embrace all those who by law have an interest in the land of the decedent, and the statute itself was enacted to prevent the sacrifice of property at judicial sales. No good reason exists for narrowing the word "representatives" so as to exclude from the benefits of the statute the widow. This would be an invidious distinction between a man's wife and his (perhaps) distant heirs (if he had no children), which we believe to be wholly foreign to the intention of the Legislature. If the decedent in this case had left no children, this property, except the dower interest of the appellant, might have been cast by the law of descent upon some distant cousins. What good reason would there be for giving them the right to redeem in such a case, and refusing it to the widow? We think the widow, as well as the heirs, are embraced within the meaning of the word "representatives," as used in the statute, and that she has a right to redeem the property when the conditions were such as to bring the transaction within the pale of the statute. It is a wise and beneficent statute, having due regard to the rights both of the purchaser and of the debtor and his representatives. The debtor can only re-

deem where the property fails to bring two-thirds of the appraised value; but, where he does redeem, he is required to pay the full original purchase money, with 10 per centum interest thereon. The object of the statute was to provide, in part, at least, for just such a condition of affairs as we have here. The purchaser has obtained the property in which appellant has a dower interest in whatever remained after the payment of the mortgage debt for less than two-thirds of its value, assuming the appraisal to be correct. It seems to us that there can be no doubt that the latter has a right under the statute to pay the purchase money, with 10 per centum interest, in order to obtain for herself the benefit of dower in the surplus over and above the mortgage debt. As the purchase of the widow will redound to the benefit of the two infant children, they should be required to contribute their pro rata of the money paid in order to participate in the benefit of the redemption. The fact that the purchaser now claims that she made the purchase for the benefit of the infant children does not alter the principle as to the appellant's right. We think the duty of contribution on the part of the infants, if they desire to enjoy the benefit of the redemption, is authorized, if not by the statute of contribution, by the general equitable doctrine of contribution. Suppose for the sake of illustration that a stranger had purchased the land for his own use and the widow had redeemed it, as she is seeking to do in this case; with what show of equity could her stepchildren claim to enjoy the land she had redeemed with her own money, without contributing their pro rata to the sum paid out in the redemption? The widow in this case has paid over to the county clerk the full amount of the redemption money required by the statute. This it is the duty of the purchaser to take, and of the court to require her to take if she refuses; and, after this is done, the widow will, in effect, have paid off the full amount of the original mortgage debt.

On the subject in hand, Pomeroy, in his *Equity Jurisprudence*, § 1222, says: "It is a general doctrine of equity that where a common charge rests upon a fund which belongs to several owners, who stand upon a footing of equality with respect to their individual titles and relations with the holder of the charge, the burden should rest ratably upon each separate portion of the fund; and if the owner of one portion, for the purpose of protecting his own interest, pays off the common charge, he is entitled to call upon the other owners to contribute their proportionate shares of the amount thus paid. This doctrine is a simple application of the maxim, 'Equality is equity.' Whenever, therefore, a mortgage rests upon

land which is owned by several persons in such a manner that their equities as between themselves are equal, and one of them redeems from the mortgage, he is entitled to a pro rata contribution from the other owners, and may keep the lien of the mortgage alive by equitable assignment as security for such contributions."

For the foregoing reasons, the judgment is reversed, with directions for further procedure consistent with this opinion.

COMMONWEALTH v. HARRIS.

(Court of Appeals of Kentucky. April 14, 1909.)

1. TAXATION (§ 122*)—PROPERTY ASSESSABLE—CORPORATE STOCK.

Under St. 1909, § 4088 (Russell's St. § 6061), providing that individual shareholders of corporations required to pay taxes on their corporate franchises shall not be required to list their shares in such corporations so long as the corporation pays taxes on the corporate property and franchises, where a public service corporation owning property both within and out of the state pays a tax on its property and franchises within the state, its stock in the hands of stockholders is not assessable for taxation.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 122.*]

2. TAXATION (§ 108*)—TRANSFER OF PROPERTY TO AVOID TAXATION.

A bona fide sale and transfer of taxable property nearly two months before the assessment day and the investment of the proceeds in nontaxable government bonds cannot be held to be a trick or device on the part of the owner to escape taxation within the provisions of St. 1909, § 4051 (Russell's St. § 5942).

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 141; Dec. Dig. § 108.*]

3. TAXATION (§ 47*)—PERSONAL PROPERTY.

Where it is shown that defendant has paid taxes on \$3,500 worth of personalty and household furniture, and it is stipulated by counsel that such property was worth less than that amount, he should not be assessed separately on a library worth \$300.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 47.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "Not to be officially reported."

Action in the name of the Commonwealth against Theodore Harris. From the judgment, both parties appeal. Affirmed on appeal by the Commonwealth and reversed on cross-appeal.

M. J. Holt, for the Commonwealth. Wm. H. Holt, for defendant.

BARKER, J. This is a proceeding instituted by the auditor's agent of the state in the Jefferson county court, under section 4241 of the Kentucky Statutes (Russell's St. § 6170), for the purpose of assessing, as omitted, certain property belonging to Theodore Harris. The trial developed that the property sought to be taxed may be classed as follows: The library of the defendant, val-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ued at \$300; 80 shares of Louisville Traction stock, worth \$118 per share; 275 shares of Louisville Home Telephone stock, worth about \$68 per share; certain bonds of the Home Telephone Company and the Straight Creek Coal & Coke Company. In a trial before the county court, it was held that the Traction and Home Telephone stock was not assessable as against the defendant under the fiscal laws of the state, and that the bonds of the Straight Creek Coal & Coke Company and of the Home Telephone Company had been sold by the defendant, Harris, prior to the 15th day of the month in which the fiscal year began, and, as he did not own them, he could not be required to pay taxes upon them. As to the household furniture of the defendant, it was held that he owned property, on assessment day, valued at \$3,500; but it further appeared that since the assessment day (September 15, 1906) the defendant had paid to the sheriff taxes on \$3,000 worth of household furniture for the year in question. It was therefore adjudged that he was assessable, then, with only \$500 worth of personalty. An appeal by the commonwealth to the Jefferson circuit court resulted in the judgment of the county court being affirmed, except that it was there held that the defendant owned a private library worth \$300, which was not by law included as household furniture, and therefore the defendant was required to pay on \$300 worth of books. The commonwealth appealed from the judgment, and the defendant has prayed a cross-appeal from so much of the judgment as requires him to pay on his library.

It is conceded in the brief for the commonwealth that the right to assess as omitted property the Louisville Traction stock is concluded adversely to the commonwealth by the opinion in the case of *Commonwealth v. Ledman* (Ky.) 106 S. W. 247. Since the submission of this case, we have decided, in the case of *Commonwealth v. Clara Belle Walsh's Trustee* (opinion delivered March 25, 1909) 117 S. W. 398, that where a public service corporation, owning property both in this state and out of it, pays a tax on its property and franchise to the state of Kentucky, its stock in the hands of the holders is not assessable for taxation under the provisions of section 4088 of the Kentucky Statutes (Russell's St. § 6061). The opinion in this case concludes the right of the commonwealth to tax the Home Telephone stock owned by the defendant, for the record shows that for the fiscal year in question the Home Telephone Company paid taxes on all of its property in the state and a franchise tax. Therefore, under the opinion mentioned, its stock is not subject to assessment in the hands of the shareholder.

The evidence shows beyond question that the defendant sold all of his bonds of the Straight Creek Coal & Coke Company and of the Home Telephone Company in July, 1906, that this sale was absolute, and made in good

faith, and the proceeds were invested in United States bonds, which were not assessable for taxation by the commonwealth. Counsel for the commonwealth now insists that this was only a trick or device on the part of defendant to escape taxation, and cites section 4051 of the Kentucky Statutes (Russell's St. § 5942) in support of his position. That section is as follows: "If any person shall willfully make a false statement, or, for the purpose of avoiding taxation, make a temporary investment in securities exempt by law from taxation, or convert any intangible property into nontaxable property outside of this state, or resort to any device whatever for the purpose of avoiding taxation, he shall be deemed guilty of a misdemeanor, and, on conviction, fined any sum not exceeding five hundred dollars, and be subject to three times the amount of tax upon his estate, to be recovered by the sheriff by action in the name of the Commonwealth in the county in which the estate is liable for taxation, or by the auditor, when the taxes are payable to him, in the Franklin circuit or quarterly court." There is nothing in the evidence in this case to show any bad faith upon the part of the defendant. Nor does it appear that the bonds he sold escaped taxation. Presumably, as they were transferred in July of 1906, they were assessed by the person or persons owning them on the 15th day of September. The statute has reference only to pretended sales, and not to bona fide transfers of property. It is not the object of the statute to paralyze traffic in personal property, merely because assessment day is approaching. The commonwealth loses nothing by a bona fide transfer of property, although the transfer may be made just before assessment day, and, when properly analyzed, it does not appear that the commonwealth has actually lost anything in the transaction under consideration. Whoever bought the bonds from the defendant, if he resided in this state and owned them on assessment day, should have listed them for taxation, and it is immaterial to the commonwealth whether the taxes on the bonds were paid by Harris or by his vendee. The United States bonds which he purchased with the money were not assessable in the hands of the person from whom he bought them, and therefore it could make no difference to the state whether they were held by Harris or his vendor. The defendant had a right to sell his bonds in good faith, and he had the equal right to invest the proceeds in government bonds. Of course, if the evidence had shown that the defendant only made a pretended sale of his bonds for the purpose of hiding them and escaping taxation, undoubtedly they could be assessed in his hands as omitted property; but the evidence does not show this state of facts, and therefore we are of opinion that the judge of the county court and the judge of the cir-

cult court ruled correctly in holding that they were not assessable as omitted property.

As to the library of the defendant, we think the circuit judge erred in holding that it should have been assessed as omitted property. The record shows that the defendant paid on \$3,500 of personalty and household furniture, and it is stipulated by counsel for the appellant and appellee that the personal property owned by defendant on assessment day of the year involved here was worth less than \$3,500. The state therefore has really received from the defendant all and more than he owed for the year in question.

For these reasons the judgment on the direct appeal is affirmed, and the judgment on the cross-appeal is reversed, with directions to dismiss the petition against the defendant.

RAMSEY v. MORROW.

(Court of Appeals of Kentucky. April 23, 1900.)

1. BOUNDARIES (§ 7*)—LOST CORNERS—DETERMINATION—RULES.

The rule for establishing a lost stake corner to run the course called for from the known corners to the intersection of the lines cannot be applied for the determination of the eighteenth corner in a description, where the lines from the seventeenth and nineteenth corners extended would never intersect.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 58-65; Dec. Dig. § 7.*]

2. BOUNDARIES (§ 3*)—LOST CORNERS—COURSES AND DISTANCES.

The ordinary rule that distances yield to courses, and both to natural objects or marked monuments, does not apply, where it is manifest from the patent as run out that proximate certainty may be accomplished by changing a course, instead of the distance, which may be done.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

3. BOUNDARIES (§ 7*)—MARKED LINES—ESTABLISHMENT.

Where a line was marked as such at the time of survey according to the surveyor's duty, such line established itself in a suit to determine a lost corner, though the corner was not marked.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 58-65; Dec. Dig. § 7.*]

4. BOUNDARIES (§ 40*)—MARKED LINE—QUESTION FOR JURY.

Where, in an action to determine a lost corner, there was some evidence that marks alleged to designate an ancient line had been made many years after the survey by another and for a different purpose, whether the line was anciently marked by the surveyor was for the jury.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 40.*]

5. APPEAL AND ERROR (§ 1063*) — INSTRUCTIONS—PREJUDICE.

Where appellant did not show adverse possession for a longer period than six or seven years consecutively, and for much of the time the tenant in possession paid rent to the owners of each of the alleged conflicting patents, appellant was not prejudiced by erroneous instruc-

tions submitting the question of adverse possession.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. § 1068.*]

Appeal from Circuit Court, Wayne County.

"To be officially reported."

Action between James Ramsey and Sherman Morrow. Judgment for the latter, and the former appeals. Affirmed.

Griffin, Kennedy & Bertram, and Joe Bertram, for appellant. Harrison & Harrison and F. R. Harrison, for appellee.

O'REAR, J. Appellant claims title to a tract of land in Wayne county covered by a patent for 200 acres issued to T. C. Dick on a survey dated January 20, 1846. Appellee claims title to a part of a 1,100-acre patent issued to Morrow and Dodson on a survey dated January 19, 1846. The patent boundaries call for the same objects and upon the same courses and for the same distances for nine of the calls. A dispute has arisen between these two litigants as to where a certain corner and two of these lines are properly located. There cannot be a conflict between them. Hence there is no question of superiority of one grant over the other. If the corner is established as claimed by appellant it should be, then the strip of land in dispute would be included in the Dick patent and would belong to appellant. If, however, the lost corner and the two lines from it should be established as contended for by appellee the disputed strip would be within the Morrow-Dodson patent. Thus it will be seen that the location of the lost corner is the principal thing to be done to settle the controversy. There was also a question made by appellant that, although the lines of the Dick patent do not embrace the disputed strip, yet the former owners marked a "conditional line" between their lands so that it would fall to appellant's boundary. He also claims it by adverse possession. The Dick patent is located correctly and without dispute as to its beginning corner, and all lines correspond substantially and satisfactorily with the actual running on the ground till the seventeenth corner (a chestnut oak) is reached. The nineteenth corner (a red bud and black oak in a gap of the ridge) is also located without dispute. The seventeenth and nineteenth corners of the Dick survey are identical with corners called for in the Morrow-Dodson patent. From the seventeenth corner of the Dick patent the call is (and so it is in the Morrow-Dodson patent) N. 60° E., 108 poles, to a stake; thence N. 75° E., 230 poles, to the red bud and black oak. But if the eighteenth call is run N. 60° E., 108 poles, then to reach the red bud and black oak corner would require a radical change of both the course and distance of the next line to reach the natural objects, the red bud and black oak, viz., a course N.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

84½° E., the length of the line being not given, but it would be longer than the line called for in the patents.

One rule laid down for establishing a lost stake corner is to run the courses called for from the known corners to the intersection of the lines. *Haggan v. Wood's Heirs*, Ky. Dec. 274. But there is no hard and fast rule on the subject. The object is always to carry into effect what was done and attempted to be done when the entry and survey were made. The rule laid down in *Haggan v. Wood*, supra, cannot be applied in this case, because if the lines from the seventeenth and nineteenth corners should be extended, they would never intersect. It is clear that an error was made by the original surveyor in copying his field notes, or in entering them. The same surveyor surveyed each entry, surveying the *Morrow-Dodson* entry first. He had the same person as a chainman in each instance. It is quite likely that, when the *Dick* entry was run out until its line reached the *Morrow-Dodson* entry, from that point the calls of the latter were copied as the calls for the *Dick* survey. That was a customary and a natural way of doing such work. Consequently any error made in entering or transcribing the calls of the former survey along that line would occur also in the *Dick* patent. In running the line from the eighteenth corner, the stake, to the red bud and the black oak, if the course named, N. 75° E., is pursued, the natural object called for would never be reached. As the corners before the eighteenth were natural objects, and satisfactorily established, the error must be corrected somewhere between the seventeenth and nineteenth corners. By beginning at the red bud and black oak, and reversing its call to the stake, then reversing the next call, it is found that by changing the course from N. 60° E. to N. 80° E. the distance 108 poles runs out at the seventeenth corner. Ordinarily the rule is that distances yield to courses, and both to natural objects, or marked monuments. *Bryan v. Beckley*, Litt. Sel. Cas. 93, 12 Am. Dec. 276. But this is not always so, for if it be manifest from the patent as run out, that approximate certainty may be accomplished by changing the course instead of the distance, then that is to be done. *Blight v. Atwell*, 4 J. J. Marsh. 278.

This case was tried before a jury. There was submitted to the jury the question of the location of this lost corner and its lines. The court told the jury that the preceding and following known marked corners must be accepted, and that if the line reversed from the red bud and the black oak corner, so as to run S. 75° W., 230 poles, was a marked line, with ancient marks apparently made contemporaneously with the making of the original survey, the jury should find that to be the line, if then by extending the next line back 108 poles it would exactly reach the chestnut oak es-

tablished as the seventeenth corner. This instruction was really more favorable to the appellant than it was entitled to, for if the line was marked as a line at the time the survey was executed, and presumably it was, as it was the duty of the surveyor to have marked it (*Bryan v. Beckley*, supra; *Johnson v. Marshall*, 4 Bibb, 133), that marked line controlled and established itself, even though the corner was not marked (*Thornberry v. Churchill*, 4 T. B. Mon. 32, 16 Am. Dec. 125). However, there was evidence that the line N. 75° E. was marked for 100 poles, with ancient line marks made in the execution of that survey. There was also some evidence that these marks had been made many years later by another person and for a different purpose; but that was a question for the jury, and the evidence on the whole seems to sustain their verdict. Thus the line N. 75° E., 230 poles, was established, which established the state corner, which is the lost corner, at its extremity. As, then, the seventeenth corner was already established, and the eighteenth was established by the verdict of the jury, the remaining line between the two should have been run without regard to course or distance, although as a matter of fact it coincides in distance with the call in the patent. Aside from the convincing reason found in the old marked line on the N. 75° E. call, for establishing that line at that place, it is manifest to us from other facts that such is the correct location. Appellant's theory, if executed, would have cut the *Morrow-Dodson* patent into two parts, excepting a very narrow elongated strip. It is not probable the prior entrants, with the power of first selection, would have voluntarily mutilated their entry and tract in such manner. Again, as we find there was a mistake made by the surveyor in transcribing the result of his work, it is more likely he would have made the error of substituting an 8 for a 6, than of substituting 75 for 84½, and making a material discrepancy also in the length of the line.

It is contended that the remote vendor of appellant and the former owner of the *Morrow-Dodson* patent established an agreed dividing line north of the line herein established between the lands which was marked and recognized by them and their vendees for many years as the true dividing line between their lands; but we do not find any evidence in the record that any of the owners of these two tracts at any time marked the line claimed by appellant. There was some evidence that a marked line existed at the point claimed; but part of it was the extreme northern line of the *Morrow-Dodson* patent, and part of it made for other purposes. None of it was shown to have been made under any sort of an agreement between any owners of the two patents here in question, that it was to constitute a divi-

sion line between them. Nor was there evidence that they recognized such line as their division line.

The question of adverse possession the trial court undertook to submit to the jury, but in instructions that were erroneous. However, they were not prejudicial to appellant for the reason that there was a failure of proof on his part to sustain him in that issue. He did not show adverse possession of any of the disputed land for a longer period than six or seven years consecutively. Then for much of the time the tenant in possession rented from and paid rent to the owners of each of the patents, so each owner had equal benefit from that fact. There should have been no instruction submitted on that issue.

Upon the whole case we are satisfied no error prejudicial to appellant's substantial rights has been committed.

Judgment affirmed.

FISCAL COURT OF BRECKENRIDGE COUNTY v. BOARD OF TRUSTEES OF TOWN OF HARDINSBURG.

(Court of Appeals of Kentucky. April 27, 1909.)

1. FRAUDS, STATUTE OF (§ 150*)—PETITION—DEFECTS—DEMURRER.

The defect in a petition, in an action on a contract, arising from a failure to allege that it is in writing as required by law, may be presented by demurrer.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 360-362; Dec. Dig. § 150.*]

2. COUNTIES (§ 121*)—PAROL CONTRACTS—VALIDITY.

The fiscal court of a county cannot bind itself by parol.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 183; Dec. Dig. § 121.*]

3. MUNICIPAL CORPORATIONS (§ 243*)—PAROL CONTRACTS—VALIDITY.

The board of trustees of a municipality of the sixth class cannot bind itself by parol.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 677; Dec. Dig. § 243.*]

4. MUNICIPAL CORPORATIONS (§ 247*)—UNAUTHORIZED CONTRACTS—EFFECT OF PERFORMANCE—VALIDITY.

An obligation in excess of \$50, incurred by a municipality of the sixth class without complying with St. 1900, § 3699 (Russell's St. § 1698), requiring such an obligation to be voted for by four members of the board, the yeas and nays entered on the journal, is invalid, and cannot be enforced, though the other party has performed its part of the agreement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 678; Dec. Dig. § 247.*]

Appeal from Circuit Court, Breckenridge County.

"Not to be officially reported."

Action by the Fiscal Court of Breckenridge County against the Board of Trustees of the Town of Hardinsburg. From a judgment of dismissal, plaintiff appeals. Affirmed.

Claude Mercer, Gus. Brown, Co. Atty., and N. McC. Mercer, for appellant. Murray & Murray, for appellee.

NUNN, J. This action was instituted by the members of the fiscal court of Breckenridge county, in their official capacity, against the chairman and the members of the board of trustees of the town of Hardinsburg, Ky., a municipality of the sixth class.

Omitting the formal parts of the petition, it contains the following allegations: "That plaintiff Henry De Haven Moorman is now the duly qualified and acting judge of the Breckenridge county court. That John O'Reilly, C. H. Drury, H. G. Vessels, T. H. Bates, Frank Ruppert, and J. T. McCamish are the duly elected and qualified and acting justices of the peace in and for the said county of Breckenridge. That as such by law they compose the fiscal court of said county of Breckenridge, state of Kentucky. That the defendants, Frank De Haven, Lewis Jarbee, P. M. Beard, Denny Sheeran, and Andrew Elder are the duly qualified, elected, and acting trustees of the town of Hardinsburg, Ky., which is a duly incorporated town of the sixth class of this state. Plaintiffs state: That during the year 1907 it and the defendant the town of Hardinsburg, Ky., acting by and through its then duly elected, qualified, and acting trustees, entered into an agreement, whereby it was agreed that if said plaintiff, for and on behalf of Breckenridge county, would construct a public privy, within said town and near the livery stable therein, and would permit the citizens and taxpayers of said defendant town to have free access and use thereof, and in consideration of a public benefit to be derived therefrom by persons in said town, that said town of Hardinsburg would pay thereon the cost of such the sum of \$175, and in addition thereto, and as a part of the consideration inducing the said plaintiff to enter into and make such agreement, that said defendant would open, for public use and travel, an alley from Court place to Fourth street, which said alley afforded means of ingress and egress to and from said public privy to Fourth street. That in consequence of and in pursuance of the said agreement, the plaintiff did erect said public privy at the designated place and had the same opened to the public. That said defendant, in pursuance of said agreement, did pay the aforesaid sum of \$175 on the cost thereof, and further did take steps towards opening the said alley in pursuance of said agreement. That said defendant did, on the 23d day of April, 1907, by an ordinance duly passed by said board, in regular session, and as prescribed by law, declare said lands necessary for said alley to be needed for municipal purposes, and did publish said ordinance as required by law. That a committee was ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pointed by said board to report to it the cost of said alley. That said committee did investigate and report the cost thereof, and the consideration asked by the landowners over whose land said alley would run was satisfactory to said board, except the amount asked by the Farmers' Bank, in said town. That thereupon said board duly authorized and directed the city attorney, then John P. Haswell, Jr., to institute such legal proceedings as required by law to condemn said lands owned by the said bank, for the purpose of opening said alley in conformity with said agreement. That thereupon said city attorney, on the 27th day of May, 1907, instituted said condemnation proceeding against the Farmers' Bank for the purpose of acquiring the right to open said alley as agreed by defendant would be opened. That said suit was filed in the Breckenridge county court, a court of competent jurisdiction in the premises. That before said litigation was completed, and before said alley had been acquired by law, plaintiff alleges that the defendant, said board of trustees, composed of the defendants, Frank De Haven, P. M. Beard, Lewis Jarbee, Andrew Elder, and Denny Sheeran, have ordered the dismissal of aforesaid action and refuse to comply with the agreement as aforesaid, and refuse to take and prosecute such legal steps as to cause the opening of said alley, and they still refuse to do so, although plaintiff avers that it has demanded of them the fulfillment of said agreement. Plaintiff avers that it has complied with its part of aforesaid agreement in full, but the defendant has violated said agreement and refuses to carry same into effect as herein alleged. Plaintiff avers that said defendants, in their capacity of trustees aforesaid, have the legal right, and the law governing such provides means whereby the said alley can be opened as was agreed, but they have refused and still refuse to comply with said agreement as aforesaid."

A demurrer was sustained to this petition, and appellants filed an amended petition, with which they filed the ordinances enacted by the town council in legal form and manner, which declared the opening of the alleyway a public necessity, and directed the city attorney to take legal steps to have it opened, and an action was pending in the county court for that purpose when the present officials were elected to succeed those who were in office when the agreement referred to in the original petition was made, and when the ordinances for the opening of the alley were enacted, and alleged that the new board wrongfully directed the dismissal of the action by which it was sought to open the alley. A demurrer was sustained to this amended petition and the original petition as amended, and the action was dismissed. Nothing appears in the ordinances, which

were duly passed, with reference to the opening of the alley, which in any way refers to the agreement, or contract, alleged in the original petition.

In Newman on Pleading & Practice, p. 390, it is said: "If the petition does not aver that the contract is in writing, it will be considered as made by parol. If the law requires the contract sued on to be in writing, and the petition does not allege it to have been so made, the statute need not be pleaded or relied on, but the defense may be presented by demurrer." See the cases of *Byassee v. Reese*, 4 Metc. 372, 83 Am. Dec. 481; *Hocker v. Gentry*, 3 Metc. 474; *Smith v. Fah*, 15 B. Mon. 445, and other cases cited therein. The foregoing rule being established, we must consider this case as if the fiscal court and town council had made nothing more than an oral agreement with respect to the matter set forth in the petition. It appears from the authorities that neither party could thus bind, or obligate, itself. That the fiscal court could not bind itself in such manner, see the case of *McDonald's Adm'x v. Franklin County*, 125 Ky. 205, 100 S. W. 861; but it appears that the fiscal court has fully performed its part of the agreement and endeavored by this action to compel the performance of the agreement on the part of the town. In our opinion, section 3699, Ky. St. (Russell's St. § 1698), is in the way of granting appellants the relief they ask. That section, in part, provides as follows: "No ordinance incurring a liability, or requiring an appropriation of exceeding fifty dollars for any one object or purpose, shall be valid, unless the same be voted for (and the yeas and nays be so entered upon the journal) by four members of the board."

It appears from the petition that the liability attempted to be incurred was for more than \$50, and, as this statute was not complied with by the council, the attempted agreement was invalid. As appellees were not bound by the oral agreement and were not obligated to open the alley, it was a matter of discretion with the council to open or not open it, and the court has no power to compel it to so act, although in good morals the council ought to comply with the contract.

For these reasons the judgment of the lower court is affirmed.

GAY v. HAGGARD, Supervisor of Roads.
(Court of Appeals of Kentucky. April 21, 1909.)

1. MANDAMUS (§ 154*)—PROCEEDINGS—PETITION.

A petition for a writ of mandamus need not expressly ask for the issuance of the writ; prayer for process being unnecessary under the Code.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 312; Dec. Dig. § 154.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. MANDAMUS (§ 1*)—NATURE.

Under the Code the writ of mandamus is a statutory writ, and is granted as a matter of right in a proper case to the party aggrieved.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. MANDAMUS (§ 157*)—PROCEEDINGS—MOTION FOR WRIT—NOTICE.

Where a petition for a writ of mandamus is filed, the ordinary summons is supplied by the notice of motion for the writ, as provided by Civ. Code Prac. § 474, but the notice is unnecessary when the defendant voluntarily appears and demurs to the petition.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 317-319; Dec. Dig. § 157.*]

4. APPEAL AND ERROR (§ 78*)—DECISIONS REVIEWABLE—ORDER SUSTAINING DEMURRER TO PETITION FOR MANDAMUS.

A ruling sustaining a demurrer to a petition for a writ of mandamus, and dismissing the action before the making of a motion for the writ, is a final order from which an appeal lies, though no notice of motion for the writ was given as provided by Civ. Code Prac. § 474; the notice being unnecessary when defendant appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 465; Dec. Dig. § 78.*]

5. MANDAMUS (§ 23*)—GROUNDS—PERSONS ENTITLED TO RELIEF.

An action for mandamus must be prosecuted by the proper public officer when the right or duty in question affects the state in its sovereign capacity as distinguished from the people at large, but, if the general public as distinguished from the state in its sovereign capacity is affected, any citizen may sue out the writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 55; Dec. Dig. § 23.*]

6. MANDAMUS (§ 23*)—GROUNDS—PERSONS ENTITLED TO RELIEF.

A citizen and taxpayer suing on his own behalf and on behalf of others may sue out a writ of mandamus to compel a road supervisor to discharge his statutory duty to let work on public roads at competitive bidding, the duty being one affecting the general public, and it is not necessary that the plaintiff should show a special interest, or that the public will sustain damage if the act is not done.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.*]

7. MANDAMUS (§ 154*)—PROCEEDINGS—PETITION.

A petition for a writ of mandamus to compel a road supervisor to let work on public roads at competitive bidding which alleges that defendant is the supervisor of the county, appointed, qualified, and acting, and has let the work on all the roads by private contract, instead of advertising for bids, sufficiently charges that the county works its roads by taxation, as those acts can occur only when that method is employed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 300, 301; Dec. Dig. § 154.*]

8. HIGHWAYS (§ 113*)—IMPROVEMENT AND REPAIR—CONTRACTS—COMPETITIVE BIDDING ON WORK.

Ky. St. 1894, § 4315, as amended by Acts 1906, p. 431, c. 118, and Acts 1908, p. 107, c. 42, requiring the letting of work on public roads at competitive bidding, and providing that the supervisor, with the consent of the county judge, may designate certain roads or parts of roads for private contracting, does not authorize the supervisor, with the consent of the county judge,

to exempt all the roads of the county from the competitive system.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 348; Dec. Dig. § 113.*]

Appeal from Circuit Court, Clark County.

"To be officially reported."

Action by David S. Gay against D. S. Haggard, Supervisor of Roads of Clark County. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Beckner & Beckner and Jouett & Jouett, for appellant. Pendleton, Bush & Bush and J. Smith Hays, for appellee.

O'REAR, J. Appellant, a citizen and taxpayer of Clark county, brought this suit on his own behalf, and the behalf of all other taxpayers of Clark county, against appellee Haggard, as supervisor of roads of Clark county, for mandamus, requiring the appellee to comply with the statute concerning the letting of work on the public roads of the county at competitive bidding, instead of private contract. It is charged that the latter course was being pursued as to all the roads of Clark county. A general demurrer was sustained to the petition, and the action was dismissed. We are advised in briefs of counsel that the learned circuit judge based his judgment upon a construction of the statute, which will presently be adverted to; but appellee here contends that there are certain technical defects in the petition which alone are sufficient to sustain the lower court's ruling. He also contends that the construction of the statute, which seems to have been the real purpose of the suit, as applied by the court, is correct. The petition does not expressly ask for the issuance of the writ of mandamus, although after stating the alleged dereliction of the defendant, a public officer, it asks that he be compelled to comply with the law, and be required to advertise the work on the roads to be let, and to let it, at public competitive bidding.

While at the common law prayer for process was the approved practice, under our Code that is not necessary. Upon the allegation of sufficient facts, process which is suitable to the relief demanded may be issued by the clerk where the law allows him to issue it, or may be awarded by the court. There was not a notice by the plaintiff of the motion for mandamus in this case. Appellee insists that, until there was such notice, the action of the trial court in ruling upon the demurrer to the petition was not a final order, although the petition was dismissed by the judgment; that the Code contemplates in this proceeding that the granting or refusing the writ of mandamus is the final order of the case; and that neither can be done until there is a motion for the mandamus. Under our Code of Practice the writ of mandamus is a statutory writ, and is granted as a matter of right in a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

proper case to a party aggrieved. *Maddox v. Graham & Knox*, 2 Metc. 56. The trial is summary. Section 475, Civ. Code Prac. By section 474, Civ. Code Prac., it is provided that, except in writs used by the court in enforcing its judgments, the writ of mandamus shall be obtained by motion as provided in title 10, c. 5, Code (applying to the trial of motions upon notice), and that "the applicant shall file a petition wherein he shall state the cause and ground of his application before giving notice of his motion; to which the party against whom the mandamus is sought shall file a demurrer or answer, at or before the time fixed for making the motion." Ordinarily a suit is begun by filing the petition in the clerk's office, and causing a summons to be issued upon it, returnable to the next term or within so many days after service. But in this proceeding the summons is supplied by the notice, the petition can be filed at any time before the notice, and the court may after the 10 days provided in the notice, or after the appearance of the defendant, summarily try the motion. When the defendant appeared and filed his demurrer, the office of the notice was dispensed with. It was no longer necessary to notify him to do what he had already done, or to apprise him of a purpose which he was then combating in court. Before the motion for the writ was made, the court held the petition to be insufficient to support such motion, and dismissed the plaintiff from court. That was an effectual denial of the writ, and is a final order in the case from which an appeal lies.

The petition does not allege that appellant will sustain special damage, or that anybody will sustain damage by reason of the alleged conduct or failure of the defendant to comply with the statute as to letting the work on the roads. There is no express provision of the statute in this state making it the duty of any public officer to prosecute actions for mandamus against derelict road supervisors. The duties of the latter officer appertain to a subject that directly concerns the public at large—the maintenance of the public roads of the counties. It affects them not only in their convenience, but as taxpayers. The rule of practice concerning who may prosecute the suit is well stated in 28 Cyc. 401, thus: "The true distinction seems to be that, where the right or duty in question affects the state in its sovereign capacity as distinguished from the people at large, the proceedings must be instituted by the proper public officer, but, if the general public as distinguished from the state in its sovereign capacity is affected, any member of the state may sue out the writ." Such was the practice applied and approved in the case of *Leslie County v. Wooten*, 115 Ky. 850, 75 S. W. 208. The principle in another aspect is more frequently encountered in cases where one citizen and taxpayer on behalf of others of the class brings an action

to restrain the levy of a tax, or other excessive ministerial act. The cases are numerous and familiar. The right of a single taxpayer to maintain such an action is no longer in doubt. It would seem to follow that where a ministerial act was required by law to be done, which if done would inure to the benefit of the public, the tardy official might be set in motion and compelled to act by a suit by one of the public affected, suing on his own and on the behalf of the others. Nor is it necessary that the plaintiff should show a special interest to be affected by the act. The reason it is public is because all the public are equally affected by it at least theoretically; and, if no one of the public could maintain the suit, none less than all could, which would be practically a denial of the right to sue, for it is scarcely possible that all the citizens of a county or other territory could be got to act together in any matter. Nor do we think it necessary to allege or to show that the public will sustain damage if the act is not done. By the enactment of a statute on behalf of the public creating an office, and providing an incumbent to discharge certain public functions, the Legislature has declared that the act is one beneficial to the public. The phase of the question is not issuable. The public pay the officer for his services. They pay for the work done upon the roads. It will not lie in the official's mouth to say that his performance of a statutory duty is not a matter of concern to the public, or that his neglect of it will not entail any damage upon the public. Nor can he ask that the public be relegated to criminal prosecutions for redress. The public needs roads, not fines. The fines are only one method of enforcing the discharge of official duty to the public; but the availability of that means will not prevent the employment of another that will get what the public are entitled to, and what was the purpose of the legislation in their behalf in that matter.

The petition in this case does not allege that Clark county works its road by taxation. It is argued by appellee that, unless the roads are worked by taxation, there is no authority for the supervisor's letting the work at competitive bidding. Our statutes contemplate several different ways of maintaining our highways. One is the tollgate system, either by a private corporation or by the counties. Another is by the hands allotted to do the work, when overseers are appointed to superintend the work. Another is by taxation or allotment of hands or both. In the last instances a supervisor may be appointed who, under the fiscal court, has charge of the work. There is no provision for the appointment of a supervisor of roads unless the county has elected to keep up its roads in whole or in part by taxation. Section 4313, Ky. St. So, when the petition alleges that the defendant is the supervisor of roads of the county, appointed, qualified, and

acting, and has let the work on all the roads of the county by private contract, instead of advertising for bids, we think it is sufficiently charged that the county was working its roads by taxation, as those acts could occur only if that method were being employed.

This brings us to the consideration of the statute, the construction of which is involved in this action. It is section 4315, Ky. St., as amended by the act of 1906 (Acts 1906, p. 431, c. 118), and as amended also by the act of March 24, 1908, p. 107, c. 42. This suit was begun four days after the amendment of March, 1908, and, as there was an emergency clause to the act, it took immediate effect. Appellant was doubtless unaware of that amendment. However, the statute before the amendment and now is not changed so far as the principal feature of this case is concerned. Before the last amendment, it was provided: "In counties wherein roads are worked by taxation it shall be the duty of the supervisor at the courthouse door in his county, on the first Monday in March in each year after twenty days written or printed notice posted at each voting place in the county, to let out to the lowest and best bidder, who shall give bonds with surety, approved by the supervisor, the working and keeping in repair of all the roads of said county," etc. Under the statute as it now stands, it is provided that the supervisor "shall advertise for fifteen days in succession in some newspaper having general circulation in his county or by written or printed notices posted up in three or more conspicuous places in each voting place in said county just preceding the regular monthly meeting of the fiscal court in April in each year, that the fiscal court will receive the bids to let out to the lowest and best bidder the work of keeping up and repairing the public roads of the county for a specified term of not less than one nor more than four years." In the statute now, and as it was before the amendment, there is this proviso: "Provided, that for the purposes enumerated the fund raised under this act, and which may be otherwise raised by the levy court, shall be sufficient; and if not sufficient, then it is to be used at such places and for such purposes as the supervisor under the general directions of said court may deem proper; and the court in giving such directions, shall have due regard for the public good, and to the wants of the different parts of the county. * * *

The supervisor, with the consent of the county judge, may designate certain roads or parts of roads that are not to be let out as hereinbefore required, but which are to be worked and kept in repair either by special contract privately made, or by hands and teams hired by him, or by delinquent taxpayers, or by persons sentenced to labor, or who, by law, may be liable to work out fines imposed by juries or courts. But it shall be the duty of the supervisors to return to the county court, at its September

term in each year, a descriptive list of such roads, which shall be recorded in its order book, and also to report in writing all hands and teams hired, and amounts paid for same, and the length of time and where employed; and also a similar report of the names of the delinquents who work, the places where, and the length of time and names of persons working out fines or sentences on roads. And it shall be the further duty of the supervisor to supervise said work, and to employ competent persons to oversee; and he may, if necessary, put balls and chains on convicts to prevent their escape." The contention is, and it is said such was the view taken of the statute by the circuit court, that it was competent under this statute for the supervisor, with the concurrence of the county judge, to exempt all the roads of the county from the competitive system, and place the whole matter within the power of the supervisor to let the work by private contracts, and inasmuch as the petition in this case did not allege that some part or all of the roads of Clark county had not been designated by the supervisor with the consent of the county judge, to be let out by private contract, that the petition was defective. It is charged in the petition that the defendant as road supervisor "has continually refused, for both the year 1907 and the year of 1908, and for all other times, to let out said roads to the lowest and best bidder, or to advertise for bids at all, though he has often been requested so to do by this plaintiff and other citizens during all the said time and has persisted in doing all of said work upon all the turnpikes and roads of the county by contracts privately made," etc. There is no room left for an exception. "All" excludes exceptions. Appellee construes the act in question as authorizing the supervisor, with the consent of the county judge, to abrogate the entire provision as to competitive bidding. It must be assumed in the present state of the record that the supervisor of the roads has designated all the roads of the county to be let out by private contract; and that the county judge has consented to it. Is that permissible under the statute?

The scheme evolved by the Legislature for maintaining the public roads of the state contemplates putting the matter primarily in the hands of the various fiscal courts of the counties. In addition to this manifest purpose evidenced by nearly every provision of the statutes on the subject, section 4306, Ky. St., reads: "The fiscal court of each county shall have general charge and supervision of the public roads and bridges therein, and shall prescribe necessary rules and regulations for repairing and keeping same in order and for the proper management of roads and bridges in said county under and subject to the provisions of this act. The public roads shall be maintained either by taxation or by hands allotted to work thereon, or both, in the discretion of the fiscal

court of the respective counties as herein provided." We must take notice that, before the establishment of the fiscal courts, the county courts had a larger authority than they now have in road matters; that then and until within recent years many of the counties of the state had their most important roads in the hands of turnpike companies; that the old system has given way to that of public ownership, the turnpikes have been bought up by the counties, and the tollgates abolished. Maintaining roads by taxation prior to the abolition of the tollgate system was the exception in this state. Under the existing conditions, there have been a number of changes in the statutes concerning the manner of keeping up the public roads—all in a few years. This indicates that the system is yet in an experimental stage. Inexperience in doing such work by the public authority and the opportunity for preying upon the public by contractors and others have combined to make the experiments expensive ones in some localities. The representatives in the Legislature have met here with these experiences and problems fresh in mind. Nearly every session sees some needed change in the road laws to conserve the public welfare. In nearly all of them there is the tendency to place the final responsibility with the elective magistracy, the fiscal courts of the counties. This is particularly manifest in the last amendment, which we are here called upon to consider. There the letting of the work by competitive bidding is adhered to; but it is deemed best to take that feature of responsibility and opportunity for favoritism and its well-known evils from the hands of the supervisors, and to lodge the power of making the contracts with the fiscal courts. The county judge sits as a member of the fiscal court. The statutes are careful to place his authority in the particular of contracting concerning county roads subordinate and subject to the fiscal courts. The supervisor has diminished authority. In view of this trend of legislation, of the causes leading up to it, of the well-known opportunity for abuse where competitive bidding for public work is not resorted to, of the fact that in nearly all public works of any magnitude, national, state, and municipal, the competitive system has been found by actual experience to be the best for the public and the taxpayers, is it permissible to read this statute so as to render it possible for the very officials designed to have a limited and special power, to enlarge their authority, to oust that of the superior magistracy, and to return to a system discarded by every progressive commonwealth and municipality? In construing a statute so as to arrive at the legislative meaning, not only the abuses intended to be corrected by it may be considered, but no part ought to be so construed as to annul another part, if it can be avoided. Particularly is this true as to allow a proviso to overturn

the entire enactment to which it constitutes an exception. If the proviso means that the supervisor and county judge may designate all the roads of the county for private contracting, then all the careful enactments pertaining to public and competitive letting for the work are or may be set at naught. Always the aim and end of statutory construction is to effectuate the legislative purpose. The difficulty of expressing exact meaning in language so general as to be applicable to so many phases of a question as that which was the subject of this statute is recognized. The language here clearly imports the legislative will that the public roads when worked by money raised by general taxation shall be maintained in the highest state of utility that the money will buy, and the adoption as the most practicable plan of doing it, that of letting the work to the lowest and best bidder, to be ascertained in the manner which has been found most certainly to get the lowest and best bid. That last feature of the statute is its most prominent one next to that of affording good roads. It was recognized that instances would arise in each county where it would be impracticable to let a particular piece of the work in this manner. It might be too remote from the main work or too insignificant of itself, or be such that the labor of the particular neighborhood could best do it, and do it cheapest. That class of work, it was seen, ought not to be included in the general work required upon the more important systems of the road, because to do so might involve greater expense and more delays than if done by local labor or special contract. Then, too, it was seen that the delinquent taxes due for roads might in certain work be used advantageously by the county, as well as the labor of prisoners required by judgments of courts to work out their sentences. These matters were therefore made exceptions to the general and more comprehensive plan outlined by the statute—not with any purpose of doing away with the general plan, but to execute it as intended, letting the excepted parts form the least important portion of the scheme. The words of the exception, "certain roads or parts of roads," are inconsistent with the idea of so working all the roads. It is more difficult to define than it is to perceive the limitation of the proviso. It is believed by the court, as it doubtless was by the Legislature, that an attempt to define it more strictly than is done in the section would be to hamper a fair execution of the statute. If there should be a purpose to evade the aim of the statute, or to stretch it unduly, the good sense of any one concerned in the matter would doubtless serve to set the limitation so as to maintain the integrity of the general plan provided by the statute, and not defeat the fair object of the proviso. It is enough to say here that the proviso does not mean that "certain roads or parts of roads" includes all roads, and

does not allow a radical departure from the scheme of public competitive bidding provided by the statute.

Although the writ cannot go to the extent prayed for, in so far as the defendant ought to act, it can go and he will be required to advertise the letting of the work for bids to be submitted to the fiscal court of the county in accordance with the directions of the statute as amended by the act of March, 1908. It is not suggested, nor do we apprehend that it is a fact, that appellee was actuated by other than an honest purpose in his course, nor that the county judge in consenting to it had other thought than to conserve the public welfare in applying the road funds of the county. Their error was doubtless one of legal construction. And it may be possible that their plan in the particular instance was working better than the one the Legislature provided. But the question is not one of expediency. It is one of law. The question has not yet arisen whether appellee and the county judge have abused their official discretion, but is one of their power to do at all what it is charged they are doing, and of the right of the taxpayers to have the law executed as the Legislature has enacted it.

The judgment is reversed and cause remanded for proceedings consistent herewith.

SIMMONDS v. SIMMONDS' ADM'R.

(Court of Appeals of Kentucky. April 23, 1909.)

1. GIFTS (§ 49*)—PERSONAL PROPERTY—EVIDENCE—SUFFICIENCY.

Evidence held to show a gift of personal property by a mother to her son and a delivery thereof in her lifetime.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 93-100; Dec. Dig. § 49.*]

2. GIFTS (§ 19*)—GIFT OF NOTES WITHOUT DELIVERY.

A daughter of the donor, having possession of notes, cannot defeat a gift of such notes to a son by refusing to surrender possession, and thus prevent delivery, where it was understood by all the parties that such gift was intended.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 34, 38; Dec. Dig. § 19.*]

Appeal from Circuit Court, Logan County. "To be officially reported."

Action by L. B. Simmonds' administrator against John P. Simmonds. From the judgment rendered, defendant appeals, and plaintiff prosecutes a cross-appeal. Reversed on defendant's appeal, and affirmed on the cross-appeal.

Browder & Browder, for appellant. S. R. Crewdson, for appellee.

HOBSON, J. Mrs. L. B. Simmonds was the widow of C. N. B. Simmonds, who died a resident of Logan county, Ky., about the

year 1890. At the death of her husband, 70 acres of land were set apart to her as her dower, and, in addition to this, she received the personal property exempt from distribution. She continued to reside on the dower land until her death, on October 2, 1907. Her son, John P. Simmonds, lived with her, and at her death claimed as his own all the personal property on the farm. C. R. Reed qualified as the administrator of her estate and brought three suits against John P. Simmonds. In the first he sought to recover the personal property referred to. In the second he sought to recover on a note executed by John P. Simmonds to J. W. Hutchins on May 20, 1898, for \$1,783.89, subject to certain credits which reduced it to about \$600 or \$800; the note having passed by assignment to Mrs. Simmonds. In the third he sought to recover on a note for \$103.40, executed by John P. Simmonds to his mother on October 17, 1899. John P. Simmonds defended all three of the actions on the ground that his mother had given him the property and the notes in her lifetime. The three cases were consolidated, and on final hearing the circuit court adjudged to John P. Simmonds the personal property, but entered a judgment against him on the notes on the ground that there had been no delivery of the notes to him. From this judgment John P. Simmonds appeals, and the administrator prosecutes a cross-appeal.

The reason which the circuit court had for adjudging to John P. Simmonds the personal property, and not adjudging to him the notes, was that he had possession of the personal property, but did not have possession of the notes; they being in the possession of his sister, Mrs. Ollie McReynolds, at the time of his mother's death. After her mother's death, Mrs. McReynolds delivered the notes to the administrator, and he brought suit upon them. The \$103.40 note was executed for money which Mrs. Simmonds paid out for her son about the time the note was given. Several years later she paid off the balance due on the note for \$1,783.89 through her son-in-law, Joe McReynolds. He testifies that she then told him to deliver the two notes to his wife, and for his wife to keep them for her. John P. Simmonds testifies that his mother asked Joe McReynolds to give her the notes, and that he refused to do so, and that for this reason she did not deliver the notes to him. For many years before her death, John P. Simmonds and his family, consisting of his wife and three children, had lived in the house with her. She had three other children, but none of the others looked after her wants, and the taking care of the old lady fell upon John and his family. At the time of her death she was blind. She had been confined to her bed about two years, and before that had been sick for a

good while. She had lung trouble and had been blind about two years before she died. She had to be bathed and dressed. She required much attention at night, and both John P. Simmonds and his wife were up with her a great deal. One witness says that there were not two nights in two years that they were not up with her.

S. S. McReynolds, who was a magistrate in the district, testifies: "I was there twice. She sent for me twice, two different times. Said she wanted to settle up her business. Said she was going to give all her property to John. Said she owed it all to John for favors he had done for her, and she was going to give it to him, I believe was the language, but she never did tell me that she had given it to him."

Mrs. Sarah C. Metcalf, a neighbor, when asked whether she ever heard her say anything about John and his wife, makes this statement: "Yes, sir; said she didn't have half enough to pay them. Said she didn't have half enough to pay John for his trouble. Told me that out of her own mouth, said she wanted John to have everything she had, and said she didn't have half enough to pay him, and said there never was a son more faithful to his mother, and I know that was the case, because I was there enough to know."

Virgil D. Simmonds, being asked the same question, gave this testimony: "She just said she was sick and not able to wait on herself, and that John waited on her more than any of the other children, and that she wanted him to have what she had, and that she was going to give it to him. Q. How many times did you ever hear her say that? A. I don't remember but twice. Q. I will get you to tell the court, as near as you can recollect, her exact words as near as you can quote them. A. I reckon I can. Q. How the subject came up, and what she said, and just how she said it? A. At one time it came up. John was agent for shears, in some kind of business, selling scissors anyway, and she got sick and said she wanted John to come home, and she kept on after him to come home, and John told her he was making a little money, and that he had debts to pay, and she just told him, says: 'John, I can't live without you, and if you will come home I will give you my property.' That is just the way she spoke it."

The deputy sheriff, W. R. Bruce, who went to collect her taxes, testified thus: "She told me on one occasion, talking about the taxes, she said that she had given everything she had to John, and that he would pay the taxes. I had a list of real estate against her, and she said she had given everything she had over to John to take care of her, that she was getting old and feeble, she said."

Miss Florence Turner, who was an intimate friend, testifies as follows: "It was in the months of January and February,

1907, while I was staying with her, that she told me what disposition she had made of her property, both personal and real estate. I remember distinctly, at three different times when I was staying with her, that she said she had given all of her property, both personal and real estate, to her son John P. Simmonds on account of the care which he had given to her during her sickness. I never at any time asked her what disposition she expected to make of her property, but she told me of her own free will. She said that in case her daughter Ollie made any trouble for her son John about the property which she had given him that she wanted me to swear in court that she had given all of her property, both personal and real estate, to her son John P. Simmonds. Mrs. Simmonds was sick in bed at her home when she told me this, Ollie McReynolds knew what Mrs. Simmonds had done with her property, and said she was going to have her part of it, and this is why Mrs. Simmonds told me so many times what she had done with her property."

These witnesses are wholly disinterested. They are not contradicted or impeached in any way. The only testimony offered by the administrator was his own deposition and that of Joe McReynolds, and they do not contradict the testimony quoted. Under this evidence we think the circuit court properly held that the personal property on the place had been given to John P. Simmonds by his mother, and that the gift had become complete by delivery, for he had possession of the property, and she declared that she had given it to him.

Some point is made in the brief that Miss Turner says that Mrs. Simmonds stated that she had given John all her real and personal property, when in fact she had no real property; but she did have the dower interest in the land, and what she meant was that she had given him all she had and had given him the use of the land while she lived. The judgment on the cross-appeal is affirmed.

As to the notes a different question is presented. Ordinarily, to support a gift there must be a delivery; but if the notes were not in her possession, and McReynolds refused to deliver them to her so that she could deliver them to John P. Simmonds, he will not be allowed to say there was no delivery. His wife had the notes. The proof shows that she had declared that she was going to have her part of the estate. She and her husband had the administrator appointed, and they alone seem to be behind this suit. At least, the other two children have taken no part in it. A person will not be allowed to take advantage of his own wrong. McReynolds and wife will not be allowed to hold the notes against the will of Mrs. Simmonds, and thus prevent her from delivering them, and then claim that the gift to the son was not com-

plete because there was no delivery. Mrs. Simmonds had nothing which she could deliver to the son as a symbolical delivery of the notes. She did all that she could do. McReynold's wife undoubtedly had the notes, and Mrs. Simmonds was for this reason unable to deliver them to John P. Simmonds. Miss Turner shows that Mrs. Reynolds knew of the gift to her brother, and was determined it should not be carried into effect. The testimony of Joe McReynolds on cross-examination goes far to show that he coincided in his wife's plans. To allow them thus to prevent the gift from taking effect, when the mother regarded the gift as complete, would be to exalt form above substance and to prostitute a rule of law to defeat the purpose for which it was intended.

Aside from this the proof shows that the personal property was of value about \$300. The old lady was in a deplorable condition, and had been for years before she died, requiring attention almost similar to that required by an infant. The notes and personal property are no more than would reasonably compensate John P. Simmonds for his care of her. The proof shows that she told him that, if he would stay there and take care of her, he should have this property. He did stay there and take care of her. He paid her doctor's bills and burial expenses and the other expenses of her sickness. If we should say that the gift was not complete, it is manifest under the proof that the property is of no more value than the services which he rendered upon the express promise of his mother that, if he would stay there and take care of her, he should have the property. There is no equity in the plaintiff's case. The chancellor will not shut his eyes to the truth in matters of this sort, but, as in other questions involving the settlement of the estate of a decedent, will do justice between the parties. Whether we put the case upon the ground of gift or contract, the plaintiff should recover nothing of John P. Simmonds.

Judgment reversed, and cause remanded, with directions to dismiss the petition.

MEADOWS v. BRYANT.

(Court of Appeals of Kentucky. April 27, 1909.)

HOMESTEAD (§ 170*)—CONTRACTS IN RELATION TO—JOINDER OF HUSBAND AND WIFE.

A contract in adjustment of a claim set up to land settled on as a homestead, whereby the party in possession agreed to hold as the tenant of the other until a time fixed, and then to surrender possession, is not void because the wife of the party in possession did not join therein under St. 1909, § 1706 (Russell's St. § 4665), providing that no release or waiver of the homestead exemption shall be valid unless in writing and subscribed by the husband and his wife, as that section merely exempts the

homestead from the debts of the owner and imposes no restraint on the husband's general right voluntarily to sell the land or otherwise contract as to it.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 170.*]

Appeal from Circuit Court, Pulaski County. "Not to be officially reported."

Action by L. D. Meadows against R. S. Bryant to quiet title. Judgment for defendant, and plaintiff appeals. Affirmed.

L. G. Campbell, for appellant. O. H. Waddle & Son, for appellee.

HOBSON, J. L. D. Meadows obtained from J. J. Jones and wife a quitclaim deed to a tract of 30 acres of land in Pulaski county, and settled on it with his family. He proceeded to cut the timber from it, when R. S. Bryant set up claim to the land and the timber. Thereupon the following written contract was entered into: "Whereas, I have cut 84 logs and 5 logs and now have them piled on the Cumberland river, which turns out to have come from the land of R. S. Bryant; and whereas, I am living on a tract of land in Pulaski county, Kentucky, on waters of Cumberland river known as the Schuyler Clark survey which belongs to said R. S. Bryant: Now in consideration of W. J. Hamilton taking said logs and paying me therefore less \$2.00 per thousand feet for the payment of the delivery of said logs and to pay for the timber, and in further consideration of said R. S. Bryant agreeing to pay me \$25.00 on my surrendering to her the full possession of said land, I now agree to hold said land as the tenant of said Bryant until October 15, 1904, on which day I agree to vacate and surrender the full possession to her without demand or notice. This July 19, 1904. L. D. Meadows." She paid him the \$25, and he received the money for the timber. In October, 1904, he represented to her he had vacated the land, but, instead, he placed a tenant on it, and on June 7, 1905, brought this suit to quiet his title, alleging that he was the owner and in possession of it. The circuit court dismissed his petition and he appeals.

It is insisted that he was a bona fide housekeeper with a family, residing on the land, and the contract above quoted is void because his wife did not join in it under section 1706, Ky. St. (Russell's St. § 4665): "No mortgage, release or waiver of such exemption shall be valid unless the same be in writing, subscribed by the defendant and his wife, and acknowledged and recorded in the same manner as conveyances of real estate." It has been steadily held that the statute only creates an exemption of the homestead from the debts of the owner, and that this section imposes no restraint upon the husband's general right voluntarily to sell the land for value or otherwise contract

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as to it. *Brame v. Craig*, 12 Bush, 404; *Pribble v. Hall*, 13 Bush, 61; *Rothwell v. Rothwell* (Ky.) 104 S. W. 276.

Judgment affirmed.

CRANOR SMITH LUMBER CO. v. FRITH.

(Court of Appeals of Kentucky. April 21, 1909.)

1. SET-OFF AND COUNTERCLAIM (§ 29*)—SUBJECTS OF COUNTERCLAIM.

Under Civ. Code Prac. § 96, defining a "counterclaim" as a cause of action in favor of defendant against plaintiff arising out of the contract or transaction stated in the petition or which is connected with the subject of the action, defendant when sued for preventing plaintiff from removing \$1,500 worth of timber under a timber contract, was entitled to counterclaim damages for plaintiff's cutting not included in the contract and for the destruction of plaintiff's fences and crops.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 49; Dec. Dig. § 29.*]

2. SET-OFF AND COUNTERCLAIM (§ 28*)—SUBJECTS OF SET-OFF.

Plaintiff sued defendant for tortiously preventing plaintiff by force from cutting and removing prior to September 1, 1906, certain timber from defendant's land under a contract made September 9, 1904, by which the timber was sold to plaintiff. Defendant claimed that on August 4, 1904, he also sold to plaintiff all the standing timber on another tract of land measuring 12 inches and over at the stump where cut, and that, in violation of that contract, plaintiff had cut and converted certain trees not within the contract of the value of \$675, for which defendant prayed judgment. Held that, since defendant's claim did not arise out of the contract sued on, it was available only as a set-off and not as a counterclaim.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 47, 48; Dec. Dig. § 28.*]

3. COMPROMISE AND SETTLEMENT (§ 23*)—RECEIPT—EVIDENCE.

Where, in an action for breach of certain timber contracts, defendant pleaded as a set-off a claim for the wrongful cutting of timber under a former contract and for damages for injuries to defendant's fences, etc., while plaintiff claimed that all such differences had been settled, a receipt from defendant to plaintiff for money paid, reciting that plaintiff agreed to make good defendant's fence, to erect a temporary fence, and in lieu thereof defendant agreed to take as much fencing lumber as was necessary to fence the tract and "settle the entire matter," was admissible to show the agreement of the parties.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 93; Dec. Dig. § 23.*]

4. COMPROMISE AND SETTLEMENT (§ 25*)—INSTRUCTIONS.

In an action for breach of a logging contract, defendant pleaded as a set-off and counterclaim damages from plaintiff's cutting trees not sold, and also for injuries to his fences. Defendant offered in evidence a receipt executed April 30, 1906, which purported to be a settlement in which plaintiff agreed to reconstruct the fences, put up a temporary fence at once, or in lieu thereof permit defendant to take as much fencing timber as was necessary to fence the tract. The court charged that the jury should find for defendant on plaintiff's

claim, unless defendant before the expiration of the timber contract objected to the removal of the timber remaining on the land which could have been removed by plaintiff before September 1, 1906, otherwise the jury should find for plaintiff, unless plaintiff and defendant agreed that, if defendant would not sue plaintiff for damages, plaintiff would repair the fence and surrender the timber remaining, in which case the finding should be for defendant. The court also charged that, if the jury found for plaintiff on its claim and found any sum for defendant on the set-off or counterclaim, they should find the difference and return their verdict in favor of the party entitled to such difference, etc. Held that, since the contract of April 30th was a complete settlement, the court should have added to both instructions that, if the jury so found, they should find nothing for defendant on his counterclaim except the reasonable value of any work on the fence which plaintiff by the contract agreed but failed to do, and the market value of any timber plaintiff afterwards cut which was not included in the contract.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 96; Dec. Dig. § 25.*]

5. LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—SIZE.

Where plaintiff purchased all the timber on certain land 12 inches or over in diameter at the stump where cut, plaintiff was not responsible for the cutting of trees at a point where they measured less than 12 inches in diameter, if their diameter at the point where trees are usually cut was sufficient.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3.*]

6. DAMAGES (§ 62*)—DUTY TO REDUCE DAMAGE.

Where plaintiff in lumbering operations, pursuant to a contract, negligently knocked down defendant's fences, defendant was not required to anticipate that they would be negligently left down by plaintiff, nor, on ascertaining that the fences were down, to do more than exercise reasonable care to protect his crops and grass.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 124; Dec. Dig. § 62.*]

Appeal from Circuit Court, Rockcastle County.

"Not to be officially reported."

Action by the Cranor Smith Lumber Company against T. S. Frith. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

C. C. Williams, for appellant. Bethurum & Bethurum, for appellee.

HOBSON, J. On September 9, 1904, Thomas S. Frith, by written contract, sold to the Cranor Smith Lumber Company, 2,826 trees standing on a tract of 800 or 1,000 acres of land owned by him in Rockcastle county, Ky., in consideration of \$4,500 cash in hand paid. The grantee was given by the contract until September 1, 1906, to get the timber off the land in the most convenient way for it to haul it, and it was provided in the contract that, should it be necessary for the grantee to go through fields in getting out the timber, it was to put up and maintain gates at such points as it went

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

through the fields. On March 11, 1907, the lumber company brought this suit against Frith, alleging in its petition that he had prevented it from getting out \$1,500 worth of the timber by September 1, 1906, by threats, force, or violence, and praying judgment against him for that sum. He filed an answer, in which, in the first paragraph, he denied that he had prevented the lumber company from getting out the timber by September 1, 1906. In the second paragraph he alleged that the trees which it bought were marked, and that it had cut and taken away 200 trees which were not marked or included in the contract, of the reasonable value of \$750. This he pleaded as a counterclaim. In the third paragraph he alleged that on August 4, 1904, he sold the plaintiff certain standing timber on another tract of land, which was 12 inches and over in diameter at the stump where cut, and that in violation of this contract it had cut and converted to its own use 230 trees, of the value of \$675, for which he prayed judgment in assumpsit, waiving the tort. By the fourth paragraph he alleged that the plaintiff, in cutting the timber and removing it, had pulled down and destroyed his fences upon the land by cutting trees upon them and failed to repair them, thus destroying his rails and fencing and causing his grass and crops to be destroyed, damaging him in the sum of \$500. In the fifth paragraph he pleaded that in April, 1906, the plaintiff and he entered into a contract to the effect that the plaintiff was to wind up its business and give him full possession of his property on June 1, 1906, and repair the fencing which had been damaged, in consideration that he would not institute a suit against it for damages, and by the terms of this contract he was to have the refuse timber, including the butts, tops, and laps of the marked trees. The plaintiff demurred to the second, third, and fourth paragraphs of the answer. The demurrer was overruled, a reply was filed, which made up the issues, and on the trial of the case before a jury there was a verdict and judgment for the defendant against the plaintiff for \$300. The plaintiff appeals.

The demurrer to the second, third, and fourth paragraphs of the answer was properly overruled. By section 96 of the Civil Code of Practice a "counterclaim" is a cause of action in favor of the defendant against the plaintiff which arises out of the contract or transaction stated in the petition, or which is connected with the subject of the action. A counterclaim may be pleaded to recover unliquidated damages. If the plaintiff had cut other trees than those included in the contract, or by cutting the trees negligently it had injured the defendant's fencing, as alleged in the second and fourth paragraph of the answer, these were matters arising out of the contract or transaction sued on and connected with the subject of the action.

Garvey v. Crouch, 10 Ky. Law Rep. 937; Tebbs v. Lewis, 15 Ky. Law Rep. 537; Stillwell v. Duncan, 103 Ky. 63, 44 S. W. 357; Newman on Pleading & Practice, 477. The matters set up in the third paragraph were not properly pleadable as a counterclaim, because the contract of August 4, 1904, was not sued on by the plaintiff; but the rule is that the plaintiff may waive the tort, and may plead as a set-off a claim of this sort where he claims only the value of the timber. Eversole v. Moore, 3 Bush, 50; Roberts v. Moss (Ky.) 106 S. W. 297, 17 L. R. A. (N. S.) 280; Dennis v. Strunk (Ky.) 108 S. W. 957.

The defendant on the trial introduced himself and two other witnesses proving that he made a contract with the plaintiff in April, 1906, by which it was agreed that the plaintiff should get out the timber by June 1, 1906, and then turn the property back to the defendant in consideration of a settlement of all differences between them, except that the plaintiff was to repair the fences. According to this testimony, this contract was in consideration of the settlement of all matters including the timber cut under the contract of August 4th, which it was claimed the plaintiff was not entitled to. The defendant introduced two witnesses who testified that no such contract was made. The parties did meet at that time and had a negotiation in which \$12.50 was paid the defendant by the plaintiff and a receipt was executed, which is as follows: "Broadhead, Ky., 4, 30, 1906. Received of Cranor Smith Lumber Co. \$12.50 in full of the rent where the Tate mill site up to October 1, 1906. It is also agreed that the said Cranor Smith Lumber Company are to make the outside fence as good as it was on October 1, 1904, just as soon as the lumber can be moved which is now on the ground. In the regular course of business, said Cranor Smith Lumber Company are to put up temporary fence until site is removed. That in lieu of this being done, said Frith agrees to take as much fencing timber as necessary to fence said tract and settle the entire matter." The defendant offered to read this writing to the jury; the court refused to allow it to be read. In this there was error. All that took place between the parties in that transaction was competent to show what their agreement was. It would not be doubted that anything that was said orally might be proved, and the writing that was then executed is equally competent. The court at the conclusion of the evidence gave the jury instruction No. 1, as follows: "You will find for the defendant, Frith, on the claim of the plaintiff, unless you believe from the evidence that the defendant, T. S. Frith, before the expiration of the contract between the parties, objected to the removal of the timber remaining on defendant's land, if any there was remaining after such objection was made by defendant, that could have been removed by

plaintiff before the 1st day of September, 1906, and if you so believe you will find for the plaintiff, Cranor Smith Lumber Company, unless you shall further believe from the evidence that before the expiration of said contract, September 1, 1906, the plaintiff and defendant entered into a contract with each other, whereby it was agreed between them, that, in consideration of defendant Frith's agreement not to sue plaintiff for damages, the plaintiff would repair defendant's fence and would on the 1st day of June, 1906, surrender to the defendant the timber remaining on the land covered by the contract, and, if you believe the latter state of case, you will find for the defendant, Frith." By instruction 2, the court told the jury that, if they found for the plaintiff, they should find for it such a sum as would reasonably compensate it for the market value of the timber standing on the defendant's land belonging to the plaintiff on the 1st day of September, 1906. The court should have added to this instruction these words: "Which the plaintiff could have removed before the 1st day of September, 1906, if the defendant had not objected to its removal." By instruction 3 he told the jury that, if the plaintiff negligently cut the timber upon the defendant's fences, they should find for him upon his counterclaim such loss as he thereby sustained. By the fourth instruction he told them that, if the plaintiff cut and took away trees not included in the contract sued on, they should find for the defendant the value of such trees. By the fifth instruction he told them that, if the plaintiff cut and took away under the contract of August 4th any trees less than 12 inches in diameter, they should find for him the market value of these trees. The sixth instruction is as follows: "If you find any sum for the plaintiff on its claim, and find any sum for the defendant, Frith, on his set-off or counterclaim, you will find the difference, if any, between the sums found, and return your verdict in favor of the party entitled to such difference, giving the amount of such difference. If the sums found by you should be equal, then your verdict on the whole case will be for the defendant, Frith. If you find any sum for the plaintiff on his claim and nothing for the defendant on his claim, your finding on the whole case will be for the plaintiff, giving the amount."

It is manifest from the proof that the contract of April 30, 1906, was a complete settlement of all matters up to that date if it was made, and the court should have added to instruction 1 these words: "And in this event the jury will find nothing for the defendant on his counterclaim except the reasonable value of any work on the fences which the plaintiff by the contract agreed to do and failed to perform, and the reasonable market value of any timber which it afterwards cut

and took away which was not included in the contract." A similar qualification should be added to instruction 6, so that the jury will understand that it only applies in case the parties did not make a contract on April 30, 1906, settling their differences up to that time.

There is some intimation in the record that the hands in cutting some of the trees under the contract of August 4, 1904, cut them higher from the ground than necessary, and that some of the stumps for this reason measured less than 12 inches in diameter, when they would have measured 12 inches if cut lower. The court on another trial will allow the plaintiff to show the facts, if he desires to do so, and will tell the jury that the plaintiff is not responsible for any tree which was cut if it was 12 inches in diameter at the point where trees are usually cut.

The plaintiff complains that the court refused to instruct the jury that the defendant could not recover on his counterclaim for any damages to his crops or grass which he could have prevented by ordinary care. We do not find in the record any evidence that would warrant the giving of the instruction. The defendant was not required to anticipate that injury would be done to his fences negligently, or that, if his fences were knocked down they would be negligently left down. If he in fact knew that the fences were down, it was incumbent on him to exercise such care as might be reasonably expected of an ordinarily prudent person under like circumstances for the protection of his crops and grass; and, if on another trial the proof should warrant it, an instruction as indicated may be given. *Raleigh v. Clark*, 114 Ky. 732, 71 S. W. 857; *Louisville & Nashville R. R. Co. v. Moore* (Ky.) 101 S. W. 934, 10 L. R. A. (N. S.) 579. On another trial, also, the court will conform the verbiage of the first part of instruction 1, above quoted, to the verbiage of instruction 1 asked by the plaintiff.

Judgment reversed, and cause remanded for a new trial.

MARION COUNTY v. RIVES & McCHORD.

(Court of Appeals of Kentucky. April 22, 1909.)

1. ATTORNEY AND CLIENT (§ 182*)—LIEN OF ATTORNEY — COMPENSATION — SUBJECT OF LIEN.

An attorney successfully prosecuting an action by a taxpayer, suing on behalf of all the taxpayers of a county to recover county money illegally appropriated cannot assert a lien on the money recovered, under St. 1909, § 489 (Russell's St. § 1806), providing that in actions for money held in joint tenancy, etc., the court shall allow reasonable compensation for one prosecuting an action for the benefit of the others interested with himself, which applies only to money held in joint tenancy, coparcen-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nary, or as tenants in common, and which contemplates that there shall be distributees among whom the fund shall be divided.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 182.*]

2. COUNTIES (§ 208*)—CAPACITY TO BE SUED—CONTRACTS—LIABILITY.

A "county" is a local subdivision of the state, created by the state of its own will, and is not a municipal corporation proper, which is called into existence either at the direct solicitation or by the consent of the persons composing it, for the promotion of their private advantage, and a county cannot be sued except on an express contract.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 338; Dec. Dig. § 208.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1653-1660; vol. 8, p. 7621.]

3. COUNTIES (§ 196*)—ACTION BY TAXPAYER—COMPENSATION OF ATTORNEY.

A taxpayer undertaking on behalf of himself and other taxpayers of a county to prevent an illegal expenditure of money, or to recover money illegally expended, cannot, without direct statutory authority, require the county to pay his attorney, and the attorney must look alone to the taxpayer for his compensation.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 196.*]

Appeal from Circuit Court, Marion County.
"To be officially reported."

Action by Rives & McChord against Marion County. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

W. W. Spalding, for appellant. H. W. Rives, for appellees.

CLAY, C. The sole question involved on this appeal is whether or not an attorney of a taxpayer, who institutes a suit on behalf of all the taxpayers of the county and recovers money illegally appropriated, can assert a lien thereon for his services and recover a judgment against the county. The question arises in the following manner: The fiscal court of Marion county entered orders appropriating certain money belonging to the county to the county attorney and the several magistrates. R. D. Thornbury, as a citizen and taxpayer of the county, instituted an action to have the orders declared void and to recover the money so paid. This action was brought for the use of himself and the other taxpayers of the county. In his effort he was successful in the circuit court, and also in this court. In the prosecution of the suit, Thornbury employed appellees, who are regular practicing attorneys of Lebanon, Ky. Upon the payment of the money recovered into the county treasury, appellees asked an allowance by the fiscal court for their services. The fiscal court declined to make them an allowance. This action was instituted to recover a fee of \$500. After setting forth the above facts, the petition concludes as follows: "Plaintiffs say that their services in prosecuting the claim committed to them, and recovering the money so recovered and paid into the treasury of Marion county for

the joint benefit of all the taxpayers of said county, were reasonably worth the sum of \$500, for which sum they had and have a lien on the claim, and on the amount recovered, and that, the employment and recovery having been at the instance of one of said taxpayers, and for the joint benefit of all, the taxpayers of the county cannot, in equity, be permitted to accept and retain the whole sum recovered, free from all expense of recovery, and without contributing ratably to the payment of the plaintiffs' fee as attorneys." The defendant, Marion county, demurred to the petition, and the demurrer was overruled. It then filed an answer in two paragraphs, which it will be unnecessary to set forth. The question of what was a reasonable fee was submitted to the jury, and a verdict in plaintiffs' favor for \$250 was returned. Judgment was entered thereon, and Marion county appeals.

The position of appellees is: That Thornbury, as a party in interest, had the right to employ attorneys to prosecute the action referred to for the benefit of himself and the other taxpayers of the county; that their efforts were successful; that their services were rendered, not for Thornbury in the establishment of a personal claim, but to recover a sum in which every taxpayer in the county had a proportionate interest. It is therefore insisted that the other taxpayers should not be permitted to take to themselves and enjoy the fruits of appellees' labor without sharing in the reasonable expense incident to the recovery, and that under the doctrine of contribution the county is liable. It is furthermore insisted that the recovery in this case is authorized by section 489 of the Kentucky Statutes (Russell's St. § 1806), which is as follows: "In actions for the settlement of estates, or for the recovery of money or property held in joint tenancy, coparcenary, or as tenants in common, if it shall be made to appear that one or more of the legatees, devisees, distributees or parties in interest have prosecuted for the benefit of others interested with themselves, and have been at trouble and expense in conducting the same, it shall be the duty of the court to allow such person or persons reasonable compensation for such trouble, and for necessary expenses, in addition to the fees and costs; said allowance to be paid out of the funds recovered before distribution, the persons interested having notice of the application for such allowance."

We are unable to see how the doctrine of contribution can apply in this case. There is no direct recovery by any of the taxpayers. None of the proceeds are distributed to them. The money recovered went into the county treasury. The recovery only incidentally benefits all the taxpayers. It may, perhaps, serve to decrease the amount of taxes there-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

after to be paid by them, but they have no control over the sum recovered. None of it belongs to them in their individual capacity. Not even the county could distribute it among them except for public purposes. Any one of them might institute an action to prevent the sum from being illegally expended, but that is as far as the power of the individual taxpayer goes. It is manifest that section 480 of the Kentucky Statutes has no application to a case of this kind. It applies only to money or property held in joint tenancy, coparcenary, or as tenants in common. It further contemplates that there shall be distributees among whom the property or fund shall be divided. Certainly the taxpayers of the county are not joint tenants, coparceners, or tenants in common of funds paid into the county treasury and belonging to the county. The statute further contemplates that the fund or property shall be distributed among those who are to contribute to the fees and costs. As said above, public funds can never be distributed among the taxpayers except for lawful, public purposes.

While the appellees are asserting a lien on the sum recovered, they are seeking to do so in an action against the county. The question, then, arises: Can such an action be maintained? With respect to the right of a party to sue them, there is a wide difference between "municipal corporations" and "counties." The distinction is well pointed out by Dillon, in his work on *Municipal Corporations* (volume 1, § 23), as follows: "The distinction between municipal corporations proper, such as chartered towns and cities, or towns and cities voluntarily organized under general incorporating acts, such as exist in a number of the states, and involuntary quasi corporations, such as counties, has been very clearly drawn by the Supreme Court of Ohio: 'Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience.' On the other hand: 'Counties are at most but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) organization is asked for, or at least assented to, by the people it embraces; the latter organization (counties) is superimposed by a sovereign and paramount authority.' 'A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provisions for

the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.'"

In discussing the same question, this court, in the case of *Commonwealth v. Baske*, 124 Ky. 468, 90 S. W. 316, used the following language: "It is a well-established doctrine in this state, and in harmony with the rule generally prevailing, that counties are not liable to suit, unless authority for it can be found in the statute, or it follows by necessary implication from some express power given. The reason upon which this rule rests is that counties are subordinate political subdivisions of the state. They are created for public purposes, and are a part of the necessary machinery of government, and can no more be sued by the citizen than can the state. *Downing v. Mason County*, 87 Ky. 208, 8 S. W. 284, 12 Am. St. Rep. 473; *Wheatly v. Mercer County*, 9 Bush, 704; *Hite v. Whitley County*, 91 Ky. 168, 15 S. W. 57, 11 L. R. A. 122; *Simons v. Gregory*, 120 Ky. 116, 85 S. W. 752; *Sinkhorn v. Lexington T. P. Co.*, 112 Ky. 206, 65 S. W. 356. It is true that in these cases damages were sought to be recovered for injury to person or property, but the principle announced, and the ground upon which the opinions rest, is that, in the absence of statutory authority or necessary implication flowing from the exercise of a power granted, an action against a county will not lie. We have not been able to find any authority in the statute for an action such as this. In fact there are very few actions that can be maintained against counties. The right of these political subdivisions of the state to sue is much larger than their right to be sued, and this follows from the fact that, having control of the bridges, highways, and public buildings of the county, it is necessary that they should be invested with all needful power to protect and preserve them, and so it has been held that a county may maintain an action for injury to its courthouse or public roads. *Christian County v. Rankin & Sharp*, 2 Duv. 503, 87 Am. Dec. 505; *Lawrence County v. Chattahoochee R. Co.*, 81 Ky. 225; *L. & N. R. R. Co. v. Whitley County*, 95 Ky. 215, 24 S. W. 604, 44 Am. St. Rep. 220. And where a county has authority to make a contract, it would follow as an incident that it might sue or be sued concerning it. There is a marked distinction between counties and municipal corporations, such as cities and towns, in respect to the power to sue and be sued. The latter, by the act creating them, are expressly authorized to sue and be sued, and hence may be parties plaintiff or defendant in any case in the absence of a stat-

ute or judicial determination to the contrary, and it has been frequently announced that an action against them will lie in behalf of a taxpayer. *City of Covington v. Powell*, 2 Metc. 226; *City of Louisville v. Anderson*, 79 Ky. 334, 42 Am. Rep. 220. When taxes have been wrongfully collected by county officials, and are in the hands of the collecting or distributing officers, a direct action may be brought by the taxpayer against the person holding the tax. *Whaley v. Commonwealth*, 110 Ky. 154, 61 S. W. 35; *Blair v. Carlisle, etc., Turnpike Co.*, 4 Bush, 157; *Commonwealth v. Stone*, 114 Ky. 511, 71 S. W. 428. But after the taxes collected have been paid out, the taxpayer is without remedy as against the county. We conclude therefore that the action of the lower court in sustaining the demurrer in behalf of Kenton county was proper, and the judgment is affirmed."

In the recent case of *First National Bank v. Christian County*, 106 S. W. 831, this court, in explanation of the statement, "And where a county has authority to make a contract, it would follow as an incident that it might sue or be sued concerning it," contained in the opinion in *Commonwealth v. Boske*, supra, used the following language: "Counsel for appellant earnestly contends that the statement in the above opinion, to the effect that, where a county has authority to make a contract, it would follow as an incident that it might sue or be sued concerning it, authorizes this action, claiming that where taxes have been illegally collected there arises upon the part of the county an implied contract to pay them back. This, however, is not the meaning of the language used. That language refers only to an express contract. It was not intended to convey the idea, nor would it be proper to do so, that the right to sue could be implied from an implied contract."

It is manifest from the foregoing that a county cannot be sued except upon an express contract. *Thornbury* had no power to make a contract with appellees that would be binding upon Marion county. As to Marion county, he was a mere volunteer. He sustained the same relation to the other taxpayers of the county. Where a party undertakes, on behalf of himself and other taxpayers of the county, to prevent the illegal expenditure of money, or to recover money illegally expended, he cannot, without direct authority contained in the statutes, expect his attorneys to be paid by the county. The sum expended by him is simply a contribution made towards good government, and he must find his recompense in the conviction that he has performed his duty as a citizen. An attorney who undertakes such employment must look alone to the taxpayer who employed him, until the Legislature provides to the contrary.

For the reasons given, the judgment is reversed, and cause remanded, with directions to dismiss the petition.

PATTON v. WALKER'S TRUSTEES.

(Court of Appeals of Kentucky. April 21, 1909.)

1. FRAUDULENT CONVEYANCES (§ 61*)—PARENT AND CHILD—INTENT.

Under Ky. St. 1909, § 1907 (Russell's St. § 2100), providing that every gift, conveyance, etc., by a debtor of or on any of his estate without valuable consideration therefor shall be void as to all his then existing liabilities, etc., it was a fraud on creditors for an insolvent to set aside the greater portion of his estate and income to his daughters, though there was no actual intention to defraud.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 153; Dec. Dig. § 61.*]

2. FRAUDULENT CONVEYANCES (§ 46*)—STATUTORY PROVISIONS—"ESTATE."

Ky. St. 1909, § 1907 (Russell's St. § 2100), providing that every gift, conveyance, assignment, etc., by a debtor of any of his estate, without valuable consideration therefor, shall be void as to existing liabilities, etc., does not apply to real estate alone, since the word "estate" includes personal as well as real property.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 108, 110; Dec. Dig. § 46.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2475-2488; vol. 8, pp. 7653-7654.]

3. FRAUDULENT CONVEYANCES (§ 263*)—PARENT AND CHILD—"FREE OF CHARGE AS ADVANCEMENTS."

The allegation that certain rents and other property were given by an insolvent father to his children "free of charge as advancements" sufficiently charged that the gifts were voluntary and without consideration.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 263.*]

4. FRAUDULENT CONVEYANCES (§ 273*)—PRESUMPTIONS.

The presumption was that advancements made by an insolvent to his child to whom he was indebted were made with the intention of liquidating the indebtedness, whether such was his actual intention or not.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 805; Dec. Dig. § 273.*]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action between J. Stone Walker's trustees and Carlisle W. Patton. From the judgment, said Patton appeals. Affirmed.

J. J. Greenleaf, for appellant. J. A. Sullivan and A. R. Burnam, for appellees.

NUNN, J. In the year 1905 J. Stone Walker, then a resident of Madison county, Ky., made an assignment of all his property for the benefit of his creditors. For many years preceding that date he was regarded as one of the wealthiest men in the county, and expended what was regarded as a great deal of money for the support and comfort of himself

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and family. He had three children by his first wife, who were at the time of the trial living, namely, Carlisle W. Walker, a daughter who, in the year 1904, married one Patton, another daughter, Laura, married one Chenault, and a minor son named for his father. These three children were devised a sum of money each of about \$2,500 or \$3,000 by an annuity, their mother's sister. Their father, J. Stone Walker, was appointed their statutory guardian, but never made any settlement with the court as such. It appears that on the 14th day of March, 1895, he prepared and executed a note to appellant in the sum of \$2,100, bearing 6 per cent. interest from date. It seems that he regarded this sum as a balance then due his ward and child, appellant. He placed this note among his papers for safe-keeping for appellant. She arrived at the age of 21 years in June, 1903, and married in the year 1904. Walker's trustees, S. H. Stone and R. E. Turley, instituted an action in the Madison circuit court on the 19th day of April, 1905, for the purpose of ascertaining all the property assigned to them and the creditors of Walker for a distribution and settlement of his estate. The case was referred to a commissioner to take proof and report upon the matters stated. Appellant filed her note with the commissioner as a preferred claim, and asked that the whole of it be paid out of her father's estate. The commissioner so allowed and reported her claim. The trustees filed exceptions to the report, and denied the validity of the claim, alleging that it had been settled, and, in effect, that he had given her, without any consideration other than love and affection, \$1,500 in cash in each of the years 1900, 1901, 1902, 1903, and 1904, and in the year 1905 the sum of \$1,000; that such gifts were frauds upon his creditors, and asked that appellant be made to account for such gifts to the extent of the amount of her note, with interest. The testimony shows that during the dates mentioned J. Stone Walker was insolvent; that his indebtedness amounted to \$200,000 or over and the value of his property was \$100,000 or less; and that nearly all who were his creditors at the date of his assignment were creditors during the dates mentioned. It is evident that appellant did not know that her father was insolvent, and that her father was not fully conscious of it. On the trial of the case in the lower court appellant's claim was dismissed, and she has appealed.

The testimony shows that these payments to appellant were made under the following circumstances: J. Stone Walker had placed his daughter and her husband, Chenault, in possession of a valuable farm near Richmond, containing about 540 acres. They lived upon it for a few years rent free, and possibly under the impression that a gift to them of the farm would be made. In 1900 Walker made an arrangement with Chenault and wife by which they were to remain on

the farm and pay one-half of the value of the rent to appellant, which they agreed to be \$1,500 a year. The year before the assignment they paid to appellant only \$1,000; the rent having been lessened by reason of valuable improvements put upon the farm by Chenault. These sums were given to the daughter in addition to the support given her at her home prior to her marriage to Patton. Appellant introduced two witnesses who stated that in their opinion the gift made to her in the way of rent and support furnished her by her father while she was in his home was not unreasonable, nor more than was necessary to maintain her in the station of life she had been reared and educated in. Appellees expressed a different opinion in their testimony, and the lower court agreed with them, at least, to the extent of the note and its interest which she was claiming.

Section 1907, Ky. St. (Russell's St. § 2100), is as follows: "Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to prior creditors, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers." From the testimony it is probable that Walker did not make the advancements to his daughters with the actual intention to defraud his creditors, and they were doubtless innocent of any such intention. However, under the facts as they appear in this case, the law implies such an intention. It was a fraud upon his creditors for Walker, considering the financial condition he was in, to set aside the greater portion of his estate and his income to his daughters, and thereby diminish his own income and his ability to meet his just obligations. Appellant also contends that the section of the statute quoted applies to real estate alone. We cannot agree to this, as the word "estate" includes personal as well as real property. The rule has been well stated by this court in the case of *Duhme & Co. v. Young, etc.*, 66 Ky. 343, where it is said: "The doctrine upon the subject, as settled by this court, and we see no reason for a departure from it, is: If the grantor, at the time of making the settlement, is insolvent or in doubtful circumstances, the conveyance would be within the statute of frauds and void; 'but, if he be not indebted to such an extent as that the conveyance will deprive the creditors of an ample fund for the payment of their debts, a good consideration will be sufficient to support the deed, although voluntary, for it is free from the imputation of fraud.'" See, also, the case of *Trimble v. Ratliff*, 48 Ky. 515. In that case the court

said: "If, on the other hand, the conveyance had been made wholly in consideration of love and affection, then, whether the grantor was to derive, or should actually derive, any benefit from it or not, and although the grantee should receive the issues for his own use, still, if the grantor were indebted, or even under pending contingent liabilities at the time, the conveyance, whatever might be the actual intention of the parties as dependent upon proof, would be deemed fraudulent in law, and void as to his creditors, actual or contingent, unless it left ample means for their satisfaction, without presenting any material obstruction or inconvenience which would not otherwise have existed. * * *

The indebted father has, however, no right to give away his property to the detriment of his creditors, though it be done for the apparent purpose of equalizing one or more of his children with the others who have been fairly advanced. If he do so, the gift is deemed fraudulent and void as to creditors, without any inquiry as to the actual intent, either of donor or donee. The claim even of a child upon his father, except for suitable present education and support while dependent on him, cannot come in competition with that of the father's creditors. To prefer his children to the injury of his creditors is therefore a fraud upon the creditors; and the donees, being mere volunteers, cannot rely upon their own ignorance or innocence in the reception of the gift, but are absolutely implicated in the fraud of the donor, whether it be intentional or implied by law, from the nature and consequences of his act." See, also, the cases of *Rucker v. Abell*, 8 B. Mon. 566, 48 Am. Dec. 406, *Enders v. Williams*, 1 Metc. 351, and *Lowry v. Fisher*, etc., 2 Bush, 70, 92 Am. Dec. 475.

Appellant contends that the demurrer to the assignees' pleadings setting up the rents received by her as an offset to her claim should have been sustained, for the reason that appellees' pleading did not charge that the advancements and gifts made by Walker to his daughter were voluntary and without consideration. It was alleged that the rents and other property were given by J. Stone Walker to his children "free of charge as advancements." The meaning of the phrase "free of charge" and of the word "advancements" is clear and free from doubt. They mean that the property was given to the daughter, that there was no charge therefor, and no valuable consideration other than love and affection.

Appellees also contend that Walker made these advancements with the intention of liquidating any indebtedness that existed between him and appellant. Whether this was his actual intention or not, the law, under the facts of this case, would make it so.

Even if appellees' pleadings had been defective, they were cured by the subsequent

pleadings of appellant, which made certain that which it is contended was uncertain.

For these reasons, the judgment of the lower court is affirmed.

WALKLATE v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 22, 1909.)

1. LARCENY (§ 70*)—TRIAL—INSTRUCTIONS.

Though an indictment charged that accused "with force and arms" stole a horse, those words should have been omitted from the instructions, for, neither force nor arms being made an element of the offense, their use in the indictment was unnecessary.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 182; Dec. Dig. § 70.*]

2. LARCENY (§ 3*)—FACTS CONSTITUTING LARCENY—"HORSE STEALING."

Obtaining possession of a horse under the fraudulent pretense of hiring it, without intending to return it, and with the felonious intent to convert the horse and deprive the owner permanently of it, is "horse stealing," without a subsequent sale or other wrongful disposition of the horse by accused; but if he hired the horse in good faith, with the intention of returning it, and was prevented from doing so by the owner's act in having him arrested, he is not guilty.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 8-10; Dec. Dig. § 3.*]

3. CRIMINAL LAW (§ 1173*)—APPEAL—HARMLESS ERROR—FAILURE TO INSTRUCT.

On a trial for horse stealing, a failure to instruct on the phase of the case that if accused hired the horse, in good faith, with the intention of returning it, and was prevented from doing so by the owner's act in having him arrested, was prejudicially erroneous.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3165; Dec. Dig. § 1173.*]

Appeal from Circuit Court, Jefferson County, Criminal Branch.

"Not to be officially reported."

Thomas Walklate, alias Stewart, was convicted of horse stealing, and he appeals. Reversed and remanded.

Herman Morris, for appellant. Jas. Breathitt, Atty. Gen., and Tom. B. McGregor, for the Commonwealth.

SETTLE, C. J. This appeal presents for review the judgment and certain rulings of the Jefferson circuit court, criminal division, in a prosecution instituted by indictment against appellant for horse stealing, which resulted in a verdict from the jury finding him guilty and fixing his punishment at confinement in the penitentiary for two years.

According to the evidence appellant hired of Fowler, a liveryman, in the city of Louisville, a horse and buggy, under the pretense that it was his purpose to drive to the village of Worthington, in Jefferson county, to visit relatives, and that he would return the horse and buggy to the owner that evening or the following morning. After getting possession of the horse and buggy, he did not go to Worthington, but drove to New Albany, Ind., and there attempted to sell both horse

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and buggy, claiming that they belonged to him; but before he could effect a sale he was arrested under the charge of horse stealing, and the stolen property returned to the owner. The foregoing facts were established by the testimony of several witnesses and only contradicted in part by the testimony of appellant alone. Nevertheless, the latter insists that he was improperly convicted, and it is our duty to determine whether there is any legal ground for this complaint.

Of the several errors assigned, only one appears to us to be worthy of consideration, and that is as to the alleged failure of the trial court to properly instruct the jury. The instructions given were proper, except that the words "with force and arms" contained in instruction No. 1 should have been omitted. The instruction is in other respects properly predicated upon the facts furnished by the evidence and which the jury found sufficient to authorize appellant's conviction. It is true the indictment under which appellant was convicted charged that he "with force and arms unlawfully and feloniously did take, steal, and lead away one horse, the personal property of Wm. Fowler, with the felonious and fraudulent intent then and there to convert same to his own use, * * *"; but neither force nor arms is made an ingredient of the crime of horse stealing by the statute. Therefore their use in the indictment was unnecessary, and the words themselves only surplusage.

It is, however, patent that the court in instructing the jury did not give them all the law of the case. The larceny of the horse and buggy was not committed in the usual way, but by a method somewhat peculiar, viz., under the pretense of a hiring of them. So, as held in *Smith v. Commonwealth*, 112 S. W. 615, if appellant got possession of the horse under the false and fraudulent pretense of hiring him, without intending to return the animal to the owner, and with the felonious intent to convert him to his own use and deprive the owner permanently of him, this would constitute horse stealing in the meaning of the statute; and if the possession of the horse was obtained by appellant as we have indicated, the mere removal of the animal by him from the owner's custody amounted to a conversion of the horse to his (appellant's) own use, without proof of a subsequent sale or other wrongful disposition of him by appellant. On the other hand, if appellant hired the horse in good faith and with the intention of returning him, but was prevented from doing so by the act of the owner or others in having him arrested, he was not guilty of the crime charged. *Smith v. Commonwealth* (Ky.) 112 S. W. 615; *Roberson's Crim. Law*, §§ 417, 418; *Alexander v. Commonwealth* (Ky.) 20 S. W. 254; *Martin v. Commonwealth* (Ky.) 106 S. W. 863. The failure of the trial court to give an instruc-

tion embodying the law on the aspect of the case last above indicated was necessarily very prejudicial to appellant, and will compel a reversal of the judgment appealed from. The court upon a retrial should, in addition to the instructions used on the former trial, give the following: "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant obtained possession of Fowler's horse under the false and fraudulent pretense, if any or either, of hiring him to drive to Worthington, but without intending to return him, and with the felonious intent to convert him to his own use and permanently deprive the owner thereof, they should find him guilty as charged in the indictment and fix his punishment as directed by instruction No. 1; but, on the other hand, if the jury believe from the evidence that the defendant hired the horse in good faith and with the intention of returning him to the owner, but was prevented from doing so by his (appellant's) arrest, they should find him not guilty."

For the reasons indicated the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

BIG SANDY & C. R. CO. v. BLANKENSHIP.

(Court of Appeals of Kentucky. April 21, 1909.)

1. CARRIERS (§ 306*)—INJURY TO PASSENGERS—COMPANY'S LIABILITY—LESSORS.

Where defendant leased the right to operate log trains over a portion of its railroad to a lumber company, defendant was liable for injuries to a passenger resulting from a collision between its passenger train and a log train, owing to the negligence of the servants of the lumber company in operating the log train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1249; Dec. Dig. § 306.*]

2. CARRIERS (§ 338*)—INJURY TO PASSENGER—COLLISION—ACTS IN EMERGENCY.

Where a passenger, seeing a collision was imminent, jumped from the moving train and was injured, she could recover, though she might not have been hurt had she remained in the coach, being entitled to act on a natural impulse which an ordinarily prudent person situated and conditioned as she was would reasonably have been expected to do.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1352; Dec. Dig. § 338.*]

Appeal from Circuit Court, Pike County. "Not to be officially reported."

Action by Harriett Blankenship against the Big Sandy & Cumberland Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sheppard, Goodykoontz & Scherr and A. B. Auxier, for appellant. P. B. Stratton, W. A. Dougherty, and Roscoe Vanover, for appellee.

O'REAB, J. Appellant is the owner and operates a narrow-gauge railroad from a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

point in West Virginia through a section of Pike county, Ky., and into the state of Virginia. A lumber company operates a branch road connecting with appellant's road in Pike county, and uses in that connection a part of appellant's main track. Appellee was a passenger on one of appellant's trains. A log train of the lumber company came upon the appellant's track at a time when appellant's train was due to pass, and had the right of way over the track. A collision resulted. In the shock and excitement, appellee, believing she was in peril of being killed or seriously hurt by staying in the coach in which she was riding, jumped off the moving train, and was injured. This suit was brought by her to recover damages for the injury, charging the operatives of appellant's road with negligence in failing to provide and keep a safe track, and in failing to learn of the presence of the other train. The verdict of the jury was for appellee.

Appellant asks that its liability be confined to its care of its own train, and that, as those operating the log train were clearly in fault in causing the collision, appellant ought not to be held liable therefor. The log road was using appellant's road as a lessee or licensee. Appellant, as charter owner and operator of the road, could not dispense with its public duty to maintain a safe, clear track for the passage of its passenger trains. The presence of the other train at the time when the collision occurred was a preventable obstruction on the track, and the allowance of which by appellant was negligence as to the latter's passengers injured because of the fact. Appellant could not abdicate its duty to the public by suffering the management or control of its tracks to pass out of its hands so as to relieve itself from liability if injury resulted to its passengers because of its cession of the use of its tracks to another company. Appellee may not have been hurt had she remained in the coach. But, being placed suddenly in a position of imminent peril, she had the right to act upon a natural impulse, and to seek safety in that course which an ordinarily prudent person situated and conditioned as she was would reasonably have been expected to do. She was not required to exercise a correct judgment in the matter. She had not the time for reflection, nor was her mind enough composed to admit of it. The negligence of her carrier had put her in such apparent jeopardy as to produce a panic in her mind, and the law allows her without being held accountable for the act as negligent to act upon the impulse created by that condition. *So. Cov. & Cinc. St. Ry. Co. v. Ware*, 84 Ky. 269, 1 S. W. 493. The instruction of the court fairly embodied the foregoing prin-

ciples. The verdict of the jury is sustained by the evidence.

Judgment affirmed.

BIG SANDY & C. R. CO. v. BLANKENSHIP.

(Court of Appeals of Kentucky. April 21, 1900.)

1. CARRIERS (§ 306*) — INJURIES TO PASSENGERS—ACCIDENTS TO TRAINS—COLLISIONS—LIABILITY OF LESSOR.

A carrier is liable to a passenger for injuries sustained through the negligence of the lessee of a right to operate log trains over the road, though the collision was caused by the lessee's negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1249; Dec. Dig. § 306.*]

2. DAMAGES (§ 130*)—EXCESSIVENESS—INJURIES.

Where plaintiff suffered a miscarriage as the result of an injury due to defendant's actionable negligence, a verdict awarding her \$500 was not excessive, though her further claim that she had also sustained a displacement of the womb was not sustained by the evidence.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 366; Dec. Dig. § 130.*]

3. DAMAGES (§ 32*) — PERSONAL INJURIES — ELEMENTS OF DAMAGE — LOSS OF UNBORN CHILD.

Where a carrier's negligent act inflicted bodily injury on plaintiff, a woman enceinte, whereby the child died and was caused to be prematurely born, plaintiff, though not entitled to damages for loss of the child, could recover for her own injury, including mental and physical suffering endured as a natural and proximate result of the injury to her person; she being entitled to bear her child in nature's way and time.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 32.*]

Appeal from Circuit Court, Pike County.

"To be officially reported."

Action by Spicey Blankenship against the Big Sandy & Cumberland Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sheppard, Goodykoontz & Scherr and A. E. Auxier, for appellant. P. B. Stratton, W. A. Dougherty, and Roscoe Vanover, for appellee.

O'REAR, J. Appellant is a common carrier, operating a railroad extending through Pike county, Ky. Appellee was a passenger on a train on appellant's road, and claims to have sustained injuries in a collision between its train and a log train being operated on the same road by a lessee or licensee of appellant. It was the same collision under consideration in the appeal of this appellant against Harriett Blankenship (this day decided) 118 S. W. 315. It was there held that appellant was liable for the negligence of the lessee where injury was thereby inflicted upon appellant's passenger. The additional questions presented in this case are: Did appellee receive the injuries for which she sues as the result of that collision, and did

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the trial court correctly submit to the jury elements of her injury for which the law allows a recovery?

Appellee claims that she was enceinte, being about four months advanced with child; that in the collision she was thrown upon her side and bruised and stunned, so that she was made sick and caused to abort. The evidence on her behalf was that in the collision she was thrown violently upon her side, causing her great pain, following the temporary stunning; that within a half hour afterward her menstruation reappeared, and for the first time since she had conceived, and that that evening she had violent pains in her abdomen, which she describes as "bearing down pains"; that these pains continued intermittently for some days, and she consulted a midwife with reference to them. Acting upon her advice, she remained as quiet as she could, hoping that the trouble was merely threatened and would pass; but it continued for a week or so, becoming worse, when she was delivered of a child stillborn. She claims, also, that she continued to suffer from the effects of the injury by reason of a displacement of her womb, and had not finally recovered from the effects at the time of the trial. It may be that the latter claim was not supported by the evidence, and was, in fact, shown not to be true. But what view the jury took of that particular feature of the case we cannot tell, nor does it appear to be material now, as there was clearly enough in the case to sustain the very modest verdict returned in appellee's behalf—\$500.

The trial court, in instructing the jury, after defining care and negligence, gave this as the law of the case: "If the jury should believe and find from the evidence that, while the plaintiff was a passenger upon defendant's train, the defendant company, by its agents or servants in control of said train, knew, or by the exercise of ordinary care could have known, that the log train of the Hurricane Lumber Company was upon its tracks, and ran its passenger train into and collided with said log train, and that by reason of said collision the plaintiff sustained any injury causing plaintiff to miscarry or give premature birth to her child, or caused plaintiff womb trouble, they will find for the plaintiff such sum in damages as they may believe from the evidence she has sustained, so the sum so found, if anything, does not exceed \$10,000, and, if the jury should not so believe and find, they will find for the defendant. If the jury should find for the plaintiff, they will only take into consideration in estimating the damages the mental and physical suffering, if any, and the permanent reduction in plaintiff's power to earn money, if any, caused by said injuries." Appellant insists that "there is little doubt that the jury awarded this verdict against appellant, not because of believing her health

was to any extent impaired by reason of this miscarriage, but for the loss of the child." *Tunncliffe v. Bay Cities Consolidated R. R. Co.*, 102 Mich. 624, 61 N. W. 11, 32 L. R. A. 142, and *Hawkins v. Front Street Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72, are cited as holding that a recovery by the mother against one negligently causing the death of the child in her womb and its premature birth is not allowed. The question decided in the first-named case was that the loss of the society and prospective earnings of the child is not a proper element of damages in an action by a married woman for injuries which resulted in a miscarriage. The trial court in that case had charged the jury that, "if the plaintiff had lost a child by reason of the liability of the defendant in this case, you may give damages for it. The society, enjoyment, and prospective services of the child is a recognized element in that regard, and you may give what it is reasonably worth." In commenting upon that charge the Supreme Court of Michigan wrote: "This charge was clearly erroneous. There was, of course, no proof in the case as to the prospective earnings of the child, even if the mother would be the proper person to recover for such a loss. Nor would the loss of the child's society be a proper element of damages. While the jury is allowed to consider the case with all its facts, and to take into account, for the purpose of compensation, not only the physical pain, but also mental suffering, in determining the award of damages, and while of necessity this involves to some extent the consideration of the nature of the injury, and cannot exclude from the consideration of the jury the fact that the physical and mental suffering of the mother by reason of such an injury would be more intense than in the case of the ordinary fracture of a limb, yet beyond this it would not be competent for the jury to go, and to attempt to compensate for sorrow and grieving of the mother." That court did allow a recovery for the injury done the plaintiff, and its consequences in causing her to abort her child, including the physical and mental suffering she endured in the travail which was the result of the injury. What was denied was that element of mental distress which is characterized as sentimental, and which followed after, or may have followed after, the physical pain caused by the injury, had subsided. This is shown by the quotation by the court with approval of this excerpt from the opinion in *Bovee v. Danville*, 53 Vt. 183: "If the violence done her person results in the miscarriage, the miscarriage was the legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject for compensation. But the rule goes no further. Any injured feelings following the miscarriage, not part of the pain natural-

ly attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachel, she wept for her children, and would not be comforted, a question of continuing damages is presented, too delicate to be weighed by any scales the law has yet invented." In the case at bar the instruction of the trial court did not allow a recovery for any sentimental suffering not involved in, and attendant upon, the physical pain endured by the plaintiff and accompanying the injury, and the miscarriage caused by it. While it may be true that no scales have yet been invented by the law for weighing purely sentimental grief, it is also true that none are known to the law which separates mental suffering caused by physical injury into its various elements and apportioned some as actionable and others as nonactionable. Distress of mind caused by and accompanying a physical injury is an element of damage which the law compensates. It is no more true that all minds do not suffer alike than that all bodies are not equally susceptible to pain. While physiologically all pain may be said to be mental as the law uses the term, it is recognized that pain is physical when a nerve is impinged. But there is always some mental pain. The latter grows out of the former, is produced by it, and is the former extended as a physiological consequence. It would be as impossible in speculation as in fact to say how much of the mental suffering was the co-operation of the nerves of the brain with those of the body, and how much was psychological. Hence the law attempts no separation, but allows a recovery for all the suffering, both bodily and mental, which is the direct result of and accompanies a physical injury. If the injury inflicted is continuing or develops in stages, as from a fracture to septicæmia, and thence amputation, it is deemed one injury, and all pain caused by and accompanying it throughout its several stages is an element of the damages which may be recovered. So if a bodily injury is inflicted upon a pregnant woman, which directly or in natural consequence results in a miscarriage, the latter event is deemed a part of the original injury.

The other case cited and relied upon by appellant (*Hawkins v. Front St. Cable Co.*) goes further than we understand the authorities to justify, and further than we are willing to follow. It was there held that proof that an unborn child died and was prematurely delivered because of negligent injuries to its mother is not sufficient to establish her right to recover substantial damages for the injury. The court held that if the plaintiff showed "impairment of health and suffering growing out of the death and premature birth of her child, which would not

have attended its birth at the usual time, either alive or dead, and also that the child's death is attributable to a negligent injury which she received," she could recover for her suffering and impaired health. "But," the court added, "she must show the injury by appropriate evidence, and the mere proof that the child died, and was prematurely delivered, as a result of the accident, would not be sufficient to presume substantial damage therefrom." The reasoning of the Washington Supreme Court is that the pregnant woman must in time have delivered the child, and that as the pain of its birth was inevitable that it was prematurely brought about could not alone be actionable; that, in order to allow the woman to recover for the miscarriage caused her, she must have suffered pain, or ill health, which would not have followed at the usual time of the birth of the child dead or alive. Whether the pain of childbirth is greater in the one instance than in the other is not shown. Whether the mother would have suffered more pain at a subsequent time, or whether her health would then have been impaired, we fail to see how it could have been shown. But it is our opinion of the law that the woman has the right to bear her child in nature's way and time. When by negligent violence to her person she is caused to give it premature birth, whether it be dead or alive, or whether the pain attending its birth be greater or less than at the ordinary season, she is damaged. She is made to suffer physically and mentally at a time when she otherwise would not have to suffer. The great function of her sex has been interfered with. We all know that nature penalizes heavily infractions of its laws on this score. Such an event cannot be unimportant to the woman either as it affects her body or her mental equilibrium. If one enters my house tortiously and disturbs my peace, the law gives compensation. If by noises, odors, or unsightly objects he tortiously interferes with my free enjoyment of my premises, he is liable to me. If he negligently causes my cow to abort her calf, he is liable for the injury to the cow and the loss of the calf. 1 Thompson on Negligence, § 156. If, then, he negligently injures the body of a woman, disturbing and deranging nature's functions so that the fetus of her child is destroyed, and she caused to abort it, why may not she have legal complaint against the wrongdoer for her bodily suffering, and her mental suffering accompanying and growing out of it? If in the collision she had had a tooth knocked out, there would be no doubt of her right of action, although had she lived she would have lost the tooth in every probability; and maybe have suffered as much or more pain from it and in having it pulled than she experienced in having it knocked out by the defendant's negligence.

We hold that a negligent act, inflicting

bodily injury upon the plaintiff, a woman enceinte, whereby her child dies and is caused to be born prematurely, gives the woman the right of action against the wrongdoer for her injury, including the mental and physical suffering endured as a natural and proximate result of the injury to her person. That is as far as the instructions in this case allowed the jury to go, and is the only feature of that question presented for our review. There was evidence to take the case to the jury and to support its finding.

Judgment affirmed.

RISSBERGER v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. April 22, 1909.)

1. MUNICIPAL CORPORATIONS (§ 978*)—TAXES—ENFORCEMENT—LIMITATION.

Where a city's right to enforce its lien on land for taxes was barred under Ky. St. § 2515 (Russell's St. § 224) because not brought in five years, a mortgagee of the land could rely on the statutory bar and defeat an action by the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 978.*]

2. MUNICIPAL CORPORATIONS (§ 978*) — ENFORCEMENT OF TAXES—STATUTES—"SALE"—"ALIENATION."

A mortgage is not a "sale" or "alienation," within Ky. St. § 4021 (Russell's St. § 5913), providing that the lien on property for taxes shall not be defeated by sale or alienation, unless made more than five years before the suit to enforce the lien; and a mortgagee, acquiring a mortgage more than five years before a suit by a city to enforce a tax lien on the mortgaged property, is not within the statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 978.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6291-6306; vol. 8, p. 7798; vol. 1, pp. 302-306; vol. 8, p. 7571.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Consolidated actions by Phillip Rissberger and by the City of Louisville to enforce liens on real estate of which Eli H. Brown, Sr., had a life estate. From a judgment in favor of the City of Louisville, Phillip Rissberger appeals. Affirmed.

R. T. Colston, for appellant. Jos. S. Lawton, for appellee.

BARKER, J. This is the second appearance of this case in this court. The opinion upon the former appeal is to be found in 120 Ky. 142, 85 S. W. 731. The facts out of which the litigation grew are so fully stated in the first opinion that it is only necessary now to refer to it. The judgment was reversed because the chancellor allowed a lien to the city on the proceeds of the sale of the fee-simple title of the lot involved in the litigation; we holding that the life estate of Eli H. Brown, Sr., was bound for the taxes, and that the city was limited to the value of

his life estate for payment of the taxes due it. Upon the return of the case the appellant, Phillip Rissberger, offered to file an amended petition pleading the statute of limitations as against the claim of the city. The motion to file the amendment was overruled by the chancellor, and the merit of this ruling is the only question arising on this appeal.

Rissberger and the city of Louisville both had liens on the same property. The city had brought suit against the owners of the property, without making Rissberger a party defendant, or in any way noticing his claim. Rissberger had brought suit against the owners of the same property without making the city a party, or in any way noticing its lien. Subsequently the chancellor consolidated the cases. The correctness of the ruling of the chancellor in refusing to allow Rissberger to plead the statute of limitations depends upon the question as to whether or not the plea would be valid if made. Section 2515 of the Kentucky Statutes (Russell's St. § 224), bars the city's claim to enforce its lien for taxes for which it had a right of action more than five years next before the institution of its suit, and undoubtedly, under this section, if the city's claim had been due for more than five years before the action was instituted, Rissberger could rely upon the statute in bar of the right of the city to enforce its lien as against him; but the city instituted its action for the taxes against the owners of the property within five years next after its cause of action accrued, and therefore its right to enforce its lien under section 2515 cannot avail Rissberger. This, as we understand it, he practically admits, and relies upon section 4021 of the Kentucky Statutes (Russell's St. § 5913), instead of 2515. The former section is as follows: "The commonwealth, and each county, incorporated city, town or taxing district, shall have a lien on the property assessed for the taxes due them respectively, which shall not be defeated by gift, devise, sale or alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale. When any lands or improvements shall not be assessed in any one year, it may be assessed retrospectively, in the manner provided by law, for that year, at any time not later than five years thereafter; but the lien thereby accruing shall not prejudice the rights of purchasers acquired in the meantime."

Rissberger insists that under this statute the city is barred from claiming as against him, because, he says, the mortgage to him was an alienation of the property within the meaning of the foregoing statute, and that

this alienation took place more than five years next before the institution of the city's action. If the mortgage was a sale or an alienation, undoubtedly he would be correct in his conclusion; but a mortgage is neither a sale nor an alienation of the property, the title remains in the mortgagor, and the mortgagee only has a lien which he can enforce as any other lien. At common law a mortgage was a sale of the property, with the right of redemption within a named time, and if the redemption did not take place within the time fixed in the instrument the mortgagor lost his property absolutely. Equity relieved the hardship of this rule by allowing the mortgagor to redeem after the time named in the instrument; and therefore it was necessary, in order for the mortgagee to enforce his rights under the deed, for him to foreclose in chancery. But, now, as said before, the mortgagee only has a lien for his debt, and a deed of mortgage has long since ceased to be a conveyance of title. *Douglass v. Cline*, 12 Bush, 608; *Woolley v. Holt*, 14 Bush, 788; *Board of Council v. F. T. & S. V. Co.*, 111 Ky. 676, 64 S. W. 470; *Mercantile Trust Co. v. Southern Park Residence Co.*, 94 Ky. 276, 22 S. W. 314; *Clore v. Lambert*, 78 Ky. 228; *Parks v. Parks*, 9 Ky. Law Rep. 347; *Guill's Adm'rs v. Corinth Deposit Bank* (Ky.) 68 S. W. 870. It follows that the plea of the statute of limitations, contained in section 4021, would not have availed appellant, even if the chancellor had allowed his pleading to be filed, and therefore his motion to file it was correctly overruled.

Judgment affirmed.

TOWN OF BEAVER DAM v. STEVENS.

(Court of Appeals of Kentucky. April 20, 1909.)

COURTS (§ 223*) — DECISIONS REVIEWABLE — AMOUNT IN CONTROVERSY.

The Court of Appeals is without jurisdiction of an appeal in an action by a town marshal to recover the alleged salary of his office, where the amount involved is but \$126, though an affirmance of the decision in the lower court for the marshal would entitle him to such salary for his full term of office, which is more than the jurisdictional amount.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 223.*]

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by J. P. Stevens against the Town of Beaver Dam. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

Glenn & Simmerman, for appellant. J. P. Sandefur and Ben D. Ringo, for appellee.

CARROLL, J. The appellee, who in 1908 and for some years prior thereto was the town marshal of Beaver Dam, brought this suit against the town to recover the salary of \$42 per month alleged to be due for the

months of January, February, and March, 1908, claiming that his salary was fixed by the board of trustees before he was elected to the office. The trustees, insisting that his salary had never been fixed, proceeded in January, 1908, to enact an ordinance allowing him the fees of the office, with no salary.

The issue of fact in the case was whether or not an ordinance had been adopted, previous to the election of Stevens, fixing his salary at \$42 per month. If, as asserted by Stevens, this ordinance was enacted, the trustees had no power to change or reduce the salary during his term of office. On the other hand, if the salary was not fixed at the time or before he was elected to office, the board had the right to fix it after his election in any sum they deemed proper. It is not, however, necessary to pursue further the inquiry concerning this issue of fact raised by the pleadings and evidence, because in our opinion we have no jurisdiction of the subject-matter in controversy. The action was brought to recover \$126, and the judgment appealed from awarded this sum to Stevens, so that the matter in controversy is only \$126.

It is argued, however, by counsel for appellant, that, although there is only involved in this particular suit \$126, yet the final determination of it fixes the salary that the appellee will be entitled to during his term of office. In other words, the argument is that, as the circuit court held that the salary of Stevens was fixed at \$42 a month before he was elected to office, if this ruling stands he will be entitled to recover from the town this sum for each month during his term that he discharges the duties of his office; and, as he has 21 months to serve after March, 1908, there is really involved in the controversy the amount he shall receive per month for this time. It may be true, as argued by counsel, that if the board of trustees fails to pay Stevens his salary for the months succeeding March, 1908, he will again sue them, and the circuit judge may again decide the case as he did this one, and hold the town liable for the salary of appellee at the rate of \$42 per month. But we are unable to perceive how this circumstance can be construed to give this court jurisdiction of the pending appeal. The amount sought to be recovered, and for which the judgment was rendered, is the amount that determines the jurisdiction of this court. What the result of future trials may be, or what effect the decision of the lower court in this case may have on other cases, cannot, in our opinion, invest us with jurisdiction of an appeal in which the amount in controversy is less than the sum necessary to give this court jurisdiction.

Wherefore the motion to dismiss the appeal must be sustained, and it is so ordered.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

RILEY v. ROACH et al.

(Court of Appeals of Kentucky. April 27, 1909.)

ADVERSE POSSESSION (§ 51*)—CONTINUITY—LEGAL PROCEEDINGS.

The defense of adverse possession is not made out, where the evidence shows that defendant's possession was temporarily interrupted within the statutory period by the execution of a writ of possession against them and the plaintiffs placed in possession, though defendants later regained and continued to hold possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 238, 239; Dec. Dig. § 51.*]

Appeal from Circuit Court, Mercer County.
"Not to be officially reported."

Action to recover land by M. L. Roach and others against William Riley. From a judgment for plaintiffs, defendant appeals. Affirmed.

L. W. McKee and E. H. Gaither, for appellant. B. F. Roach and J. T. Wilson, for appellees.

NUNN, J. It appears that W. H. Roach and Phillip Kennedy held a claim against one Peter Jordan for about \$90, for the recovery of which they instituted suit against him in the year 1871. They obtained judgment in the same year, and caused an execution to be issued thereon, which was levied by the sheriff upon the tract of land that Jordan resided upon. After allotting Jordan a homestead, there were left 24 acres of land, which were sold under the execution at the price of \$75. In 1872 another execution was issued to collect that part of the judgment unpaid, and levied upon the equity of redemption of Jordan, which was sold for \$37, the balance of the judgment, and Roach and Kennedy became the purchasers. In 1875 the sheriff made and executed to them a deed for the 24 acres of land. In 1876 they instituted suit against Jordan in ejectment to recover the land from him, in which action judgment was rendered in their favor by default, and a writ of possession was awarded them. Peter Jordan died in 1886, and an action was brought by his administrator to settle his estate. The action of Roach and Kennedy having remained on the docket to that time, they consolidated it with the action of the administrator. In 1889 a motion was made to revive the action of Roach and Kennedy against the real representatives of Jordan; but the court overruled the motion, deciding that it was unnecessary. In 1890 the writ of possession awarded them was placed in the hands of the sheriff, who executed it and made return, in substance, as follows: Executed by taking possession of the land described and placing Phillip Kennedy in possession thereof, as agent for the plaintiffs.

The representatives of Peter Jordan having regained possession, this action was brought by appellees, the heirs of Roach and Kennedy,

to recover the land. It was not shown how Peter Jordan became the owner of this 24 acres of land, unless he obtained title by the actual adverse possession of it. The proof shows that Ann Jordan held the legal title to her death, but the date of her death does not appear positively. The proof tends strongly to show that she died more than 15 years before the death of Peter Jordan, and that he held the actual adverse possession of the land from that date to his death. The tract of land to which Peter Jordan had a paper title was sold by an order of court in the suit referred to, and his widow became the purchaser at the sale, but afterwards transferred her bid to one of her sons, and he received the title from the commissioner of the court. In 1892 Jordan conveyed the land, together with the 24 acres, to one D. L. Caldwell, who took possession of it, and owned it until the year 1905, when he sold and conveyed it to appellant. Both parties to the action claim title by actual adverse possession for more than 15 years.

There can be no question, under the proof, that Peter Jordan had the actual adverse possession of the land in dispute to the time of his death for a longer period than 15 years, or for a sufficient length of time for it to ripen into a good title in him. This question was submitted to the jury, and it found for appellees. The testimony showed that appellant and his vendors also held the land and were in the actual adverse possession thereof for over 15 years next before the institution of this action, but for the fact of the break in his title by the execution of the writ of possession by ousting those in the possession and placing it in possession of Kennedy. This occurred within 15 years before the institution of this action. Under the facts stated, and with reference to which there is but little dispute, we are of the opinion that appellees obtained a good title to the 24 acres of land, and their right thereto has not been lost by reason of the statutes of limitations interposed by appellants.

For these reasons, the judgment of the lower court is affirmed.

LOUGHRIDGE et al. v. BALL et al.

(Court of Appeals of Kentucky. April 21, 1909.)

1. APPEAL AND ERROR (§ 1097*) — LAW OF CASE.

The decision on appeal is the law of the case on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

2. PRINCIPAL AND AGENT (§ 24*)—POWER OF ATTORNEY—EXECUTION — EVIDENCE — PRESUMPTIONS—QUESTION FOR JURY.

On the issue as to whether B. executed a power of attorney to D., evidence that D. made deeds under the power; that B. had not claimed any of the land so conveyed; that he had himself conveyed other lands by deeds made in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

county; that, according to the record of a county court, he had revoked the power—was sufficient to raise a presumption of fact, after the lapse of 50 years, that B. executed the power, and the question was for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 24.*]

3. ESTOPPEL (§ 32*)—BY DEED.

Where deeds establishing a dividing line were exchanged between adjoining owners in order to settle litigation, the acceptance by one of the parties of the deed to him was not a waiver of such title as he already had to the land on his side of the agreed line though it was covered by the deed, and his grantees were not estopped to say that the other party did not own the land.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 32.*]

4. DEEDS (§ 97*)—CONSTRUCTION.

Where, in the caption of a deed, T. and his wife were named as parties of the second part, but in the granting clause only T. was named, there was a conveyance to T. alone.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 434; Dec. Dig. § 97.*]

5. BOUNDARIES (§ 40*)—QUESTIONS FOR JURY.

Where land in controversy was just in the corner of a certain patent if run out as claimed by plaintiffs, but, if as located by another surveyor, the patent would include but a small part of the land involved, whether the patent included the land or a part of it was for the jury; how the patent should be located depending on the variation to be given the courses in the patent, the location of the objects called for, and the marks found on the ground.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 196-204; Dec. Dig. § 40.*]

6. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS.

Where an instruction given is correct as far as it goes, a party failing to request other instructions cannot complain that none were given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

Appeal from Circuit Court, Harlan County.
"Not to be officially reported."

Action by W. J. Loughridge and others against Leonard Ball and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. G. & J. S. Forester, for appellants. W. F. Hall and Greene, Van Winkle & Schoolfield, for appellees.

HOBSON, J. The facts in this controversy were stated in the opinion on the former appeal. See *Ball v. Loughridge*, 100 S. W. 275. On the return of the case to the circuit court it was tried again. The jury found a verdict for the defendants, and the court entered judgment on the verdict in their favor for the 100 acres of land in controversy. The plaintiffs appeal.

The opinion delivered on the former appeal is the law of the case, and only those matters need be noticed which were not determined on the former appeal. The plaintiffs showed title to one-half of the patent to Hamblin and Ledford for 6,500 acres independently of the power of attorney from Boyd Dickinson to John Dickinson; and the

court submitted to the jury the question whether Boyd Dickinson had executed to John Dickinson the power of attorney in question. It is insisted for the appellants that he should have instructed the jury that, under the evidence, Boyd Dickinson had, in fact, executed the power of attorney. The plaintiffs showed that John Dickinson had made a number of deeds under this power of attorney; that Boyd Dickinson had not claimed any of the land so conveyed; that he had himself conveyed away other lands by deeds made in the county. They also introduced a record of a county court in Virginia, showing that Boyd Dickinson in 1858 revoked the power of attorney to John Dickinson. Waiving the question whether the Virginia record of the revocation of the power of attorney was so certified as to be admissible in Kentucky, we are of opinion that the facts shown were sufficient to raise a presumption of fact, after the lapse of 50 years, that Boyd Dickinson had executed the power of attorney; but it was a presumption of fact and not of law, and was properly submitted to the jury. It is true that William Turner, under his deed, had taken possession of the land. The fact that he had remained in possession a long time undisturbed, when taken in connection with the other facts, made out a case from which the jury might well have found that the power of attorney was executed. But, after all, there was no presumption of law in favor of its execution that would warrant the circuit judge in taking the question away from the jury. Aside from this, the jury found for the defendants as to all the land, which shows that their finding was not based upon the idea that the power of attorney had not been delivered; for the nondelivery of the power of attorney would only have defeated the action as to one-half of the land.

It is also insisted for appellants that both parties claim under William Turner, Sr., and that, as they both claim under William Turner, Sr., the court should have instructed the jury that it was unnecessary for the plaintiffs to show title further back than William Turner, Sr. The deeds that were made between William Turner, Sr., and William Turner, Jr., were made to settle a litigation. In making that settlement William Turner, Jr., secured peace. But, by accepting the deed from William Turner, Sr., he did not waive such title as he already had to the land on his side of the agreed line, and, if sued for it, he might still stand on that title. The defendants, as purchasers from him, had all his rights, and were not estopped to say that William Turner, Sr., did not own the land in controversy. William Turner, Jr., made a deed for the land in controversy to Chad B. Turner. Chad B. Turner was a son of William Turner, Sr. The deed was dated in the year 1874, and was acknowledged

ed then, but was recorded in 1887. William Turner, Sr., died about the year 1880, and, after his death, the land embraced in the Hamblin and Ledford patent was sold in a suit to settle his estate; Chad B. Turner, as one of his heirs, being a party to the action. The land was bought by the plaintiffs, and was conveyed to them by a commissioner's deed. It is insisted that, as Chad B. Turner was a party to the action, all title which he had to the land passed to the purchasers, whether he derived the title from his father, William Turner, Sr., or from William Turner, Jr. The court so instructed the jury.

It is insisted for appellees that there was no evidence when the deed from William Turner, Jr., to Chad B. Turner was delivered, and that there was no proof of any acts on the part of either from which a delivery might be presumed previous to the time that the deed was recorded in 1887. The deed was made in consideration of love and affection. In the caption Chad B. Turner, and his wife, Mary Jane Turner, are named as the parties of the second part; but in the granting clause only Chad B. Turner is named, and there is no habendum. It would seem that the wife, Mary Jane Turner, was the daughter of William Turner, Jr. She was for this reason perhaps named in the caption. However, as her name occurs only in the caption, this must be held a conveyance to Chad B. Turner alone. 13 Cyc. 623.

It is insisted that it is not uncommon in cases of this sort for the father or father-in-law to keep possession of a deed which he makes long after it is signed and acknowledged by him. In the absence of any evidence on the subject, it is said the deed may be presumed to have been delivered when it was recorded. Deeds are often drawn long before they are delivered; and, while delivery may be presumed from the record of the deed, it is urged that there is no fact in this case except the mere date of the deed to show that it was delivered before. See 13 Cyc. 565, 567. Estoppels are not favored, and some weight must be given the fact that Chad B. Turner after this sold the land for value and that those claiming under him entered on it and held it so long without question. However, it is unnecessary for us to decide the question, for the circuit court adopted appellants' view of it.

He, in substance, instructed the jury as follows:

(1) If the land was embraced within the bounds of the patent to Hamblin and Ledford and Boyd Dickinson executed the power of attorney to John Dickinson, they should find for the plaintiffs all the land in controversy, unless the defendants and those under whom they claim had the land in actual adverse possession for 15 years continuously before the bringing of the action.

(2) If Boyd Dickinson did not execute the

power of attorney they should still find for the plaintiffs as to one-half of the land embraced in the patent unless the defendants had had adverse possession as defined in No. 3.

(3) If the defendants or those under whom they claimed entered on the land, claiming, occupying, and holding it as their own in adverse possession to the extent of well-defined boundaries continuously for 15 years before the suit was brought, the jury should find for them.

(4) The commissioner's deed made on November 30, 1886, passed all interest in or title to the land which Chad B. Turner had.

These were the only instructions given. The defendants' paper title was not submitted to the jury. They were only allowed to find for the defendants if the land was not embraced in the patent, or the defendants had had adverse possession for 15 years. The instructions eliminated all other questions from the case. Under the instructions, the jury were, in effect, told that the defendants had no right to the land except such as they acquired by adverse possession. The 100 acres in controversy is just in the corner of the 6,500-acre patent if run out as claimed by the plaintiffs. If located as run out by another surveyor, the patent would include but a small part of the land in controversy. How the patent should be located would depend upon the variation to be given the courses in the patent, the location of the objects called for, and the marks found on the ground. It was not therefore improper for the circuit court to submit to the jury the question whether the plaintiffs' patent included the land in controversy or a part of it.

On the former appeal it was distinctly held that there was sufficient evidence of adverse possession on the part of the defendants to submit that question to the jury. Although there is proof that William Turner, Sr., had tenants on the 6,500-acre survey, there is nothing to show that he had any such possession within the lap of the land claimed by William Turner, Jr., as to give him title thereto. The question of the propriety of submitting to the jury the defendants' title by adverse possession was conclusively settled on the former appeal, and the evidence is now practically the same as it was then. While the deed from William Turner, Jr., to Chad B. Turner is inartificially drawn, we think its manifest purpose was to convey all the land that William Turner, Jr., owned between the agreed line which he and William Turner, Sr., made, the top of Little Black Mountain, and the ridge west of Gabe's Branch. He could have had no motive for excepting out of the deed a strip of land along the side of the mountain; and, taking all the language of the deed, we think it must mean that he intended to convey to his line on top of the mountain. The defendants and those un-

der whom they claim took possession under their purchase by building a house on the land and making a clearing more than fifteen years before the suit was brought, and were thus in possession of the land embraced in their deed. While the jury might have found a different verdict, we cannot say that their finding is palpably against the evidence. On the whole case we see no error in the record prejudicial to the substantial rights of the appellants.

The plaintiffs asked no instruction defining further adverse possession, and, as the instruction which the court gave is correct as far as it goes, the plaintiffs cannot complain that other instructions were not given.

SOUTHERN RY. CO. IN KENTUCKY v. SCHMIDT.

(Court of Appeals of Kentucky. April 27, 1909.)

1. APPEAL AND ERROR (§ 597*)—TRANSCRIPT—EXHIBITS.

Photographs, filed as exhibits and intended to be used on appeal, should be filed with the transcript of the evidence in the circuit court and certified by the clerk of the circuit court with the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2630; Dec. Dig. § 597.*]

2. APPEAL AND ERROR (§ 655*)—EXHIBITS—CERTIFICATION.

Photographs properly certified by the stenographer, in the absence of any suggestion that they are not the true exhibits, will not be stricken out because not certified by the circuit court clerk with the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2623; Dec. Dig. § 655.*]

3. APPEAL AND ERROR (§ 641*) — RECORD — RIGHT TO OBJECT.

Appellant cannot complain where appellee furnishes for his use the entire record of the case, nor can appellee object to the record he has himself filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2790; Dec. Dig. § 641.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by Matthew Schmidt against the Southern Railway Company in Kentucky. Judgment for plaintiff, and defendant appeals. On appellant's motion to continue, and strike out a copy of a transcript of the testimony and exhibits filed by appellee. Overruled.

Edward P. Humphrey, for appellant.
Popham & Webster, for appellee.

HOBSON, J. Section 741 of the Civil Code of Practice provides: "The appellee may file an authenticated copy of the record in the clerk's office of the Court of Appeals with the same effect as if filed by the appellant." The appellee has filed a copy of the record duly certified. It shows that the

appellant filed in the circuit court on March 19, 1909, its bill of exceptions and transcript of the evidence, and these papers, properly certified, are copied into the transcript before us. The photographs filed as exhibits should have been filed with the transcript of the evidence when it was filed in the circuit court, and should have been certified by the circuit clerk with the transcript; but as they are here, properly certified by the stenographer, and there is no suggestion that they are not the true exhibits, and the contrary in fact appears from the affidavits filed by appellant on this motion, the mode in which they got here is one of those unsubstantial irregularities which it is the duty of the court to disregard, under section 134 of the Civil Code of Practice, for appellee cannot object to the record he has himself filed. The purpose of the appeal is to reverse the judgment of the circuit court, and appellant cannot complain when appellee furnishes for his use the entire record of the case.

Motion overruled.

HUGHES et al. v. WALLACE.

(Court of Appeals of Kentucky. April 21, 1909.)

1. VENDOR AND PURCHASER (§ 233*) — BONA FIDE PURCHASER—NOTICE.

The recording of instruments creating liens on real estate is statutory, and, in the absence of a statute providing for their record for the purpose of notice, the rule caveat emptor applies to intending purchasers.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 563-566; Dec. Dig. § 233.*]

2. STATUTES (§ 195*)—CONSTRUCTION—IMPLIED EXCLUSION—LIENS.

A statute which enumerates the particular things which shall be necessary to create a lien on real estate excludes the idea of the doing of other things as essential to the completeness of the lien.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 273; Dec. Dig. § 195.*]

3. VENDOR AND PURCHASER (§ 233*) — BONA FIDE PURCHASER—STREET IMPROVEMENTS—LIEN—CREATION—STATUTES.

Ky. St. 1909, § 3432 (Russell's St. § 1430), providing that the lien for the cost of an improvement shall be fixed on the acceptance of the work ordered pursuant to an ordinance requiring the improvement, etc., and sections 3248, 3274, Ky. St. 1909 (Russell's St. §§ 1254, 1291), requiring the proceedings of the council to be recorded and indexed, do not make necessary to the creation of a lien for the cost of an improvement the recording of the proceedings of the council or of the contract, and a lien for an improvement exists as against a subsequent purchaser without notice, though the books of the city do not show the existence of the lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 233.*]

4. MUNICIPAL CORPORATIONS (§ 519*)—STREET IMPROVEMENTS—LIENS.

As between a contractor for a street improvement not required by statute to make a record of his contract and a subsequent pur-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

chaser who could have seen the improvement, and who is charged with knowledge of the law giving a lien therefor to the contractor, the court cannot postpone the lien of the contractor in favor of the subsequent purchaser on the ground that the equity of the latter is stronger, but the older equity must prevail.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 519.*]

5. EQUITY (§ 67*)—"LACHES."

Laches is negligence by which another has been led into changing his condition with respect to the property or right in question, making it inequitable to allow the negligent party to be preferred on his legal right to the one whom his negligence has misled.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 191-196; Dec. Dig. § 67.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 3969-3972; vol. 8, p. 7700.]

6. LIMITATION OF ACTIONS (§ 36*)—STATUTES OF LIMITATIONS—APPLICABILITY TO EQUITABLE ACTIONS.

The statutes of limitation are available as a bar in suits in equity the same as at law.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 168; Dec. Dig. § 36.*]

7. MUNICIPAL CORPORATIONS (§ 564*)—PUBLIC IMPROVEMENTS—LIENS—ENFORCEMENT—LACHES.

A purchaser of real estate charged with a lien for a street improvement could have seen the improvement, and he was aware of the power of the city to order the improvement at the cost of the property, and that the cost was a lien thereon. The purchase was made in January, 1907. The apportionment warrant for the cost of the improvement was issued in August, 1905. *Held*, that the right to enforce the lien against the purchaser was not barred by laches; the lien being good under the statute for five years.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 564.*]

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Action by E. M. Wallace against M. E. Hughes and another. From a judgment for plaintiff, defendants appeal. Affirmed.

B. G. Williams, for appellants. G. H. Briggs, for appellee.

O'REAR, J. The council of Frankfort ordered a pavement to be constructed at the cost of the owners of the abutting lots on Logan street. The work was done under a contract between the city and the contractor, made in accordance with the statutes and ordinances. The contract was made in December, 1904. The work was completed in 1905. The city engineer's report showed that the work had been done in accordance with the ordinance and contract, and the city received the work, and ordered apportionment warrants to be made out against each of the abutting owners, which was done. Included in the number was the property of N. B. White. The apportionment warrant issued against his lot was \$84.16, and was issued in August, 1905. The contractor sold the warrant to appellee. Thereafter White sold the lot for a full, fair consideration in hand to appellants.

After appellants bought the lot, appellee brought this suit upon the apportionment warrant to enforce the lien given by section 3452, Ky. St. (Russell's St. § 1430), following: "When the common council shall have passed an ordinance requiring said improvements to be made, and when a contract in pursuance to such ordinance shall be executed and ratified as aforesaid, and the common council shall have received the report of the engineer estimating and apportioning the cost of the work, and, by order or resolution, shall have received said work as done in accordance with the contract, then the liability of the owners of the property chargeable with the cost of said work shall be fixed, and there shall be a lien on the property for same." Appellants by their answer admitted the regular passage of the ordinance directing the improvement, and admitted the contract, the execution of the work, and that all steps had been duly taken under the ordinance and statutes up to and including the issue of the apportionment warrant. But the answer sought to controvert the plaintiff's right to recover on the ground that appellants had become the owners of the lot without actual or constructive notice of the existence of the lien. It was asserted that the books of the city did not show that the lien was in existence, or that it had not been discharged, and that the report of the city engineer was not indexed in the city clerk's office, nor were the orders accepting the work and directing the apportionment warrants to be issued indexed, and that appellants, before they bought and paid for the lot, made an examination of all the county records, including the city clerk's office, to learn whether there were liens against the property, and had no knowledge or actual notice of the existence of the lien now sought to be enforced against the lot. It was also pleaded that appellee was guilty of laches in failing for so long—nearly four years—to file his suit, by which his right to maintain the suit was lost. The circuit court sustained a demurrer to the answer, and, appellants failing to plead further, a judgment was entered against them, decreeing the property to be sold to satisfy the lien. From that judgment this appeal is prosecuted.

When the work was ordered done by the ordinance, contracts let and approved as required by the statutes, and the work was done and accepted, the lien attached under the statute. The law requires proceedings of the council to be recorded (section 3274, Ky. St. [Russell's St. § 1291]), and that they shall be properly indexed by the city clerk (section 3248, Ky. St. [Russell's St. § 1254]). But it will be observed that the statute creating the lien in case of street improvements does not make the existence of the lien at all depend upon the recordation of the contract or of any of the steps of the common council of the city leading up to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the completed work. In this country the prevalence of the system for recording not only conveyances, but instruments creating liens upon real estate, is so general, and so wisely conceived as to fit our conditions, that it is a natural notion that unless a record is made, and so kept as to afford reasonably available notice to inquiring purchasers that the lien has been created, purchasers in ignorance of the lien are protected against it. The common law did not know registration acts of this character. When they exist, they are matters of statutory creation. In the absence of such statute, the rule of caveat emptor would doubtless apply to intending purchasers. In the statute regulating conveyances in this state it is expressly provided that, unless the statute is complied with, an innocent purchaser without notice of the lien shall not be affected by it. Sections 494, 495, Ky. St. [Russell's St. §§ 2060, 2061]. And in one case it was intimated (Elliott v. Harris, 81 Ky. 471) that a deed not properly indexed, as required by statute, was not "entitled to the legal force or validity of public records for the purposes of notice to all who may be affected by their contents." In that statute the recordation of the instrument for the purpose of constructive notice was required, and it might have been regarded that the indexing of such records was of an importance scarcely secondary to that of the record itself in effectuating the object of the statute. But here the recordation of the proceedings of the council or of the contract are not made necessary at all in order to create the lien in behalf of the contractor. The statute enumerates what shall be necessary to create the lien. The enumeration of particular things excludes the idea of something else not mentioned, as an essential to the completeness of the lien. Whether constructive notice is ever necessary in order to charge the property in the hands of a subsequent vendee is a matter of legislative discretion. It may be said that there is not provision in this statute for constructive or any notice to such purchasers; that they must look to their warranty or prosecute inquiries till they are satisfied and secured against the existence of such liens. As between the contractor, who is not required to make or cause made an indexed or other record of his contract, and who has done the work improving the lot, and the purchasers who saw or could have seen the improvement, was charged with knowledge of the law giving a lien therefor to the contractor, and who might have required the production by his vendor of a receipt from the contractor before paying for the property, it is not within the legal discretion of the courts to postpone the former for the latter upon the ground that the equity of the latter is stronger. The older equity prevails in such cases. An instance of the application of this doctrine in a case much stronger

for the purchaser than the one we have here is *Comley v. American Standard Asphalt Company* (Ky.) 113 S. W. 125. In that case the council had adopted an erroneous basis of apportionment, had apportioned the amount due upon one owner's lot, and he had paid it to the contractor and caused the lien to be released of record. The courts having subsequently decided that the apportionment was wrong, ordered a reapportionment, increasing the amount due upon the particular lot. In the suit against one who had purchased for full value after the release of the lien upon the record by the contractor it was held by this court that the lot was in lien for the full amount of the sum finally and rightly apportioned against it. Upon the other ground, appellants thus state the reason why their plea of laches should have prevailed: "Appellee, having in his pocket an interest-bearing warrant without making any record of it or giving any sort of notice, attempts to make an innocent purchaser of property pay his demand without even bringing an action against the person who owes the money." We have seen that the contractor was not (nor was his assignee) required to have a record made of the lien. A record of the ordinance directing the work was made; so was there the contract on file, and the record of the acceptance of the work. Nor does it appear to be material on this question that appellee did not sue the person originally bound.

Laches is negligence by which another has been led into changing his condition with respect to the property or right in question, so that it would be inequitable to allow the negligent party to be preferred upon his legal right to the one whom his negligence had misled. It falls but little short of estoppel, and is applied upon the same principle. It was the creature of the courts of equity to take the place in equitable actions in those instances where in actions at law the statutes of limitation would have applied as a bar. The statutes of limitation are available as bar in suits in equity in this state the same as at law, and in the case in hand is five years from the accrual of the cause of action. *Waggoner v. Board of Councilmen* (Ky.) 99 S. W. 918. There does not appear such extraordinary circumstances in the record as warrant the application of the rule stated in 5 *Pomeroy's Equity Jurisprudence*, § 20, that if a party, knowing his rights, takes no steps to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state if the right be then enforced, the former will be postponed to the latter. Appellants could have seen and doubtless saw that the sidewalk had been built. They were aware in law and probably in fact of the power of the city to order such improvements to be made at the cost of the lot, and that they constituted liens upon the lot. They

forebare inquiry whether, or at least assurance that, it had been paid for. So that appellants' condition is not due solely to the non-action of appellee in bringing his suit so late. Nor was there such great and unreasonable delay. The apportionment warrant was issued in August, 1905. Appellants bought the lot in January, 1907. No delay subsequent to their purchase could be imputed to appellee as negligence. Less than 18 months had passed from the time suit could have been brought till the property had changed hands, whereas the lien was good for 5 years.

We concur with the circuit court that appellants' answer failed to present a defense. Judgment affirmed.

WEBSTER et al. v. CADWALLADER et al.
(Court of Appeals of Kentucky. April 23, 1906.)

1. MORTGAGES (§ 27*)—EQUITABLE MORTGAGES—AGREEMENT TO SUPPORT THIRD PERSONS.

A covenant in a deed charging the grantee with the support of a person named as a part of the consideration for the deed creates a lien on the land for such support.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 53; Dec. Dig. § 27.*]

2. MORTGAGES (§ 27*)—EQUITABLE MORTGAGE—AGREEMENT TO SUPPORT THIRD PERSON.

Under a covenant in a deed that, as a part of the consideration therefor, the grantee will furnish support for a person named "in the event that from disease or other cause he should become unable to support himself," the obligation to furnish such support does not exist and become a lien on the premises conveyed until the support is asked for.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 53; Dec. Dig. § 27.*]

3. APPEAL AND ERROR (§ 1152*)—REVIEW—REPORT OF COMMISSIONER—EFFECT OF CONFIRMATION.

A decree on the report of the commissioner may be modified on review, though there were no exceptions filed to the report before confirmation.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1152.*]

4. PARTITION (§ 53*)—DECREE—RECEIVER—ENFORCEMENT OF CHARGE FOR SUPPORT.

Where, in an action for partition, an intervening petition was filed to enforce petitioner's right to support out of the land, the court properly by its decree appointed a receiver to rent the land and to pay out of the rent taxes and other preferred claims, and then, after providing for petitioner's support, to pay the remainder to the other parties interested, with the alternative that the land might be sold and the proceeds divided among the parties in interest after making provision for the support of petitioner.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 53.*]

Appeal from Circuit Court, Fayette County.
"To be officially reported."

Action for partition between Joseph S. Webster and others, remaindermen, wherein George Cadwallader intervened. From the

judgment rendered, the remaindermen appealed. Reversed.

R. S. Crawford and Geo. Denny, for appellants. Geo. B. Kinkead, for appellees.

NUNN, J. It appears that Geo. Cadwallader and his wife, Mary, were the owners for several years prior to 1883 of five small tracts of land, all adjoining, amounting to about 130 acres, and were situated about four miles from Lexington, Ky. His wife owned most of the land. He possibly owned one of the tracts in fee and a life estate in one or two of the others. His wife, with his consent, executed a will whereby she devised the whole of the land to Sarah J. Campbell. After the death of his wife, to make the title perfect, he executed a conveyance to Sarah J. Campbell. On July 13, 1883, Sarah J. Campbell conveyed all of this land to Charles A. Finnell and Sarah Elizabeth Finnell, his wife. One consideration named was "love and affection," and the additional ones were as follows: "And upon the valuable consideration moving from the said Sarah J. Campbell unto them and hereinafter set out, promise and agree and do hereby promise and agree to and with her to provide for her and to furnish to her a home for and during her life at the residence now occupied by her, and hereinafter described, and further to provide her with a maidservant, during her life, of such character and qualification as may be suitable for her and agreeable to her, and to supply, furnish and provide said Sarah J. Campbell and said maidservant with suitable, proper and convenient diet, lodging, washing, fuel and other necessities of all sorts, and also to keep and take care of the phaeton and such pony or horse as the party of the first part may at any time have, of which said phaeton and pony or horse she is to have the exclusive use and control. And the said parties of the second part have further promised and agreed, and do hereby promise and agree to and with the said party of the first part to provide and furnish with necessities of life George Cadwallader now of the city of Lexington, and State of Kentucky, in the event that from disease or other cause he should become an invalid and unable to provide for himself, and the said Charles A. Finnell has further agreed and promised, and does hereby agree and promise, to and with the said Sarah J. Campbell, to assume and pay off and discharge the mortgage debt, with the interest due or to become due thereon, now held by one Cassandra Inskeep, on the property hereby conveyed." In the habendum clause of the deed there is the following recital, to wit: "That they (meaning the Finnells) their heirs, executors, administrators and assigns shall and will faithfully and truly

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

perform and execute the covenants and agreements aforesaid." So far as appears from the record, the Finnells executed all the covenants and agreements contained in the deed, except the one referring to appellee Cadwallader. On the 3d day of November, 1887, the Finnells sold and conveyed the lands referred to, to one L. G. Webster for the price of \$7,500, \$7,000 of which was paid by him at the time. L. G. Webster made a gift of this land to Zinamon Webster and several other parties named in the deed. The gift was to Zinamon for life and to the others in fee. The note for \$500, that part of the purchase price remaining unpaid, was executed by Zinamon Webster. He having died, this action was instituted in the month of February, 1904, by the remaindermen then alive and the children and descendants of those who had died before Zinamon Webster for the purpose of having the land sold and the purchase money divided among those interested, as the land could not be divided among them without materially impairing its value. A sale was ordered, and one W. R. Stone became the purchaser, paying therefor about \$5,000. Stone filed exceptions to the report of sale, because, among other reasons, George Cadwallader was not made a party to the action, which he stated should have been done because the land was charged with the support of Cadwallader for the rest of his life. The court sustained the exceptions and set the sale aside.

On February 13, 1905, George Cadwallader filed an intervening pleading in the action and asked to be made a party defendant. He alleged that, by reason of his incapacity to labor, he was entitled to support from the land described by virtue of the provisions of the deed from Sarah J. Campbell to the Finnells; that he was 65 years old; that he was uneducated and had no capacity to earn a living by mental efforts; that by reason of his age, and the hardships he had theretofore endured, he was utterly incapacitated to do physical labor, and incapable of providing and furnishing himself with the necessaries of life; that he was without means, and had never received anything in the way of support or otherwise from the parties holding the land. There were several answers filed by the parties in interest controverting the allegations of his pleading. The court referred the matter to a master commissioner to take proof and report with reference to the physical and mental condition of George Cadwallader; to ascertain whether he was incapable of making anything for his support; what means he had, if any; and the amount which would be necessary to support him. The commissioner took the proof and reported that he was not capable of supporting himself; that he was without means; that he was entitled to \$450 a year for support, beginning with the 1st of January,

1903. The court confirmed this report; no exceptions having been filed. A short time after this appellants appeared and asked that the order of confirmation be set aside, and they be allowed to file exceptions to the report. The court overruled their motion and rendered judgment in behalf of Geo. Cadwallader in conformity with the commissioner's report, and appointed the Lexington Bank & Trust Company receiver to take charge of the lands and rent them out, pay the taxes and other preferred claims, and pay Geo. Cadwallader \$450 a year for his support, beginning with the 1st day of January, 1903. From this judgment, this appeal is prosecuted.

Appellants contend that the provisions in the deed charging a support upon the land for the benefit of Geo. Cadwallader was only a personal obligation upon the part of the Finnells to furnish this support; that it did not create a lien upon the land for that purpose. We are of a different opinion. The provision for the support of Cadwallader was a part of the consideration for the conveyance. The deed represented a deferred payment for the purchase of the land. This court in construing a deed in the case of Keltner v. Keltner, 6 B. Mon. 40, said: "The stipulation for support constitutes but a part of the consideration for the deed." In the case of Gallion's Adm'r v. Moberly, etc., 9 Ky. Law Rep. 149, the same principle was recognized. That the consideration for maintenance and support can be maintained as a lien on land, see, also, the case of Bevins v. Keen (Ky.) 64 S. W. 423. Section 2353, Ky. St., provides: "When any real estate shall be conveyed, and the consideration, or any part thereof, remains unpaid, the grantor shall not have a lien for the same against bona fide creditors or purchasers, unless it is stated in the deed what part of the consideration remains unpaid." The converse of this section is necessarily true; that is, when the consideration is shown in the conveyance not to have been paid, a lien exists for its payment.

We are of the opinion, however, that the court erred in rendering judgment for too great a sum for the support of appellee and in beginning this support back in January, 1903. So far as this record shows, he had lived without creating any debts until he filed his petition in February, 1905, and his allowance should have been from that date. The provision in the deed from Campbell to the Finnells was not for the purpose of making a charge upon the land to reimburse appellee for cost incurred in his support. It was intended to help him live when he became an invalid. Therefore the court ought not to have given him aid out of appellants' lands before he asked it. The proof shows that Cadwallader has a second wife, who is about 56 years old; that they keep and have been keeping a boarding house for many years during the summer months in the town

of Latonia, Ky.; that they have been able to live from the proceeds of this. He has not been sick, but has had slight trouble with his kidneys. He is able to move about and do the marketing for his wife. His greatest trouble is weakness from age. Our opinion is that the charge as fixed by the lower court is too great; that \$250 a year, beginning at the time he filed his pleading, would be amply sufficient to support him in the manner contemplated by the provisions of the deed referred to. Appellees say, however, that we cannot give appellants relief in this respect for the reason that there were no exceptions filed to the report of the commissioner; that it was confirmed, and is therefore binding upon them. In the case of *Addisson v. Dent*, etc., 88 Ky. 628, 11 S. W. 950, this court, in speaking upon the subject of the confirmation of a commissioner's report, said: "The order of confirmation should be, as it is, merely interlocutory, and subject to the chancellor's revision and correction until the final judgment is rendered in the case." This rule should be followed, especially in this case where the rights and interests of many infants are involved.

The court did not err in appointing a receiver to take charge of the property and rent it out, and in ordering to be paid out of the rent proceeds the taxes, other preferred claims, and the allowance to Cadwallader, and the remainder to the persons owning the land. The court may, however, if the parties desire, sell the land; but, before the proceeds are divided among the parties in interest, provisions for the support of appellee must be made.

For these reasons, the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

BULLITT et al. v. GOSNELL et al.
(two cases).

(Court of Appeals of Kentucky. April 21, 1909.)

1. MUNICIPAL CORPORATIONS (§ 450*) — STREET IMPROVEMENTS — ASSESSMENT DISTRICTS.

The property on the north side of the street improved ran back 180 feet to the city limits. On the south side was a block, which ran back to a depth of 880 feet, and which was bounded by principal streets; there being no probability that a short avenue running parallel with the improved street, and which, if extended, would pass through said block, would be extended. *Held* that, under Ky. St. 1909, § 2833 (Russell's St. § 895), providing that the improvement shall be at the cost of the owners of lots in each fourth of a square, to be equally apportioned, according to the number of square feet owned by them; that each subdivision of the territory bounded on all sides by principal streets shall be deemed a square; and that, when the territory contiguous to the improved street is not defined into squares by principal streets, the improvement ordinance shall state the depth, not exceeding 500 feet,

on both sides of the improvement, to be assessed according to the number of square feet owned by the respective parties within the stated depth—the assessment district should be all the property on the north side and one-fourth the depth of the block on the south side.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1073; Dec. Dig. § 450.*]

2. MUNICIPAL CORPORATIONS (§ 511*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—APPEAL—PREJUDICIAL ERROR.

As, under Ky. St. 1909, § 2833 (Russell's St. § 895), a proportional part of the entire cost of a street improvement is to be assessed against each square foot in the assessment district, one assessed, and showing that the assessment district was not as large as it should have been, shows damage from the error in assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1184; Dec. Dig. § 511.*]

3. MUNICIPAL CORPORATIONS (§ 506*) — STREET IMPROVEMENT—ASSESSMENTS CORRECTING ERRORS.

Under Ky. St. 1909, § 2834 (Russell's St. § 897), relative to enforcing payment of the cost of street improvements against the property bound therefor, providing that no error in the proceedings of the general council shall exempt from payment after the work has been done, but said council or the courts shall make corrections to do justice to all parties, error of the council in making the assessment district too small will be corrected.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1177; Dec. Dig. § 506.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division. "To be officially reported."

Actions by G. W. Gosnell, for use, etc., against Outhbert Bullitt and others and against Tullia A. Bullitt and others. From adverse judgments, defendants appeal. Reversed, and remanded for further proceedings.

Bingham & Davies, for appellants. William Furlong, for appellees.

NUNN, J. In the year 1900 the city of Louisville, through its council, caused the improvement of Field avenue, and assessed the cost thereof, proportionally, against the property on either side thereof to a depth of 180 feet. There are eight property owners who are appellants in one case and six in the other. Both cases involve the same questions, and we will consider them as one. Appellants do not question the regularity of the proceedings had in making the improvement. The only thing they complain of is the manner in which the cost of the improvement was apportioned.

We will endeavor to explain the situation so that it may be understood. Field avenue, the street improved, runs east and west and is 180 feet south of the northern city limits. The next street south of it, and running nearly parallel therewith, is Frankfort avenue. The distance between

the two is about 880 feet. The two streets connecting with Field avenue, at the place it was improved, are Roberta and Bayly avenues. These two streets are parallel and run north and south. To the west of Bayly avenue is an avenue about 360 feet long, called "Victor avenue," which runs parallel with Frankfort and Field avenues. Victor avenue, according to the evidence, cannot be extended through the block surrounded by Field, Bayly, Frankfort, and Roberta avenues without condemning parts of four lots and destroying two houses situated thereon, which were valued at \$9,000. The cost of the improvement of Field avenue was assessed, proportionally, against the property abutting that part of the avenue improved to the depth of 180 feet on the south side of it for two reasons: One was because they could not extend the distance on the north side farther than 180 feet, as at that point they reached the city limits. The other was they wanted to leave a territory south of Field avenue and beyond 180 feet in the block referred to, to be assessed for the improvement of Victor avenue when it was extended through the block. It appears that when the city improved Frankfort avenue the cost of the improvement was assessed against the property abutting thereon to a depth of 440 feet, including one-half of the block referred to. It seems that it did not consider then that Victor avenue would ever be extended through the block, and, under the proof in this case, there is no probability that it ever will be so extended, and, if not, this would leave a territory between the point where the avenue would pass through the block and the point 180 feet south of Field avenue untaxed for the improvement of any street running east and west.

Section 2833, Ky. St. (Russell's St. § 895), under which the improvement of Field avenue was made, is in part as follows: "When the improvement is the original construction of any street, road, lane, alley or avenue, improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally appointed (apportioned) by the board of public works, according to the number of square feet owned by them, respectively, and in such improvements the cost of the curbing shall constitute a part of the cost of the construction of the street or avenue, and not of the sidewalk. Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the depth, not exceeding five hundred feet, on both sides of said improvement to be assessed for the cost of making the same, including the cost of the improvement of the intersection, if any, of said public way, according to the number of square feet

owned by the parties respectively within the depth as set out in the ordinance."

Appellees' contention is that the property on neither the north nor south side of Field avenue, where it was improved, was bounded by principal streets on all sides, and for that reason the city was compelled to fix the territory to be taxed on each side of the avenue at the same depth, and, as the city limits were only 180 feet north of the avenue, they could not go farther than that on the south side. We are of the opinion that the property on the south side of Field avenue was bounded on all sides by principal streets, and were squares within the meaning of the statute, and the cost of the improvement should have been assessed against the property on the south side within one-fourth of a square of the avenue. On the north side the cost should be assessed against all the property there is within the city limits north of that part of the street improved. It would be impossible to make squares out of the property on the north side of the avenue and bound them by principal streets as contemplated by the statute.

Appellees contend that appellants have not shown that a different apportionment would be of any benefit to them, and for that reason this court should not reverse the case, even though the apportionment was irregular. This court has repeatedly announced this rule, but appellees' position is wrong. Appellants both allege and prove that it would be of benefit to them to have the apportionment made correctly, and of this there can be no doubt. The statute requires the cost for such improvements to be made according to the number of square feet owned by the parties, respectively, within the territory as set out in the ordinance. If appellants' contention be sustained, there will be considerably more property within the territory to be assessed for the payment of the cost of the improvement, which will, necessarily, decrease the amount to be assessed against their property.

Section 2834, Ky. St. (Russell's St. § 897), provides, among other things, that "no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned." In the case of *American Standard Asphalt Co. v. Schuster*, 125 Ky. 497, 102 S. W. 806, this court held that in a case like this the failure to make proper assessment for the cost of an improvement could not defeat or injure the contractor who performed the work.

On the return of this case the lower court should require the pleadings to be amended and the proper parties brought before the court, and a reapportionment made of the whole cost of the improvement according to the principles herein established.

For these reasons, the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

LOCKARD et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 14, 1909.)
TAXATION (§ 848*)—FAILURE TO LIST FOR TAXATION—FORFEITURE.

Ky. St. 1909, §§ 4076b-4076k (Russell's St. §§ 5970-5983), providing for forfeiture of land for continued failure to list for taxation, do not apply where one receiving a patent from the state, purporting on its face to convey a certain number of acres, not knowing how much he could legally call his own, because of prior patents and adverse possession of parts of the land, lists his patent for taxation from year to year as a less number of acres, and the state authorities accept the returns made by him, and assess the land, and receive the taxes thereon from him.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1664; Dec. Dig. § 848.*]

Appeal from Circuit Court, Leslie County.
"To be officially reported."

Proceedings by the Commonwealth against Cordelia B. Lockard and others. Judgment for the Commonwealth. Defendants appeal. Reversed.

M. J. Holt and Lindsay & Edelen, for appellants. Ira Fields and James H. Jeffries, for the Commonwealth.

BARKER, J. In the year 1873 the commonwealth of Kentucky issued to C. O. Lockard a patent for a boundary of land lying in Harlan and Leslie counties, which on its face purported to convey to him 40,400 acres of land. Much of the land included within this boundary was in the adverse possession of others, and perhaps more covered by prior patents. Be this as it may, however, Lockard seems never to have known exactly the number of acres under the patent which he could legally call his own; but in each year after the issuance of the patent he listed for taxation in Harlan and Leslie counties 15,000 acres of land, about one-half in each county. Prior to the institution of this proceeding he seems to have brought an action in the federal court against a large number of persons and recovered judgment against them, by which it was determined that he was the owner of some 40,400 acres of land. After this judgment, in 1908, this proceeding was instituted in the Leslie circuit court for the purpose of forfeiting so much of the patent as had not been listed for taxation; in other words, all except 15,000 acres, upon which the taxes had been paid. Lockard or his heirs had conveyed to F. M. Sackett and D. B. Cornett certain boundaries of his patent, and they were made parties defendant to this procedure. The defendants pleaded the listing of the land and the payment of the taxes in bar to the right of forfeiture

on the part of the commonwealth, and the vendees pleaded their purchase prior to the institution of this action. The trial before a jury resulted in a peremptory instruction for F. M. Sackett, one of the vendees, and a judgment against the heirs of Lockard and against D. B. Cornett, forfeiting all of the patent except that which had been sold to Sackett. To review this judgment, this appeal has been prosecuted.

A great number of questions of law have been raised and ably discussed by counsel on the respective sides of this litigation, but the view we have taken of it renders it unnecessary for us to notice but one. This procedure is under that section of the revenue statute enacted in 1906 which is embraced in Ky. St. §§ 4076b to 4076k, inclusive (Russell's St. §§ 5970-5983). The history of this statute was fully set forth and the validity of the act upheld in the cases of *Eastern Kentucky Coal Lands Co. v. Commonwealth* (Ky.) 106 S. W. 280, *Kentucky Union Co. v. Commonwealth* (Ky.) 108 S. W. 981, and *Eastern Kentucky Coal Lands Co. v. Commonwealth* (Ky.) 108 S. W. 1138; and it is not necessary for us to do more than to refer to these opinions for the purpose of upholding the validity of the act. In those cases it was held that old land grants which had never been listed for taxation at all might be forfeited under the statute by the failure of the owners to comply with its terms. But we have no such case here. The owner of the outstanding patent has year by year listed his patent for taxation, and the state authorities have accepted the returns made by him, and assessed the land, and received the taxes thereon from him. It may be true, and doubtless is, that Lockard owned a great deal more land within the boundaries of his patent than he returned for taxation, and it was entirely competent for the state officials to have refused to receive his returns, and thus forced him either to assess his whole patent or to come within the language of the forfeiting clauses of the statute; but they could not allow him to make the return of 15,000 acres under the belief that that was a satisfactory assessment, and afterwards forfeit the overplus for nonassessment. This would be practically laying a trap to catch him unawares. Evidently Lockard and the fiscal officers of the state believed that 15,000 acres was about as much land as he could legally recover under his patent, and that this was a fair assessment for fiscal purposes. The object of the statute is to force the owners of outstanding patents to list their lands for taxation. It is notoriously true that there were a large number of outstanding patents in the hands of nonresidents, which cast a cloud upon the title of the possessors of a large part of eastern Kentucky; that the names of these nonresidents were unknown; and that they

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had persistently for a long period of years failed or refused to return their lands for taxation. It was for the purpose of either forcing these owners to pay their taxes or to give up their claim to the land covered by their patents that the statute was enacted.

But it was never the intention of the Legislature, where an owner in good faith had each year after he received his patent listed what he thought or believed was all of the land that he could legally claim under it, and this return had been accepted by the fiscal officers of the state, that in a procedure such as this the remainder, if it developed that there was more than was returned, might be forfeited to the commonwealth. The law does not favor forfeitures, and in order that they may be upheld or enforced there must be a clear and undoubted authority therefor. They cannot be accomplished by indirection or by implication. They must be enforced by an undoubted decree of the lawmaking power. This principle is too elementary to require either elucidation by argument or the citation of authority. The condition that we have in this record is not covered by the language of the statute. At most it would only be by a strained construction of it that the land in question could be brought within its terms. This, as we have said before, is not permissible. The Lockard patent is neither within the language nor the spirit of the statute which the commonwealth has invoked in this case. Of course, we do not mean to say, or intimate, that the commonwealth may not by appropriate procedure collect the taxes for the number of acres covered by the patent upon which the owner has not paid; but this is a very different proposition from forfeiting the land. We are of opinion that the motion of all of the defendants for a peremptory instruction to the jury to find a verdict for them should have been sustained at the conclusion of the evidence.

For these reasons, the judgment is reversed, as to all of the appellants, for procedure consistent herewith.

BENNETT et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 21, 1909.)

1. INDICTMENT AND INFORMATION (§ 110*)—DEFACING BRANDS—LANGUAGE OF STATUTE.

An indictment for defacing the brand from railroad ties substantially following the language of St. 1909, § 1409, subsec. 11 (Russell's St. § 5867), which specifically defines the crime and the manner in which it may be committed, and in addition charging that defendants fraudulently and feloniously committed the acts violative of the statute, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 292; Dec. Dig. § 110.*]

2. LOGS AND LOGGING (§ 37*)—DEFACING BRAND—ADOPTION AND RECORDING—EVIDENCE.

The state, on a prosecution for defacing, in violation of St. 1909, § 1409, subsec. 11 (Russell's St. § 5867), from railroad ties, a brand of a certain company, recorded, as required by the act, in the office of the clerk of the county, is properly allowed to introduce and identify by a deputy county clerk the record containing the writing and accompanying certificates whereby the company adopted the brand.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 118; Dec. Dig. § 37.*]

3. LOGS AND LOGGING (§ 9*)—BRANDS—ADOPTION.

Under St. 1909, § 1409, subsec. 7 (Russell's St. § 5863), providing that a timber dealer may adopt a brand by executing and recording a certain writing, the paper may be executed by the manager of a timber dealing company; the statute not saying what officer shall execute it.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 18; Dec. Dig. § 9.*]

4. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER CRIMES.

Defendants having as part of the same transaction saved brands from railroad ties, part of which were the brand of the O. Company and part another brand, the entire transaction may be given in evidence on a prosecution for defacing the brand of the O. Company, though it shows another crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. § 369.*]

5. LOGS AND LOGGING (§ 37*)—OBLITERATING BRAND—"CUT OUT, CANCEL, OBLITERATE, OR DEFACE."

Sawing off the end of a railroad tie containing the owner's brand is within St. 1909, § 1409, subsec. 11 (Russell's St. § 5867), making it a crime to "cut out, cancel, obliterate, or deface" the brand.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 118; Dec. Dig. § 37.*]

6. CRIMINAL LAW (§ 753*)—PREEMPTORY INSTRUCTION.

The court may not give a peremptory instruction to acquit if there is any evidence, however slight, conducing to show defendant guilty of the offense charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1727; Dec. Dig. § 753.*]

Appeal from Circuit Court, Lee County.

"To be officially reported."

William Bennett and another appeal from a conviction. Affirmed.

J. B. White, for appellants. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, C. J. The appellants, William Bennett and Jeff Angel, were indicted, tried, and convicted in the Lee circuit court and their punishment fixed at confinement in the penitentiary one year each, for the crime of defacing branded railroad ties in violation of subsection 11 of section 1409, Ky. St. Failing to obtain a new trial in the court below, they prosecute this appeal.

Subsection 11 of section 1409, Ky. St. (Russell's St. § 5867), reads as follows: "Any person or persons who shall unlawfully cut out,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cancel, obliterate or deface any brand recorded as provided by this act, which shall have been placed upon the standing timber, saw log, or other log tree prepared for the purpose of sale, or any cross or railroad tie, stave, heading or other timber prepared for market, of another of this Commonwealth, shall be deemed guilty of felony, and upon conviction thereof shall be, for each offense, confined in the penitentiary of this state, not less than one nor more than three years." Subsection 7 of section 1409 (Russell's St. § 5963), provides: "Every such dealer desiring to adopt a brand may do so by the execution of a writing in form and effect as follows: Brand—Notice is hereby given that I (or we as the case may be) have adopted the following brand in my (or our, etc.) business as timber dealer or dealers, to wit (here insert the words, letters, figures, etc., constituting the brand, or if it be any device other than the words, letters, or figures, insert the fac simile thereof). Dated this _____ day of _____ A. D. _____. The said writing shall be acknowledged or proved for record in the same manner as deeds are acknowledged or proved and shall be recorded in the office of the clerk of the county in which the principal office or place of business of such timber dealer may be. A copy thereof shall be posted up at the place where the principal business is done, and one at the court house door in the county where the business is carried on and at three public places in the county."

The railroad ties, the brands upon which the indictment charges appellants with defacing, belonged as therein alleged, and as the evidence showed, to the Ohio Valley Tie Company, a corporation doing business in this state. According to the evidence the corporation's brand consisted of the letter W and a yellow spot about an inch in diameter. These it places on the end of each of its railroad ties; the W being made with a heated branding iron, and the spot with a brush dipped in yellow paint. According to the evidence this brand had been duly adopted by the Ohio Valley Tie Company by the execution of a writing in form and effect as provided by subsection 7 of section 1409, Ky. St., which writing was signed and acknowledged by the manager of the corporation in his official capacity and soon thereafter duly recorded in the office of the clerk of the Lee county court, where the principal office and place of business of the corporation seems to be; copies thereof being posted up in the manner and at the several public places in Lee county required by the statute.

The evidence as to appellants' guilt of the crime charged was furnished by four witnesses introduced for the commonwealth, Isaacs, Perkins, Sternberg, and Easter, who testified, in substance: That a lot of ties owned by the Ohio Valley Tie Company and each branded with the letter W and a yellow spot, were in August and September, 1908,

lying on the bank of the North fork, near the mouth of the Middle fork, of Kentucky river in Lee county; that they saw appellants engaged in the work of defacing and destroying the brands on the ties by sawing off the ends of the ties containing them and throwing them into a nearby thicket, where they were concealed; that they called to appellants and asked what they were doing, to which they replied that they were sawing off ties, but did not explain why they were doing so. The same witnesses further testified that at the same time appellants in their presence sawed off the ends of some ties containing as a brand a horseshoe and the figure 7. The witnesses also identified and exhibited to the jury certain blocks containing the brand of the Ohio Valley Tie Company and that of the horseshoe and figure 7, as a part of the same they had seen appellants saw from the ties on the occasion referred to.

Appellants' first complaint is that the trial court erred in overruling their demurrer to the indictment. In response to this complaint it is only necessary to say that the indictment substantially follows the language of the statute, and, in addition, charged that appellants fraudulently and feloniously committed the acts violative of the statute, and, as the latter specifically defines the crime charged and the manner in which it may be committed, no better form of indictment could have been adopted than that used in this case. Therefore in overruling the demurrer the court committed no error.

Appellants also complain of the ruling of the circuit court in allowing the commonwealth to introduce, and identify by a deputy county clerk of Lee county, the record containing the writing and accompanying certificates, whereby the Ohio Valley Tie Company adopted a brand for its railroad ties. The ruling in question was proper. The only competent manner of showing the corporation's adoption of a brand for its ties was by the introduction and identification of the record thereof by its legal custodian, the county clerk or his deputy, or by the introduction of a copy attested by the clerk or his deputy. The record produced by the county clerk showed that the brand used by the Ohio Valley Tie Company for marking its ties had been adopted in the manner required by the statute, and therefore the trial court could have had no doubt of the competency of the record.

There is no force in appellants' claim that the manager of the Ohio Valley Tie Company was without authority to execute the writing by which its tie brand was adopted. The statute does not say what officer of the company shall execute the paper. Therefore it was proper for the manager to do it.

Equally unsubstantial is the objection urged by appellants to the proof made by the commonwealth of the posting up by the Ohio Valley Tie Company of copies of the recorded

writing by which its brand was adopted. In no other way could such proof have been made, and no error was committed by the court in admitting it.

It was not, as claimed by appellants, improper or prejudicial to them for the court to allow the witnesses for the commonwealth, who discovered appellants sawing brands from the ties of the Ohio Valley Tie Company, to testify that appellants at the same time and place sawed brands other than that of the Ohio Valley Tie Company from other ties. The entire sawing and destruction of brands was one and the same transaction, or a series of acts constituting one transaction. Therefore the whole was properly allowed to be proved. In Bishop's New Criminal Procedure, vol. 1, § 1225, under the title, "Whole Transaction," the competency of such evidence is recognized in the following statement: "As explained under the doctrine of *res gestæ*, wherever a part of a transaction appears in evidence, the rest is thereby made admissible. So that the entire transaction, wherein it is claimed the wrong in issue was done may be shown, though it includes also other crimes, and even though each transaction was a continuing one, or transpiring in parts on different days." Greenleaf on Evidence, vol. 1, § 53, and volume 3, § 15; *Tye v. Commonwealth*, 3 Ky. Law Rep. 59; *Thomas v. Commonwealth*, 1 Ky. Law Rep. 122; *O'Brien v. Commonwealth*, 115 Ky. 608, 74 S. W. 666.

It is insisted for appellants that their motion for a peremptory instruction made at the conclusion of the commonwealth's evidence should have been sustained by the court. We are at a loss to know upon what this contention rests. It will not do to say that the sawing off of the end of a tie containing the owner's brand does not, as argued by appellants' counsel, "cut out, cancel, obliterate, or deface" the brand in the meaning of the statute, for the sawing off of the end of the tie containing the brand and concealing the detached piece is manifestly a destruction or complete "obliteration" of the brand. The evidence seems conclusive of the appellants' guilt; but if this were not true, and there were but slight evidence of their guilt, that state of case would not have justified a peremptory instruction compelling the jury to acquit them. No better statement of our meaning as to the matter can be made than is expressed in the following utterance of this court, found in *Commonwealth v. Murphy*, 109 S. W. 353: "It is not within the province of the trial court to take from the jury a criminal prosecution if there is any evidence, however slight it may be, conducing to show that the defendant is guilty of the offense charged, or any of its degrees mentioned in the Code. This rule of practice is not found directly in either the Code or the statutes, but is firmly established as a part

of the criminal jurisprudence of the state, and is uniformly applied by this court in considering appeals in criminal cases when a reversal is asked because the verdict is flagrantly against the evidence, or is not supported by sufficient evidence, and should control the lower courts in the disposition of criminal cases."

The objections urged by appellants' counsel to the instructions caused us to consider them with even more than ordinary care. We have not, however, been convinced that they are in any respect incorrect. On the contrary, they fairly and fully present the law as it should have been given for the guidance of the jury. The record as a whole shows that no error was committed to appellants' prejudice.

Wherefore the judgment is affirmed.

GIPSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 20, 1909.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—QUESTION OF FACT—CREDIBILITY OF WITNESSES.

The credibility of a witness is a question for the jury in the trial court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3077; Dec. Dig. § 1159.*]

2. HOMICIDE (§ 268*)—QUESTION FOR JURY—EVIDENCE.

In a murder case, evidence held sufficient to go to the jury.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 562; Dec. Dig. § 268.*]

3. CRIMINAL LAW (§ 723*)—TRIAL—ARGUMENT OF COMMONWEALTH'S ATTORNEY.

In a murder case, it was not improper argument for the commonwealth's attorney to say, "I demand for the commonwealth and all these people (meaning those in the courtroom assembled to hear the argument) a verdict of guilty against this defendant;" he having a right to ask such a verdict for the commonwealth if he believed the evidence authorized a conviction, and to refer to the audience, they being citizens, and as such interested in having the law enforced.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1676; Dec. Dig. § 723.*]

4. CRIMINAL LAW (§ 855*)—TRIAL—CONDUCT OF JURY—WRITING OUT TESTIMONY.

The practice of writing out the testimony of witnesses by the jury after retirement, and using the writing in arriving at a verdict, is not to be commended.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 855.*]

5. CRIMINAL LAW (§ 1156*)—APPEAL—REVIEW—REFUSAL OF NEW TRIAL.

Under Cr. Code Prac. § 281, providing that the decision on motion for a new trial shall not be subject to exception, the matter of misconduct of the jury, first brought to the attention of the court on application for a new trial, cannot be considered on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1156.*]

Appeal from Circuit Court, Carter County.
"To be officially reported."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Van Gipson was convicted of voluntary manslaughter on a charge of murder, and appeals. Affirmed.

Armstrong & Duvall, John S. Marcum, and Frank Prater, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, C. J. The appellant, Van Gipson, insists that he was illegally convicted in the court below of voluntary manslaughter under an indictment charging him with the murder of Elmer James, and his punishment fixed at confinement in the penitentiary 21 years, and by this appeal seeks a reversal of the judgment entered upon the verdict of the jury.

James was shot in the back and instantly killed, and appellant admitted on the trial that he killed him, but claimed that in taking his life he acted in self-defense. The commonwealth's theory is that appellant shot and killed deceased from ambush, or when he was fleeing from him. The latter view was favored by its counsel because of the character of the wound inflicted; two physicians having testified that they were unable to probe the wound from the point of the bullet's entrance, from which they deduced the conclusion that, when shot, the body of deceased was inclined forward as if he were running, which stretched the muscles and ligaments of the back, but that, upon receiving the wound and falling, they relaxed and resumed their normal position, thereby closing the wound, and so obstructing the passage made by the bullet that the probing was made impossible. On the other hand, if, when shot, deceased was, as claimed by appellant, in the act of picking up a rock to throw at him, that fact would also account for the closing of the passage made through his body by the bullet.

The deceased married a sister of appellant, and he and his wife made their home with the mother of appellant and the wife of deceased on another part of the same farm upon which appellant resided. According to the evidence, deceased and his mother-in-law were not on good terms, and for this or some other reason there had been a bad state of feeling existing for some time between deceased and appellant. The killing of James occurred about 7 o'clock on the morning of July 17, 1906, on a branch near appellant's residence. Two or three witnesses introduced by the commonwealth testified that they heard the pistol shot when the killing occurred, and that it was immediately followed by a cry of distress; but none of the commonwealth's witnesses saw the killing. One of them, Elmer Webb, a 16 year old nephew of appellant and a member of his household, testified that he heard the shot, and shortly before it was fired saw appellant get from a trunk his pistol and start with it in his possession toward the tobacco

patch, where the killing occurred, saying when he left the house that he would "put Elmer James out of the hollow damned rough." The witness further testified that soon after the appellant's departure he left the latter's house to take some milk to his grandmother, Mrs. Dana Gipson; that upon reaching the top of a hill he heard a pistol shot down in the hollow about 150 yards from him, and, going further, met appellant with the pistol in his hand returning to the house, but neither of them then spoke to the other. The witness said he then went on down in the hollow, and there found deceased lying in the path, face downward, dead; that he proceeded to the house of his grandmother, about 100 yards from the place of the homicide, and delivered the milk, without telling her of the death of her son-in-law, and then returned to appellant's house; that upon his arrival at the top of the hill beyond the hollow he again met appellant, who asked him if he saw James, and if he was dead, to both of which questions the witness gave affirmative answers; that appellant then told witness to go to the house and tell his Aunt Eliza, appellant's wife, to bring him his clothes, that he was going to Ohio, which intention appellant at once carried into effect, but a few days later returned to this state and surrendered himself to the sheriff of Carter county.

Appellant's account of the homicide greatly differed from that of the witness, Webb. He testified that he and his nephew, Webb, were at work in the tobacco patch, and his wife was also present, when James was killed; that he had his pistol with him, because he had learned from his mother the day before that James had threatened to kill her, and also kill appellant, and had invested the proceeds derived from the sale of a calf in a pistol for that purpose; that James came up the hollow, and appellant said to him, "Good morning," to which James replied, "Go to hell, you damned son of a —," and added that Eliza, appellant's wife, had been telling lies on him. Appellant further testified that, following these statements of James, he told him of his abuse of and threats against appellant's mother, and that he should not blackguard his wife, and must get his clothes and get out of the hollow, or he (appellant) would put him out; that James thereupon cursed appellant, said he would kill him, and, picking up a rock, threw it at him, but appellant dodged it; that James then threw a second rock, which struck appellant on the hip, following which he jumped from the bank over the branch, and, stooping over, with his back toward appellant, picked up the third rock, and was in the act of raising it, to again throw it at appellant, when the latter shot him with the pistol; that James then dropped the rock, gave a cry, and ran back down the hollow about 40 yards, fell to the ground,

and soon died. The post mortem conducted by the physicians showed that the pistol ball passed through the lower part of the heart, causing, as the physicians testified, instant death. They therefore expressed the opinion that deceased fell where he was shot, and this testimony, it was urged in behalf of the commonwealth, contradicted that of appellant that deceased ran 40 yards after he was shot, and, together with the nature of the wound received and proof of tracks found near the body, tended to support the theory of the commonwealth that deceased was fleeing from appellant when shot.

Various grounds were filed by appellant in support of his motion for a new trial, but we deem it necessary to consider only such of them as are urged by counsel for a reversal.

Their first contention is that the trial court erred in refusing to permit appellant to testify for himself that his mother, a day or two before the homicide, informed him of James' abuse of and attempt to strike her, and his threats against her and appellant. There is no ground upon which to rest this contention, for the bill of evidence found in the record shows that both appellant and his mother testified in detail as to this matter, without objection or denial from court or counsel. We assume, therefore, that counsel for appellant inadvertently overlooked that part of the evidence.

The second contention of appellant's counsel, that the verdict of the jury is flagrantly against the evidence, we must also pronounce untenable. This contention is based on the alleged contradictory statements of appellant's nephew, Elmer Webb, without whose testimony, it is argued, appellant could not have been convicted. It must be conceded that Webb was not consistent as a witness. It appears that he first testified at the inquest held by the coroner, and then denied that he knew anything about the killing of James, but, upon being charged with the homicide and placed under arrest therefor the following day, admitted knowledge of the crime, and for the first time told that appellant was the slayer of James, and revealed the facts with respect to the crime as he seemed to know and understand them. Again, only the day before appellant's trial, Webb was by the latter's procurement taken to the office of his counsel, and there, in the presence of appellant, his grandmother, the counsel, and one or two other persons, signed and perhaps swore to, a written statement in which he substantially corroborated appellant's version of the manner in which the homicide occurred. Yet, when called to the witness stand during the trial, he made the same statement with respect to the homicide that he made at the time of his arrest, at the same time admitting that he made the statement of the day before, contained in the writing produced by appellant's counsel, but claiming that it was untrue, and that he

made it because of the presence of the grandmother, and through fear of his uncle, the appellant, with whom he had lived, and by whom he had once been whipped. It is not material whether this court would or would not have accepted the testimony given by Webb on the trial. It was for the jury to determine whether he then told the truth. They had him before them, saw his demeanor, and heard his statements; and we, even if disposed to disbelieve the witness, have no right to invade the province or usurp the powers of the jury by declaring that his testimony should have been rejected. We are therefore unable to say that the verdict was flagrantly against the evidence; and, as it would be still wider of the mark to declare there was no evidence authorizing it, we cannot say, as requested by appellant, that the trial court should have peremptorily instructed the jury to acquit him.

It is also contended by appellant that the circuit court erred in permitting the commonwealth's attorney, over appellant's objection, to say in argument to the jury, "I demand for the commonwealth and all these people (meaning those in the courtroom assembled to hear the argument) a verdict of guilty against this defendant." The statement in question was not prejudicial. The commonwealth's attorney had the right to ask for the commonwealth a verdict of guilty if he believed the evidence authorized appellant's conviction, and to refer to the audience present, as was done; they being citizens of the commonwealth, and in common with all other people interested in having the law enforced by the punishment of the guilty.

It is further contended that a new trial should have been granted because the jury were guilty of improper conduct, in that one of their number, after the submission of the case, took it upon himself to reduce to writing the testimony of each witness, which writing, it is claimed, was used by the jury in arriving at a verdict. It appears that the writing referred to was done in the presence of all the members of the jury, and in the absence of proof to the contrary must be presumed to have been the joint production of all, though written by one of their number. The writing does not seem to have been preserved, and, not being in the record, its accuracy cannot be tested by a comparison with the contents of the bill of evidence brought to this court. We do not mean to commend such a practice, but it does not appear to have been prejudicial in this case to the rights of appellant. Moreover, the error, if it be such, is one which this court is without power to review. As said in *Stuart v. Commonwealth*, 105 S. W. 170: "But, waiving this matter (as to manner of arriving at the verdict in that case) and also the question of the impropriety of permitting an attack upon the verdict by the members of the jury—which this court, in *Commonwealth v. Skeggs*, 3 Bush, 19, and *Lucas v. Cannon*,

13 Bush, 650, seems to have held could not be done—as the alleged error charged to the trial court grew out of its refusal to grant appellant a new trial on account of the action of the jury complained of, and was a ruling as to a matter brought to the attention of the court for the first time on the application for a new trial, we are prevented by section 281, Cr. Code Prac., from considering it.” *Redmon v. Commonwealth*, 82 Ky. 333; *Rutherford v. Commonwealth*, 78 Ky. 639.

No objection is made to the instructions, and our examination of them convinces us that none could be urged, as they fully and fairly advised the jury of the law with respect to every aspect of the case in language that the jury could not fail to understand.

The record manifesting no error that could have been prejudicial to the appellant, the judgment is affirmed.

KENTUCKY HEATING CO. v. HOOD.

(Court of Appeals of Kentucky. April 16, 1909.)

1. GAS (§ 21*)—INJURIES TO GAS FIXTURES AND CONNECTIONS—ELEMENTS OF COMPENSATION.

Where the servants of defendant, a gas company, wrongfully removed and destroyed the fixtures and connections with plaintiff's house of a rival gas company, thereby depriving plaintiff and her tenants of necessary heat, and causing the tenants to leave, plaintiff may recover as compensation, not only the cost of replacing the fixtures and connections, but also reasonable compensation for the loss of profits from her tenants, and for personal inconvenience and discomfort.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 21.*]

2. DAMAGES (§ 20*)—INJURIOUS RESULTS NOT WITHIN CONTEMPLATION OF DEFENDANT.

In an action for damages for a wrongful act, it is not material whether it was in the contemplation of the wrongdoer that loss of business or profit would result to the injured person.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 56, 57; Dec. Dig. § 20.*]

3. TORTS (§ 4*)—PROXIMATE CAUSE—IGNORANCE OF RESULT.

It is no defense to an action for a wrongful act that defendant did not know that any injury or loss would result.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 4; Dec. Dig. § 4.*]

4. GAS (§ 21*)—INJURY TO GAS FIXTURES AND CONNECTIONS—EXEMPLARY DAMAGES.

Where the servants of defendant, a gas company, wrongfully removed and destroyed the fixtures and connections with plaintiff's house of a rival gas company, thereby depriving plaintiff and her tenants of necessary heat, and failed to make repairs when notified of the injury, exemplary damages were properly allowed plaintiff.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 21.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

“To be officially reported.”

Action by Jessie Hood against the Kentucky Heating Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

Morton K. Yonts, for appellant. Eugene R. Attkisson, for appellee.

CARROLL, J. The appellee rented a house on Walnut street in Louisville for the purpose of subletting rooms to boarders. The house consisted of a basement and three stories, the third story being an attic containing two small bedrooms. She paid as rent for the property \$60 a month; and, when the incident out of which this suit arose occurred, several of the rooms in the house were occupied by persons who had rented them from her. Some of these rented rooms had grates, but they were not used, as the appellee heated the entire house by heating gas furnished by the Louisville Gas Company. In May, 1907, Mrs. McDonald, a subtenant, who occupied, as a restaurant, a part of the basement, desired to use in her place the natural gas furnished by the Kentucky Heating Company, and applied to this company to connect her stove with its gas mains. At this time there was in that part of the basement, under the control of appellee, three gas meters; two that had been installed by the Louisville Gas Company, one for illuminating gas, and the other for heating gas, the third meter belonging to the Kentucky Heating Company. When the employees of the Kentucky Heating Company went to the residence for the purpose of connecting the stove of Mrs. McDonald with the mains of that company, they disconnected the heating pipes of the Louisville Gas Company, cut out and used some 16 feet of the pipe, took down the meter, and threw it in an ash barrel, thereby cutting off all the heat in the house that was supplied by the Louisville Gas Company. As a result of this all the renters of appellee left, because the weather was too cold to occupy the rooms without heat. At the time the employees cut off the heat, Mrs. Hood was in the house, but they did not notify her what they were going to do, or what they did, nor did she know anything about it until the renters complained to her of having no heat in their rooms. When she discovered the cause of the trouble, she at once notified the Kentucky Heating Company, and requested it to repair the injury its employees had done, and attempted on several different days to get the company to replace the fixtures, but without success. About a week after the pipes were disconnected, the Louisville Gas Company sent its men to the house, and they replaced the fixtures and turned on the heat, charging appellee for this service \$6. Whereupon the appellee brought this suit against the Kentucky

Heating Company to recover damages for the willful, malicious, and wrongful acts of the employees in interfering with the heating fixtures of the Louisville Gas Company, thereby not only depriving her of the heat that company furnished, and subjecting her to inconvenience and discomfort, but causing the renters from whom she had been receiving about \$160 a month to leave the premises. Upon a trial, the jury assessed the damages at \$500. A reversal is asked upon two grounds: First, because the verdict is excessive; second, for error in instructing the jury.

Among the instructions given was the following: "I further instruct you, gentlemen, that if you believe from the evidence that the agents or employees of the Kentucky Heating Company maliciously, or in wanton disregard of plaintiff's rights, disconnected the meter of the Louisville Gas Company, and cut off the supply pipe, whereby she was deprived of the use of the gas, you may or may not in your discretion award her punitive damages, or damages by way of punishment. I further instruct you by 'malicious' as used in this instruction is meant the intentional doing of a wrongful act without legal right." It may be conceded at the outset that, unless the appellee was entitled to recover punitive damages, the verdict is excessive. And we are also of the opinion that instruction No. 2 was deficient in failing to specify the character of damages appellee was entitled to recover as compensation. But the error in this instruction was not so prejudicial as to authorize a reversal, especially in view of the fact that the jury were not confined in assessing the damages to compensation.

It is insisted that the appellee was only entitled to recover the amount expended by her in replacing the fixtures taken out by the employees of the appellant company, but in this view we do not agree. The appellee had the unquestioned right to heat her house with gas furnished by the Louisville Gas Company, and to enjoy the profit she might have received from the persons to whom she rented rooms; and it is equally plain that the employees of the appellant had no right or authority to in any manner interfere with or disturb the fixtures by which the heat was obtained. And the evidence conduces to show that at the time the heating fixtures were removed, it was necessary that the rooms of the house should be heated in order to make them comfortable and habitable, and also that the deprivation of the heat caused the renters to leave. As appellant's servants wrongfully deprived appellee of the convenience and comfort of having her house heated, and also by this conduct caused her to lose the income she received from the tenants, she was entitled to recover as compensation, not only the cost of replacing the fixtures, but in addition thereto reasonable compensation for the

loss she sustained in being deprived of her tenants, and for personal inconvenience and discomfort. It would fall far short of the relief to which appellee was entitled to limit her recovery to the money she was required to pay out to have the injury repaired. A person cannot either negligently or wantonly injure the property of another, thereby causing the other to suffer loss in business or profits, or in the denial of the ordinary and reasonable comforts he enjoyed, and then assert that all the injured party is entitled to recover is the cost of replacing the injured property. Waiving, for the moment, the question of exemplary damages, we may lay it down that, whenever a person is injured in his person or property by the wrongful act of another, he is entitled to recover such a sum as will fairly compensate him, not only for the actual loss sustained, but for such consequential damages as may spring from the deprivation of business or profits as are the direct or proximate result of the tort complained of, if such consequential damages are capable of reasonable ascertainment, and in addition thereto, the facts justifying it, compensation for personal inconvenience and discomfort. In the case before us the loss sustained by appellee, aside from personal inconvenience and discomfort, was not only the sum she paid out for having the fixtures replaced, but the loss she suffered in being deprived of the profit she had the right to expect would be received from the renters. This profit was not uncertain or speculative. It was as reasonably sure as any kind of business profit can be that depends upon the development or happening of the future; and, furthermore, it was capable of reasonable ascertainment by a jury. The appellee, when her tenants left, was receiving from them a fixed sum. This income she lost when they withdrew from her premises, and the loss of this source of income was the proximate result of the wrongful act complained of.

It is not material whether it was in the contemplation of the wrongdoers that loss of business or profit would result to the injured party. In actions for breach of contracts the rule generally held to is that only such damages can be recovered as are actually sustained, or such as it is reasonable to conclude were within the contemplation of the parties at the time the contract was entered into. 2 Chitty on Contracts, p. 1324. But this measure that obtains in contracts will not be applied in actions sounding in tort. There is a wide difference between the rights and remedies allowable in the one case and in the other. 1 Sutherland on Damages, § 15. It is the wrongful act done, and the consequences that naturally result from it, that the law looks at and holds the wrongdoer responsible for. A person who commits a tort like this is liable for all the damages that naturally flow from, and are

the result of, this wrongful act, although he may not at the time have given any thought to or have anticipated that injurious consequences would follow. It is no excuse or defense for the wrongdoer that he did not mean to commit any wrong, or did not know that any injury or loss would ensue. The general rule in respect to the recovery of consequential damages in cases of tort is very well stated in *Sutherland on Damages* (volume 1, § 16): "In an action for a tort, if no improper motive is attributed to the defendant, the injured party is entitled to recover such damages as will compensate him for the injury received so far as it might reasonably have been expected to follow from the circumstances; such as, according to common experience and the usual course of events, might have been reasonably anticipated. The damages are not limited or affected so far as they are compensatory, or by what was in fact in contemplation of the party in fault. He who is responsible for a negligent act must answer 'for all the injurious results which follow therefrom, by ordinary natural sequence.' * * * Whether the injurious consequences may have been 'reasonably expected' to have followed from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. * * * There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable consequences of his conduct; he is responsible therefor because the result proximately follows his wrongful act or nonaction. All persons are imperatively required to foresee what will be the natural consequences of their acts and omissions, according to the usual course of nature and the general experience." See, also, note to *Wallace v. Pennsylvania R. Co.*, 195 Pa. 127, 45 Atl. 685, 52 L. R. A. 33; *Wyant v. Crouse*, 127 Mich. 158, 86 N. W. 527, 53 L. R. A. 626; 13 Cyc. pp. 28, 29, 49; *Gregory v. Slaughter*, 124 Ky. 345, 99 S. W. 247, 8 L. R. A. (N. S.) 1228.

It is further contended by counsel for appellant that it was error to instruct the jury that they might assess exemplary or punitive damages. But, considering the circumstances under which the tort was committed, we think it was a case in which the jury might in their discretion allow exemplary damages, and hence the instruction in this particular was correct. It is a general rule that exemplary damages in cases of this character are not allowable unless the wrong complained of is committed in a malicious, aggravating, or insulting manner, or with reckless disregard of the rights of the injured person. *Major v. Pulliam*, 8 Dana, 582; *Parker v. Jenkins*, 3 Bush, 587; *Jennings v. Maddox*, 8 B. Mon. 430; *Andrews v. Sing-*

er Mfg. Co. (Ky.) 48 S. W. 976; *Reynolds v. Braithwaite*, 131 Pa. 416, 18 Atl. 1110; 4 *Sutherland on Damages*, §§ 1031, 1092-5. Measured by this rule, we have little difficulty in reaching the conclusion that the conduct of the servants of appellant in cutting the pipes and throwing the meter in an ash barrel was, to say the least of it, a high-handed, aggravating piece of business, done in utter and reckless disregard of the rights of appellee. The employés of the appellant company do not give any reasonable or satisfactory excuse for their conduct, but they make plain the fact that it was not the result of ignorance or mistake or accident. It was not necessary, in order to connect the mains of the heating company with Mrs. McDonald's stove, that they should either cut the pipes of the Louisville Gas Company or tear down its meter, although they testify that it was more convenient and less expensive to do it in this way than it would be to make the necessary connections, as might have been done, without disturbing the fixtures of the other company. Looking at the matter from any reasonable standpoint, it is inconceivable why these men should have acted in this manner, unless they did it with the malicious intention of interfering with, and injuring, the property. Nor did appellant company treat appellee in a proper, becoming, or reasonable manner, after she notified it that her fixtures had been disconnected by its reckless, if not malicious, employés. Although appellant was notified of the trouble on the day following the commission of the wrong, it did not repair the injury or make any reasonable effort to do so.

Upon the whole case we see no reason for disturbing the judgment, and it is affirmed.

SAMEULS v. WILLIS.

(Court of Appeals of Kentucky. April 21, 1909.)

1. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—PETITION—VARIANCE.

Where the petition, in an action for malpractice, alleged that defendant, in the course of an operation on plaintiff, negligently cut her intestines, and negligently left in her abdomen after the operation a sponge which irritated the intestines, causing them to ulcerate, etc., plaintiff, though failing to show that defendant negligently cut the intestines, could recover by showing that he negligently left in her abdomen a sponge causing the injuries complained of.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Dec. Dig. § 18.*]

2. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—PETITION—INSTRUCTIONS.

The original petition in an action for malpractice alleged that defendant negligently left a sponge in plaintiff's abdomen after an operation, and that the sponge caused the intestines to ulcerate. An amended petition also charged that defendant negligently cut the intestines. The evidence was confined to the negligence based on leaving the sponge in the abdomen. There was no claim of surprise. *Held*, that the

court properly submitted the case to the jury on the issue of the negligence alleged in the original petition.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 18.*]

3. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where, in an action for malpractice, defendant testified that the terms of his policy insuring him against accidents did not cover any damages that might be recoverable in the action, and the court subsequently directed the jury to disregard the testimony as to his insurance, the error in permitting evidence as to his insurance was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4179; Dec. Dig. § 1053.*]

4. EVIDENCE (§ 506*)—OPINIONS—MATTERS DIRECTLY IN ISSUE.

In an action for malpractice in the performance of an operation, physicians may testify concerning the teachings of their science and the customs of their craft, but they cannot give their opinion whether an operation performed in a manner described was performed in an ordinarily careful manner; that being for the jury alone.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

5. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—QUESTION FOR JURY.

Where, in an action for malpractice in the performance of an operation, based on the negligence of the physician in leaving a sponge in the patient's abdomen after the operation, physicians testified that the best surgeons sometimes left a sponge in the bodies of their patients in performing similar operations, the question whether the physician exercised proper care was still for the jury, since because all men are at some time careless does not relieve one from the legal consequences of his careless act.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 44; Dec. Dig. § 18.*]

6. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—DAMAGES.

Defendant, after performing an operation, negligently left in plaintiff's abdomen a sponge, which caused the intestines to ulcerate, creating a fistula which emitted fecal matter and noxious gases to the serious impairment of plaintiff's health and caused her sickness and mental and physical suffering. *Held*, that a verdict for \$3,500 was not excessive.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 46; Dec. Dig. § 18.*]

Appeal from Circuit Court, Barren County.
"To be officially reported."

Action by Mary Willis against F. W. Samuels. From a judgment for plaintiff, defendant appeals. Affirmed.

Porter & Sandidge, J. C. Sims, and Sims, Du Bose & Rodes, for appellant. Baird & Richardson, for appellee.

O'REAR, J. Appellant is a surgeon of many years' experience in performing abdominal operations. His office and residence are at Louisville. He was called to Glasgow Junction to operate on appellee for ovaritis. Appellee had been very sick for some months, and, the local doctors advising the operation and recommending appellant, she

decided to have him do the work. He sent down a trained nurse and followed next day with a medical student as assistant. Several doctors of the neighborhood came in to witness the operation. After the patient had been put under the influence of an anæsthetic, the abdomen was opened by a five or six inch incision, the intestines were pressed aside from the infected region, and in order that they might be held in place, and so as not to interfere with the operator's work, a number of surgical sponges were inserted in the abdominal cavity, forming a kind of confederam about the organ to be operated upon. These sponges are described as gauze cloths about 14 inches by 6 inches, stitched together. After the operation the sponges were intended to be removed and the cut in the abdomen drawn together by stitches, leaving a small opening in which was inserted strips of the gauze for drainage purposes. The operation was thought to have been a success, but the patient did not respond by the anticipated recovery. Instead, after a few days, she grew worse. Finally, and in about 30 days after the operation, it was discovered through a part of the original opening made in the abdomen that some foreign substance was lying near the surface, which on being removed was discovered to be one of the surgical sponges used at the operation. So it is claimed by appellee. It was incrustated in and saturated with foul-smelling pus. After its removal the patient improved in health, but there was left a sinus, which it is claimed has developed into a fecal fistula. Appellee brought this suit against appellant, charging malpractice, in that he negligently left or suffered to be left in her person after the operation the surgical sponge, which irritated the intestines, causing them to fester and ulcerate, creating the fistula, which emitted fecal matter and noxious gases to the serious impairment of her health, and causing her sickness and humiliation, mental and physical suffering, for which she sought damages. The trial resulted in a verdict and judgment for \$3,500 for the plaintiff.

There are several rulings of the trial court presented on this appeal by the defendant as errors, for which he asks a reversal of the judgment. In the petition it was charged, *inter alia*: That the defendant negligently and carelessly caused and permitted to be left in the plaintiff's body instruments, material, and dressing used in said operation, and negligently and carelessly left said instruments, material, and dressing to remain in her body for several weeks, injuring and perforating her intestines and bowels, and destroying same; that he negligently and carelessly permitted her intestines and bowels to perforate; and that her intestines and bowels are still perforated, and permanently injured, and so forth. In an amended petition filed before the trial, it is said: "She

states: That, wherever the word 'perforated' occurs in her petition, she asks leave of the court to strike the same. She states that the defendant when making and superintending said operation negligently and carelessly cut her intestines, and negligently left the same open, and he negligently and carelessly left the sponge described in her original petition in her bowels for more than 30 days, and the same festered and gathered pus in her bowels, and ulcerated her intestines and left an opening therein, and the gas and food and contents of her stomach and bowels worked out through said opening in her intestines made, as aforesaid, passing out at the opening in her abdomen, which was made to perform said operation, thus forming an artificial opening in her abdomen; that the same has existed and continued, and now exists by reason of the negligence and careless acts of the defendant, causing her great bodily and mental anguish, humiliation, and suffering, and permanently injuring her as stated in her original petition."

There was no evidence that appellant perforated or cut the plaintiff's intestines. There was evidence that the sponge was left in her abdomen, and that it did ulcerate the intestines, with the consequences charged. It is now urged by appellant that plaintiff by the amended petition quoted abandoned and withdrew her complaint based upon the perforation of her bowels by the sponge, and elected to try to recover upon the sole charge of the negligence of the defendant in cutting or perforating the bowels in the course of the operation. It was therefore urged in the court below, and is urged here by appellant, that all the evidence admitted, and the instructions submitted authorizing a recovery by the plaintiff for the ulceration of her bowels by the sponge, and any consequences therefrom, were irrelevant to the issue, and should not have been allowed. Simplified, the charge in the original petition was that the defendant had carelessly left foreign substances in the plaintiff's abdomen after the operation, which had perforated her bowels, producing the ill effects specified. It was doubtless thought by plaintiff's counsel upon reflection that they would be held to show a perforation in order to recover, and that by the foreign substance left there, whether the sponge or other thing; that to perforate required a cut or puncture. Unwilling to rest their case upon such a narrow charge, they by the amendment sought to and did enlarge it. First they withdrew the charge that by the substances left in the abdomen the bowels had been perforated. In lieu they charged: First, that the defendant in the course of the operation negligently cut or perforated her intestines; and, second, that the sponge which he negligently left in her abdomen ulcerated her intestines "and left an opening therein," festering and gathering pus in her bowels. When the evidence failed to support the first

charge, plaintiff was still at liberty to sustain the latter if she could, and such was the issue presented by the pleadings. Proof upon that issue was admitted from each side. There is no claim of surprise. Expert witnesses were brought from great distances by the defendant, whose testimony in the main, if not wholly, was upon that point. The jury's attention was directed sharply to that issue of fact. The motion for a peremptory instruction for the defendant, and for judgment upon the pleadings, based upon the theory of the issue now advanced by appellant, were properly overruled.

While the defendant was testifying, he was required on cross-examination to answer the question whether he carried a policy of insurance against accidents of that kind. Before another witness had been introduced, the court receded from his ruling on that point. This appears in the bill of evidence: "The court said to the jury that on yesterday the plaintiff asked of the defendant if he didn't carry an insurance policy against loss or liability of this character. On motion all the testimony of the defendant pertaining to such policy is now withdrawn from the jury, and the court admonished the jury to disregard all that testimony and not consider it for any purpose in the consideration of this case." The record does not show upon whose motion the matter was withdrawn. Nor does it appear that the evidence could have been very material in any event. On his re-examination before the matter was withdrawn, appellant was questioned and answered thus: "Q. You have been asked about insurance against suits for malpractice. I will ask you if the terms of your policy cover any damages that may be recovered in a case like this? A. Not in the slightest." We see no cause to suspect that the jury would have disregarded the witness' answer, or did not obey the subsequent admonition of the court. The error was probably harmless in the first place, and was cured in the next.

Appellant testified, and a number of other witnesses in his behalf testified, as to the customary and correct method of skilled physicians in performing the operation which is the subject of this suit. Some of the witnesses were asked the hypothetical question whether, if the operation was performed in that manner, it was an ordinarily careful manner of doing it, or was negligent. Upon objection the witnesses were not allowed to answer that question. This was the correct ruling. That was for the jury alone. Witnesses from a profession may be called to testify concerning the teachings of their science, and the customs of their craft, but whether these things amount to due care is for the court or jury to say in a controverted case.

Many of the physicians testifying on behalf of the defendant said that the best of surgeons sometimes left a sponge or some foreign substance in the bodies of their pa-

tients in performing similar operations. It is argued from this that, as the highest degree of skill and care are not exempt from the commission of such accidents, a similar lapse by appellant was at least not other than "ordinary care"; but that does not follow. Because all men are at some time careless does not relieve any man from the legal consequences of his careless act; but even that was for the jury to say whether appellant exercised the degree of care in the case which ordinarily prudent and skilled surgeons, who practice in similar localities, usually exercise in such matters.

The evidence was conflicting whether appellant left the sponge in appellee's body, but it was there. Its presence was not otherwise accounted for. He alone placed and removed the sponges that were used in the operation. There was considerable evidence tending to show it was left there by appellant, and that he did not pursue the course which his own witnesses of his profession said was customary and necessary to verify whether all sponges had been removed.

We think a statement of the case disposes of the claim that the damages were excessive.

Judgment affirmed.

WILLIAMS COAL CO. v. JONES.

(Court of Appeals of Kentucky. April 23, 1909.)

1. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—PEREMPTORY INSTRUCTION.

Under the rule that, if the facts shown legitimately establish a no stronger presumption of negligence of defendant causing the injury than of an accident for which defendant would not be responsible, a peremptory instruction should be given, the jury should have been instructed to find for defendant, in an action for injury by the falling down of the brake to an employé riding an empty car to a coal tippie, his complaint being that sufficient help was not furnished, so that on the day in question he had, in addition to his regular duties of riding the empties to the tippie, to ride the loaded cars out from the tippie, requiring him to hurry; he not testifying that he was so hurried as to prevent his inspecting the car before starting to ride it, as was his duty, or that he was acting under an emergency requiring him to dispense with the inspection because of his double duty, and the evidence leaving the mind in equal doubt as to whether plaintiff did or did not inspect, or as to whether the action of the brake was or was not simply an accident incident to the business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1114, 1115; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§§ 101, 102*)—FURNISHING SAFE APPLIANCES—STATEMENT OF DUTY.

Instead of telling the jury that it was the master's duty to furnish the employé appliances that were reasonably safe, they should have been told it was its duty to use ordinary care to furnish appliances that were reasonably safe; at least where, as in the case of railroad

cars, ordinary care will not always furnish an appliance that is reasonably safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 173, 174; Dec. Dig. §§ 101, 102.*]

3. MASTER AND SERVANT (§ 201*)—DUTY TO FURNISH APPLIANCES—PLEADING AND EVIDENCE—INSTRUCTIONS.

The gist of an action by an employé for injury not being the furnishing of an unsafe car, but failure to furnish him reasonable assistance and requiring him to do the work in a way that was not reasonably safe, an instruction as to the duty to furnish safe appliances should be omitted, as not following the cause of action pleaded and attempted to be proved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1186; Dec. Dig. § 291.*]

4. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING EVIDENCE.

The uncontroverted evidence in an action for injury to a servant by defect in a car being that he was paid to inspect the cars, the bracketed words should have been omitted from the instruction that, when a servant enters a master's employ, he assumes the risk ordinarily incident to his employment [but, in the absence of an agreement to do so, he is not bound to inspect machinery with which he works].

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 613; Dec. Dig. § 253.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

The evidence does not warrant the bracketed part of the instruction, in an action for injury to an employé while performing his regular duty of riding empty cars to a coal tippie, in addition to which he was on the day in question required to ride the loaded cars out from the tippie, that if the jury believe from the evidence it was plaintiff's duty to inspect the cars before using them, and he failed to do so, or did it in a negligent manner, he cannot recover [unless the jury believe from the evidence that plaintiff was acting at the time under the direct orders of a superior servant, and was prevented from making an inspection by his orders]; there being no evidence that, when the boss told plaintiff to run both ends that day, he told him not to inspect the cars, or even that plaintiff told the boss that such double duties would leave him no time to inspect the cars, and that the boss then told him to go on for that day and run both ends anyhow.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 601-603; Dec. Dig. § 252.*]

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by Frank Jones against the Williams Coal Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

H. P. Taylor, for appellant. Ernest Woodward and M. L. Heavrin, for appellee.

HOBSON, J. The Williams Coal Company loads coal on cars furnished by the Illinois Central Railroad Company. It was Frank Jones' duty to run the empty cars down to the tippie. Ordinarily, when they were loaded at the tippie, it was the duty of one Jackson to run them down from the tippie. The track was constructed upon an incline, so that the cars would move by their own weight when started, and could be

checked by the person on them when they reached the proper place. About July 7, 1908, Jackson went away with the superintendent of the mines, fishing, and the boss ordered Jones to ride the cars both ways; that is, to ride the empties down to the tippie and to ride the loaded cars out from the tippie, telling him that he would furnish a man named Baker to help, but Baker could not handle the cars by himself. While Jones was taking an empty down to the tippie that day, a brake shoe dropped down, and was wedged in between the tracks. A man who was standing not far off saw the car stop, and, seeing nothing of Jones, went over to it. He found him lying in the bottom of the car insensible. His jawbone was broken and his teeth were knocked loose. His brake stick was in the brake wheel, and the proof was to the effect that, when the shoe dropped down, the brake would unwind, causing the wheel to revolve, and that, as the wheel revolved, it would bring the stick in contact with Jones' head, if he was standing on the car as indicated by the position of his feet at the time he was found; that is, the hanging of the shoe would cause the brake wheel to turn rapidly in the other direction from that in which Jones was turning it, and would cause the brake stick to strike him. Jones testified that the last thing he remembered he was on the hill or top of the incline, that he got down and fixed the chain and got back on the car, and that is the last he could recollect until the next morning. He brought this suit to recover for his injuries on the ground that he was doing at the time the work of two men; that it was necessary to have another man to assist him; that he was required by the bank boss to do the work by himself; that he informed the boss that the work could not be done properly by one man, but the boss answered that one man was sufficient to do it, and he, relying on this assurance, attempted to proceed with it, and, while so engaged, received the injuries complained of by reason of the fact that he had not proper assistance.

There is no proof at all that he informed the boss that the work could not properly be done by one man, or that the boss assured him that one man was sufficient to do the work, or that he received any assurance from the boss as to his safety in doing the work. The fact is the proof shows conclusively that, when Jackson was there, he simply rode the loaded cars out from the tippie to the lower end of the side track. Jones brought in the empties from the upper end of the side track to the tippie by himself. He had been working there two years, and this was the usual course of business. The absence of Jackson, Jones testifies, made it necessary for him to take out the loaded cars from the tippie, and this gave him less time to attend to his usual duties of bringing in the empties from the up-

per end of the track. He says he had to be in a hurry all day to keep the cars at the tippie so that the coal could be loaded upon them. It is insisted for him that, owing to the fact that he had to take out the loaded cars that day, he had less time to inspect the empties and to bring them down to the tippie than he otherwise would have had, and but for this he would not have been injured. The proof is conclusive that the inspection of the cars was to be performed by Jones. He was paid 40 cents extra to inspect empty cars. No other servant was required to make an inspection of the empties except him. He testifies that he always inspected the cars, that he cannot say whether he inspected this particular car or not, but he supposes he inspected it, as he made it a rule to inspect the cars. He does not show that he did not inspect the car, or that he failed to inspect it because he had not time to do so. He does not show that the boss told him not to inspect the cars, or relieved him of his duty. There is nothing in the proof to show that he was prevented from making an inspection by reason of the absence of Jackson, and it is not shown that by any inspection which he could have made the dropping down of the brake shoe could have been averted. In other words, the whole cause of the accident is unexplained, and it would seem from the proof to have been merely one of the accidents incidental to the movement of railroad cars. The rule is that the plaintiff must show negligence on the part of the defendant, and that this negligence caused his injury. If the facts shown legitimately establish a no stronger presumption of negligence on the part of the defendant causing the injury than of an accident for which the defendant would not be responsible, a peremptory instruction should be given. Under this rule, we conclude that the circuit court should have instructed the jury peremptorily to find for the defendant. While the plaintiff does testify that he had to be in a hurry all that day because he had to run both ends, as Jackson was away, he does not testify that he was so hurried as to prevent him from inspecting the car before starting down the hill with it. He does not testify that he was acting at the time under any emergency requiring him to dispense with the inspection of the cars by reason of the double duty the defendant had imposed on him. The evidence leaves the mind in equal doubt as to whether the plaintiff inspected or did not inspect the car, or as to whether the falling down of the brake was or was not simply an accident incidental to the business.

In instruction No. 1 the court should not have told the jury that it was the duty of the defendant to furnish Jones appliances that were reasonably safe; but he should have told them that it was its duty to use ordinary care to furnish appliances that

were reasonably safe. While this language is used in some opinions, it has always been used where ordinary care would furnish an appliance that would be reasonably safe; but railroad cars sometimes will not be reasonably safe, although ordinary care has been used. In addition to this, the gist of this action is not the furnishing of an unsafe car. The coal company did not furnish the car. The gist of the action is that the coal company did not furnish Jones reasonable assistance, and required him to do the work in a way that was not reasonably safe. This is the cause of action set out in the petition. The instruction of the court does not follow the cause of action set out in the petition, or attempted to be shown by the evidence. For the same reason instruction No. 5 should not have been given. Instruction No. 4 is as follows: "The court instructs the jury that as a matter of law, when a servant enters in the employ of a master, he assumes the risk ordinarily incident to his employment; but, in the absence of an agreement to do so, he is not bound to inspect machinery with which he works." All that part of the instruction following the word "but" should have been omitted. Instruction No. 6 is as follows: "If the jury further believe from the evidence that it was the duty of the plaintiff to inspect the cars before using them, and he failed to do so, or did it in a negligent or careless manner, then the plaintiff cannot recover unless the jury believe from the evidence that the plaintiff was acting at the time under the direct orders of a superior servant, and was prevented from making an inspection of the cars by the orders of a superior servant of the defendant." There was nothing in the evidence to warrant the giving of that part of this instruction following the word "unless." If it had appeared from the evidence that, when the bank boss told Jones to run both ends that day, he had told the bank boss that this would leave him no time to inspect the cars and the bank boss had told him to go on for that day and run both ends anyhow, then an instruction of this sort might be proper, but the evidence did not show anything of this sort.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

BOWMAN v. STRAIGHT CREEK COAL & COKE CO.

(Court of Appeals of Kentucky. April 28, 1909.)

JUDGMENT (§ 143*) — DEFAULT JUDGMENT — SETTING ASIDE — GROUNDS.

When a case was called for trial on April 30th, the court gave judgment for plaintiff, subject to be set aside if defendant presented a defense within three weeks thereafter. On May 21st defendant tendered an answer, presenting both a defense and counterclaim and supported by affidavits. The answer and exhibits also dis-

closed that the preparation of the answer required the examination of a great many papers, books, and accounts. *Held*, that it was error to refuse to set aside the judgment and to reject the answer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269-291; Dec. Dig. § 143.*]

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action by the Straight Creek Coal & Coke Company against R. L. Bowman. From a judgment for plaintiff, and from an order refusing to set the judgment aside and to permit defendant to file an answer, he appeals. Reversed, with directions.

Cook & Jones and Hazelrigg & Hazelrigg, for appellant. Wm. Ayres, for appellee.

CARROLL, J. On March 16, 1908, the appellant executed to the appellee a note for \$3,172.63, payable one day after date. To secure the payment of this note appellant pledged 80 shares of stock in the Pineville Electric Light, Power & Ice Company. On April 8, 1908, the appellee brought suit on the note, and in due time appellant was summoned to appear at the April term, which commenced on April 27th. On April 30th judgment was rendered by default and an order entered directing a sale of the stock to satisfy the note. During the term, and on May 21st, the appellant tendered an answer and counterclaim, supported by affidavit, and moved the court to set aside the judgment and allow the tendered pleading to be filed. The court overruled the motion, and this appeal is prosecuted from the judgment on the note, as well as the order refusing to set aside the judgment and permit the pleading to be filed.

We express no opinion concerning the answer and counterclaim, except to say that it contained matter presenting both a defense and counterclaim. The only question we are concerned with is whether the court should have set aside the judgment and allowed this pleading to be filed. The answer and affidavit, in addition to setting out the reasons why an answer was not filed when the case was called for trial, contained the following uncontradicted statement: "And at the beginning of the present term his counsel sought to obtain an agreement with counsel for the plaintiff, appellee, whereby he could have at least 15 days' further time to answer; and, failing to get this agreement, on the calling of this case on the fourth day of the present term, he appealed to the court for such time to answer. Whereupon the court announced that judgment might go in favor of plaintiff, subject to be set aside if defendant presented a defense within three weeks thereafter; that his attorneys had been devoting most of their time since then to the preparation of said answer, barring such time as his attorney was called away to London and Monticello, covering

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

about one week, to look about litigation that imperatively demanded the attention of said attorney."

In view of this statement and the further fact that the answer and exhibits disclosed that it was necessary that a great many papers, books, and accounts should be examined in preparing the answer, we think the court erred in refusing to set aside the judgment and in rejecting the tendered pleading.

Wherefore the judgment is reversed, with directions to the lower court to set aside the judgment and allow the answer and counterclaim to be filed.

BARKER, J., not sitting.

FANTZ v. STEINMETZ.

(Court of Appeals of Kentucky. April 27, 1909.)

1. WILLS (§ 693*)—CONSTRUCTION—POWER TO DISPOSE OF PROPERTY.

By will testator gave his widow for life or during her widowhood the whole of his real estate with power to sell any of it for reinvestment or for the support of herself and children, and authorized her to make advancements to the children to the extent of one-third of their legal share, and provided that there should be no division of the real estate until the marriage of the widow and all the children of testator should become 21 years of age. *Held*, that the widow had power after the children had all become of age, though she had not married, to partition some of the real estate among the children if she deemed that course to be for the best interest of herself and children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655-1657; Dec. Dig. § 693.*]

2. WILLS (§ 693*)—CONSTRUCTION—POWER TO DISPOSE OF PROPERTY.

The will further providing that "in the division of my estate all my children shall receive an equal share, and if any one of them should die before said division takes place and leaves children, said children shall be entitled to the share of their parent," testator's grandchildren could not complain of a partition by the widow among testator's children when the latter all became of age, as in that case the grandchildren could not take under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655-1657; Dec. Dig. § 693.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action for specific performance by Conrad Steinmetz against Fred J. Fantz. From a judgment for plaintiff, defendant appeals. Affirmed.

L. Frank Withers, for appellant. L. A. Hickman, for appellee.

SETTLE, C. J. This appeal presents for consideration the question whether a deed tendered appellant by appellee, and purporting to convey a lot 22 by 150 feet fronting on Logan street near Breckenridge, in the city of Louisville, will pass to the former a

good and merchantable title to the lot. The written contract of sale particularly describes the lot, sets forth its purchase by appellant at the price of \$600, his promise to pay that amount upon the delivery of a deed conveying a good title, and the undertaking of appellee to make him such a deed. The deed was duly executed by appellee and tendered appellant, but the latter refused to accept it on the ground that it would not pass to him a good title. The nonacceptance of the deed was followed by the bringing of this action by appellee for a specific performance of the contract; the petition setting forth the essential facts and questions of law appertaining to the rights of the parties. A demurrer was filed by appellant to the petition, which the court overruled. Appellant stood upon the demurrer and refused to plead further. The court then entered judgment granting the relief prayed in the petition, and of that judgment appellant complains.

The lot in controversy formerly belonged to Henry Krupp, who died in 1890, the owner of considerable real estate in the city of Louisville. Krupp left a will by which he devised his entire estate to his wife for life or during her widowhood, with remainder to his children, of whom there were and are eight, all now adults. The widow, now 80 years of age, is still living, and has never remarried. In 1906 the widow made partition of some of the real estate left by the testator, the lot in controversy being allotted to Rosa Krupp, an unmarried daughter. Rosa received a deed thereto in which her mother, brothers, and sisters, the wives of the former and husbands of the latter, all united. Later she sold and conveyed the lot to John Kirchdofer, who thereafter sold, and with his wife, conveyed, it to appellee.

It is conceded by the parties to the appeal that the question of whether appellant will receive a good title to the lot in question by the deed appellee tendered him depends upon whether the widow of Henry Krupp had the power under his will to partition the real estate devised. Appellant denies that the will confers upon her such power. The following clauses of the will appear in the record, viz.:

"(3) After the payment of all my just debts, I will, bequeath and devise the rest of all my property real and personal, and mixed, wherever it be situated, to my beloved wife, Francisca Krupp, to hold, use and enjoy the same during her natural life or widowhood, but it is my will and desire that she will give all our children a proper education and support the same until they become of age or marry.

"(4) I give and grant to my said wife full power and authority to sell and convey any and all of my real estate, if she deems it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

proper to do so, and to reinvest the proceeds in real estate or other property to be held in the same manner as that sold or to use the proceeds to her own support or to the support and education of our children, if such is necessary.

"(5) No division of my estate shall take place during the life of my said wife as long as she remains my widow, and in case my wife should die before my youngest child becomes of age, or if she should marry again my estate shall not be divided before my youngest child becomes of age.

"(6) If my wife deems it proper to make advancements to any of my children she may do so to the extent of one-third of their legal share, but such advancements shall be charged against them as part of their claim in the division of my estate.

"(7) In the division of my estate all of my children shall receive an equal share, and if any one of them should die before said division takes place and leaves children, said children shall be entitled to the share of their parent.

"(8) If my wife should marry again, all power and authority given to her by this instrument shall cease and the court shall appoint a proper guardian for my children and a proper administrator of my estate, in this case one-fifth of my whole estate shall be allotted to her to belong to her absolutely in lieu of dower or any other claim against my estate.

"(9) The shares of my estate which will come to any of my daughters shall belong to them as their private property free from the claim and control of their future husbands not subject to any of the debts of their husbands.

"(10) I appoint my wife, Francisca Krupp, executrix of this my last will and testament and desire that no bond or security shall be requested of her as such."

By the third, fourth, and sixth clauses of the will the testator gives his widow for life or during her widowhood the whole of his real estate, the power to sell and convey any of it for reinvestment and for the support of herself and children and the education of the latter, and also the power to make advancements to the children to the extent of one-third of their legal shares, respectively.

It is unnecessary to determine whether the lot in question was conveyed Rosa Krupp by way of advancement. It is not so claimed in the petition, or therein averred that when conveyed her it did not exceed in value one-third of her interest in the entire estate. It is true the deed of partition refers to the lot as an advancement, but it does not state its value, or say whether it is of greater or less value than one-third of what Rosa will be entitled to from the estate. So, in view of the condition of the record, we cannot rest the partition or conveyance of the lot to her on the ground that

it was authorized by the sixth clause of the will which confers upon the widow the power to make advancements to the children. Nor are we prepared to say that a mere general power given the widow by a will to sell the real estate for reinvestment necessarily confers the power to make partition, though such seems to be the view of the law stated in 18 Am. & Eng. Ency. of Law (1st Ed.) p. 940, and also by the Supreme Court in *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855. This court does not seem to have passed on the precise question here presented; so, in determining it, we must rely upon recognized rules of construction as applied to wills, keeping in view the importance of ascertaining the intention of the testator.

Clause 5 of the will provides that there shall be no division of the testator's real estate until two events happen: (1) The marriage of his widow; (2) when all the testator's children become 21 years of age. It is insisted for appellant that another thing was also necessary—that is, the death of the widow—but we incline to the opinion that it was the testator's intention that his widow's life or death should make no difference as to when the division should take place. In other words, we think it was his intention to prevent a division as long as his wife was a widow and might desire to postpone it, so that she might have the control of the whole estate and the benefit of the entire income. At the time of the partition one of the events provided for by the will had happened, the youngest child had reached the age of 21, though the widow was still unmarried. She was then 78 and is now 80 years of age. Having lived a widow 18 years and reached that age, there is little room for doubt that she will remain a widow until she dies. It is true, as contended by appellant, that clause 5 of the will declares that partition shall not be made as long as the testator's wife remains a widow, but other clauses of the will must be read in connection with that clause and the intention of the testator gathered from the will as a whole. Other clauses of the will, especially the third and fourth, show the testator's solicitude for both wife and children and charge the estate with their support, and the fourth clause confers upon the former full power to sell the real estate for the support of herself and children and the education of the latter; the whole matter being left to her discretion. The deed of partition, according to its express declarations, was made for the purpose of providing for the support of the widow and children; and who but the widow was to judge of the necessity of the partition for that purpose? Being invested by the will with the sole discretion and made the only judge in the matter, we will not assume, in the absence of a showing to the contrary, that the recitals of the deed which recaved her sanc-

tion are untrue, or that the partition was not necessary for the support of herself and children when she therein declared it was.

But whether a division of the real estate as here made was, strictly speaking, an application of it to the support of the testator's widow and children in the meaning of the will, is not so material after all. We are convinced that the restriction that the division should not take place during the widowhood of the testator's wife was intended for her protection and to secure to her absolute control of the property, as well as the right to decide for herself whether it was to her best interest to do away with the restriction. If it was for her protection alone, and she waived the restriction and had the right to do so, others cannot complain of the act, and she would be estopped to do so. It is insisted, however, for appellant, that the grandchildren of the testator have an interest as contingent remaindermen in the real estate devised by the will, clause 7 of which provides: "In the division of my estate all my children shall receive an equal share, and if any one of them should die before said division takes place and leaves children, said children should be entitled to the share of their parent." If, as we have indicated, it was the intention of the testator in imposing the restriction upon the division of the realty to better protect the widow in the absolute control thereof, and yet permit her to make such disposition of it as she might deem necessary for the support of herself and children, including the right to partition it and her decision that such partition was necessary when made is conclusive as to the other devisees, it follows that none of the testator's grandchildren can complain of the division; for their parents, the testator's children, were all living when the real estate was partitioned. Therefore the grandchildren can take nothing under the will.

The judgment of the circuit court, being in accord with the conclusion we have expressed, is hereby affirmed.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT v. HERNDON'S ADM'R
et al.

(Court of Appeals of Kentucky. April 30, 1909.)

1. APPEAL AND ERROR (§ 78*)—FINAL ORDER—ABATEMENT OF ACTION.

An order reciting that the case had been heard on plaintiff's motion to have its amended petition treated as a petition, and that the action stand on such petition as an original action, and the court, being sufficiently advised, overruled the motion, and, plaintiff declining to proceed further, it was adjudged that the action be abated, was in effect a final order of dismissal, and was appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 471; Dec. Dig. § 78.*]

2. TAXATION (§ 643*)—LIEN FOR TAXES—ENFORCEMENT.

In a suit to enforce a lien for taxes, a claim of lien for additional taxes for a subsequent year on the same land was properly set up by amended petition, as authorized by Civ. Code Prac. § 694, subsec. 3.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1308; Dec. Dig. § 643.*]

3. ABATEMENT AND REVIVAL (§ 58*) — NEW CAUSE OF ACTION—AMENDED PETITION.

Suit having been instituted in December, 1901, to enforce a tax lien, no further action was taken until December 5, 1904, when defendant demurred. The record was lost, and defendant died in January, 1905, after which the record was supplied in 1906, and attempts made to revive the action. In December, 1906, an amended petition was filed, setting up a lien for additional taxes for 1902, on which process was issued and served on the personal representatives of the original defendant. *Held*, that the amended petition set up a new cause of action, and hence the abatement of the original cause of action would not abate the action pleaded by the amendment.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 298; Dec. Dig. § 58.*]

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by the Board of Councilmen of the City of Frankfort against Hallie Herndon's administrator and others. From an order abating the action, plaintiff appeals. Reversed and remanded.

Wm. Cromwell, for appellant. John W. Ray, for appellees.

CLAY, C. On December 31, 1901, the board of councilmen of the city of Frankfort instituted an action in the Franklin circuit court to enforce a lien of the city of Frankfort for taxes on a lot of ground owned by Miss Hallie Herndon for the years 1897 and 1898. This action was filed just a few days before the statute of limitations would have barred the claim of the city for the year 1897. No action was taken in the case until September 5, 1904, when the defendant filed a demurrer to the petition. The record was lost, and the defendant died in January, 1905. The record was supplied under an order of the court in the year 1906. Thereafter an attempt was made to revive the action against the administrator, and after the expiration of 12 months from the appointment and qualification of the administrator an attempt was made to revive it against defendant's real representatives. On December 27, 1906, appellant filed in the clerk's office of the Franklin circuit court an amended petition, setting up a lien for additional taxes for the year 1902. This amended petition was filed a short time before the statute of limitations would have barred the claim. Process was issued upon the amended petition and served upon the personal and real representatives of the

original defendant, Hallie Herndon, but not ten days before the first day of the January term, 1907. At this term of the court appellees moved that the action abate for the want of revivor in proper time. At the same time appellant moved that its amended petition, filed on December 27, 1906, be considered as an original petition. At its September term, 1908, the court overruled appellant's motion and ordered that the action be abated. From this order this appeal is prosecuted.

The first question presented is whether or not the order appealed from is a final order. The order appealed from is as follows: "This cause having been heard upon the motion made by plaintiff that its amended petition be treated and considered as a petition, and that said action proceed on said petition as an original action, and the court, being sufficiently advised as to the matters of law arising thereon, overruled said motion; and, plaintiff declining to plead further, it is adjudged that the action be abated, to all of which plaintiff excepted, and prays an appeal to the Court of Appeals, which is granted." It is manifest that this order not only overrules the motion of plaintiff to have its amended petition treated and considered as a petition, but directs that the action itself be abated. The effect of the order is the same as if it directed that the amended petition be dismissed. By this order appellant was out of court. It could take no further steps in the court below so far as the present action was concerned. We therefore conclude that the order appealed from was a final order.

As to the main question, it is the contention of counsel for appellees that the abatement of the original action carried with it the abatement of every proceeding that was a part of that action. The amendment in question, however, was not made for the purpose of strengthening the original petition; in fact, it presented an entirely different cause of action. It attempted to set forth a lien for taxes for years other than those embraced in the original cause of action. It derived no support from the original petition, nor did it add any strength to that petition. Inasmuch as the lien sought to be enforced was a lien upon the same property involved in the original action, it was entirely proper that the lien should be set up in the same action by amended petition; indeed, that is the method pointed out by the Code (subsection 3, § 694, Civ. Code Prac.). Had no process been served upon decedent's administrator and her heirs, a different question would be presented. In the case before us, however, the cause of action arising upon the amended petition, taken in connection with the service of process upon the parties in interest, has in it all the elements of an original action. The effect of the amended

petition being the same as if it were an original petition, we think it would be taking entirely too narrow a view of the question to hold that the amended petition should abate, along with the original action, merely because the subsequent action was instituted by way of amended, instead of original, petition. Whether or not the action represented by the amended petition should abate should depend entirely upon whether or not it was in effect a new action, and not upon the fact that the pleading by which it was instituted was denominated an amended petition. Tested by this rule, the trial court should have directed that the amended petition be treated as an original action, and erred in dismissing the amended petition along with the original action.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

MILLER'S ADM'R v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. April 28, 1909.)

1. RAILROADS (§ 370*)—INJURIES TO PERSON ON TRACK—CARE REQUIRED.

The rule that where the public generally, with the acquiescence of a railroad company, has continuously used the tracks for a long time, the presence of persons on the track must be anticipated by the company in running its trains, so that as to such persons it must give warning and keep a lookout, is confined to cities and thickly populated communities.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1265; Dec. Dig. § 370.*]

2. RAILROADS (§§ 355, 365, 369, 376*)—TRESPASSERS ON TRACK—CARE REQUIRED.

A pedestrian on a railroad track going from the depot to a town of 160 inhabitants 1,200 feet away is a trespasser, and the company does not owe to him the duty of keeping a lookout, of having the train under a reasonable control, and of giving timely warning of the approach of the train, but must exercise ordinary care to prevent injuring him after actually discovering his peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220-1279; Dec. Dig. §§ 355, 365, 369, 376.*]

3. RAILROADS (§ 377*)—TRESPASSERS—CARE REQUIRED.

Trainmen may presume that a trespasser on the track will hear the repeated whistles, and will heed the same, and get off the track, until it becomes reasonably apparent that he is oblivious of the approach of the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1280; Dec. Dig. § 377.*]

4. RAILROADS (§ 376*)—INJURIES TO TRESPASSERS—NEGLIGENCE.

Where, in an action for the death of a person struck by a train, the evidence showed that decedent was a trespasser, and that he was so deaf that he could not hear the signals, and that after his presence on the track was discovered the brakes were applied, the engine reversed, and repeated blasts of the whistle sounded until he was struck, the evidence failed to show actionable negligence, though there was no proof that the engine bell was rung.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1279; Dec. Dig. § 376.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by J. L. Miller's administrator against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

G. B. Likens, for appellant. H. P. Taylor, Blewitt Lee, and Trabue, Doolan & Cox, for appellee.

CLAY, C. This action was instituted by J. W. Miller, as administrator of Joseph L. Miller, deceased, against the appellee, Illinois Central Railroad Company, to recover damages growing out of the death of his intestate. At the conclusion of the plaintiff's testimony, the railroad company asked for a peremptory instruction. This was refused. At the conclusion of all the testimony the motion for a peremptory instruction was renewed, and sustained. Judgment was then entered in favor of appellee. From that judgment, this appeal is prosecuted.

The record discloses the following facts: Horse Branch, in Ohio county, Ky., is a town of the sixth class, and has about 160 inhabitants. Appellee owns and operates a line of railroad through the town. It also operates a branch line extending from the main line at Horse Branch to Owensboro. Appellee's depot is located about 1,200 feet east of the town limits. On January 22, 1908, appellant's intestate, Joseph L. Miller, arrived at Horse Branch depot on appellee's east-bound train, which arrived at about 12:55 a. m. About an hour later he was struck and killed by appellee's freight train No. 151. Besides the track on which appellant's intestate was struck, appellee had three other tracks: One known as the "Horse Branch" track, another the "business" track, and the third "the siding." The point at which the accident occurred was not within the limits of the town of Horse Branch, but was at a point 40 feet east of the town limits. The accident did not occur on a public road or street. Appellee's tracks, as they approach the depot and for 400 or 500 feet beyond it, have a considerable curve. The depot is about 1,200 feet from the place of the accident. The distance of the place of accident from the point where the track begins to curve around the depot is 767 feet; that is, the track is straight for about that distance. As the train which struck decedent approached Horse Branch, it whistled for the semaphore and received the board. It answered the board by two short blasts of the whistle. As it rounded the curve onto the straight track, it whistled certain signals to one or more trains standing on the side tracks. At that time there were three other trains on tracks other than that upon which appellant's intestate was killed. There were also some box or storage cars upon these tracks. While the decedent might have been seen from the depot if all the tracks were clear, it is certain from the evidence

that the trains and cars upon the track obstructed the view of the engineer and fireman of the train until the straight track was reached. There was some testimony to the effect that the decedent had been loitering around the place of the accident a few minutes prior to the time he was killed. According to the testimony of the engineer and fireman in charge of the train that killed decedent, and of the only eyewitness who testified for plaintiff, the engineer, immediately upon reaching the straight track, gave the alarm signal, applied the brakes, reversed the engine, and continued to signal by repeated blasts of the whistle until decedent was killed. According to the testimony of an engineer who was in charge of an engine upon a side track, the decedent hesitated as if undecided whether to go to one side or the other side of the track. He was then struck and killed. The decedent was quite deaf. One witness testified that he had to write in order to talk to people, although witness claimed that decedent could hear a loud noise. The repeated blasts blown by the engineer were heard by witness as located some distance from the place of the accident. The train causing the injury consisted of 26 cars. It ran 43 car lengths after the engineer discovered decedent's position. Its speed at the time was about 40 miles per hour.

There was proof to the effect that there was some travel along appellee's tracks between Horse Branch and the depot; that passengers from Horse Branch in going to and from the depot, instead of using the road provided for that purpose by the railroad company, would use appellee's tracks. It is therefore insisted by counsel for appellant that this customary use of appellee's tracks imposed upon it the duty of keeping a lookout, of having its trains under reasonable control, and of giving timely warning of the approach of its trains. In discussing when and under what circumstances such duties are imposed upon railroad companies this court, in the recent case of *Chesapeake & Ohio Railway Co. v. Nipp's Adm'r*, 125 Ky. 49, 100 S. W. 246, uses the following language: "It has been ruled by this court that, where the public generally with the knowledge and acquiescence of the railroad company have continually used the tracks for a long period of time, the presence of persons on the track at the point where it is so used must be anticipated by the company in running its trains, and it owes to persons thus habitually using its right of way the duty of giving warning and keeping a lookout. *Davis v. L. H. & St. L. R. Co.*, 122 Ky. 528, 92 S. W. 339, 5 L. R. A. (N. S.) 458, 121 Am. St. Rep. 481; *McCabe v. Maysville & Big Sandy R. R. Co. (Ky.)* 89 S. W. 683; *L. & N. R. R. Co. v. Redmon*, 122 Ky. 385, 91 S. W. 722. But the operation of this rule has been confined to cities and thickly populated communities, and has

not been and will not be extended to rural communities or sparsely settled regions, although footpaths crossing the track and the right of way may be used by a large number of persons each day. In the country districts traversed by lines of railway it is no uncommon thing for numbers of persons in going to public places, such as schoolhouses, churches, stores, and the like, to use paths or ways that cross the railroad tracks, but that are not private or farm crossings, and also to travel upon the right of way and tracks of the company. It may be also conceded that these persons use the right of way and tracks of the company with its acquiescence in the sense that it does not interfere with their use, or take steps to prevent it; but this use by individuals of the tracks and right of way of railroad companies in places of this character does not convert them from trespassers into licensees, nor does it impose upon the company any duty of lookout or warning. Persons who thus use the tracks and right of way do so at their peril. They are trespassing upon dangerous premises, and assume the risk of any accident that may befall them by passing trains. *Gregory v. L. & N. R. R. Co.* (Ky.) 79 S. W. 238; *C. & O. Ry. Co. v. See* (Ky.) 79 S. W. 252; *Brown v. L. & N. R. R. Co.*, 97 Ky. 228, 30 S. W. 639; *C. & O. R. R. Co. v. Perkins* (Ky.) 47 S. W. 259; *Wilmuth's Adm'r v. Illinois Central R. R. Co.* (Ky.) 76 S. W. 193; *L. & N. R. R. Co. v. Redmon*, 122 Ky. 385, 91 S. W. 722. The same distinction is also pointed out in the case of *Illinois Central Railroad Co. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729, 11 L. R. A. (N. S.) 352. This is one of the cases upon which appellant relies. The accident in this case did not occur at a public crossing; nor did it occur within an incorporated town. It is therefore governed by the rule applying to injuries inflicted upon persons walking along railroad tracks in or near villages or sparsely settled hamlets. In such cases the party injured or killed is treated simply as a trespasser, to whom there is owing no duty except to use ordinary care to avoid injuring him after his peril is discovered. *L. & St. L. Ry. Co. v. Jolly* (Ky.) 90 S. W. 977; *Smith v. I. C. R. R. Co.* (Ky.) 90 S. W. 254; *L. & St. L. Ry. Co. v. Hathaway*, 121 Ky. 668, 89 S. W. 724, 2 L. R. A. (N. S.) 498; *M. & O. R. R. Co. v. Dowdy* (Ky.) 91 S. W. 709; *L. & N. R. R. Co. v. Redmon*, 122 Ky. 385, 91 S. W. 722.

As appellee did not owe to the decedent the duty of keeping a lookout, of having the train under reasonable control, and of giving timely warning of the approach of the train, the only question involved in this case is whether or not those in charge of the train used ordinary care to prevent injuring the decedent after his peril was actually discov-

ered. It is insisted that the fact that the engineer saw the decedent when he was 1,200 feet away, and the train after striking the decedent ran its full length, was evidence of the fact that those in charge of the train failed to exercise ordinary care to stop it after seeing decedent on the track. As stated above, however, there is nothing in the record to show that decedent's peril was discovered until the straight track was reached. The train was then 767 feet distant. Furthermore, those in charge of the train had a right to presume that the decedent would hear the repeated blasts of the whistle, and would heed them and get off the track, until it became reasonably apparent from his manner that he was oblivious of the approach of the train. The undisputed evidence shows that after decedent's presence upon the track was discovered the brakes were applied, the engine reversed, and that repeated blasts of the whistle were sounded until decedent was struck. It is true there was no proof that the bell was rung; but it is manifest that, if the decedent could not have heard the louder and more effective signals resulting from the blasts of the whistle, he could not have heard the ringing of the bell. This fact under the circumstances of this case did not constitute negligence.

A careful reading of the entire record convinces us that the unfortunate accident resulting in the death of decedent was due, not to any negligence upon the part of the railroad company, but to his own deafness which prevented him from hearing the signals, which would have been heard by any one not suffering from the same affliction. We therefore conclude that the peremptory instruction in favor of appellee was proper.

Judgment affirmed.

KENTUCKY COAL MINING CO. v. MATTINGLY.

(Court of Appeals of Kentucky. April 27, 1909.)

1. PLEADING (§ 121*)—DENIAL—SUFFICIENCY.

A denial of knowledge or information sufficient to form a belief is not a good plea as to the facts within defendant's knowledge.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 245; Dec. Dig. § 121.*]

2. BILLS AND NOTES (§ 493*)—CONSIDERATION—PRESUMPTIONS.

Metal checks issued to employes, by which the employer promises to pay a certain amount to redeem the same, are presumed, in the hands of holders for value, to be based on an adequate consideration.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1852, 1853; Dec. Dig. § 493.*]

3. MASTER AND SERVANT (§ 79*)—COMPENSATION—MEDIUM OF PAYMENT.

The redemption by the employer at bimonthly pay days of checks issued to employes for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

services at a reduction of 10 per cent. of their face value is a violation of Const. § 244, providing that all wage earners employed in this state in factories, mines, workshops, or by corporations shall be paid for their labor in lawful money.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 104; Dec. Dig. § 79.*]

4 USURY (§ 26*)—REDEMPTION OF OBLIGATIONS AT DISCOUNT.

The redemption by the employer at bi-monthly pay days of checks issued to employees for services at a reduction of 10 per cent. of their face value is a violation of the usury law. Ky. St. 1909, § 2219 (Russell's St. § 1815).

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 57; Dec. Dig. § 26.*]

Appeal from Circuit Court, Union County.

"To be officially reported."

Action by Ben J. Mattingly against the Kentucky Coal Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Drury & Drury, for appellant. L. O. Flournoy, for appellee.

HOBSON, J. The Kentucky Coal Mining Company issues to its miners aluminum checks stamped on one side "Kentucky Coal Mining Company," and on the other side, "Good for one dollar in merchandise." It issues similar checks for 50, 25, 10, and 5 cents. Ben J. Mattingly became the owner of these checks for value to the amount of \$235.65, and, the company declining to pay them, he brought this suit to recover the amount. A trial was had upon which the following agreement of facts was filed:

"That defendant is a corporation operating a coal mine at Waverly, and pays its laborers at the times required by law. Further, that frequently its laborers make application to it in advance of pay day for assistance, and that it did upon such application issue to said laborers aluminum checks or coins marked '100,' '50,' etc., and at the time of the issue of said checks or coins it agreed upon pay day to redeem same at their value, which it was agreed was as follows: A check marked '100' was good for 90 cents; a check marked '50' was good for 45 cents; a check marked '25' was good for 22½ cents; a check marked '10' was good for 9 cents; and a check marked '5' was good for 4½ cents. No checks were ever issued to pay wages that were due, and often checks were issued when nothing had been earned. For such checks the laborers were charged as follows: For check marked '100' they were charged \$1; for check marked '50' they were charged 50 cents; for check marked '25' they were charged 25 cents; for check marked '10' they were charged 10 cents; for check marked '5' they were charged 5 cents. The defendant had an arrangement with several merchants in Waverly for the redemption of such checks at the agreed value for which it redeemed same from the miners. It had no such

agreement with Mattingly. The checks offered by Mattingly are of the type and kind issued by defendant. For such coins the defendant paid the following sums on pay day. For the coin marked '\$1' it paid 90 cents; for the coin marked '50' it paid 45 cents; for the coin marked '25' it paid 22½ cents; for the coin marked '10' it paid 9 cents; and for the coin marked '5' it paid 4½ cents; all in money. Plaintiff demanded payment of these checks both in merchandise and in money, and payment was refused, except upon the terms stated just above, and that this would only be paid him provided he would deposit these checks on either the 1st or 15th of the month, and the defendant would pay these checks upon the above terms on the following pay day. The company redeemed all checks on same terms, whether same were presented by the merchant or the miner to whom they were issued. Coins represented in the majority of cases actual value of labor done or to be done frequently issued when no work had been done and often as pure charity; that is to say, sometimes a miner would come in and could not get board and the company would advance aluminum checks. Often men left and the company would get no return. Not more than \$25 or so was so issued. Sometimes miners overdrew and quit company. All checks issued company expected to redeem at 90 cents on the dollar, the 10 cents to pay for bookkeeping and profit and loss.

"It is further agreed: That checks or coins similar to those sued on in this case were issued by defendant company to its miners from time to time, and that same passed current in the town of Waverly where the defendant's mine was located, and were redeemed by defendant company from any holder at the prices stated in the first part hereof, and that plaintiff Mattingly is now the holder for value of the checks or coins sued on and made part of his petition. That it is impossible to say or ascertain to whom defendant issued and delivered the checks sued on herein. It is further agreed that the plaintiff, Mattingly, is not a miner and has never been so, and has never been in the employment of the defendant, but has gone into the open market, and has bought the coins sued on at a discount for a speculation, and for the purpose of testing the question of the right of the defendant to issue such coins to its miners as aforesaid. Plaintiff bought these coins from the Waverly Mercantile Company, and that company had gotten these coins in the usual course of trade, and got the most of them from a butcher in Waverly, and the butcher, in turn, from the sale of meat to the employees of the defendant or their families, and possibly some of them from other parties as such coins passed current generally all over the

town of Waverly with the knowledge of the defendant.

"After issue and after passing into the channels of trade, the identity of the coin is lost."

The defendant's answer contained, among other things, the following: "The defendant says it has no knowledge or information sufficient to form a belief as to whether or not it ever issued the checks sued on and described in plaintiff's petition, or that same were ever delivered by defendant to any employé or that they represented the true value of the labor performed, or that plaintiff is now the owner of any of said checks or coins for value, or that the face value of these represents two hundred and thirty-five dollars and sixty-five cents (\$235.65) or any other sum."

The rule is that a denial of knowledge or information sufficient to form a belief is not good as to facts within the defendant's knowledge. The defendant is presumed to know its own checks, and it cannot require the plaintiff to prove the genuineness of a check when it is unwilling to say the check is not genuine. For the same reason this allegation is insufficient as to the delivery of the checks to an employé. The checks are a promise in writing to pay, and the law presumes they were based on an adequate consideration. The agreed facts show that the plaintiff was the holder for value of the checks sued on.

This brings us to the real question in the case: Has the defendant a right to a deduction of 10 per cent. from the face of the checks? Section 244 of the Constitution is as follows: "All wage earners employed in this state in factories, mines, workshops or by corporations shall be paid for their labor in lawful money. The General Assembly shall prescribe adequate penalties for violations of this section." Under this section the defendant may lawfully issue checks to its miners to show what it owes them, but these checks must at the next bimonthly pay day be paid at their face value; otherwise, the miners will not be paid for their labor in lawful money, but will be scaled one-tenth of their earnings because a check was issued to them. Section 2219, Ky. St. (Russell's St. § 1815), provides: "All contracts and assurances made, directly or indirectly, for the loan or forbearance of money, or other thing of value, at a greater rate than legal interest, shall be void for the excess over the legal interest." The company did not lend its men any money. Its lending its credit to them until the next bimonthly pay day in consideration of a deduction of 10 per cent. from their wages was a contract the law will not sanction or enforce. If such contracts were upheld, our usury laws would be vain and useless; for they could in this

way be evaded without the lender being out of his money at all.

We are therefore of opinion that the circuit court on the agreed facts properly entered judgment for the plaintiff.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. PAYNE.

(Court of Appeals of Kentucky. April 28, 1909.)

1. CARRIERS (§ 317*)—INJURIES TO PASSENGERS—EVIDENCE—ADMISSIBILITY.

Where, in an action for injuries to a passenger while alighting at a depot, the evidence showed that the approach of the train to the depot had been properly announced, and that the way from the train to the platform was lighted by a brakeman, evidence of the extent of the carrier's freight business, conducted at its freight depot on the other side of the track, and on the side that the passenger attempted to alight, was inadmissible, at least in the absence of evidence that the passenger knew of the existence of the freight depot, or that he had business to transact there.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 317.*]

2. CARRIERS (§ 286*) — DEPOTS — CARE REQUIRED.

A carrier must keep its depot platform and approaches thereto properly lighted, so as to permit passengers to pass safely to and from the train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1152; Dec. Dig. § 286.*]

3. CARRIERS (§ 317*)—INJURIES TO PASSENGERS—EVIDENCE—ADMISSIBILITY.

In an action for injuries to a passenger while alighting at a station, by the sudden starting of the train, evidence of negligent failure to properly light the depot was inadmissible.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 317.*]

4. WITNESSES (§ 37*)—COMPETENCY—KNOWLEDGE.

A witness coming to a town in the spring is incompetent to testify as to the manner and extent of the lighting by a carrier of its depot platform at the town during the summer before.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where the ground relied on for a recovery is the commission of a negligent act in one respect, it is prejudicial to permit evidence establishing another and different negligent act.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4166; Dec. Dig. § 1050.*]

6. TRIAL (§ 110*)—MISCONDUCT OF COUNSEL—REVERSIBLE ERROR.

Where counsel for the successful party persistently pursued a line of interrogation of witnesses which the court ruled to be wrong, and which one reasonably acquainted with the rules of evidence knew to be improper, and the course pursued was for the purpose of prejudicing the jury, the conduct of the counsel was reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 271; Dec. Dig. § 110.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. APPEAL AND ERROR (§ 1195*)—REVERSAL AND RETRIAL—LAW OF THE CASE.

Where instructions have been approved by the appellate court as the law of the case, only such instructions should be given on a retrial where the evidence on the retrial is the same as on the former trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

Appeal from Circuit Court, Marion County.
"To be officially reported."

Action by T. L. Payne against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Benjamin D. Warfield, William C. McChord, and William W. Spalding, for appellant. Hugh P. Cooper, for appellee.

LASSING, J. This is the second appeal of this case. The opinion on the former appeal is found in 104 S. W. 752. As the facts are fully stated in that opinion, they are not restated here. Upon the return of the case a trial was had, which resulted in a verdict for \$1,000 in favor of the plaintiff, and to reverse the judgment predicated on that verdict, this appeal is prosecuted.

Four grounds are relied upon for reversal: First, that the verdict is flagrantly against the evidence; second, that the court erred in admitting incompetent evidence; third, because of misconduct of plaintiff's counsel; and, fourth, for errors in instructing the jury.

We will consider these questions in their natural order. The incompetent evidence complained of as prejudicial is this: Plaintiff was permitted to prove, over the objection of defendant, the extent of its freight business, which was conducted at its freight depot on the south side of the main track; also that the local agent and his assistants had an office at the freight depot, where the freight business of defendant company was transacted. The evident purpose of this testimony was to establish in the plaintiff a right to alight from the train on that side rather than on the north side of the track, or rather to excuse him from being negligent in so doing. Plaintiff was a passenger, and, so far as the record shows, had no business to transact at the freight office, and no occasion to go there, for it does not appear that he knew of the existence of the freight depot on that side of the track. It was about 10 o'clock at night when the train reached the station, and the freight depot was then closed. The approach of the train to the depot had been properly announced, and the way from the train to the platform was lighted by the brakeman, who had a lantern to light the way if additional light was needed. This evidence did not tend in the least to throw any light upon the manner in which plaintiff was injured, and

could serve no purpose other than to confuse the minds of the jury.

Again, plaintiff introduced, over the objection of the defendant, evidence as to what lights were maintained at the depot. It is unquestionably the duty of the railroad company to keep its depot platform and approaches thereto properly lighted, so as to afford passengers an opportunity to pass safely to and from the train; and a failure to have the platform and the approaches thereto lighted would render the company liable in damages to one injured as a direct result of such neglect. But the negligence complained of and relied upon in this case was the sudden starting of the train; and, having specified the particular act of negligence relied upon, plaintiff cannot recover by showing other acts of negligence. No claim is made in the pleadings that the platform was not sufficiently lighted, or because of insufficient lights plaintiff could not see where or how to go, but the sole ground relied upon is that the train started with a sudden jerk, and threw him to the ground and under the wheels, to his injury. This evidence, not bearing upon the issue made by the pleadings, was incompetent, and should not have been admitted, and this is especially true as to the evidence of the witness Hagan, who testified that he did not come to Lebanon until in the spring of 1906, and, of course, could know nothing of the way and extent to which the platform was lighted in the summer of 1905, when the accident occurred. He knew nothing of how the platform was lighted at the time of the injury, and could not testify upon this point even if this character of testimony was permissible. All incompetent evidence is not prejudicial to such an extent as to warrant a reversal; but, where the ground relied upon for a recovery is the commission of a negligent act in one respect, it is prejudicial to permit evidence tending to establish another and different negligent act to go to the jury, for the jury would no doubt receive the evidence tending to establish the latter act as having some important bearing upon the act of negligence charged, and hence such evidence would be prejudicial.

The misconduct of counsel complained of in this case was the repeated asking of incompetent questions over the objection of counsel for defendant, and in the face of the rulings of the court that such questions were incompetent. Counsel for plaintiff attempted to establish that the servants in charge of defendant's trains on other occasions had been guilty of acts of negligence similar in character to that for which a recovery was sought in this case. This the court held to be incompetent; but, in spite of his ruling to this effect, counsel for plaintiff persisted in pursuing this line of interrogation almost

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to the point of exasperation. To each new question bearing upon the same subject counsel for defendant would object, and the objection was promptly sustained, and exception taken, and the question immediately asked in another form with the same result. These questions were incompetent, and the line of interrogation attempted to be pursued wholly improper; and, when the trial court had so decided and ruled, counsel for plaintiff should have desisted in his efforts to bring the matter before the jury. Of course a large discretion is allowed an attorney in presenting his case, and so long as it does not appear that he is knowingly and intentionally violating the rules of practice in the introduction of evidence, or otherwise, the fact that he does so will furnish no grounds of complaint to opposing counsel, where the error is corrected by the court; but in a case like that here presented, where counsel persistently pursues a line of interrogation which the court rules to be wrong, and which one reasonably well acquainted with the rules governing the admission of evidence must know to be improper, the conclusion is irresistible that it is done for the purpose of influencing and prejudicing the minds of the jury in arriving at a verdict. No court should countenance such conduct; and, when the trial judge, because of his kindness of heart, or long-suffering and forbearing nature, permits it to go unpunished, there remains nothing to do but deprive the one offending of the fruits of his victory thus earned. This case must be reversed for other reasons; but, if there were none such, this misconduct upon the part of plaintiff's counsel would furnish abundant grounds for reversal.

The rules of practice now recognized and approved by our court, and courts generally, are the result of ages of experience in the administration of justice. They are necessarily general in their nature and application, and subject to many exceptions, variations, and modifications, and so it is not to be expected that, in their practical application to individual cases, mistakes and errors will not be, at least occasionally, made by counsel. Such, in fact, may be expected; but, where corrected by the trial court, no ground of complaint exists because of such mistake. Since no one is infallible, and all are liable at times to be mistaken, and honestly so, in the exercise of the judgment as to what is competent to be proven in support of a given proposition, errors of this character will necessarily occur with more or less frequency, but such are errors of judgment; they are not of the class with which we are dealing. Where the record shows that an attorney persistently and dogmatically pursues a line of interrogation over the objection of opposing counsel and the adverse ruling of the court to the extent here shown, the conclusion is irresistible that such was not due to error of judgment, but in pursu-

ance of a determination to present the matters about which the questions are asked to the jury in spite of court and counsel. Such conduct should neither be tolerated nor excused by the trial court, and no litigant should be permitted to profit by such practice.

In the case of *L. & N. R. R. Co. v. Reaume* (Ky.) 107 S. W. 290, it was expressly held to be a reversible error to repeatedly and persistently ask incompetent questions. And in the case of *Marcum v. Hargis* (Ky.) 104 S. W. 693, this court held that, where a line of questions had been ruled to be incompetent, the trial court did not err in requiring counsel, before he would permit the question to be asked, to first submit it to him, not in the hearing of the jury, in order that he might determine its competency before he would permit it to be asked. The reason for the rule is apparent. Where an incompetent question is asked, opposing counsel must either permit it to be answered or enter his objection; and, although the trial court refuses to permit the question to be answered, the very fact that the same question in a different form is repeatedly asked, and a vigorous objection interposed to its answer, emphasizes its importance in the minds of the jury, and necessarily prejudices the case, and for this reason, if for no other, where this practice is pursued to the extent indicated in the record in this case, the judgment should be reversed.

Excluding from our consideration the evidence which we have held to be incompetent, there was no material difference between the evidence brought out on the last trial and that produced on the former trial. This being so, only the instructions which were approved as being the law of the case on the former trial should have been given. The court, however, in addition to such instructions, gave the two following additional instructions: "No. 7. If you believe from the evidence, that there was no platform opposite where plaintiff attempted to get off the train, or that there was as good a platform on the side where he did attempt to get off, and that he did not increase the danger of injury to himself in any way by attempting to get off on the right-hand side, you cannot find for the defendant under instruction No. 6. No. 7½. The mere fact that the plaintiff was intoxicated, if he was intoxicated, does not affect his right to recover in this case one way or the other, unless you believe from the evidence that by reason of his intoxication he failed to exercise such attention and care for his own safety as might be usually expected of a sober person of ordinary prudence under like circumstances." It has frequently been held that, where certain instructions have been approved as the law of the case, upon a retrial only such should be given, and it is error for the trial court to fail or refuse to

give those, or to give other or additional instructions. Of course, if the facts upon the retrial were different from those upon the former trial, the trial court would be justified in making the instructions conform to the facts. Such a condition, however, does not exist in the present case, and the trial court should not have given either instruction 7 or 7½.

As the case must be retried, we again refrain from passing upon the question as to whether or not the verdict is against the evidence; but, for the reasons indicated, the judgment is reversed, and the case remanded for another trial consistent herewith.

KEEN'S ADM'R v. KEYSTONE CRESCENT LUMBER CO.

(Court of Appeals of Kentucky. April 27, 1909.)

1. MASTER AND SERVANT (§ 88*)—INJURIES TO SERVANT—INDEPENDENT CONTRACTOR.

Defendant employed men to cut standing timber and haul the logs to a place where it had established a mill. The superintendent of the lumber camp left, and defendant hired another person with his mill and a fireman, paying for the mill and fireman a stipulated price a month and made the person foreman of the camp. The foreman hired decedent to fire a boiler which exploded and killed him. Held, that the foreman was not an independent contractor, and decedent was an employé of defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144-146; Dec. Dig. § 88.*]

2. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—FURNISHING DEFECTIVE APPLIANCES.

Where a master knows that machinery is defective, the servant continuing to work with knowledge of the defect is not precluded from recovery for injuries sustained therefrom, unless he had knowledge of the dangers likely to result from the further use of it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

3. MASTER AND SERVANT (§ 205*)—INJURY TO SERVANT—COMPLAINT TO MASTER OF DEFECTIVE APPLIANCE—ASSURANCE OF MASTER OF ABSENCE OF DANGER.

Where a servant, who was firing a defective boiler, drew the foreman's attention to escaping steam and was assured that there was no danger, he had a right to rely upon the assurance and continue at work; the danger not being so obvious that an ordinarily prudent person would have refused to perform the work under the circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

Appeal from Circuit Court, Pike County.
"Not to be officially reported."

Death action by Shade Keen's administrator against the Keystone Crescent Lumber Company. There was a directed verdict for defendant, and plaintiff appeals. Reversed and remanded.

N. J. Auxier and A. E. Auxier, for appellant.

NUNN, J. This action was instituted in the Pike circuit court September 14, 1907, seeking to recover \$2,000 in damages for the death of Shade Keen, which was caused by the explosion of a steam boiler in a sawmill operated by appellee company, and in which Keen was working at the time as fireman. At the conclusion of all the testimony the court gave a peremptory instruction to the jury to find for appellee.

It is shown by the pleadings and proof: That Keen had a very short experience in working about a sawmill, and had been firing only seven or eight days; that he was unacquainted with machinery; also, that the boiler which exploded had been in use over 20 years; that the dome on the boiler was cracked and had been for a month or two before the explosion; that the "stay bolts" within the dome stood upright and were fastened below and in the top of the dome to hold it; that for some cause they had decayed and were nearly severed, possibly by rust, at the time the explosion occurred. Appellee, by its answer, admitted that Shade Keen was its servant at the time he was killed, that there was a crack in the dome of the boiler, and that the steam escaped therefrom, but denied that the stay bolts were defective, and alleged that Keen knew of the escape of the steam through the crack in the dome, and that he took the risk of the dangers incident thereto. Appellant, by reply, admitted that Keen knew of the escape of the steam and of the crack in the dome, but alleged that he did not know of the dangers he was subject to in working about it, that he was assured by appellee's superintendent within two or three minutes before the explosion that there was no danger of an explosion and that it was safe for him to work at that place, and, relying upon this assurance, he continued his labor. The testimony of each party authorized all these allegations.

On August 24, 1908, appellee filed an amended answer withdrawing its original allegation and admission concerning the employment of Keen, and alleged that he was the employé of one Thacker and not its servant, that Thacker was an independent contractor operating the mill for himself, that appellee had no control over Keen, and that Thacker controlled him. These allegations were controverted, by agreement, of record. The facts with reference to this matter were, in substance, these: Appellee was the owner of a number of standing trees on a certain creek in Pike county and employed a lot of men to cut the trees and haul the logs to a certain point on the creek where it had established a mill to saw them into lumber of the kind and character fixed in bills furnished by it to the manager or

sawyer. One Barcus had been superintendent of this lumber camp, but for some reason left. Then it was appellee employed Thacker and his mill and a fireman for the price of \$100 per month, and made Thacker superintendent of the camp. Thacker was introduced by appellant as a witness, and he testified as follows: "I was to have \$100 a month for my mill and fireman, and I was to have pay for what work I did. They were to bear the expenses, keep up repairs of the mill. They put me in as foreman at the mill. They paid me \$3 per day for this." He also testified that he employed one Dick Syck as fireman, that he performed this labor for some time, but during the latter part of the work he did some of the sawing for which he received \$1.50 a day, until upon his (Syck's) complaint his wages were raised, and he did most of the sawing. Keen was employed by the foreman, Thacker, to work at the "skidway," and, when Syck was running the saw, Keen was sent from the skidway to do the firing, and, as stated, the last seven or eight days before the explosion he was firing at the mill the most of his time. His wages were \$1.50 per day, no change in which had been made. Thacker testified that Keen knew he was his hand when firing the mill. The facts proved do not show that Thacker was an independent contractor. He and all the other hands at the mill were under the control and directions of appellee, and appellee was required to use reasonable care to furnish reasonably safe appliances and machinery with which its employes were required to labor, and, if the death of Keen resulted from want of such care on its part, it is responsible. When it rented the mill from Thacker, to all intents and purposes it was its mill for the length of the lease, and, in addition to this, it expressly contracted to keep the mill in repair, and the law required it to keep it in a reasonably safe condition. Keen was a laborer for it, and it was as much its duty to furnish reasonably safe machinery for his protection as for Syck or any one else laboring at the mill. He was not in any sense a trespasser.

The case of Edward Messmer, Jr., by, etc., v. Bell & Coggeshall Co. (the opinion in which was delivered by this court March 23, 1909) 117 S. W. 346, is applicable to the case at bar. In that case it was contended by appellee: That one Wommer was employed by it under a special contract to make or squeeze boxes at so much per 1,000, and Wommer was to employ and pay all of his helpers; that Edward Messmer, Jr., was employed by Wommer as one of his helpers; that while he was engaged at labor with Wommer and under his directions he received his injuries. It was admitted that it, by check, paid Messmer his wages, but it was done by the directions of and as a favor to Wommer. The amount of the wages was charged to Wommer, and the company took a credit by it

when it settled with Wommer on the contract price it had with him. In discussing that case the court said: "The squeezing of the boxes by Wommer was simply one of the intermediate steps between the beginning and the end. The manufacturing of the boxes was the thing that the employer was doing, and, from the beginning of the box to the end, all the persons who worked on it were under the control of the employer. Without the power of control in the employer, the business could not reasonably be conducted. Wommer was as fully under the control of the foreman of the factory while squeezing boxes as when running the saw or doing other work about the factory. We therefore conclude that Wommer was not an independent contractor, but a servant of the Bell & Coggeshall Company, and that it was liable to the plaintiff for his negligence, if he was negligent."

In the case at bar appellee had control over Thacker and all the hands at the mill, and it is reasonable to presume that Thacker, knowing this fact, reserved the right to select the employe who should fire the mill. However, this did not make such employe the servant of Thacker, but he was a laborer for appellee and entitled to the same protection from it as any other employe in the mill.

It is shown by the testimony, without contradiction, that the mill furnished to do the work was defective and dangerous, and for that reason appellee says that appellant is not entitled to recover because Keen, with the knowledge of that fact, continued to labor at the mill and take the risk. It is true that Keen knew of the crack or defect in the dome of the boiler, but it is not shown that he knew of the danger incident thereto. He knew of the crack, but he might not have known that there was any great risk in continuing his labor. When the master knows that the machinery with which he furnished employes to labor is defective, he must show, before he can relieve himself from liability for injury to one of his employes, to the satisfaction of the jury, that his employe continued to labor with the defective machinery with the knowledge of the defective condition and the dangers likely to result from the further use of it. In addition to this, Keen had a right to rely upon the assurance of Thacker as to the safety of the boiler. As stated, it was shown without contradiction that Keen, two or three minutes before he was killed, called Thacker to him and called his attention to the escaping steam from the dome and expressed a fear of its exploding. Thacker answered that there was no such danger; that it was safe to continue to fire the boiler.

In the case of Lasch, by, etc., v. Stratton, 101 Ky. 672, 42 S. W. 756, it appears that the employe notified the foreman who had charge of the factory that he feared the

machinery was defective, but was assured by the foreman that it was not dangerous, and that he continued to operate the machinery relying upon such assurance, and it was held that he had a right to rely upon such assurance and was not guilty of contributory negligence, unless the danger or risk was so obvious and imminent that an ordinarily prudent person would have refused to perform the work under the circumstances. *L. & N. R. R. Co. v. Shivell's Adm'x* (Ky.) 18 S. W. 944, and *Rogers v. South Covington & C. St. Ry. Co.* (Ky.) 112 S. W. 630.

Appellant was clearly entitled to have his case submitted to the jury under proper instructions.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings herewith.

HITE v. HITE'S EX'R.

(Court of Appeals of Kentucky. April 29, 1909.)

1. WILLS (§ 681*)—ESTATES IN TRUST—APPOINTMENT OF TRUSTEE—POWER OF COURT.

Testator devised his estate to three trustees, and provided that there should always be two trustees, and that an appointee under an appointment made with the consent of all the adult devisees should not be required to give bond, and that, where an appointment was made without such consent, the trustee should execute a bond. One trustee resigned and one died. All the adult devisees, except one and his daughter, requested the appointment of a son of one of the original trustees. He was fitted for the trust, and would give the matter his personal attention. *Held*, that the court properly appointed him trustee as against the objection that a trust company should have been appointed.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1599-1601; Dec. Dig. § 681.*]

2. TRUSTS (§ 378*)—TRUSTEES—BONDS—LIABILITY OF SURETIES.

A bond of one appointed testamentary trustee conditioned as required in the will on his faithfully discharging the duties, without specifying any amount, is a common-law obligation, and the sureties are responsible for all moneys of the estate coming into the hands of the trustee notwithstanding the act of 1908 (Acts 1908, p. 125, c. 49), providing that the bond of a fiduciary shall be in a penal sum, and that the surety shall not be liable beyond such sum.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 619; Dec. Dig. § 378.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Proceedings for the appointment of a testamentary trustee of the estate of W. C. Hite, deceased. From an order appointing John W. Barr, as trustee, Louis Hite, a devisee, appeals. Affirmed.

Johnson & Hieatt, for appellant. Humphrey, Davie & Humphrey, for appellee.

HOBSON, J. Many years ago W. C. Hite died in Jefferson county, the owner of a large estate. By his will he devised his estate in

trust, the income to be paid to certain persons for life, and to others in remainder. He appointed as trustee Thomas L. Barrett, William W. Hite, and Judge John W. Barr. All three qualified. He left a widow and five children. The widow and the oldest son, W. W. Hite, have since died. Judge Barr resigned the trust and Allen R. Hite was appointed in his stead. Thomas L. Barrett died. When W. W. Hite died, Allen R. Hite was the only surviving trustee. The will provided that it was the desire of the testator that there should be always two trustees. It also provided that, if an appointment was made by the written consent of all the devisees over 21 years of age, the trustee so appointed should not be required to give bond; but, if the appointment was made without such consent, then he requested the court to require the trustee to execute "bond with good security for the faithful discharge of his duties." All the adult devisees, except Louis Hite and his daughter, Lucile Hite, requested the court to appoint John W. Barr as trustee, and to allow him to qualify without bond. Louis Hite opposed the appointment, insisting that a trust company should be appointed trustee. The court appointed John W. Barr, who executed a bond conditioned as provided in the will, with security worth double the amount of the estate; and, under an agreement between Barr and the Fidelity Trust Company of which he is the president, it was ordered by the court that he should appoint the Fidelity Trust Company as his agent to manage the trust, the trust company in consideration of receiving the compensation that would go to Barr guaranteeing his fidelity in the management of the estate. From this order Louis Hite has appealed, insisting that the court erred in not appointing as trustee a trust company on the ground that a trust company is better qualified to manage such an estate; that it never dies; that it is always accessible; that it can give bond with less trouble than an individual; and that so large a bond would be required of the trustee that it would be very burdensome for an individual to give it, and difficult for the court to protect the estate by keeping the bond good. He also insists that the bond executed by Barr as trustee does not conform to the statute and is not sufficient.

We do not see that the circuit court abused a sound discretion in the matter. All the adult devisees, except Louis Hite and his daughter, requested the court to appoint Mr. Barr. Among other things, they wished him to be trustee for the reason that his father was one of the original trustees, and on account of the fact that they felt assured that he would give the matter his personal attention, and for other reasons that need not here be elaborated. He is a man eminently

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fitted for such a trust, and no objection is made here to him on that score. The court is not required to appoint a trust company as trustee, and especially is this true where a majority of the persons interested desire an individual appointed; or when from the nature of the case the appointment of the person selected will be likely to lead to a management of the estate that will be satisfactory to those interested. It seems to us from the record that the court made an ideal selection, and that no interest of the appellant's was prejudiced. The act of 1908 (Acts 1908, p. 125, c. 49) requires that the bond of a fiduciary shall be in a penal sum, and that the surety shall not be liable beyond the sum so specified. This act was passed manifestly for the benefit of sureties in such bonds, and to protect them from the liability which had been imposed upon them in some cases under the previous statute under which they had been held liable without regard to the amount specified in the bond. The bond here specifying no amount, the sureties of the trustee are responsible for the faithful discharge of his duties by him and for all moneys coming to his hands belonging to the estate. The bond conforms to the provision of the will. The absence of an amount to limit the liability of the sureties can hurt nobody but the sureties, and they are bound upon the bond as a common-law obligation. The proof filed before the chancellor shows that the bond is amply sufficient. If at any time it should develop that the bond is not sufficient, the trustee may be required to give an additional bond in the circuit court.

Judgment affirmed.

HAMILTON et al. v. WILLIAMS et al.
(Court of Appeals of Kentucky. April 29, 1909.)

**EXECUTORS AND ADMINISTRATORS (§ 21*)—
APPOINTMENT OF ADMINISTRATOR WITH
WILL ANNEXED—REVOCATION.**

Where the probate of a will nominating no executor is set aside on appeal after the appointment of an administrator with will annexed, the letters of administration to him may be revoked, and an administrator may be appointed, under Ky. St. 1909, § 3897 (Russell's St. § 3920), providing for the appointment of an administrator who will settle the estate as prescribed by statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 114; Dec. Dig. § 21.*]

Appeal from Circuit Court, Bracken County.

"To be officially reported."

Proceedings for the appointment of an administrator of the estate of Ahab A. Hamilton, deceased, after the setting aside on appeal the probate of the will of the deceased. From an order appointing S. W. Bradford administrator, Oliver T. Hamilton, ad-

ministrator with will annexed, appeals. Affirmed.

H. P. Willis, W. A. Byron, and Lindsay & Edelen, for appellant. Geo. Doniphan and Geo. B. Kinney, for appellees.

NUNN, J. On April 26, 1908, one Ahab A. Hamilton died domiciled in Bracken county, Ky. He left a paper purporting to be his last will, which was thereafter probated in the Bracken county court; and appellant was duly appointed administrator of his estate with the will annexed, no executor having been nominated in the will, and he duly qualified as such. Thereafter some of the heirs at law of Ahab A. Hamilton appealed from the order of probate to the Bracken circuit court, and on the trial of the appeal the paper was adjudged not to be the last will of Hamilton. Therefore it was ordered by the circuit court that the county court set aside the order probating the will and appointing appellant Oliver T. Hamilton as administrator with the will annexed. The county court complied with this order. On March 2, 1907, the county court, upon motion of the heirs of Hamilton, appointed S. W. Bradford administrator of the estate. Appellant appealed from the judgment of the county court removing him as the administrator with the will annexed to the circuit court. Upon the hearing of the case, that court affirmed the action of the county court, and appellants have appealed from the ruling of the circuit court.

It appears to us that the only question on this appeal is whether appellant or Bradford is legally empowered to settle the estate of Ahab A. Hamilton, and, unfortunately for appellant, he failed to make Bradford a party to this appeal. But, waiving this question, it appears plainly to us that the administrator with the will annexed occupied the same relation to the estate that an executor named in the will would have occupied had one been named and qualified. The administrator with the will annexed is required to settle the estate in the way and upon the terms prescribed in the will. Where there is no will, the administrator settles the estate as prescribed by the statute. He receives his appointment under section 3897, Ky. St. (Russell's St. § 3920), which provides that, if no person applies for administration, the county court may at the second term after the death of a person grant administration to a creditor or any other person whom the court in its discretion may appoint. All the parties in interest were before the court in the will case, and were before the county court when Bradford was appointed, and all the heirs, except appellant Oliver T. Hamilton, asked for and approved the appointment of Bradford. The question is: Does the defeat of the probate of the will on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the appeal authorize the removal of one who had been appointed administrator with the will annexed? We have not been cited to, nor have we been able to find, any decisions in this state directly upon this point, but the question has been decided in other states. In 2 Am. & Eng. Ency. of Law, p. 819, it is said: "If the will is set aside after an administrator with the will annexed is appointed, his letters may be revoked." See the authorities there cited to sustain the text. In the case of *Smith v. Stockbridge*, 39 Md. 640, the court said: "Where a will which has been admitted to probate has been declared void by the Court of Appeals, administration with the will annexed is also void." See, also, the case of *Kilton v. Anderson*, 18 R. I. 136, 25 Atl. 907, 49 Am. St. Rep. 751.

For these reasons, the judgment of the lower court is affirmed.

FRISBIE v. BIGHAM MASONIC LODGE NO. 256.

(Court of Appeals of Kentucky. April 30, 1909.)

1. PARTY WALLS (§ 5*)—CONTRACT AS TO CONSTRUCTION OF WALL—DURATION OF EASEMENT—DESTRUCTION OF BUILDINGS.

Defendant sold plaintiff a part of a lot for a specified sum and the further consideration of using the wall of the building about to be erected by plaintiff. The deed specified the manner in which defendant was to join her building to that of plaintiff, and provided that certain abutments projecting from plaintiff's wall were to be furnished by plaintiff. *Held*, that the deed gave defendant a perpetual easement in plaintiff's wall, and on the burning of the buildings defendant could demand that abutments be provided on the rebuilding of plaintiff's building and could use the wall without a payment of any part of the cost to plaintiff, and before the wall was rebuilt the right to the easement was in abeyance.

[Ed. Note.—For other cases, see *Party Walls*, Cent. Dig. § 13; Dec. Dig. § 5.*]

2. EASEMENTS (§ 42*)—CONSTRUCTION OF GRANT.

Where the language used in a grant of an easement is ambiguous as to the nature or extent of the right, the meaning given to it will be the one most favorable to the claimant of the easement.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 97; Dec. Dig. § 42.*]

3. CONTRACTS (§ 153*)—CONSTRUCTION—INTENT OF PARTIES.

A contract should be so construed as to give effect to the intention of the parties, and the language used should receive a common-sense interpretation, and, when the language is indefinite or ambiguous, it is proper to look to the condition of the parties and their probable motive and object.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 734; Dec. Dig. § 153.*]

4. PARTY WALLS (§ 5*)—EXISTENCE OF RIGHT—EVIDENCE.

The fact that plaintiff, on erecting its second buildings, again put its wall in condition for defendant to build to it, and defendant again

made use of the wall, was a recognition of the continuation of defendant's right to use the wall.

[Ed. Note.—For other cases, see *Party Walls*, Cent. Dig. § 13; Dec. Dig. § 5.*]

Appeal from Circuit Court, Crittenden County.

"To be officially reported."

Action by Bigham Masonic Lodge No. 256 against Electa M. Frisbie. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to dismiss the petition.

J. G. Rochester and H. V. McChesney, for appellant. L. H. James and Jno. W. Blue, Jr., for appellee.

SETTLE, J. In the year 1895 the appellee, desiring to erect a three-story brick building in Marion, Ky., found that a lot which it then owned was too small to contain such a building, and it therefore purchased of the appellant, who was then Mrs. Electa Boaz, a parcel of ground from an adjoining lot owned by her, receiving of her and her then husband, J. D. Boaz, a deed therefor, which is in words and figures as follows: "This deed of conveyance made and entered into this the 8th day of November, 1895, by and between Electa M. Boaz and John D. Boaz, her husband, residents of Marion, Crittenden county, Kentucky, parties of the first part, and the trustees of Bigham Lodge F. & A. M. No. 256, of Marion, Kentucky, for the use and benefit of said lodge, parties of the second part, witnesseth: That for and in consideration of the sum of three hundred and forty dollars, cash in hand paid to the parties of the first part, the receipt of which is hereby acknowledged, and the further consideration of joining the south wall of the Masonic building when completed, as herein specified, the parties of the first part have sold and conveyed, and do by these presents, hereby sell and convey to the parties of the second part for the purpose aforesaid, and their successors in office, the following described land lying in Marion, Crittenden county, Kentucky, and at the east end of the Masonic lodge lot: (Description of the land omitted.) It is agreed by and between the parties hereto that the parties of the first part are to have the privilege of joining to the first two stories of Masonic Lodge building, on the south side when erected, but are to join to same by means of a four-inch abutment at the base and brick projecting from said wall for four inches at the second floor, but no holes or indentations is to be made in said wall. Said projecting brick and abutment are to be placed in position by parties of the second part in a safe and substantial manner, but such anchors as may be necessary for the purpose of adjoining are to be

furnished by the parties of the first part. Said property is conveyed unto the parties of the second part. To have and to hold forever unto themselves and successors and assigns in office and with covenant of general warranty. In testimony whereof, we have hereunto subscribed our names, this the day and date aforesaid. Electa M. Boaz. J. D. Boaz."

At that time appellant also had in contemplation the erection of a two-story brick business house upon what remained of her lot after the conveyance of a part of it to appellee. Hence the insertion in the deed to the latter of the provisions relating to her right to attach or join her building to the south wall of the building to be erected by appellee. In the years 1895 and 1896 appellee erected its three-story brick building as contemplated, and about the same time, or shortly thereafter, appellant also erected on her lot adjoining that of appellee a two-story brick building as purposed by her. In constructing on its own lot the south wall of its building, appellee, as it had covenanted in the deed from appellant to do, at its own expense extended the foundation over on appellant's lot adjoining, 18 or 20 inches, to furnish a rest for the joists of the ground floor of her building, and further up in its wall made a similar projection for the support of the joists of the second floor of appellant's building. Appellee, by thus extending the foundation of its wall and making the projection therefrom above, enabled appellant to attach her building to it and make the south wall of its building the north wall of hers, all of which was in conformity to the provisions of the deed between the parties.

In March, 1905, these two buildings, with several others in the same block, were destroyed by fire, for which neither appellant nor appellee was responsible. In the spring of 1906 appellant and appellee each again erected a building of the same dimensions to take the place of the one destroyed; that of the latter being first commenced and perhaps first completed. In erecting its last and present building, appellee, by again extending the foundation of its south wall over on appellant's lot for appellant's ground joists, and by making the projection in the wall as a rest for the joists of the second story of her building, again caused the one building to be attached to the other, and made the south wall of appellee's building the north wall of appellant's building. The erection of the south wall of its building up to and including the projection made for the support of the second floor joists of appellant's building seems to have cost appellee \$553, and the payment of one-half of this sum, \$276.50, it demanded of appellant, but she refused to pay it or any part thereof. Thereupon appellee brought suit against her in the court below for the \$276.50, and for \$100 damages it claimed to have sustain-

ed for injuries resulting to the south wall of its building from the negligence of appellant's employes in erecting her building. The circuit court on the trial rejected appellee's claim for damages, but gave it judgment against appellant for \$276.50, as half the cost of that part of its south wall in use as a wall for appellant's building. The latter complains of the judgment, and by this appeal seeks its reversal.

We think it manifest that the deed by which appellant conveyed appellee a part of the ground occupied by its building reserved and conferred upon her a perpetual easement in the south wall of its building. In other words, the right to join her building to the south wall of appellee's building was a part of the contract whereby she parted with the title to the parcel of ground purchased of her by appellee, and a part of the consideration for its sale. Of this there can be no doubt for it is so expressed in the following language of the deed: "That for and in consideration of the sum of three hundred and forty dollars, cash in hand paid to the parties of the first part, the receipt of which is hereby acknowledged, and the further consideration of joining the south wall of the Masonic building when completed, as herein specified, the parties of the first part have sold and conveyed and do by these presents hereby sell and convey to the parties of the second part, for the purposes aforesaid, * * * the following described land. * * *" So careful were the parties in respect to the right thus conferred upon appellant to use the south wall of appellee's building as the north wall of her building, that the further and entire agreement between them in regard thereto was set forth in a subsequent part of the deed with such particularity as to direct the manner in which appellant should attach or join her building to that of the appellee, how the foundation and wall of appellee should be prepared for such use, the preparation therefor to be made by appellee, and that it should be done at its cost. We find nothing in the language of the deed that limits or confines the right or easement thus acquired by appellant to the building erected by appellee immediately following the execution and delivery of the deed. The deposition of appellant clearly shows her understanding that the easement was not confined to the use by her of the wall of that building, but that it was a continuing right which would apply to any building that appellee might erect upon its lot. If such was not the understanding of the persons representing appellee, it does not satisfactorily appear from their testimony. The original contract of sale and deed, later executed, were both written by an official representative of appellee, and, if it had been understood by the contracting parties that there was to be any limitation placed upon appellant's easement in appellee's wall which would have confined it to

the building destroyed, he surely would have incorporated it in the deed.

Neither fraud nor mistake in the execution of the deed is alleged. Where a writing indicates an evident intention to grant an easement, but its language is ambiguous as to the nature or extent of the right, it should be given such meaning as would be most favorable to the claimant of the easement. It is also a recognized rule of construction that a contract should be so construed as to give effect to the intention of the parties, and the language used, should receive a common-sense interpretation, and, when it is indefinite or ambiguous, it is proper to look to the condition of the parties, their probable motive and object. While in our opinion appellant, under the contract evidenced by the deed in question, by purchase acquired a perpetual right to join or build to the side wall of any building appellee might have or erect upon the lot adjoining hers, subject to the stipulations contained in the deed as to the manner of doing it, we would not be understood as holding that appellant's right was such that she could, after the destruction of the two buildings, have compelled appellee to rebuild in order that she might again have the use of its wall. After the destruction of appellee's building, and while it had no building on its lot, appellant's easement was in abeyance; but, when it rebuilt, the easement was revived.

We are further of the opinion that, as the right here asserted by appellant is in the nature of a grant based upon a good and sufficient consideration, it carries with it, as a part of the grant, the additional right to demand of appellee that it prepare, in the manner required by the deed and at its own cost, the south wall of its present building for the joining of appellant's building to it. Appellee is as much bound by the terms of the deed to do this at his own expense as it is to allow appellant to join her building to its wall, for the one duty is as imperatively required by the language of the deed as the other; and, in apparent anticipation of appellant's claiming the right to join her building to the south wall of its present building, appellee, as before stated, in erecting that wall, extended it at the foundation and also made the upper projection, as required by the deed, thereby putting it in condition for appellant to build to it, which she has done. These acts of appellee, while not conclusive as amounting to recognition of appellant's right to the use of its wall, would seem to furnish some evidence of their belief in such right.

Although this court has reviewed many cases involving litigated questions as to party walls, it has not had before it a case presenting the precise question now under consideration, nor have we been cited by counsel to a case in point outside of Kentucky; but,

notwithstanding the absence of direct judicial authority, we are unable to escape the conclusion that appellant is entitled to the enjoyment of the right she asserts, and that she is not chargeable with any part of the cost to appellee of the south wall of its building or of the work performed by it in preparing the wall for her use.

We have not considered the claim of appellee to damages for alleged injury to its wall charged to appellant, as there is no cross-appeal from that part of the judgment disallowing such damages.

For the reasons indicated, the judgment is reversed, and cause remanded, with directions to dismiss the petition.

NUNN, J., not sitting.

GREEN v. QUISENBERRY et al.

(Court of Appeals of Kentucky. April 29, 1909.)

1. INJUNCTION (§ 250*)—BOND—ACTION—PETITION.

Plaintiff, a life tenant, leased the land, agreeing to place and hold his tenant in peaceable possession, but, before a crop had been planted, the remaindermen sued both plaintiff and his tenant for forfeiture of plaintiff's life estate for waste, and obtained an injunction restraining plaintiff and his tenant from cropping the land. *Held*, that a petition on the injunction bond after the injunction had been dissolved, alleging such facts and that plaintiff was damaged by the loss of the rent, stated a cause of action, though it did not allege that the injunction expressly commanded plaintiff not to collect the rent under the lease, or restrained the tenant from paying it; the tenant not being liable for rent because of failure of consideration.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 250.*]

2. INJUNCTION (§ 219*)—DUTY TO OBEY.

It is the duty of the party against whom an injunction is issued to obey it as long as it remains in force, regardless of whether it was rightfully or wrongfully issued.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 441; Dec. Dig. § 219.*]

3. INJUNCTION (§ 252*)—ACTION ON BOND—PETITION.

Plaintiff in an action on an injunction bond is limited to the damages alleged.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 591; Dec. Dig. § 252.*]

4. INJUNCTION (§ 252*)—ACTION ON BOND—ATTORNEY'S FEES—RIGHT TO RECOVER.

Where an injunction is the only relief sought, and gives that relief, if sustained, no recovery for attorney's fees can be had on dissolution of the injunction, but if injunctive relief is ancillary, or is relied on to secure the relief when obtained, a recovery may be had on the bond for reasonable attorney's fees for services in dissolving the injunction; and hence, in an action by the remaindermen against the life tenant and his tenant in possession to forfeit the life estate for waste, where an injunction was obtained against further waste, which was subsequently dissolved, the life tenant was entitled to recover reasonable attorney's fees paid or incurred for services in dissolving the injunction,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

apart from services rendered in defending the action.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 596, 597; Dec. Dig. § 252.*]

Appeal from Circuit Court, Madison County.

"To be officially reported."

Action by John L. Green against J. R. Quisenberry and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

A. R. Burnam & Son and J. Tevis Cobb, for appellant. S. M. Wallace and W. S. Moberly, for appellees.

SETTLE, C. J. This is an appeal from a judgment of the Madison circuit court sustaining a demurrer to and dismissing appellant's petition; the action being one to recover upon an injunction bond damages appellant claims to have sustained by reason of the wrongful issue of an injunction by procurement of the appellee J. R. Quisenberry, who, together with the appellee R. E. Turley, as surety, executed the bond required to obtain it. It appears from the averments of the petition that appellant owns the life estate in a 60-acre tract of land in Madison county which he early in the year 1908 leased to Leonard Minter for a term of three years at an annual rental of \$333.33⅓. By the terms of the lease Minter was to clean up the land, put it in suitable condition for cultivation, and cultivate 50 acres of it in corn and tobacco. The lease also contained a covenant that appellant would place and hold Minter in peaceable possession of the leased premises. The latter took possession of the land, and immediately commenced to clean it up preparatory to its cultivation. After Minter had done considerable work in preparing the land for a crop, but before he had an opportunity to plant the crop, the appellee Quisenberry, owner in remainder of the land, brought in the Madison circuit court against the appellant as life tenant and Minter lessee of the land an action for waste and to recover the land by a forfeiture of the life estate of the former and treble damages amounting to \$500 for the alleged waste. In that action, following the execution of a proper bond therefor, the injunction in question was obtained whereby the life tenant was restrained from permitting performance by the lessee, Minter, of the covenants of the lease, and the latter from doing work upon the land, and from pitching or producing a crop for or during the year 1908. Appellant and Minter filed answers to the petition in that case, denying the alleged waste, the right of appellee to the forfeiture or damages claimed, and controverting the grounds alleged for the injunction. The trial of the case, which occurred in October, 1908, resulted in a judgment dismissing the action and dissolving the injunction. Shortly after

the rendition of that judgment, appellant instituted the present action against appellee and the surety in the injunction bond to recover the damages resulting to him from the wrongful obtention by appellee of the injunction, which the petition alleges is \$350 for loss of rent on the land by reason of and during the continuance of the injunction and \$250 fees paid his attorneys, making altogether \$600.

The only question presented by this appeal for our consideration is: Does the petition in the instant case state a cause of action? The circuit court held that it did not; and hence the demurrer interposed by appellees to the petition was sustained. We think the court erred in sustaining the demurrer. Fairly construed, the averments of the petition are to the effect that the injunction not only prevented Minter, appellant's tenant, from proceeding with the work of clearing up the land, preparing it for cultivation, and also from producing a crop in 1908, but that it likewise prevented appellant from collecting of the tenant the rent for that year. The action was against both appellant and his tenant and the injunction issued against and executed upon each of them. While it did not in express terms command appellant not to collect the stipulated rent or restrain the tenant from paying it, both were restrained by it from performing the rent contract until it was too late to prepare the land for cultivation, or to raise a crop in the year 1908. Obviously the tenant was not liable under the circumstances for that year's rent, nor could appellant by suit have compelled him to pay it; for the tenant, if sued for it, could have escaped liability upon the ground of a failure of consideration, as he was not permitted to raise a crop that year, and received no benefit from his mere possession of the land. Besides, under a covenant of the lease, appellant was obliged to protect him in the peaceable possession of the leased premises, and the right to cultivate it and produce a crop of corn and tobacco upon 50 acres of it. Moreover, it was the duty of appellant and his tenant to obey the injunction as long as it remained in force, regardless of whether it was rightfully or wrongfully obtained; nor were they relieved of this duty until the injunction was by judgment of the court dissolved. The fact that the injunction was wrongfully issued having been determined by the judgment dissolving it rendered in the former action, and appellant being protected by the injunction bond as well as his tenant, we conclude that the petition states a cause of action as to the claim of appellant for damages resulting from the loss of rent for the year 1908. But, as the petition does not allege any other damage than what appellant sustained in the loss

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of rent, his recovery on that score should not exceed the amount he was to receive from his tenant by way of rent for the year 1908, viz., \$383.33%.

The question of whether the further item of \$250 damages by way of an attorney's fee claimed in the petition to have been expended by appellant in defeating the injunction, the reasonableness of which is duly alleged, can be recovered by him, is not free from doubt. The rule, however, seems to be that when the injunction is the only relief sought, and, in fact, gives the relief, if sustained, no recovery for attorney's fees can be had; but when the injunction is merely ancillary, or in aid of the relief sought, or is relied on to secure the relief when obtained, a recovery may be had on the bond for the payment of reasonable attorney's fees when the defendant has succeeded in dissolving the injunction. *Tyler & Apperson v. Hamilton, etc.*, 108 Ky. 120, 55 S. W. 920; *Turnpike Company v. Dulaney*, 86 Ky. 518, 6 S. W. 590; *Burgen v. Sharer*, 14 B. Mon. 497. We gather from the averments of the petition in the instant case that the action in which the injunction was obtained against appellant and his tenant was brought by the remainderman to recover of appellant as life tenant the land the latter leased to Minter, on the ground that appellant by committing or suffering waste had forfeited his life estate therein which entitled the remainderman to immediate possession. The remainderman also sought to recover in that action of the life tenant treble damages for the waste committed, and, in addition, obtained the injunction to prevent the life tenant and his tenant from committing further waste to the land. In this view of the matter, it would seem that the primary purpose of the action was the recovery of the land and damages for the injury to it from the waste resulting from the life tenant's acts or sufferance while in possession. If this be true, the injunction was not the only remedy, but was merely ancillary or in aid of the relief sought, for its object was to prevent further waste, and therefore alleged irreparable injury before the termination of the prime or real cause of action. Perhaps our meaning can be better explained by quoting the following illustration contained in *Turnpike Co. v. Dulaney*, supra: "So, in case of an injunction, when the widow asserts her right to dower, and obtains an injunction to stay waste, the right to dower may be conceded or litigated; and, if it turns out that the injunction was improperly granted and is dissolved, a recovery may be had for the attorney's fees arising from the employment to dissolve the injunction. Injunctions, therefore, like attachments when dissolved, and are obtained as ancillary to an original proceeding, the obligors on the injunction bond are

liable for a reasonable attorney's fee. To this extent the doctrine has been carried by this court as to the measure of recovery on attachment, and injunction bonds, but no further."

While in the instant case the averments of the petition as to the claim for attorney's fees are somewhat indefinite, yet on the whole they seem to authorize a recovery of attorney's fees on the injunction bond, but the recovery can go no further than what would be a reasonable fee paid, or agreed to be paid, by appellant in the employment of counsel to resist and defeat the injunction. We have seen from the excerpt quoted above that an action upon an injunction bond is governed by the same rule that applies to an action upon an attachment bond. In either case the damages that can be recovered on the bond, including attorney's fees, are such as result from the order of injunction or attachment, and not the damages incurred by reason of the action independent of the injunction or attachment. *Trapnall v. McAfee*, 3 Metc. 34, 77 Am. Dec. 152; *Shultz v. Morrison*, 3 Metc. 99; *Caldwell v. Deposit Bank*, 109 Ky. 197, 53 S. W. 589. So, in the matter of the attorney's fee claim by appellant, we will say that, if the whole of it was incurred in defending the action in which the injunction was obtained, nothing by way of such fee can be recovered on the bond, but, if incurred in defending the injunction alone, it can be, or, if incurred partly in defending the injunction and partly in defense of the action, it is recoverable as far as applicable to the injunction. *Johnson v. Farmers' Bank*, 4 Bush. 283; *McClure v. Renaker* (Ky.) 51 S. W. 317.

For the reasons indicated, the judgment is reversed and cause remanded for further proceedings consistent with the opinion.

KEVIL v. CITY OF PRINCETON.

(Court of Appeals of Kentucky. April 29, 1909.)

1. EASEMENTS (§ 8*)—EASEMENTS IN STREETS—ACQUISITION—STATUTES.

Under St. 1909, § 2546 (Russell's St. § 221), providing that limitations do not run against actions relating to public easements, etc., until the municipality has been notified in writing by the party in possession that the possession will be adverse to the title of the municipality, one maintaining without authority water pipes in the streets of a city for the delivery of water to customers does not acquire the right by adverse possession to maintain the pipes, where no notice was given the city.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 23; Dec. Dig. § 8.*]

2. WATERS AND WATER COURSES (§ 189*)—STREETS—LICENSES—REVOCATION.

One maintaining, under a revocable license, pipes in the streets of a city to deliver water to customers, cannot recover damages

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from the city for not allowing him to carry on the business.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 272; Dec. Dig. § 189.*]

3. **WATERS AND WATER COURSES (§ 107*) — POLLUTION—EVIDENCE—ADMISSIBILITY.**

In an action for polluting the waters of a subterranean stream by emptying sewage therein, evidence of the prior pollution of the waters by surface waters was admissible, not to justify the act of defendant, but to show that the water was so contaminated before its act as to render the same useless for plaintiff's purposes, thereby showing that he suffered no injury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 116; Dec. Dig. § 107.*]

4. **EMINENT DOMAIN (§ 84*)—PROPERTY SUBJECT OF COMPENSATION—WATER RIGHTS.**

Under Const. § 242, providing that municipal corporations taking private property for public use must make compensation therefor, etc., a city cannot take an underground stream flowing under the land of an individual for a public sewer without compensating him for the resulting injury.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 227; Dec. Dig. § 84.*]

Appeal from Circuit Court, Caldwell County.
"Not to be officially reported."

Action by J. R. Kevil against the City of Princeton. From a judgment of dismissal, plaintiff appeals. Affirmed.

Hodge & Hodge, for appellant. Darby, Lis-anby & Gates, for appellee.

HOBSON, J. Near Court Square in Princeton, Ky., is a large spring, which has been known ever since the town was located as the "Big Spring," and was for many years the chief reliance of the town for water. A large underground stream flows under the town coming out at this spring. Some 25 years ago E. H. Daniels dug into the stream above the Big Spring and installed a waterworks plant from which he supplied water for his storehouse and dwelling house, and also supplied a number of persons in the town by pipes laid under the streets and alleys of the town. He had a tank which held 50,000 gallons of water and an engine with which he pumped up the water into the tank. From the tank the water ran out through his mains to his customers by gravity. Some years ago he sold his property, including his waterworks plant, to J. R. Kevil, who continued to operate the waterworks plant as he had done. The city, in the course of time, installed a waterworks plant, and on July 5, 1907, by an ordinance, directed its street commissioners to make connections running the sewerage of the city into the subterranean stream which fed Big Spring above the plant of Kevil. This was done, and Kevil thereupon brought this suit against the city, charging that thereby it had contaminated the water so as to render his water plant valueless, to his damage in the

sum of \$5,000. An answer was filed by the city traversing the allegations of the petition as to the damage done, and on final hearing the jury to whom the case was submitted found a verdict for the defendant. The court entered a judgment on the verdict dismissing Kevil's petition, and he appeals.

Kevil showed on the trial by the evidence on his behalf: That at the time the sewerage was run into the stream he was using the water in his property; that this use of it by him was worth \$5 a month; that he was selling it to neighbors whose property he could get to without crossing any street or alley of the town, who paid him \$8 a month; that he had other customers whom he reached by his pipes passing under or along the streets of the town, who paid him \$30 or \$40 a month; that the water was good up to the time the sewerage was run into the stream; and that it cost him only a nominal sum to operate the plant. The court excluded from the consideration of the jury all evidence as to his customers whom he reached by passing under or along any of the streets or alleys of the town, and of this he complains. Although these pipes had been in the streets for over 25 years, Daniels had no authority from the town authorizing their being put there. They had been put down and had remained in the streets simply by sufferance. Although they had been there so long, no right to maintain them had been acquired by adverse possession, as no written notice had been given the town as provided by section 2546, Ky. St. (Russell's St. § 221), which is as follows: "The limitations mentioned in the first article of this chapter shall not begin to run in respect to actions by any town or city for the recovery of any street, alley, or other public easement, or any part of either, or the use thereof in such town or city, until the trustees, or the council or the corporation, by whatever name known or called, have been notified in writing by the party in possession, or about to take possession to the effect that such possession will be adverse to the right or title of such town or city. Until such notice is given, all possession of streets, alleys and public easements, or any part of either, in any town or city, shall be deemed amicable, and the person in possession the tenant at will of such town or city."

We had this subject before us in *City of Covington v. Hall*, 98 S. W. 317, and in *City of Latonia v. Latonia Agr. Ass'n*, 109 S. W. 356, and in those cases the previous cases are referred to. As his use of the streets to deliver the water to his customers was simply by reason of a license from the city, which it had power to revoke at any time, he cannot recover damages from it for not allowing him to carry on a business which it had power to stop and the court properly so held. *Rough River Tel. Co. v. Cumber-*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

land Tel. Co., 119 Ky. 475-476, 84 S. W. 517.

In the subterranean stream referred to some distance above the point where Daniels tapped it, there is an opening from the top of the ground into the stream known as "Cave Spring"; this being substantially what is commonly known as a "sink hole"—that is, it is a low place through which the surface water from the surrounding territory runs into the stream. This surrounding territory embraces 73 acres of land, a large part of which is within the city of Princeton and thickly populated. There are within it, among other things, two large livery stables, and a number of other houses, the filth from which is washed by the surface waters into this cave. The proof for the city is to the effect that for many years before the sewers were run into the stream there was a bad odor in this cave, and that the quantity of filth which thus ran into the stream rendered it unfit for domestic purposes. The city also showed that there were other openings along the stream by which the surface water ran into it and contaminated it. The plaintiff objected to all this evidence, insisting that one wrong does not justify another, and that one injury to the water does not justify a greater injury. This is true, but the question here is: How much injury did the city inflict upon the plaintiff? And to enable the jury to decide this question intelligently it was proper that the city should show that other causes were contaminating the stream, for the result which the plaintiff complains of may not in fact be due to the act of the city, and, if the water was so contaminated before as to be rendered useless for practical purposes, the city may show this to establish its defense that it has done the plaintiff no real injury. Section 242 of the Constitution provides: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction." Under this section the city cannot take this underground stream for a public sewer without compensating the plaintiff for the injury it has thereby done him; but, if he has suffered no substantial loss by the act of the city, it may show this fact that the jury may arrive at a proper verdict in the case.

The court gave the jury these instructions: "(1) The court instructs the jury that, if they believe from the evidence that the water obtained by the plaintiff for use in his waterworks plant on his lot, and obtained from the Big Spring creek, was of such quality that same could be and was profitably used by the plaintiff in his waterworks plant, up to the time the sewers con-

structed by the city were turned into said creek, and that the connecting of the sewers by contaminating the water in the creek depreciated the value of plaintiff's waterworks plant by rendering it unprofitable to operate it, then the jury will find for the plaintiff. (2) If the jury find for the plaintiff, they will award him such sum in damages as will reasonably compensate him for the depreciation, if any, in the reasonable market value of his waterworks plant, directly due to the contamination of the water by the city's sewers, considering its reasonable market value immediately before the contamination caused by the sewers and its reasonable market value immediately thereafter, but not exceeding \$5,000, the sum claimed in the petition. (3) If the jury believe from the evidence that the water in the Big Spring creek, prior to the building of the sewers by the city, was not of such quality that the plaintiff could and did operate his plant therewith profitably, and that same was not rendered unprofitable to operate by reason of the connecting of the sewers with said creek, they will find for defendant. (4) The court says to the jury that the plaintiff in operating his waterworks plant had no right to the use of the streets and public alleys in the city, and in determining the question of the profitable operation of said plant they will only consider such use as was being made of it on the plaintiff's own property and such other places as were supplied with water therefrom, without entering on or using the said streets and alleys, with his water pipes or mains."

These instructions fairly submitted to the jury appellant's case. They were not at least prejudicial to him. The gist of his action was that the city had polluted the water. If it had not substantially injured the water, he had no cause of complaint. He was allowed to recover not only for the use of the water at other places supplied by him, but also for the use on his own property; and, as we have said, the court properly excluded the use of the water by persons whom he reached by crossing the streets and alleys of the city. The evidence was very conflicting, but there was much evidence on behalf of the city that the water was unfit for use before the sewers were turned into the stream, and that the turning of the sewers into it did the plaintiff no damage.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. CROW.

(Court of Appeals of Kentucky. April 30, 1909.)

1. DAMAGES (§ 95*) — ELEMENTS — PERSONAL INJURIES.

In an action for personal injuries, compensatory damages are confined to the expense of cure, value of time lost, a fair compensation for physical and mental suffering caused

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by the injury, and for any permanent reduction of earning power.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 222-229; Dec. Dig. § 95.*]

2. RAILROADS (§ 282*)—INJURIES TO LICENSEE—EXEMPLARY DAMAGES.

In an action against a railroad company for injuries to a third person engaged in loading a car by the negligence of the railroad in moving the car without warning to plaintiff, plaintiff could not recover exemplary damages.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 916; Dec. Dig. § 282.*]

3. RAILROADS (§ 275*)—INJURIES TO LICENSEES — MOVING CAR — WARNING — NEGLIGENCE.

Where persons other than employees by the consent of a railroad company are loading a car, it is negligence for the company to move the car without first giving notice to the persons so engaged, if their presence is known or could be ascertained by ordinary care, so that they might have reasonable time to save themselves from injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 873-875; Dec. Dig. § 275.*]

4. RAILROADS (§ 282*)—INJURIES TO LICENSEES—ACTIONS—INSTRUCTIONS.

In an action for injuries to a plaintiff while loading a car by the sudden movement of the car, the issue was whether plaintiff had been notified. The court charged that failure of defendant to have a servant standing on the moving train by which the car was moved to give notice of its approach entitled plaintiff to recover, that the railroad company could not rely on any action of plaintiff prior to the approach of the train as constituting negligence as a defense to the action, but if, after the train approached, plaintiff by his own carelessness contributed to the injury, he could not recover. *Held*, that such instructions were erroneous for failure to present the issue raised.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 282.*]

Appeal from Circuit Court, Nelson County.
"Not to be officially reported."

Action by John H. Crow against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Benjamin D. Warfield and John S. Kelly, for appellant. Nat. W. Halstead, Morgan Yewell, and F. E. Daugherty, for appellee.

CARROLL, J. While assisting in loading logs on a car of the appellant company that had been placed on a siding for that purpose, one of the skids used in loading fell on appellee and injured him quite severely. In loading the logs two skids, each about 18 feet long, 10 inches wide, and 12 inches thick, were placed with one end on the ground and the other on the car. A rope was then put around the log, and with the assistance of horses attached to the rope, and on the opposite side of the car from the logs, it would be rolled from the ground on the skids to the car. At the time appellee was injured, the rope had broken, and he was sitting down near the side of the car directly under one of the skids, engaged in fixing the rope. While so employed an

engine backed some cars in on the siding where the car that was being loaded was standing, causing it to move, and its movement resulted in the skid falling on appellee. The testimony for appellee conducted to show that the persons loading the car were not notified that it would be disturbed, while, on behalf of appellant, there was evidence to the effect that appellee and the others were warned to be on the lookout, as the car would be moved. It is conceded that no brakeman was on the car that struck or bumped against the car being loaded with logs. Upon a trial of the case before a jury, appellee received a small verdict, and the company appeals.

The only errors that we need notice are those respecting the instructions given. In instruction No. 2, the measure of damage that appellee was entitled to recover was not correctly defined. In cases like this compensatory damages are confined to the expense of cure, value of time lost, a fair compensation for physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money. *Carson v. Singleton* (Ky.) 65 S. W. 821; *L. & N. R. R. Co. v. Logsdon*, 114 Ky. 746, 71 S. W. 905; *L. & N. R. R. Co. v. Hall*, 115 Ky. 579, 74 S. W. 280. In instruction No. 3, the jury were told that they might award punitive damages. The evidence in this case did not warrant an instruction upon the subject of exemplary damages. Instruction No. 4 reads as follows: "It was the duty of defendant, in backing its train on the side track and forcing it in contact with the car at which plaintiff was at work, to have had a servant standing on said moving train to give notice of its approach to the plaintiff's car, and, the defendant failing to have said servant on the watch on said moving train on the occasion of the plaintiff's injury, the law is for the plaintiff, and the jury should find for plaintiff according to the degree of negligence found as set out in instructions 2 and 3 herein." In instruction No. 5, the court said: "The defendant failing to have said servant on said moving train as indicated in the next preceding instruction, it cannot rely on any action, nonaction, or conduct of the plaintiff prior to the approach of its said train towards the car where the plaintiff was at work as constituting contributory negligence, or in any manner or degree as a defense to the action. But if the jury shall believe from the evidence that, after the said train began its approach to the car where the plaintiff was at work, he, by his own carelessness or negligence, contributed to his injury, and without which the said injury would not have occurred, then the law is for the defendant, and the jury should so find."

Instructions Nos. 4 and 5 were virtually a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

direction to find for appellee, as it was admitted that there was no employé on the moving train to give notice of its approach to the car plaintiff was assisting to load. These instructions were radically wrong. They did not present at all to the jury the real issue in the case, which was whether or not appellee had not been notified before the car was moved. In cases like this, the law is that, when persons other than employes are by the consent or direction of the railroad company engaged in loading or unloading a car, it is negligence on the part of the company to move the car so being loaded or unloaded without first giving notice to the persons engaged in loading or unloading it, if their presence is known, or could be known by the exercise of ordinary care, so that they may have reasonable time and opportunity to save themselves from injury. *L. & N. R. R. Co. v. Farris* (Ky.) 100 S. W. 870. The liability of the company in this case turns upon the question whether or not notice was given to appellee before the car was moved; whereas, the trial court instructed the jury that they were liable unless a person was on the moving car. If, as a matter of fact, appellee had been previously notified that the car he was loading would be moved, it was immaterial, so far as he was concerned and under the facts of this case, whether there was any person on the moving car or not.

Judgment is reversed, with directions for a new trial in conformity with this opinion.

HOWARD v. HOWARD et al.

(Court of Appeals of Kentucky. April 29, 1909.)

1. TRUSTS (§ 86*)—PRESUMPTIONS—PURCHASER AT FORECLOSURE SALE.

Where, after sale of certain land, on foreclosure of a vendor's lien, to H., the original vendee continued in possession until his death in 1860, and his widow and children held the land thereafter without any claim on the part of the purchaser, it would be presumed that the purchaser held the land for decedent.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 128; Dec. Dig. § 86.*]

2. JUDGMENT (§ 651*)—AGREEMENT—CONCLUSIVENESS.

Where, in a suit between plaintiff and defendant, judgment was entered by agreement, under which the land in controversy was conveyed to plaintiff, such judgment was conclusive, in favor of plaintiff's right to the land conveyed, until opened or modified.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1163; Dec. Dig. § 651.*]

Appeal from Circuit Court, McLean County.

"To be officially reported."

Action by James O. Howard and others against W. A. Howard for a division of certain land. Judgment for plaintiffs, and defendant appeals. Affirmed.

Taylor & Clark, for appellant. R. Alexander, for appellees.

HOBSON, J. Alex A. Howard bought a tract of land in what is now McLean county in the year 1850, and resided on it until his death in 1860. He left surviving him a widow and four children, who continued to reside on the land until the year 1868, when the dwelling house burned. They then moved to another tract, where they lived, renting this farm, until 1877. The widow then returned to it, and lived there until 1882, when she married a man named Collier and went to Henderson, Ky. She then rented this tract of appellant, W. A. Howard, who was one of the four children of Alex Howard; he agreeing to pay her annually for the use of the farm. One of the other children, a daughter, conveyed her fourth interest to her brother, appellee James O. Howard. In the year 1893 James O. Howard sold to W. A. Howard his half of the land for \$400, subject to his mother's life interest. The mother died in the year 1904. In 1905 W. A. Howard filed a suit in the McLean circuit court against James O. Howard, alleging that he had been in adverse possession of the land for 15 years, and praying that his title to it be quieted. James O. Howard filed an answer, in which he set up the deed which he had made W. A. Howard and the notes for \$400, which remained unpaid, and asked that his lien be enforced. Before this case was tried, the courthouse burned, and, the papers not having been supplied, the action was dismissed without prejudice. James O. Howard then brought an action against W. A. Howard to recover on his notes and enforce his lien on the land. In this action W. A. Howard filed an answer, denying that he had accepted the deed from his brother, and alleging that he was the owner of the land by adverse possession. After this answer was filed, when the parties met to take depositions, it was agreed between them that the notes should be canceled, and that James O. Howard's half of the land should be conveyed back to him. At the next term of the court a judgment was entered pursuant to the agreement, and a deed was made pursuant to the judgment to James O. Howard for one-half of the land. He then instituted this action, under section 490 of the Civil Code of Practice, for a division of the land, asking that his half of it be cut off to him. W. A. Howard filed an answer, in which he set up the same defense as he had set up in the former action. Proof was taken, and on final hearing the circuit court adjudged the plaintiff, James O. Howard, the relief sought. W. A. Howard appeals.

It appears from the evidence that, when Alex Howard in 1850 bought the land, there was a lien on it for the purchase money; that in a suit against him to foreclose the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Then the land was ordered sold, and William H. Howard became the purchaser of the land, and a deed was made to him for it in 1853. Who William H. Howard was, or what was his relation to Alex Howard, does not appear; but it does appear that Alex Howard remained upon the land until his death, and that his widow and children have held it ever since, without any claim on the part of William H. Howard to it. Under such circumstances it must be presumed that William H. Howard held the land for Alex Howard. The appellant, W. A. Howard, in no way connects himself with William H. Howard, who purchased the land in 1853. Beside, he entered on the land under his mother, and held it under her. He is bound by the judgment by which the deed was made to his brother, J. O. Howard. It is immaterial that that judgment was entered by agreement. An agreed judgment is as binding as any other judgment, unless it is opened in the manner provided by law. The proof shows clearly that the agreement was made between W. A. Howard and James O. Howard, and that the judgment was entered pursuant to their agreement. If there was any mistake about this, the court that entered the judgment may, in a proper proceeding, grant relief by opening or modifying it; but until it is so opened or modified it is conclusive on W. A. Howard that his brother, James O. Howard, is the owner of one-half of the land.

Judgment affirmed.

SMITH v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 27, 1909.)

1. CRIMINAL LAW (§ 590*)—CONTINUANCE—ABUSE OF DISCRETION.

When the indictment against defendant for a capital crime was returned, the court set the trial for four days later, and appointed an attorney to defend. Counsel, after conference with defendant, at once placed subpoenas for certain witnesses in the hands of the sheriff, but, when the case was called for trial, applied for a continuance because some of the witnesses had not been served, some of them were absent, and counsel had not been able to prepare a defense. The court, ascertaining that the attendance of all the absent witnesses save one could be procured by the time they were needed, directed defendant's counsel to state the facts which the other witness would testify to, and ordered the affidavit to be read to the jury, and directed the commonwealth to admit the truth thereof, and refused the continuance. Defendant was convicted and sentenced to be executed. *Held*, that the court abused its discretion, denying the continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1316, 1317; Dec. Dig. § 590.*]

2. HOMICIDE (§ 33*) — VOLUNTARY MANSLAUGHTER.

If accused unlawfully and willfully shot and killed deceased in a sudden affray, or in a sudden heat and passion, with a felonious in-

tent to kill, or if the killing was the direct and natural, though unintentional, result of a reckless, wanton, or grossly careless use of a gun by defendant in struggling with deceased for its possession when he knew it was dangerous to life, if handled in that manner, he would be guilty of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 54; Dec. Dig. § 33.*]

3. HOMICIDE (§ 34*) — INVOLUNTARY MANSLAUGHTER.

If the shooting and death of deceased resulted from the unintentional and careless discharge of a gun by defendant in struggling with deceased to retain the gun to shoot another, when deceased was trying to prevent such shooting, defendant would be guilty of involuntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 55; Dec. Dig. § 34.*]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Jonas Smith was convicted of patricide, and he appeals. Reversed and remanded.

Jas. Campbell, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, C. J. The appellant, Jonas Smith, was indicted in the court below for the murder of his father, Amos Smith. He was brought to trial within four days of the return of the indictment, by verdict of the jury declared guilty as charged, and given the death penalty. Of that verdict, the judgment entered thereon, and the refusal of the circuit court to grant him a new trial he complains; hence this appeal.

The facts leading to and connected with the homicide were few and simple. It appears from the evidence that appellant and his father are negroes, the latter being an old man 70 years of age, and that both lived with a brother of the former and son of the latter in the city of Paducah. The evidence showed appellant to have been a violent and reckless man, and that he had served a term in the penitentiary, but that he and his father had always been on good terms. It was also shown by the evidence that appellant and one John Polk, also a negro, were enemies; that shortly before the killing of Amos Smith appellant had threatened to kill Polk; and that on the morning of the day of the homicide appellant purchased a number of gun cartridges. It was further shown by the evidence that appellant about 7 p. m. of that day met John Polk on the street near his home, which was close to that of appellant, and with a shotgun attempted to shoot him, but that he was prevented from doing so by the act of Polk in grabbing the gun and calling for help; that the father and two brothers of Polk, hearing the cries, came to his rescue, and assisted him in holding or trying to take the gun from appellant. At that juncture appel-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lant's father, Amos Smith, hearing the cries and seeing the altercation, appeared on the scene, and at once undertook to assist the Polks in wresting the gun from his son. When he took hold of the gun, the Polks released their hold upon it, and left to him the task of taking it from appellant. In the struggle that continued between appellant and his father for the possession of the gun the weapon was discharged, and the balls entering the body of the latter caused his death. According to the testimony of several of the Polks, during the struggle between father and son over the gun the son in an angry manner, and with an oath, told his father, if he did not release his hold upon the gun, he would shoot him, and this declaration was immediately followed by the discharge of the gun. Appellant denied the making of such a declaration, but admitted the shooting of his father, and claimed that it was purely an accident.

Although numerous grounds were urged for a new trial, but two of them impress us as being worthy of consideration. These are (1) the failure of the circuit court to grant the continuance asked by appellant before the beginning of the trial; (2) its alleged failure to properly instruct the jury.

When the indictment was returned, the court informed appellant that the case ought to be disposed of at that term, and ordered that it be set for trial four days later. Being then advised by appellant that he had not secured counsel and was without means to employ one, the court appointed a member of the bar present to defend him. The counsel named accepted the appointment, and, after a hasty conference with appellant, at once procured and placed in the hands of the sheriff subpoenas for certain witnesses whose names appellant furnished him. When the case was called for trial on the day fixed by the court, appellant, through his counsel, informed the court that he was not ready for trial, and moved that the case be continued until the next term of the court, filing in support of the motion the affidavits of himself and counsel, in each of which was set forth the absence of certain witnesses, some of whom had not been served with the subpoenas issued at appellant's instance on the day of the return of the indictment, and the further fact that appellant's counsel had not been able to fully investigate the facts connected with the homicide for which appellant was indicted, or to properly prepare his defense. The court, having ascertained that the attendance of all the then absent witnesses, save one, could be procured by the time they would be needed, refused the continuance, and, requiring appellant to state, in the form of an affidavit, the material facts to which the one witness whose attendance could not be procured would testify, ordered that it be read on the trial as the deposition of such

witness and admitted by the commonwealth as true. To the ruling of the court in refusing the continuance the appellant duly excepted, and the trial proceeded with the result previously indicated. Under the circumstances of this case the court's refusal of the continuance asked by appellant was an abuse of discretion. The appellant may be a brutal and dangerous man, but by the showing of the record he is certainly an ignorant one. His penniless and friendless condition, together with his ignorance and the fact that his counsel between the time of his appointment to represent him and the beginning of the trial was almost constantly engaged in discharging his professional duties in other cases pending in the same court, made it well nigh impossible for him to properly prepare appellant's case for trial within the three or four days' time allowed by the court. That appellant's counsel is a capable lawyer all who know him will concede; but, while the record manifests the skill and care with which under the circumstances he conducted appellant's defense, it also shows the embarrassments that inevitably result from the hasty and incomplete preparation of a case. He should have had reasonable opportunities for conferring with his client and the members of his family; reasonable time for looking up witnesses, and ascertaining their testimony, and for making such further preparation as would secure for his client a fair and impartial trial.

We are also satisfied that the jury were not instructed as to all the law of the case. Instruction No. 1 was properly given, for it correctly advised the jury of the law in respect to the crime of murder, and told them in what state of case they would be authorized to find appellant guilty of that crime, and what in that event should be his punishment. We cannot, however, approve instructions 2 and 3 as given by the lower court. They fall short of an accurate statement of the law as to voluntary and involuntary manslaughter, and altogether failed to submit to the jury the question of whether the killing of deceased resulted from sudden heat and passion on the part of appellant excited by the interference of the former in trying to wrest from him the gun to prevent the shooting of Polk. "It is essential to the commission of voluntary manslaughter that the homicide should have been willfully and intentionally committed (i. e., in a sudden affray or in sudden heat and passion), or under such circumstances as to strike one at first blush as so reckless and wanton as to be felonious, though apparently not intended by the perpetrator." *Montgomery v. Commonwealth* (Ky.) 81 S. W. 264; 1 *Bishop's New Crim. Law*, § 314; *York v. Commonwealth*, 82 Ky. 360; *Smith v. Commonwealth*, 98 Ky. 318, 20 S. W. 229. On the other hand, if the homicide resulted

from the careless and unintentional discharge of the gun by appellant in the doing of an unlawful act, such as struggling with his father to retain the gun when the latter was holding it to prevent him from wrongfully shooting Polk, the act was involuntary manslaughter and punishable at the common law by fine or imprisonment in jail, or both, in any amount and for any length of time, in the discretion of the jury. *Brown v. Commonwealth*, 122 Ky. 628, 92 S. W. 542; *Ewing v. Commonwealth* (Ky.) 111 S. W. 352. In lieu of instructions 2 and 3, the court should on a retrial give the following:

Although the jury may believe from the evidence beyond a reasonable doubt that the defendant shot and killed deceased with a gun, loaded as in instruction No. 1 described, if they believe from the evidence that he committed the act without previous malice, but shall believe from the evidence beyond a reasonable doubt that such shooting and killing was unlawfully and willfully done by defendant in a sudden affray or in sudden heat and passion and with the felonious intent to kill deceased, or shall believe from the evidence beyond a reasonable doubt that the shooting and killing of deceased, if done by defendant, was the direct and natural, though unintentional, result of a reckless, wanton, or grossly careless use or handling of any of said gun by defendant in struggling with deceased for its possession, when he knew it was dangerous to life if so handled by him, they should find him guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary not less than 2 nor more than 21 years.

If, however, they should believe from the evidence beyond a reasonable doubt that defendant shot and killed deceased with a gun, and that such shooting and death of deceased resulted from the unintentional and careless discharge of the gun by him in doing an unlawful act, such as struggling with deceased to retain the gun for the purpose of shooting John Polk, if he was so struggling for the possession of the gun for such purpose, when deceased was trying to prevent him from shooting said Polk, if he was so trying, they should in that event find defendant guilty of involuntary manslaughter, and fix his punishment at a fine in any amount, or imprisonment in jail any length of time in the discretion of the jury. If the jury believe from the evidence that the killing of deceased by defendant was not murder, voluntary or involuntary manslaughter, as defined in the instructions, but was unintentional and accidental, they should acquit him.

In addition to instruction No. 1, and those herein directed to be given, the circuit court will again give the instructions numbered 4 and 5. The record fails to disclose any

error in the admission or rejection of testimony.

On account of the errors indicated, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

PALMER TRANSFER CO. v. FIDELITY & CASUALTY CO.

(Court of Appeals of Kentucky. April 28, 1909.)

INSURANCE (§ 183*)—ACCIDENT INSURANCE—PREMIUMS—POLICY—CONSTRUCTION.

Where an accident policy issued by plaintiff covering the drivers of vehicles of defendant transfer company provided that the premium was based on the entire compensation earned by the drivers, and that, if it should exceed the sum set forth in the schedule furnished, defendant should pay the additional premium earned, plaintiff was entitled to a premium based on the entire compensation paid the drivers, though part of the time they were employed as stablemen.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 183.*]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by the Fidelity & Casualty Company against the Palmer Transfer Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Crie & Ross and Miller & Miller, for appellant. Wheeler, Hughes & Berry, for appellee.

LASSING, J. The Palmer Transfer Company is a corporation doing a general transfer and passenger business in the city of Paducah. In the course of its business it employs a number of men to drive its hacks, busses, and other vehicles, and also employs a number of men as stablemen, hostlers, blacksmiths, etc. On November 1, 1904, it took out a policy of accident insurance in the appellee company, covering its drivers of vehicles. This policy was No. 43,076, and the premium charged therefor was estimated from a statement made by the appellant company, showing the number of drivers in its employ, and the weekly salary paid to each. This policy ran for 12 months. On November 1, 1905, the first policy expired, and another policy was issued in lieu thereof, for 12 months; the premium upon this policy being estimated the same as upon the first policy. On November 1, 1906, a third policy was issued for the same purpose, and the premium was estimated in the same way. In the application for each of these policies it was represented that there would be three hacks, one hotel coach, one United States mail wagon, and two baggage wagons engaged in the conduct of appellant's business. Each policy contained the following provision regulating the premium thereon: "Condition J: The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

premium is based upon the entire compensation earned by the drivers of the assured during the period of this policy. If the assured himself drive any draught or driving animal or vehicle there shall be included therefor in the compensation a sum equivalent to the average compensation of the driver of a team covered hereunder. Whenever employes are compensated, in whole or in part, by store certificates, board, merchandise, credits or any other substitute for cash, the amount of compensation covered by such substitutes shall be included in the compensation. If such compensation exceeds the sum set forth in the schedule, the assured shall immediately pay the company the additional premium earned; if such compensation is less than the sum set forth in the schedule, the company will return the unearned premium, when determined; but the company shall receive or retain not less than fifty dollars (\$50.00), it being agreed that this sum shall be the minimum earned premium."

At the date of the delivery of each of these policies, the estimated premium thereon was paid by appellant, and at some time after the expiration of the first and second of said policies, upon a statement made by appellant to appellee, appellee rebated to appellant company a portion of the premium which it had paid at the date of issue of the policy. It appears that no auditor of appellee had, in the meantime, audited the books of appellant to ascertain whether or not the statement made by appellant as to the amount of money annually paid to its drivers was correct. Some question having been raised as to the correctness of the reports furnished by appellant, appellee caused the books of appellant company to be audited, and this investigation disclosed the fact that appellant had, during each of the years covered by the contract of insurance, paid to its drivers a sum largely in excess of that reported in the statement which it had made to appellee, and demand was therefore made by appellee upon appellant, not only for the return of the premium rebated, but also for the payment of the additional premium for each year as called for by the contract of insurance. Appellant, while admitting that it had paid to its drivers the amount of money reported by the auditor for appellee company, insisted that, inasmuch as their said drivers had not devoted more than one-half of their time to the business of driving, the sum which they had reported as paid to their drivers was, in fact, in excess of what it should have been. The appellant company had charged one-half of the sum paid to those employed as drivers to their account as stablemen. It seems that these drivers, when not actively engaged in driving, were required to do other work around the transfer barn.

It appears from the pleadings that appellant also took out other accident insurance with appellee, covering its stablemen and other employes. The annual premium charged

on this latter class of policies was much cheaper than that charged on the policy covering the drivers. Appellant refused to pay the sum demanded by appellee, or any sum whatever as additional premiums, and thereupon appellee instituted a suit to recover same. Appellant answered and joined issue upon the material allegations of the petition, which formed the basis of appellee's claim, and, in addition, pleaded that as to the claim on policies 1 and 2 there had been a settlement and an adjustment thereof, in which the appellee company had refunded to it certain designated portions of the premium which had been paid when the policy was issued. It also pleaded that the method of bookkeeping which had been adopted and followed by it had been approved, acquiesced in, and consented to by the local agent of the appellee company. The material allegations of the answer were traversed, proof was taken, and the case submitted to the chancellor for judgment. He found in favor of the insurance company for the full amount sued for, and, being dissatisfied with that finding and judgment, the transfer company appeals.

Counsel for appellant cannot seriously rely upon the defense of settlement as to the dispute over premiums covering the first and second policies of insurance. There was no settlement, but the insurance company, without investigation, accepted the statement furnished it by appellant as correct, and fixed the premium for each year according to the statement as regulated by the terms of the policy. If, as a matter of fact, the statement for each of said years, as furnished by appellant, was not correct, and appellee was deceived or misled by reason thereof, appellant would be in no position to avail itself of its own error or wrong. The policy itself furnishes the real contract. The method of bookkeeping adopted and used by appellant has nothing to do with the questions involved in this litigation. The contract of insurance provides definitely and distinctly the manner in which the premiums to be paid shall be estimated at the date upon which the policy is issued, and determined with accuracy at the expiration thereof. Hence it is immaterial that the local agent of appellee was advised of the method of bookkeeping used by appellant. The premium to be paid is determined, not by the method of bookkeeping employed, but by the amount of money actually paid to the drivers. The only question therefore which we deem it necessary to consider is whether or not, under the provisions of the policy, appellant had the right to have the premiums on said policies fixed by considering the total compensation paid to the drivers while actually engaged in the business of driving, or whether the total compensation received by them while in the employ of appellant company must be taken into account.

While the business of appellant is a haz-

ardous one, the greater part of the hazard is confined to the use of its vehicles, and hence the cost of insuring it on account of loss by accident that may occur to passengers riding in its vehicles, or to the public that may be injured by reason of any negligence of its drivers, is correspondingly high. It would be impossible to determine what would be a fair charge to make for assuming this risk without some data to serve as a guide, and hence appellee required that appellant furnish certain information concerning the nature, character, and extent of its business as a condition prerequisite to entering into a contract of insurance. This information is the "statement" in the policy. The facts therein set out were exclusively within the knowledge of appellant, and, as they form the very basis and foundation of the contract, it is bound by them. It will be observed that the statement describes the number and character of vehicles used in the transportation of passengers and freight, and gives the number of drivers employed and their compensation. There is no intimation in this information furnished as to what part of each driver's time is employed in driving. No such information is sought, and if it had been it could not have been furnished with any degree of accuracy, for this would necessarily depend upon the run of business which appellant would have. No estimate of the hazard assumed could be based upon such information, but when appellee knew the number and kind of vehicles used by appellant in its business, and the number of drivers employed and their pay, a basis was furnished upon which an estimate could be made. Upon such statement the value of the hazard was figured and the contract of insurance made, with the proviso that, should there be an increase or decrease of drivers so employed, the cost of insurance should be increased or decreased accordingly.

If appellant's contention is correct, then there would have been no occasion for issuing a different policy covering different grades of employes; but all that would have been necessary to do would be to state the total number of employes, and how much of the time of each (estimating as he proposes in this case to do) would be devoted to the discharge of the several duties that might be assigned to them. The fact that the business was not conducted in this way is persuasive that such a plan was not contemplated. If part of the time of the driver was taken up in the discharge of other duties, and his compensation while so employed properly chargeable as pay to "stableman," then for such time he was not a driver, and if an accident had occurred while he was driving, and the insurance company had sought to defend upon the ground that he was a stableman, would such a defense

be regarded as meritorious? Certainly not; and, as such fact could not be used as a defense by the insurance company, it can no more be used as a shield by the transfer company to enable it to escape liability when called upon to pay the premium as fixed by the terms of the contract.

The contract fixes the premium by taking into consideration the number of vehicles used, and the drivers employed, and their compensation, without regard to the length of time actually employed by each driver while driving, and the trial court having so construed it, and entered his judgment accordingly, we are of opinion that it should be, and is, affirmed.

JOHNSON v. GORDON.

(Court of Appeals of Kentucky. April 29, 1909.)

1. JUDGMENT (§ 585*)—RES JUDICATA.

A judgment for defendant in forcible entry proceedings is not a bar to a forcible detainer proceeding, since whether defendant forcibly entered the demise or not had no relevancy to whether she forcibly detained it after being legally required to surrender the possession.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1084, 1085, 1092-1095, 1097; Dec. Dig. § 585.*]

2. FORCIBLE ENTRY AND DETAINER (§ 5*) — WHERE LIES.

Under Civ. Code Prac. § 452, subs. 4, providing that the refusal of one who has made a forcible entry on the possession of a tenant for a term to deliver possession to the landlord, on demand, after the term expires, is a forcible detainer, one entering premises with or without the consent of the tenant and refusing to vacate on demand of the landlord after the tenant's term expires is guilty of forcible detainer.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 23-28; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2372, 2373.]

3. LANDLORD AND TENANT (§ 63*)—ESTOPPEL TO DENY LANDLORD'S TITLE.

Neither a tenant nor one entering under him can deny the landlord's title in a proceeding by the latter to recover possession.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 159; Dec. Dig. § 63.*]

Appeal from Circuit Court, Fayette County.
"Not to be officially reported."

Action by A. N. Gordon against Elizabeth M. Johnson. Judgment for plaintiff, and defendant appeals. Affirmed.

R. S. Crawford and Geo. C. Webb, for appellant. J. D. & G. R. Hunt and Falconer & Falconer, for appellee.

O'REAR, J. Appellee was in possession of a certain house and lot on Maxwell street and Lexington avenue in the city of Lexington, having bought it from the trustee of a building association. His tenants occupied the premises for several years. Finally he rented the place to one Morrison, and turn-

ed over the key to him that he might go into the possession. Morrison did enter into the possession, but, before he had finished moving in his furniture, the appellant who was a former owner of the property, and who claims that the building association had extorted usury from her and had in its foreclosure suit against the property proceeded irregularly to the judgment of the sale, went to Morrison and prevailed upon him to surrender the possession to her. Morrison's lease was from month to month for a term, conditioned upon his prompt payment of the rent. Appellee, learning that Morrison had abdicated, brought forcible entry proceedings against appellant. He was successful in the country, but upon the traverse in the circuit court the jury found the appellant not guilty. Thereupon appellee instituted this forcible detainer proceeding against appellant to recover the possession of the property.

In the country and upon the traverse the judgment was that appellant was guilty. Upon this appeal two grounds are assigned as error. The first is that the trial court erred in excluding the verdict and the judgment in the circuit court upon the former traverse, which were attempted to be used as a bar to this proceeding. We think the circuit court was correct in that ruling. Whether the defendant was or was not guilty of having forcibly entered the demise had no relevancy to whether she had forcibly detained it after being legally required to surrender the possession. *Shepherd v. Thompson*, 2 Bush, 176.

The other question presented involves the nature of appellant's act in getting the possession from Morrison. It is contended that, if appellant went into possession with the consent of Morrison, then her entry was not forcible, and did not come under subsection 4, § 452, Civ. Code Prac., which provides: "The refusal of a person who has made a forcible entry upon the possession of a tenant for a term to deliver possession to the landlord, upon demand, after the term expires," is a forcible detainer. Whether appellant entered with or against the consent of Morrison is in some doubt, but, whichever it was, she is guilty of the forcible detainer, having refused to vacate the premises upon demand of Gordon after Morrison's term expired. If she entered under circumstances set out in subsection 4 of section 452, Civ. Code Prac., *supra*, she is guilty. If she entered by consent of Morrison, then she held under him, and could acquire no greater right from him as against his landlord than he himself had. So when Morrison would have been required to surrender the possession to his landlord, appellant, who entered under him, was likewise required to surrender the possession. The tenant cannot deny his landlord's title, neither can one who enters under the tenant deny it, in a pro-

ceeding by the landlord to recover the possession.

The facts and law were appropriately submitted to the jury. There is no error in the record.

Judgment affirmed.

CAMPBELL v. PREECE.

(Court of Appeals of Kentucky. April 29, 1909.)

1. FRAUDS, STATUTE OF (§ 103*)—SALE OF LAND—WRITTEN CONTRACT.

The statute of frauds is sufficiently complied with if there is a written memorandum of the contract for the sale of land, signed by the party to be charged.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 192, 193; Dec. Dig. § 103.*]

2. FRAUDS, STATUTE OF (§ 104*) — CONTEMPORANEOUS MEMORANDUM.

A memorandum of a contract for the sale of land, sufficient to satisfy the statute of frauds, need not be contemporaneous with the contract; it being sufficient if it is subsequently executed and ratifies the contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 209; Dec. Dig. § 104.*]

3. FRAUDS, STATUTE OF (§ 119*)—NATURE AND EFFECT OF STATUTE.

The statute of frauds pertains only to the evidence of a contract, so that a contract, in the making of which the statute has not been complied with, is void only because of the lack of legal evidence to establish its existence.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 119.*]

4. FRAUDS, STATUTE OF (§ 103*)—"MEMORANDUM"—SUFFICIENCY.

A "memorandum," required by the statute of frauds, is such a written declaration of the parties to the agreement as will relieve the court from relying on parol evidence to ascertain the subject of the contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 103.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4472-4473; vol. 3, p. 7720.]

5. FRAUDS, STATUTE OF (§ 108*)—MEMORANDUM—REQUISITES—TERMS OF CONTRACT.

A memorandum, sufficient to satisfy the statute of frauds, need not state the terms of the contract as to the consideration which may be proved by parol, even if to do so involves contradiction of the memorandum.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 214-221; Dec. Dig. § 108.*]

6. FRAUDS, STATUTE OF (§ 118*)—MEMORANDUM—SINGLE WRITING.

Two or more writings, signed by the party to be charged, and shown to refer to the same subject-matter, and describing the subject of the contract so that it may be identified, may together constitute a sufficient memorandum.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 262-265; Dec. Dig. § 118.*]

7. FRAUDS, STATUTE OF (§ 118*) — SALE OF LAND—MEMORANDUM—SUFFICIENCY.

In 1894, plaintiff sold defendant by parol and placed him in possession of land described, for \$1,000, to be paid for in cutting and hauling timber from the land for plaintiff. In 1899,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff executed a receipt to defendant for \$265 as part payment "on the land sold him by myself on the Shanty branch," and in 1900 an instrument was executed, reciting that defendant thereby sold to plaintiff all the merchantable timber now standing on the lands that plaintiff sold to defendant, situated on the Shanty branch, etc., at a specified price, etc. Held that, the parol contract of sale being admitted, such writings, construed together, constituted a sufficient memorandum to satisfy the statute of frauds.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Dec. Dig. § 118.*]

Appeal from Circuit Court, Pike County.

"To be officially reported."

Action by A. W. Campbell against Joseph Preece. Judgment for defendant, and plaintiff appeals. Affirmed.

Roscoe Vanover, for appellant. N. J. Auxler, P. B. Stratton, and Hazelrigg & Hazelrigg, for appellee.

O'BEAR, J. In 1894 appellant sold to appellee by parol contract, and put him in possession of, a tract of land situated "on the Shanty branch on left fork of Peter creek in Pike county, Kentucky" (and which is particularly described in the pleadings and judgment in this case), for the agreed price of \$1,000, to be paid for by appellee in cutting, hauling, and delivering to appellant the timber from the land at so much per thousand feet. A contract as to some of the timber was not concluded till 1900, when it was reduced to writing, and signed by both parties. It contained this recital: "That the said Preece does hereby sell to the said Campbell all the oak, poplar, ash, cucumber, basswood and any other woods that merchantable timber can be obtained from, that is now standing on the lands that said Campbell sold to said Preece situated on the Shanty branch on the left fork of Peter creek, Pike county, Kentucky, at \$1.50 per M. feet where it now stands." The first contract between the parties as to the timber to be cut and delivered in part payment for the land seems to have been in parol. When it was executed, upon a settlement a balance was found due to appellee, which was credited upon the purchase price of the land, as evidenced by the following receipt: "\$265.00. Phelps, Ky. March 31, 1899. Received of Joseph Preece two hundred and sixty-five dollars as part payment on the land sold him by myself on the Shanty branch. A. W. Campbell." A further credit was due upon a settlement of the second timber contract, which has been referred to above. Appellee failed to pay all the purchase money; nor was appellant able, until after the commencement of this suit, to convey a good title to the land; nor did he ever offer to convey any title to appellee. This suit was brought recently by appellant against appellee in ejectment, the former electing to treat his parol agreement to convey the land

as void, because it was conceived by him to be within the statute of frauds and perjuries. Appellee defended, setting up the parol purchase of the land and the subsequent ratification thereof in writing, making proffer of the two writings copied above. He tendered payment of the balance of the purchase money, and asked a specific execution of the contract. The action having been transferred to equity, the circuit court adjudged that the contract was enforceable, and that it be specifically enforced. Appellee paid the adjudged balance of the purchase money into court, which appellant declined to accept, but prosecutes this appeal from the judgment decreeing the performance of the contract. The question for decision is the sufficiency of the written memoranda of the contract.

The statute of frauds and perjuries, as now in force in this state, so far as material to this case, reads (section 470, Ky. St. [Russell's St. § 1775]): "No action shall be brought to charge any person * * * upon any contract for the sale of real estate or any lease thereof for a larger term than one year, * * * unless the promise, contract, agreement, representation, assurance, ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent. But the consideration need not be expressed in the writing; it may be proved when necessary, or it may be disproved by parol or other evidence." It is not necessary to the validity of the contract that it shall be in writing. If there be a written memorandum of it, signed by the party to be charged, it is taken out of the statute. Nor is it necessary that the memorandum be contemporaneous with the contract. If it be executed subsequently, and ratifies the contract, it is sufficient. The statute pertains to evidence of the contract—not to its validity. While it follows that, if the required evidence of the contract be wanting, its enforcement is denied, and the contract is said to be void, it is void only because of the lack of legal evidence of its existence.

The note or memorandum required by the statute is such written declaration of the parties to the agreement as will relieve the court from relying upon parol evidence to ascertain the subject of the contract. When the subject is established by a sufficient writing, there is then such evidence of the contract upon that score as satisfies the statute; and, if the contract be then established by the proof, it may be enforced. Nor is it necessary that the terms of the contract, in so far as they constitute part of the consideration, be stated in the writing, or, if stated therein, that they be proved as stated. *Camp v. Moreman*, 84 Ky. 635, 2 S. W. 179. The consideration, so the stat-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ute allows, may be shown by parol, even if to do so involve a contradiction of the written memorandum. Nor is it necessary that the written memorandum, evidencing the contract or ratifying it, be contained in one writing. If two or more writings, signed by the party to be charged, and shown to be referable to the same subject-matter, describe the property so that it may be identified, it is sufficient. *Camp v. Moreman*, supra. The parol agreement is not disputed. Both parties agree as to it. Nor is the identity of the property, or the balance owing upon it, in dispute. So the question comes down to this: Is the subject of the contract sufficiently identified by the writings?

Reading the two writings together, it is noted that appellant states he had theretofore sold appellee certain land on the Shanty branch on the left fork of Peter creek, in Pike county, Ky. The location of the land is then established. Its boundary remains alone to be ascertained. The writings speak of the transaction in the past tense. It refers to the land which Campbell had sold to Preece. If it had stated, "the land where Joseph Preece now lives," or the land "where Joseph Preece lived in 1899," it would not be questioned that the description would have been sufficient. Parol evidence is always receivable to identify the land spoken of in the writing, but not to designate it. Thus in *Henderson v. Perkins*, 94 Ky. 207, 21 S. W. 1035, the memorandum ran: "Have this day sold and by these presents sell my home place and storehouse to L. D. Perkins, of Rocky Hill, Barren county, Kentucky, for and in consideration of four thousand dollars," etc. The court said: "We think this is a sufficient memorandum of the contract to take it out of the statute. There was a partial execution of it, and the description of the land, although defective, was sufficiently full for easy identification."

In *Overstreet v. Rice*, 4 Bush, 1, 98 Am. Dec. 279, the memorandum was that the parties had "this day swapped farms." It appears that each had taken possession of the land received in exchange by him. The court, implying that the language of the writing was too uncertain to be enforceable without itself, held that, when the parties by their conduct had rendered the uncertainty sure by taking possession and consummating the mutual exchange, the impediment was removed. That was but another way of identifying what would have been impossible without extraneous aid, owing to the ambiguity of the writing—a course familiar in the construction of contracts whose terms or descriptions are ambiguous. In *Ellis v. Deadman's Heirs*, 4 Bibb, 466, the writing was: "4 Jany. 1808. Received of Jesse Ellis \$—, in part payment for a lot he bought of me in the town of Versailles, it being the cash part of the purchase of said lot. Nathan Deadman." The writing was held to sat-

isfy the statute as to the description of the land. *Kay & Casey v. Curd*, 6 B. Mon. 100, *Tucker v. Denton* (Ky.) 106 S. W. 280, 15 L. R. A. (N. S.) 289, *Usher v. Floyd*, 83 Ky. 552, *Moayan v. Moayan*, 114 Ky. 855, 72 S. W. 33, 60 L. R. A. 415, 102 Am. St. Rep. 308, and *Vorheis v. Biting* (Ky.) 22 S. W. 80, are relied on by appellant. Those cases (except *Moayan v. Moayan*) were instances where there was no identification, or means of identification, afforded by the writings. If the writing identifies the land, that, of course, ends the inquiry. If it does not identify it, but affords means of identification, that is deemed sufficient. If the means of identification are other records or writings, it is practically certain. But if not other writings, as it may not be, it may nevertheless be a satisfactory means. All that is required is that it shall be susceptible of certainty. If, when the means are resorted to, it is still left open what lands are meant to be conveyed, the description will be bad. Therefore it is never good to refer to a future event, as that could not have been certain when the memorandum was made. But generally a reference to an existing or past event is good. There it can be known certainly what was intended; for that which has transpired is changeless. "The place where I live" identifies one place only, and is susceptible of being shown definitely and unerringly. "The place which I sold to A." is likewise susceptible of identification; and, if I had sold but one place to A., it is as certain as would have been a more particular description. It is from such instances that the maxim has arisen, "That is certain which can be made certain." If the description had read, "beginning at an oak tree on Shanty branch in Pike county," and "then following the marked lines and fences around the tract to the beginning," while it would have been held a sufficient description, it would have required extraneous aid to have located the particular oak that constituted the beginning corner, as well as the fences and lines around the tract. In the *Moayan* Case, supra, it was said, *inter alia*: "It is as essential that the terms be specified as the description of the property." That expression, taken out of its connection, is misleading. The court was there discussing the opinion in *Ellis v. Deadman*, supra, in which it had been held that the description was good, but that the memorandum was deficient in not stating the terms of the contract. We were explaining the ground upon which *Deadman's* contract had been held insufficient under the statute, as it was. For the statute of frauds and perjuries of 1706, then under consideration (1 Litt. St. 371), did not contain the clause found in our present statute relative to the consideration.

We find that the description in the memoranda in this case was sufficient to satisfy the statute. Hence the judgment below is affirmed.

PECK-WILLIAMSON HEATING & VENTILATING CO. v. MILLER & HARRIS.

(Court of Appeals of Kentucky. April 30, 1906.)

1. CONTRACTS (§ 10*)—REQUISITES—MUTUALITY.

A contract between a manufacturer and a selling agent by which the manufacturer agrees to give the agent exclusive sale of its goods in a specified locality for one year, and to bill its goods at certain discounts from its price list, and the agent agrees to sell exclusively the manufacturer's goods and to push their sale during the term of the contract, is not void for want of mutuality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

2. CONTRACTS (§ 326*)—ACTIONS FOR BREACH—GROUNDS OF ACTION.

The violation by a manufacturer of a valid contract with a selling agent renders the manufacturer liable in damages.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 326.*]

3. PARTNERSHIP (§ 279*)—DISSOLUTION OF PARTNERSHIP—RIGHTS OF THIRD PERSONS—CONTRACTS.

Where the breach of a contract with a partnership occurs prior to the dissolution of the partnership, such dissolution cannot be urged as a defense in an action for the breach, even if such dissolution terminated the contract.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 636, 637; Dec. Dig. § 279.*]

4. PARTNERSHIP (§ 279*)—DISSOLUTION AS TERMINATION OF CONTRACT WITH PARTNERSHIP.

Where both partners are liable on a contract, the dissolution of the firm will not terminate the contract.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 636, 637; Dec. Dig. § 279.*]

5. CONTRACTS (§ 324*)—ACTIONS FOR BREACH—NATURE OF REMEDY.

Where the measure of damages for the breach of a contract is the amount of profits to which plaintiffs would be entitled, it is immaterial whether they sue for damages or for an accounting of profits.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.*]

6. CONTRACTS (§ 202*)—ACTS CONSTITUTING BREACH.

A contract by defendant to give plaintiff the exclusive sale in a certain locality of its "residence furnaces, furnace fittings, and laundry dryers," in consideration of plaintiffs agreeing to sell exclusively the goods manufactured by defendant, is not breached by the sale of airtight stoves by plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 918-920; Dec. Dig. § 202.*]

Appeal from Circuit Court, Warren County.
"Not to be officially reported."

Action by Miller & Harris against the Peck-Williamson Heating & Ventilating Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. B. Gaines, T. W. Thomas, and R. C. F. Thomas, for appellant. Sims, Du Bose & Rodes, for appellees.

CLAY, C. The appellees, W. H. Miller and R. E. Harris, partners doing business in Bowling Green, Ky., under the firm name

of Miller & Harris, instituted this action against appellant, the Peck-Williamson Heating & Ventilating Company, to recover damages for the violation of a contract whereby appellant gave to appellees the exclusive right of sale for a period of one year from February 23, 1906, of their furnaces and furnace fittings in Bowling Green and vicinity. Appellant filed an answer, which consisted of a traverse, a plea of fraud in the execution, and operation of the contract, and a counterclaim of \$1,000. The allegations of the answer were denied by reply. The action was then transferred to equity, and judgment rendered by the chancellor in favor of the appellees for the sum of \$150. From that judgment this appeal is prosecuted.

The contract sued upon is as follows:

"This agreement, entered into by and between the Peck-Williamson Heating and Ventilating Company, of Cincinnati, Ohio, party of the first part and Miller and Harris, of Bowling Green, Ky., parties of the second part, witnesseth:

"That the party of the first part agrees to give the exclusive sale of its residence furnaces, furnace fittings and laundry dryers, in the following territory, to wit: Bowling Green and vicinity for the term of 1 year from date, and further agrees to supply suitable advertising matter free of cost. The party of the first part agrees to bill its goods to the parties of the second part, at the following discounts from prices listed in catalogues I, said prices being F. O. B. Cincinnati or Wellston, O.:

Furnaces.....	50 per cent.
Laundry dryers....	30 per cent.
Furnace fittings..	30 per cent.
List in 1904 laundry dryer catalogue.	
Repair castings....	5 cents per pound net.
No. 730 Favorite underfeed furnace, complete with casing.....	\$ 88 00
No. 734 Favorite underfeed furnace, complete with casing.....	105 00
No. 738 Favorite underfeed furnace, complete with casing.....	120 00

"A charge will be made for crating and hauling on orders amounting to less than ten (\$10.00) dollars.

"In consideration of the above prices and exclusive agency, the parties of the second part agree to sell exclusively the goods manufactured by the party of the first part, and push their sale during the term of this contract; and further agree to make settlement for all goods shipped by giving a 60 days acceptance the first of each month for all goods purchased the previous month, or pay cash less 2 per cent.

"The parties of the second part especially agree not to show this contract, or in any way make known its contents to any person whomsoever.

"In witness whereof, we have hereunto set our hands, this 23rd day of Feb'y, A.

D. 1906. The Peck-Williamson Heating and Ventilating Co., By W. T. Jameson.

"Acceptance. We, parties of the second part, hereby accept the foregoing proposition of the Peck-Williamson Heating and Ventilating Company and agree to push the sale of the 'Favorite' furnaces and will order all furnaces used during the continuance of this agreement.

"Done at Bowling Green, Ky., this 28rd day of Feb'y, A. D. 1906."

It is first insisted by appellant that the writing set out above is not a contract, because of its lack of mutuality. With this contention we are unable to agree. By the terms of the contract the parties of the second part are given the exclusive sale of appellant's furnaces, furnace fittings, etc., in the city of Bowling Green and vicinity for the term of one year. The party of the first part further agrees to bill its goods to the parties of the second part at certain discounts from the price list in its catalogue. In consideration of the prices quoted and of the exclusive agency, the parties of the second part agree to sell exclusively the goods manufactured by the party of the first part, and to push their sale during the term of the contract. Here we have obligations proceeding from each party to the contract, and which are capable and possible of performance. Under such circumstances there can be no doubt of the validity of the contract. The contract is such as to protect the rights of either party thereto. It is manifest, therefore, that, if appellant violated its contract, it is liable in damages. *Chipman v. Turner, Day & Woolworth Handle Co. (Ky.) 106 S. W. 852.* According to the testimony for appellees, the latter, immediately upon execution of the contract, began to make efforts to sell appellant's furnace. They did this by distributing advertising matter which appellant furnished, and by personal solicitation among those who they supposed would likely purchase furnaces. A few days after the contract was entered into appellant's special agent in charge of the southern territory, W. T. Jameson, came to the hardware store of appellees, and found the appellees busy. He thereupon left the store. Soon thereafter he made arrangements with one C. H. Smith to take the agency for the furnaces. During the continuance of the contract Jameson and Smith sold from 12 to 14 furnaces. According to the testimony for appellant, this change in the agency was made because appellees had no mechanic qualified to do furnace work, and because they were not pushing the sale of the furnaces. A careful reading of the whole record, however, convinces us that appellees were not given a reasonable time in which to make or push the sales of the furnace. After the expiration of a little over a month, appellant se-

cured the services of another agent. It appears that some time about the 1st of July W. H. Harris retired from the firm of Miller & Harris, and one Rogers took his place. It is therefore insisted by appellant that the contract was terminated by the dissolution of the firm. It appears, however, that appellant's violation of the contract occurred long prior to that time. Even, then, if the firm's dissolution thereafter terminated the contract, it would not be available as a defense by appellant. But the dissolution of the firm had no such effect upon the contract. As between appellant and Miller & Harris, both were liable to appellant on the contract, and appellant was liable to them. It may be that between Miller & Harris, Miller alone was liable, or alone had the right to recover.

It is next insisted that appellees' cause of action, if they had any, would sound in damages to them, and not in an accounting of profits. In a case of this kind, where the measure of damages would be the amount of profits to which the appellees would be entitled, that question is immaterial.

Counsel for appellant further claim that appellees violated their contract by selling certain airtight stoves during the continuance of the contract. This was not a violation of the contract on the part of the appellees, for the goods manufactured by the party of the first part and referred to in the contract are evidently furnaces, furnace fittings, etc., and not ordinary stoves used for household purposes. Appellant was not competing with ordinary stoves, but with other furnace manufactories.

The plea that appellees were guilty of fraud in the execution and operation of the contract is not borne out by the evidence.

Being of the opinion that the weight of the evidence is in favor of the finding of the chancellor, the judgment is affirmed.

HACKETT'S EX'RS v. HACKETT'S TRUSTEE.

(Court of Appeals of Kentucky. April 30, 1909.)

1. BANKRUPTCY (§ 148*)—PROPERTY ACQUIRED BY TRUSTEE—AFTER-ACQUIRED PROPERTY.

The life estate of a bankrupt acquired by will after the adjudication of his bankruptcy does not pass to his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 625; Dec. Dig. § 148.*]

2. BANKRUPTCY (§ 156*)—INTERVENTION IN OTHER PROCEEDING—SUFFICIENCY OF PETITION.

A petition of intervention filed in an action for the construction of a will by a trustee in bankruptcy claiming the estate created by such will is insufficient where it fails to show that testator died before the adjudication in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 156.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. PLEADING (§ 205*) — SCOPE OF GENERAL DEMURRER.

A general demurrer to a petition of intervention filed in an action to construe a will by a trustee in bankruptcy claiming an estate created by the will questions the sufficiency of the petition to show that testator died before the adjudication in bankruptcy.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 205.*]

4. BANKRUPTCY (§ 156*) — INTERVENTION IN OTHER PROCEEDING—PLEADING—CONSTRUCTION.

Where a petition of intervention filed in an action to construe a will by a trustee in bankruptcy claiming an estate created by such will fails to show that testator died before the adjudication in bankruptcy, under the rule that a pleading must be construed most strongly against the pleader, it will be presumed that testator's death was after the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 156.*]

5. BANKRUPTCY (§ 156*) — INTERVENTION IN OTHER PROCEEDING—PARTIES.

Where a will gave a bankrupt a life estate in land in trust for himself and his wife and children, the wife and children are necessary parties to a petition of intervention filed in an action for the construction of the will by the trustee in bankruptcy claiming the bankrupt's interest in the estate created by the will.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 156.*]

Appeal from Circuit Court, Madison County.
"Not to be officially reported."

In an action by the executors of B. C. Hackett, deceased, for the construction of a will, the trustee in bankruptcy of T. B. and Jacob Hackett filed a petition in intervention. From a decree for the intervener, the executors appeal. Reversed.

A. B. Burnam & Son, Smith & Smith, and J. A. Sullivan, for appellants. Grant E. Lilly, for appellee.

LASSING, J. In December, 1905, B. C. Hackett, a bachelor, died a resident of Madison county, Ky. He left a last will by which he disposed of his estate. After the probate of this will, his executors brought suit to settle his estate, and asked the court to construe certain sections of his will, and direct them how to proceed. The following are the provisions of the will involved in this litigation:

"II. I own 550 acres of land, more or less located on the waters of Otter creek, in Madison county, Ky., and known as the Oren and B. C. Hackett farm. This land has been divided into two parts by survey made by B. F. Crook, surveyor. Of said farm, 300 acres more or less, are in the possession of T. B. Hackett, being the west part of the whole boundary, and adjoining Ira N. Scutter, Mrs. John Davis, etc. Of said boundary, and being the east part thereof, 250 acres, more or less, are in possession of Jacob Hackett.

"I will said boundary of 300 acres, more or less, now in possession of T. B. Hackett,

to said T. B. Hackett, in trust for his use and that of his wife and infant children residing with him, equally, for and during the life of T. B. Hackett, and on his death, I will that said farm go to and be equally divided among his children, and the representatives of any that may be dead take their dead parent's part or interest in said farm.

"I will boundary of 250 acres, now in possession of Jacob Hackett, to said Jacob Hackett in trust, for his use, and the benefit and the use of his wife and infant children residing with him, equally, for and during the life of said Jacob Hackett, and at the death of said Jacob Hackett I will that said farm go to and be divided equally among all the children of said Jacob Hackett; and that if any of his children shall be dead, then leaving issue or descendants, that they take their dead parent's part the same as if he or she were alive.

"I will that neither T. B. nor Jacob Hackett be required to execute any bond as trustees aforesaid, and that they shall manage said farms respectively and control same according to their judgment. Said trust farms shall be respectively held for the use and benefit only of Jacob and T. B. Hackett, and their wives and their infant children who may reside with them on said farms. On the death of said T. B. Hackett and Jacob Hackett, respectively, and as they die said trusts shall cease, and each of said farms shall descend as above provided."

Thereafter J. J. Greenleaf, trustee in bankruptcy of T. B. Hackett and Jacob Hackett, filed an intervening petition, in which he sought to be made a party to the suit, and set up the fact that they had each been adjudged a bankrupt, and that he had been duly appointed and qualified as their trustee; that, under the second clause of the will, they each took an undivided one-half interest for life in certain lands devised to them in said clause. He asked the court to so adjudge, and that their interest in the said lands be subjected to the satisfaction of their debts. General demurrers were filed to the petition of the executors, and also to the intervening petition of the trustee in bankruptcy. These demurrers were each overruled, and, no further pleading being filed, the allegations of the intervening petition were taken as confessed, and judgment entered in accordance with the prayer thereof. From that judgment this appeal is prosecuted.

Three questions are raised:

First. The intervening petition fails to show when T. B. and Jacob Hackett were adjudged bankrupts; that is, whether before or after the death of their uncle, B. C. Hackett. If before, of course, the trustee had no interest in the estate that passed to them

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

under the will of their uncle, and it is insisted for the appellants that it was necessary that the intervening petition state affirmatively such facts. The omission of these necessary allegations from the intervening petition is practically conceded by counsel for appellee, but he insists that as this point was not made in the lower court, and is a defect which could have been readily cured, the case should not be reversed for that reason. To this objection it is only necessary to state that the general demurrer filed specifically raised this point, and, under the general rule that a pleading must be construed most strongly against the pleader, it must be presumed, in the absence of an allegation to the contrary, that the said T. B. and Jacob Hackett were adjudged bankrupts before the date of the death of their uncle, and hence the pleading in the form in which it is presented to us fails to state a cause of action on the part of the trustee in bankruptcy, and the demurrer should have been sustained.

The second point raised is that there is a defect of parties; that, as the wives and children of T. B. and Jacob Hackett are jointly interested with them in the ownership of the land or parts thereof sought to be subjected to the satisfaction of the claims in the hands of the trustee against said T. B. and Jacob Hackett, they should have been made parties to his intervening petition. To this objection counsel for appellee responds that, while it is true that the wives of T. B. and Jacob Hackett were not named as parties to the suit, still as they were represented by counsel through their husbands, who were also their trustees, their interests were fully looked after and protected, and the fact that they were not made parties to the litigation affords no ground for complaint on their part, or reason why the judgment should be reversed; and, further, that before advantage could be taken of this omission on appeal it would be necessary that a motion be made in the circuit court to correct the error. This position of counsel for appellees is wholly untenable, and is no doubt due to the fact that he has confused the object sought to be attained in the original suit with that in his intervening petition. The executors have nothing whatever under the terms of the will to do with the land which appellee seeks to subject in satisfaction of the claims of the creditors of T. B. and Jacob Hackett. The purpose of the original suit was to settle the estate of B. C. Hackett, and, as a means to that end, the executors sought the guidance, direction, and instruction of the court as to how they should proceed in the management of certain other lands and matters which were, by the express provisions of the will, entrusted to them, whereas the purpose of the intervening petition is, in effect, to have the lands

described therein partitioned among their respective owners, and the interests of T. B. and Jacob Hackett therein set apart and subjected to the satisfaction of their debts. It is true that, in order to have this done, it is necessary that clause 2 of the will under consideration be construed so that the definite interests of said T. B. and Jacob Hackett in said land might be ascertained. As the wives and infant children of T. B. and Jacob Hackett have an equal present interest with them in said lands, and are therefore directly interested in the result of the claims prosecuted by the trustee in his intervening petition, they are necessary parties to said action, and no valid judgment could be rendered until both the wives and the infant children of T. B. and Jacob Hackett have been made parties, and properly brought before the court.

As the judgment must be reversed for these reasons, we deem it unnecessary to pass at this time upon the other questions raised.

The wives and infant children of T. B. and Jacob Hackett should be made parties defendant to the intervening petition, and brought before the court thereon, the demurrer to the said petition should be sustained with leave to amend, and if the pleading, when so amended, states a cause of action against T. B. and Jacob Hackett, then they should be permitted to plead and set up a homestead interest in said land, and make such other defense as they desire or can.

For the reasons indicated, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

TAYLOR et al. v. CUNDIFF et al.

(Court of Appeals of Kentucky. April 28, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 42*)—ESTABLISHMENT—ORDER—LOCATION OF SCHOOL.

The order of the county court under St. 1909, § 4464 (Russell's St. § 5736), providing that an order shall fix the boundary of a proposed graded school district and direct the holding of an election, provided that no point of the boundary shall be more than $2\frac{1}{2}$ miles from the site of the proposed schoolhouse, and that the location and site of the schoolhouse are set out with exactness, sufficiently locates the schoolhouse to validate the election, where, after specifically setting out the boundary, it provides that the site shall be south of a certain line and as near as practicable to the center of the district, so that the boundary line shall be at no point more than $2\frac{1}{2}$ miles from the schoolhouse.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 42.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 42*)—CREATION—ELECTION—ORDERS.

Where the county court ordered an election to be held at E. on a certain date on the question of creation of a graded school district, its subsequent order referring to the first order, and reciting that it appears by a report on file that said election "was duly held at the time and

place set forth in said order," sufficiently shows the election was held at E.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 42.*]

3. APPEAL AND ERROR (§ 909*)—PRESUMPTION—PERFORMANCE OF DUTY BY OFFICER.

There being in the record a statement, certified to by the sheriff who was ordered to open a poll on the question of creation of a school district, setting out that in accordance with the order "notice is hereby given that an election will be held," etc., it will be presumed, in the absence of any showing to the contrary, that the officer performed his duty by publishing the notice as required by law.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 909.*]

Appeal from Circuit Court, Pulaski County.
"Not to be officially reported."

Action by J. M. Taylor and others against H. V. Cundiff and others. From an adverse judgment, plaintiffs appeal. Affirmed.

Jas. Denton, for appellants. Virgil P. Smith, for appellees.

CARROLL, J. The appellants attack the validity of a tax levied to establish and maintain a graded school in Pulaski county upon the grounds: (1) That the order of the county court creating the school district and authorizing the levy of the tax, if a majority of the voters favored the establishment of the school, is void because the order fails to describe or designate the site of the schoolhouse in the district; (2) that the election returns of the poll opened for the purpose of ascertaining the will of the voters was not certified according to law; (3) that the school was not organized in accordance with the order of court. Their petition was dismissed, and they appeal.

Section 4464, Ky. St. (Russell's St. § 5736), provides in part that the county judge, after he receives a petition, shall enter an order "fixing the boundary of any proposed graded common school district, as agreed on by the county judge and the petitioners, and directing the sheriff or other officer, whose duty it may be to hold the election, to open a poll in said proposed graded common school district, at the next regular state, town or city election to be held therein, or on any other day fixed by said judge in said order, * * * provided * * * that no point on the boundary of any proposed graded common school district be more than two and one-half miles from the site of its proposed schoolhouse, and that the location and site of said schoolhouse in said district are set out with exactness in said petition to the county judge."

The order of the county court calling an election describes the proposed district as follows: "Beginning at J. S. Higgins (Andy Gibson place); thence with the line of district No. 2 (Somerset) to R. Gibson's place, not including it; thence to John Hanes, including him; thence to L. A. Gover's farm,

including it; thence to Perk Hamilton's farm, not including it; thence down Pitman creek to the railroad bridge; thence with the railroad, not including it, to E. F. Parker's, including him; thence to John D. Gover's farm, including it; thence to James Cowan's farm, including it; thence to S. I. Govers, including him; thence to Joe Barnes, including him; thence to where the line of district No. 1 crosses the Monticello road; thence with said line of district No. 1 to the beginning. The site of the schoolhouse shall be located south of the original line of the city of Ferguson and as near as practicable to the center of the district, so that the boundary line of said district shall not at any point be more than two and one-half miles from the schoolhouse."

It is not insisted that the boundary is insufficient, but the contention is that the site of the schoolhouse is not accurately defined. It is neither practicable nor necessary that the site of a schoolhouse in a graded school district should be exactly in the center of the district. The direction in the statute is that "no point on the boundary of any proposed graded common school district shall be more than two and one-half miles from the site of its proposed schoolhouse, and that the location and site of said schoolhouse in said district are set out with exactness." A substantial compliance with this statute in reference to the designation of the site of the schoolhouse is all that is required, and, while the location of the school building is not as accurately defined as it might be, this fact will not invalidate an election in other respects conforming to the law. The election returns were not properly certified at the time they should have been; but counsel candidly admits that the result of the election was properly certified afterwards, and that the subsequent action of the commissioners, as held in *Mullins v. McKeel*, 109 Ky. 539, 50 S. W. 849, remedied the defect in the first returns and certification.

The next objection urged against the validity of the tax is that the orders of court do not show with sufficient certainty that an election was held. The order of court entered on February 18, 1907, directs the sheriff of Pulaski county "to open a poll and cause an election to be held at Elihu on the 6th day of April, 1907, the same being 40 days and more after and from the entry of this order, for the purpose of taking the sense of the legal white voters residing within said boundary." The next order recites, in part, that: "By an order made by this court at the regular February term, 1907, of said court, an election was ordered to be held within the boundary proposed for said district. It now appears from a report on file that said election was duly and legally held at the time and place set forth in said or-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

der." It is true the order reciting that an election was held does not certify that it was held at "Elihu," as required in the order directing an election, but the recitation that it was held at the time and place mentioned in the order leaves no room to doubt that it was held at Elihu, so that we find little merit in this objection.

It is further insisted that there is no statement in the record that notices of election were published in the manner required by the statute. We find, however, in the record a statement certified to by the sheriff of Pulaski county, to whom the order to open a poll was directed, setting out that in accordance with the order "notice is hereby given that an election will be held at Elihu, Ky., and a poll opened in said voting place on the 6th day of April, 1907, for the purpose of getting the sense of the legal voters of said district." In the absence of any showing to the contrary, we will presume that the officer did his duty and published the notices as required by law.

It is suggested that the graded school district was not properly organized, but this intimation is not borne out by the record.

Perceiving no objection to the validity of the tax, the judgment of the lower court is affirmed.

DR. C. BOUVIER SPECIALTY CO. v. JAMES, Auditor, et al.

(Court of Appeals of Kentucky. April 29, 1909.)

1. INTOXICATING LIQUORS (§ 49*)—LICENSES—"COMPOUNDING OR ADULTERATING."

The manufacture of buchu gin by pouring pure gin on a bed or mat of buchu leaves and allowing it to percolate through; then adding distilled water and syrup, the gin comprising some 50 per cent. or more of the compound, which is 46 per cent. alcohol and designed for use as a beverage, constitutes a "compounding or adulterating" within St. 1909, § 4114A et seq. (Russell's St. § 6157), imposing a license tax of 1¼ cents a wine gallon on the business of compounding, rectifying, adulterating or blending distilled spirits.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 50; Dec. Dig. § 49.*]

2. INTOXICATING LIQUORS (§ 49*)—DISTILLED SPIRITS—"SINGLE-STAMP SPIRITS."

Single-stamp spirits within St. 1909, § 4114A et seq. (Russell's St. § 6157), imposing a tax on the business of compounding, rectifying, adulterating, or blending distilled spirits known and designated as single stamped spirits, is not confined to whisky, but includes any distilled alcoholic spirits used as a beverage whether single or double stamped.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 49.*]

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by Dr. C. Bouvier Specialty Company against Frank P. James, as Auditor,

and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Alfred Selligman, for appellant. Jas. Breathitt, Atty. Gen., and Jno. F. Lockett, Asst. Atty. Gen., for appellees.

O'REAR, J. By an act of the General Assembly, extraordinary session of 1906, the business of compounding, rectifying, adulterating, or blending distilled spirits, "known and designated as single-stamp spirits," is required to pay a license tax of 1¼ cents a wine gallon, on such compounded, blended, or rectified article. Section 4114A et seq., Ky. St. 1909 (Russell's St. § 6157). Appellant is a domestic corporation engaged in the production of what it has named "buchu gin." It was required to report and pay license tax on its business. It now sues the Auditor of Public Accounts to recover the sums so paid, alleging that the payments were coerced from it and were made under a mistake of law and fact as to its liability therefor. It asserts that its product is not blended or rectified spirits, but is a medicinal preparation solely, and that, while it contains some 46 per cent. of alcohol, it has certain of the constituent elements of buchu, which, with the syrup and water that is added, make it potable, and impart to it certain medicinal properties. Just what per cent. of the properties of buchu is incorporated in the product is not stated in the petition. It is manufactured by pouring pure gin upon a bed or mat of buchu leaves and allowing it to percolate through; then add distilled water and syrup, the gin comprising some 50 per cent. or more of the compound. "Gin" is distilled alcoholic spirits, made from rye and barley, flavored with juniper berries or turpentine. It is notoriously strong alcoholic spirits. When diluted and sweetened, with the slight flavor of buchu leaves added, it would be, and doubtless is, an attractive drink as a beverage, and is so advertised by appellant. The quantity of the medicinal properties of buchu leaves is negligible, or may be, as this product is made; but, although it may have some medicinal quality, its main constituent is gin, and the principal use designed for it is as a beverage. The process of making it is a "compounding" or "adulterating," as those words are used in the statute.

While the statute speaks of "single-stamp spirits," it was not intended to confine it to whisky, as appellant contends; but any distilled spirits, alcoholic and used as a beverage, whether single stamped or double stamped, are included within the intent of the act. Brown-Foreman Co. v. Commonwealth, 125 Ky. 402, 101 S. W. 321. The act is primarily a revenue act, is so denominated by the Legislature, and classed as such by it and the compiler of the statutes. Incidental-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ly it was designed to protect the distillers of straight whiskies, and to protect the public from spurious and adulterated articles. The business of making a merchantable potation to be sold as a beverage, by blending distilled alcoholic spirits of the proof which is required to pay a revenue tax to the United States government, with any other liquid, or by adulterating such distilled spirits by diluting it so it will have a lower spirit proof, is taxed by the statute. Nor does it make any difference what name may be given the product, or what uses, whether good or innocent, it may be suited to. That occupation or business is taxed, and the license prescribed by the statute is necessary, or it is unlawful to conduct it.

Such was the effect of the judgment of the circuit court, and it is affirmed.

NICHOLS v. PENNINGTON.

(Court of Appeals of Kentucky. April 29, 1909.)

1. ELECTIONS (§ 298*)—CONTESTS—SCOPE OF INQUIRY.

In a school district trustee election contest, under St. 1909, § 1596a (Russell's St. § 4046), providing that the courts shall try contested election cases in lieu of boards of contest, etc., the court had no jurisdiction to pass on the alleged want of eligibility of the contestee because of nonresidence.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 303, 305; Dec. Dig. § 298.*]

2. ELECTIONS (§ 298*)—CONTEST—COUNTING VOTES IMPROPERLY EXCLUDED.

Where in an election contest it appeared that two persons whose votes were refused were legal voters, the court could not consider their votes as cast, but could only declare that there was no election, where their votes, if cast, would have changed the result.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 303, 305; Dec. Dig. § 298.*]

3. ELECTIONS (§ 298*)—CONTEST—REVIEW OF FINDINGS OF ELECTION OFFICERS.

Where election officers had reasonable ground to find that persons who offered to vote were not entitled to do so, such findings will not be disturbed by the courts in a contest.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 303, 305; Dec. Dig. § 298.*]

Appeal from Circuit Court, Greenup County.

"Not to be officially reported."

Petition by William Pennington against J. B. Nichols to contest the latter's election as school district trustee. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

A. S. Cooper, for appellant. E. E. Fullerton, for appellee.

NUNN, J. There was an election held in a school district in Greenup county on the first Saturday in August, 1908, under the provisions of an act which took effect March 24, 1908 (Laws 1908, p. 133, c. 56), for the purpose of electing a trustee for that district. There were two candidates legally presented

to be voted for, to wit, the parties to this action. When the polls were closed it was ascertained by the election officers that appellee had received 30 and appellant 31 votes. The officers of the election certified to the election of Nichols. The county school superintendent for that county recognized Nichols' election and inducted him into office. Within the time fixed by the statute, and on the 5th day of August, 1908, appellee filed a petition in the circuit court of Greenup county for the purpose of contesting the election of Nichols. The grounds alleged for the contest were that Nichols was ineligible to the office because he did not reside, at the time of his election and qualification, in that district; but his place of residence was in an adjoining district. He named one person who voted for Nichols who, he alleged, had been convicted of a felony and who had not been pardoned, and by reason thereof was not entitled to vote. He also gave the names of two other persons whom he alleged were legal voters in that district, and who appeared at the polls and offered to vote and were refused the privilege, and that they would have voted for him, if they had been permitted to vote. Appellant filed his answer within the time fixed by the statute, namely, subsection 12 of section 1596a Ky. St. (Russell's St. § 4046), by which he controverted the allegations of the petition. Appellee took his proof within the time prescribed by the statute. Appellant did not take any testimony, and the case was submitted for trial. The court sustained appellee's contest and awarded him the office.

The testimony tended to show that Nichols' dwelling house was not within the district in which the election was held, and it must have been upon this evidence that the lower court sustained appellee. The court, in a contest case like this, has no power to consider and pass upon such a question. In the case of *Wilson v. Tye*, 122 Ky. 508, 92 S. W. 295, this court decided that this section of the statute (section 1596a) was especially enacted to give the courts a right to try contested election cases, in lieu of boards of contest, and it defines the power of the court, and the rules of procedure, and the court is compelled to conform to them in such trials. It fixes the time for the filing of the petition, answer, reply, and within what time each of the parties must take their proof. It requires both the circuit court and the Court of Appeals to hear and determine the case as speedily as possible, giving such cases preference over all others, and then defines how the court shall try them by ascertaining from the record who was elected; but if it appears that there has been such fraud, intimidation, bribery, or violence in conducting the election that neither the contestant nor contestee can be adjudged to have been fairly elected, the court,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in such event, should adjudge that there has been no election. The court in that case said: "In our opinion, when the General Assembly enacted this statute, in lieu of the former statute, with reference to the trial of contested elections, it was intended to relegate the question of eligibility or legal qualifications for the office to a different or other mode of procedure."

That case is conclusive of this question. There was no testimony, or at least no competent testimony, introduced showing that any person voted for appellant at that election who had been convicted of a felony. There was testimony showing that two persons offered to vote at that election and were not permitted to do so, for the reason, as the officers of the election conceived, they were not legal voters in that district. These two persons testified that they would have voted, had they been permitted to do so, for appellee; but the fact is they did not vote, and the election officers did not have, nor has this court, the right to consider those two votes as cast. The result of the election can be determined only by the number of votes actually polled, and of these appellant had the majority. If the two persons who offered to vote and were refused were legal voters, the only power this court would have would be to declare that there was no election. This court could not declare appellee elected. However, the testimony as to the qualification of the two persons named left the mind in doubt as to whether or not they were legal voters in that precinct at that election, and the officers of the election had reasonable grounds to conclude that they were not, and we will not disturb their finding. Nor would we interfere with their conclusion had they, under the evidence, decided otherwise.

For these reasons the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

JOHNSON'S ADM'R v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. April 29, 1909.)

1. RAILROADS (§§ 356, 376*)—INJURIES TO PERSON ON TRACK—TRESPASSERS.

Where a railroad maintained two tracks leading to a small station, and the right of way was fenced on both sides to a cattle guard near the station, and many persons walked on the right of way going to and from the station, held, that a person on the right of way was a trespasser to whom the railroad only owed the duty of saving him from injury by ordinary care after discovering his peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1228-1234, 1276; Dec. Dig. §§ 356, 376.*]

2. RAILROADS (§ 401*)—INJURIES TO TRESPASSERS ON TRACK—EVIDENCE—INSTRUCTIONS.

Where, in an action for the death of a trespasser struck by a train, the evidence showed that on decedent turning on the track the

brakes were applied, the whistle sounded, and that the bell continued to ring until the time decedent was struck, an instruction that if the trainmen, after discovering decedent's peril, used all reasonable means at their command to avoid injuring him, there could be no recovery, but that if they failed to use ordinary care to apprise decedent of the approach of the train, and as a result thereof he was killed, a recovery was authorized, properly submitted the issues.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1382-1390; Dec. Dig. § 401.*]

3. RAILROADS (§ 376*)—INJURIES TO TRESPASSERS—CARE REQUIRED.

In determining whether trainmen used ordinary care to prevent injury to a trespasser on the track after discovering his peril, the jury should consider the time in which they had to act and all the circumstances of the situation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1276; Dec. Dig. § 376.*]

Appeal from Circuit Court, Marion County.

"Not to be officially reported."

Action by Alfred Johnson's administrator against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

C. S. Hill and Russell & Hill, for appellant. W. C. McChord, W. W. Spalding, and Benjamin D. Warfield, for appellee.

NUNN, J. Alfred Johnson was killed by one of appellee's engines, which was attached to some passenger coaches, on its line of road in Marion county, Ky., something near 300 yards south of a small station called "Riley." There were two tracks at this point. One was the main and the other a side track. These two tracks were six or eight feet apart. The space between them was filled with cinders which had been made level and smooth. Johnson and the train were moving north towards the station when he was killed. On either side of the two tracks appellee had a fence which extended north to a cattle guard that crossed both tracks near the station, but it does not appear how far they extended south. Immediately on the outside of the fence on the east side was a public road running parallel with the tracks. Johnson resided a few miles south of Riley station.

The testimony tended to show: That Johnson left his home for the purpose of looking for a hog that had strayed; that he moved towards the station along the public road until he reached a point where the two tracks came together; that at this point he entered upon the track and continued his course towards the station. It was shown by the testimony, without contradiction, that many persons walked upon or between these tracks daily going to and coming from the station. No witness saw Johnson upon the track before he was killed, except the engineer and fireman. They testified: That they saw him walking along between the tracks, but nearer the side track than the main line, when

they were 700 or 800 yards from him; that, if he had continued his course along near the side track, he would have been in no danger of being hurt; that, instead of doing this, when they reached a point 60 or 70 feet from him, he turned at an angle of about 45 degrees and walked upon the main track in front of the engine; that immediately the air brakes were applied to their full capacity, and the alarm whistle was sounded three or four times, but, in spite of all they could do, they could not save Johnson. The testimony was very conflicting as to whether or not the whistle was sounded for the station; several witnesses testifying on either side. The engineer and fireman testified, and were not contradicted, that the bell on the engine was started to ringing at a point several hundred yards south of Johnson, and that it continued to ring to the time Johnson was struck.

The facts of this case are not as strong for appellant here as were the facts in the case of *L. & N. R. R. Co. v. Redmon's Adm'x*, 122 Ky. 385, 91 S. W. 722, for the appellee therein, and the court in that case decided that the railroad company was not responsible for the death of Redmon. Under the authority of that case and the cases of *Parkerson, Adm'x, v. L. & N. R. R. Co.* (Ky.) 80 S. W. 468, and *Chesapeake & Ohio R. R. Co. v. Nipp's Adm'x*, 125 Ky. 49, 100 S. W. 246, appellee owed Johnson no duty, except to save him from injury after discovering his peril, if they could do so by the use of ordinary care. The court instructed the jury upon this question as follows: "(1) The court instructs the jury that decedent, at the time he was struck, was a trespasser on the defendant's right of way and those in charge of the train owed him no duty until his peril was actually discovered by them, and if you believe that, after his peril was actually discovered, the defendant's employes used all reasonable means at their command to avoid injuring him, considering the time at their disposal, you should find for the defendant. (2) If you believe from the evidence in this case that, after the engineer in charge of defendant's engine became aware of the fact that decedent was on or so near the track on which said train was running as to render his position dangerous or perilous, he failed to use ordinary care to apprise decedent of the approach of the train and to avoid striking him, and that as a result thereof he was struck and killed, you should find for the plaintiff. On the other hand, unless you do believe from the evidence that the said engineer, after becoming aware of decedent's presence on or so near said track as to render his position dangerous or perilous, did fail to use ordinary care to apprise him of the approach of the train and to avoid striking him, you should find for the defendant; and, in determining the question as to whether

said engineer did or not use ordinary care, you should consider the time in which he had to act, and all the circumstances of the situation." These instructions correctly state the law of the case.

For these reasons, the judgment of the lower court is affirmed.

CHICAGO BLDG. & MFG. CO. v. PETERSON. SAME v. BEAVEN. SAME v. MAHON.

(Court of Appeals of Kentucky. April 30, 1909.)

1. CORPORATIONS (§ 78*)—SUBSCRIPTION TO STOCK—CONSTRUCTION.

A contract was entered into between subscribers to a voluntary association and a manufacturing company, whereby the subscribers each agreed to subscribe to one share of stock, and the company agreed for a certain price, to be paid from the subscriptions, to erect a butter factory, the balance of the subscriptions to be delivered to a corporation which was to be formed by the subscribers, and provided that for any unpaid or deferred balance of subscription all delinquent subscribers should be jointly liable, that as soon as the corporation was formed, stock certificates should be issued to each paid-up stockholder, and that pursuant to the laws of his state, etc., each stockholder should be liable for the amount of stock set opposite his name, and no more. Nine subscribers to one share each, of the par value of \$100, refused to pay their subscriptions. Held, that they were jointly and severally liable for the total amount due from them; the provision for limitation of liability to the amount of stock subscribed by each having reference solely to the rights and liabilities of stockholders in the corporation which was to be formed.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 78.*]

2. CORPORATIONS (§ 78*)—SUBSCRIPTION TO STOCK—CONSTRUCTION.

As each subscriber could extinguish his liability by paying the amount of his subscription, there was no liability on the part of a single subscriber for the whole amount to be paid the building company; the liability of the subscribers being several, unless they elected to make it joint by becoming delinquent.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 78.*]

3. APPEAL AND ERROR (§ 61*)—DECISION REVIEWABLE—COURT OF APPEALS—AMOUNT IN CONTROVERSY.

The liability of each of the nine delinquents being for the entire \$900, the Court of Appeals had jurisdiction of appeals, in actions brought by them against the building company to have their subscriptions declared void.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 61.*]

4. CORPORATION (§ 77*)—SUBSCRIPTION TO STOCK.

Where a subscription paper, signed by subscribers to stock in an enterprise, consisted of one sheet of paper folded so as to make four pages, the first page containing the specifications of the building the other party to the contract proposed to erect; the second page containing the contract between the subscribers and the other party; the third page containing blank columns in which to insert the names of the subscribers, and the numbers of shares of stock subscribed for by each, presenting, at the top of the page over one column, the words "names of stock subscribers," over the next words "num-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bers of shares," and over the next "amount of stock subscription"; and the fourth page containing a diagram of the factory to be erected—*held*, that the paper embraced a single contract, the page containing the subscribers being their acceptance of the terms thereof.

[Ed. Note.—For other cases, see *Corporation*, Dec. Dig. § 77.*]

5. CORPORATIONS (§ 83*) — STOCK SUBSCRIPTIONS—RIGHT OF SUBSCRIBER TO WITHDRAW.

Where numerous persons agreed with each other and with a building company that they would pay the amount of stock subscribed by them to establish a butter factory, and that when the plant was completed by the building company they would organize themselves into a corporation, none of them could, in the absence of fraud or other good cause, withdraw before the corporation was formed, and avoid payment of his subscription.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 828-336; Dec. Dig. § 83.*]

6. CORPORATIONS (§ 76*) — SUBSCRIPTION TO STOCK—VALIDITY—FAILURE TO READ BEFORE SIGNING.

That persons signing a written contract of subscription to stock failed to read or understand it before signing would not relieve them from liability thereon in the absence of fraud.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 76.*]

Appeal from Circuit Court, Marion County.

"To be officially reported."

Action by John F. Peterson, T. A. Beaven, and John R. Mahon against the Chicago Building & Manufacturing Company. Judgment for plaintiff in each case, and defendant appeals. Reversed, with directions.

Jno. McChord, for appellant. W. W. Spalding, H. W. Rives, and P. K. McElroy, for appellees.

CARROLL, J. These three appeals, involving the same questions of law, will be disposed of together.

In July, 1908, the appellant company, which was engaged in erecting creamery or butter factories, sent one of its agents to St. Marys, in Marion county, for the purpose of interesting the farmers of that community in establishing a factory. The agent was successful in securing 55 persons to subscribe for one share of stock each of the par value of \$100. The subscription paper signed by all of the subscribers consisted of one sheet of paper, folded so as to make four pages. The first page contained the specifications of the building the manufacturing company proposed to erect; the second page contained the contract between the company and the subscribers; the third page contained blank columns in which to insert the names of the subscribers and the number of shares of stock subscribed for by each. At the top of this page there is printed over one column the words "names of stock subscribers," over the next, the words "number of shares," and over the next "amount of stock subscription." The fourth page contained a diagram of the factory. The contract on the second

page reads in part as follows: "Witnesseth: That the first party hereto until full and final payment of this contract is a voluntary association of persons in and around the city of St. Marys, county of Marion, and state of Kentucky, and known as the St. Marys Creamery Association, and who will subsequently organize themselves into a going corporation, to permanently conduct the creamery business as contemplated herein. The second party hereto is the Chicago Building & Manufacturing Company, manufacturers and builders, doing a manufacturing and wholesale business solely from Chicago, Illinois. On the 6th day of January, A. D. 1908, the said parties execute the following contract, to wit: In consideration of the entire purchase price of forty-nine hundred and fifty (\$4,950) dollars, which first party herein pledges itself to pay in cash or equivalent note, as hereinafter specified, second party and successors agree as follows: To devise, erect, equip and deliver, on land hereafter to be acquired, a butter factory, at or near St. Marys, Ky., to be delivered at any time within ninety days from date of final approval to said contract, unavoidable accidents and delays excepted. [Then follows a description of the factory to be erected.] First party and successors further agree as follows: On notice from second party to appoint a building committee, consisting of not more than five persons, with conclusive authority to represent first party from date of appointment, till final settlement and permanent organization of the future corporation. Within three days thereafter said committee, at expense of first party, shall procure and purchase in fee simple suitable level land with good legal title and to furnish thereon, in time for the builder, suitable water for direct connection with pump for the needs of said factory, and properly assign and describe said site to second party, to be held in trust for first party till full discharge of this contract agreement by first party. Said committee shall inspect work and material during construction and shall specify in writing to second party any defects therein, if any, at occurrence, to be remedied within a reasonable time. At date of delivery said committee shall meet with a representative of second party and together compare the details of said factory, and if it is in substantial accordance with the within contract and specifications, with the machinery and fixtures set up in a workmanlike manner, second party's discharge of this contract is complete and payment is due thereunder. * * * For any unpaid or deferred balance of subscription, all delinquent subscribers are jointly liable and first party agrees that any failure in any of its covenants may be construed as a joint and total breach of the within contract. * * * All remaining subscriptions or note balance, aft-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er said association's entire indebtedness to second party has been so paid, shall be duly assigned to the said corporation for a working capital. After payment and delivery has been made, as above, said association shall organize a co-operative society under state law, fixing aggregate amount of stock at not less than the amount subscribed hereto, represented by stock certificates for \$100 each. Said certificates will then be issued to each paid-up stockholder, in proportion to his interest, it being especially agreed that there can be no default, withdrawal or transfer of subscription or stock until lawfully entered on the books of said future corporation by its regularly elected officers. Pursuant to the laws of his state and these conditions, it is agreed that each stockholder shall be liable for the amount of stock set opposite his or her name and no more."

On September 1, 1908, the manufacturing company executed the following additional obligation: "The Chicago Building & Manufacturing Company, of Chicago, Illinois, hereby agrees that it will carry out in full the conditions of its contract made July 6, 1908, with the subscribers to the St. Marys Creamery Association and guarantees that it will collect by suit or otherwise the subscription contract amounting to \$5,500.00, and will turn over to said association through its duly authorized agent the surplus of \$550.00 as a running fund, as soon as collection is made by said company or as soon as said manufacturing company has had reasonable time to coerce payment of said subscription list. Said manufacturing company guarantees the collection of said subscription list for the purpose of satisfying the cost of the creamery and said working fund."

It appears that 46 of the subscribers paid their subscriptions in full, and on the 21st day of September, 1908, a committee of 5, appointed by the subscribers to examine the factory that had just been completed by the company, certified in writing that it was finished according to the specifications and contract, and accepted the same. But, previous to this time, and on August 27, 1908, the appellees instituted separate actions against the appellant company, in which they asked to have their several subscriptions declared void, and that the company be required to erase and cancel their respective names from the subscription list, and be perpetually enjoined from asserting any claim against either of them on account of said subscription. They sought this relief upon the ground that the agent who secured the subscriptions practiced a fraud upon the subscribers by representing, as an inducement to obtain their subscriptions, that the company was going to erect a creamery at St. Marys, and organize the company to operate it, and that the stock would be \$100 per share, and the cost of the plant \$4,950, and that the company would guarantee dividends of 6 per cent. on the stock, and, further, that the president of

the Marion National Bank had agreed to take two shares of stock, and to furnish to the creamery the milk of 20 cows. They averred that in subscribing they did not know they were signing any contract as individuals, but supposed they were obligating themselves to take stock to the amount of their subscription in the company that would be organized. When the case came on for trial, the company filed an answer and counterclaim, in which, after traversing the averments of the petition, and setting up the facts hereinbefore stated in reference to the completion of the creamery, and its acceptance by the subscribers, it asked judgment against each of the appellees for the amount of their respective subscriptions. A general demurrer to this pleading was sustained, and thereupon an amended answer, counterclaim, and cross-petition was filed. In this pleading it was averred that all of the subscribers had paid their subscriptions, except 9, and that each of these 9 had filed suits similar to the ones brought by these 3; that of the \$4,900 received from the paying subscribers, it had retained \$4,060, and had paid \$555 to the creamery company, leaving \$900 due to it as a balance on the construction price of the factory. It further averred that the paying subscribers had in October, 1908, organized a corporation under the laws of the state for the purpose of operating the creamery. It set up the stipulation in the contract providing that "For any unpaid or deferred balance of subscription, all delinquent subscribers are jointly liable and first party agrees that any failure in any of its covenants may be construed as a joint and total breach of the within contract," and asked that the 9 actions brought by the 9 delinquent subscribers be consolidated, and that it have judgment against each and all of them jointly and severally for the sum of \$900. To this pleading a demurrer was sustained, and a judgment entered canceling each subscription, and enjoining the manufacturing company from asserting any claim against the subscribers on account of their several subscriptions.

The first question raised is, Has this court jurisdiction of the appeal? It is the contention of appellees that each subscriber was only liable for the amount of his subscription; and, as each subscription was only for \$100, this court has not jurisdiction. On the other hand, the manufacturing company insists that each of the delinquent subscribers is jointly and severally liable for the total amount of delinquent subscription, and hence it was entitled to judgment against each of them jointly and severally for \$900, and so this court has jurisdiction, and the power to review the judgment dismissing its answer, counterclaim, and cross-petition which sought judgment for this amount. In addition to this it is said that, as the actions by the appellees were not brought for the recovery of money or property, but for the purpose of having their subscriptions canceled,

this court would have jurisdiction even though it be conceded that the amount in controversy in each case was only \$100. In the view we have of the matter it does not seem necessary to pass upon the question whether this court would have jurisdiction if the only relief sought and granted was the cancellation of a subscription for \$100. In our opinion, under the terms of the contract, each of the delinquent subscribers was liable, jointly and severally, for the total amount due by the delinquents. This seems to be the plain reading of the contract. Nor is there any conflict between the clause in the contract containing this condition and the clause stipulating, "Pursuant to the laws of his state and these conditions, it is agreed that each stockholder shall be liable for the amount of stock set opposite his or her name and no more." This last provision has reference to the rights and liabilities of the stockholders in the corporation it was contemplated and agreed in the contract should be created. Whereas the provision that "for any unpaid or deferred balance of subscription all delinquent subscribers are jointly liable" has reference to the liability of the subscribers in the voluntary association that was organized for the purpose of erecting the factory. Under this construction, which seems to be the reasonable one, both clauses may stand, and the contract as a whole remain a harmonious instrument.

In its inception, and when the contract in controversy was signed by the subscribers, it was merely a voluntary association; but it was contemplated, and so provided in the contract, that the members of this voluntary association "will subsequently organize themselves into a going corporation to permanently conduct the creamery business as contemplated herein." In the corporation to be organized the manufacturing company had no interest or concern. It was only interested in obtaining the requisite number of subscriptions to the voluntary association to guarantee the purchase price of the plant it proposed to erect. The whole paper must be construed as one contract, and the page containing the names of the subscribers be treated as their acceptance of the terms of the contract. We find nothing unconscionable or against public policy in this contract. The manufacturing company obligated itself to furnish for a specified sum a plant equipped according to the plans and specifications that were a part of the contract, and the subscribers bound themselves to pay for the stock they took in the association. They further agreed that, if any of them failed to pay when due the amount subscribed, each subscriber so in default would be jointly and severally liable for all delinquent subscriptions. In other words, each subscriber said, "I will either pay the amount I have subscribed, or if I fail to pay it, I will become responsible for all the others who fail to pay their subscriptions." Any subscriber could extinguish his

liability by paying the amount of his subscription. It was only in the event that he failed to pay his subscription that his obligation to become responsible for the other delinquent subscriptions attached. So that there is no foundation in fact for the argument presented by counsel for appellees that each subscriber became liable for the whole amount they agreed to pay the manufacturing company. The person who first subscribed for one share of stock, as well as the person who last subscribed for a share, could relieve himself from any further liability by paying, when due, the amount subscribed. They did not become liable for any other unpaid or deferred subscription unless they were also delinquent. The clause covering this feature of the contract is plain. It reads: "For any unpaid or deferred balance of subscription, all delinquent subscribers are jointly liable." Except for this clause, which was evidently inserted for the purpose of inducing all of the subscribers to pay the amount of their subscription, no one of them would be liable for any more than the amount he subscribed. The liability of the subscribers was a several one, unless they elected to make it a joint one by becoming delinquent. The contracts construed in *Davis v. Belford*, 70 Mich. 120, 37 N. W. 919, *Gibbons v. Grinsell*, 79 Wis. 365, 48 N. W. 235, and *Davis, etc., Co. v. Barber* (C. C.) 51 Fed. 148, did not contain the joint liability clause we are considering.

The further argument is made that the appellees had the right, at any time before the voluntary association was converted into a corporation, to withdraw their subscriptions; and, as this action was instituted in August, 1908, and the corporation was not organized until October, 1908, it is said that appellees had the right to withdraw, and that after their withdrawal they could not be proceeded against on their subscriptions; that the remedy, if any, against them would be an action in damages. There is some authority supporting this view. *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 32 Atl. 888, 33 L. R. A. 593, 47 Am. St. Rep. 823; *Davis v. Bronson*, 2 N. D. 800, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783. It does not, however, seem necessary that we should express an opinion as to the right of a subscriber to stock in a proposed corporation to withdraw his subscription before the corporation is organized. That question is not before us on this record. The subscribers to the contract we are considering bound themselves to pay to the manufacturing company a certain sum in consideration of its agreement to erect and equip a factory according to the specifications agreed upon. Upon this state of facts we are of the opinion that, in the absence of fraud, mistake, or some other good reason that would authorize a cancellation of the subscription, the subscribers could not defeat the purpose of the association, or relieve themselves from lia-

bility to the company, simply by declaring that they intended to withdraw from the association. In *Twin Creek & Colemansville Tp. R. Co. v. Lancaster*, 79 Ky. 552, Lancaster and others subscribed stock in a corporation proposed to be organized for the purpose of constructing turnpike roads. After the company was organized, some of the subscribers declined to pay, and an action to recover the amount of their subscription was instituted against them. In the course of the opinion holding them liable, the court said: "The purpose of signing the subscription was to enable the subscribers to organize and form a corporation that would inure to the benefit of all. It was in fact a mutual agreement by which each subscriber pledged himself to pay a certain sum of money in order to perfect the organization and complete the enterprise. A subscriber or partner in an intended undertaking, subscribing an agreement to take measures to carry out the same, cannot discharge himself from liability, or repudiate the concern to which he may have pledged himself. This was not in fact an agreement to subscribe, but it was a subscription without any other condition than the organization of the company or corporation. * * * There was no other condition annexed. * * * The agreement in this case is not a mere voluntary donation by the appellees, but an agreement, in effect, to form an association which, when organized and the enterprise completed, will vest the parties with a right of property that will advance their private, as well as the public, interests; and in such a case we regard the doctrine as well settled that it is too late after the act of incorporation takes place, whether the work has or not been undertaken, to withdraw from the association." This case was followed in *Bullock v. Falmouth, etc.*, Tp. R. Co., 85 Ky. 185, 3 S. W. 129, and *Cadiz R. Co. v. Roach*, 114 Ky. 984, 72 S. W. 280. And we see no difference in principle between the rule announced in those cases and the one we have applied in this. The parties to this contract agreed, not only with the man-

ufacturing company, but with each other, that they would pay for the purpose of establishing the proposed enterprise the amount of stock subscribed, and further agreed that when the plant was completed they would organize themselves into a corporation. Thus a complete and binding contract was entered into by each of the subscribers, and neither, in the absence of fraud or other good cause, had the right to withdraw from the corporation, or fail to pay his subscription and thereby defeat the ends intended to be accomplished when the contract of subscription was entered into. *Cross v. Pinckneyville*, 17 Ill. 54; *Hughes v. Antietam Mfg. Co.*, 84 Md. 316; *Johnson v. Wabash R. Co.*, 16 Ind. 389; *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80. The manufacturing company was only interested in the subscriptions to the extent of the contract price of \$4,950. After this sum had been collected, the remainder of the subscriptions belonged to the voluntary subscribers, and was intended to be, as expressed in the contract, turned over to the corporation for a working capital. If one of the subscribers could withdraw, others could, of course, do the same, and the result would be that the purpose for which the association was formed would be defeated. It would be the merest child's play to permit persons to enter into voluntary agreements of this kind one day and repudiate them the next. It may be, as said by counsel for appellees, that if these subscribers had known the terms of the contract, they would not have subscribed to the enterprise, but the fact that they did not see proper to read or understand the contract is no reason why they should be released. Their failure to read it is another of the many illustrations that come before courts that persons entering into contracts read them after they have signed them, in place of before.

The judgment in each case is reversed, with directions to overrule the demurrers to the pleadings filed by appellant and for other proceedings not inconsistent with this opinion.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS v. IMPROVED BENEVOLENT AND PROTECTIVE ORDER OF ELKS.

(Supreme Court of Tennessee. April 27, 1909.)

CORPORATIONS (§ 49*)—CORPORATE NAMES.

A corporation chartered under the name of "Benevolent and Protective Order of Elks of the United States of America," maintaining certain business institutions, clubhouses, a home for aged and invalid members, and engaged in conducting charities and supplying amusements for its members, who were all white people, was entitled to an injunction restraining a corporation, composed of colored people and organized for similar purposes, from using the name "Improved Benevolent and Protective Order of Elks of the World," and also from using complainant's badge, emblems, ritual, passwords, etc.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. § 49.*]

Bill for injunction by the Benevolent and Protective Order of Elks of the United States of America against the Improved Benevolent and Protective Order of Elks of the World. A decree for complainant in the chancery court of Shelby county was affirmed by the Court of Civil Appeals, and defendant petitions for certiorari. Application refused.

J. N. Estes, for complainant. Thos. M. Scruggs and B. F. Booth, for defendant.

NEIL, J. The complainant alleged in its bill that it was a corporation chartered under the name of "Benevolent and Protective Order of Elks of the United States of America," and that its members were generally known over the United States as the "Elks"; that the defendant was subsequently chartered under the name of the "Improved Benevolent and Protective Order of Elks of the World"; that the similarity of the two names has not only produced confusion in the operations of the two bodies, but, in the nature of things, will continue to cause confusion, in the fact that mail intended for the one will be delivered to the other, that the membership of the one will be confounded in the public mind with the membership of the other, likewise the enterprises whereby money is raised for charitable purposes, such as baseball games, theatrical entertainments, etc., which require advertisement and public patronage; that thereby the complainant will be greatly depleted and deteriorated in its membership, which will cause large financial losses, since extensive revenues are derived from this source. It is shown in the bill that, while complainant is not technically engaged in business, it owns property worth \$9,000,000, has an annual income of \$4,000,000 and yearly dispenses in charity \$500,000. It also appears from the bill that the complainant owns clubhouses in which its members are entertained; also that it

maintains a home for its aged and invalid members, wherein they are cared for in comfort and happiness. It is alleged, as above indicated, that it conducts enterprises of a business nature from time to time for the purpose of raising money to expend in charity, not only upon its own members, but upon worthy objects outside of the order. It appears that the organization from a small beginning in 1868, has grown to a membership of more than 225,000 in the United States, composed only of white persons, citizens of the United States, within prescribed age limits. It was alleged in the bill that defendant had not only appropriated complainant's name in substance, but had also copied its ritual and its badge, the latter, being very distinctive, bearing an elk's head with antlers spread.

The bill was filed in the name of the complainant, Benevolent and Protective Order of Elks of the United States of America, through a committee appointed by the Grand Lodge, the governing body of the order, and was also joined in by Memphis Lodge, No. 27, likewise a corporation; this local body having a membership of more than 800.

There was a prayer for an injunction to prevent the use of the name "Improved Benevolent and Protective Order of Elks of the World"; also the use of complainant's badge, emblems, ritual, passwords, etc.

A demurrer was filed, making the point that the rights asserted in the bill were not property rights, and that the wrongs complained of were not such as a court of equity would protect by injunction. The demurrer was overruled, and thereupon the defendant filed its answer.

The answer admitted that the defendant was chartered and organized under the name charged in the bill, but denied that it was using the ritual, passwords, badges, or emblems of the complainant, or that there was any danger of the two orders being mistaken for each other, and relied particularly upon the fact that the members of defendant were colored people, while the members of complainant were white people.

Upon the hearing the chancellor sustained the bill and decreed a perpetual injunction. From this decree the defendant prayed an appeal to the Court of Civil Appeals, where the decree was affirmed. The defendant has now filed a petition, asking that the cause be removed to this court by the writ of certiorari. In the petition the evidence is not referred to; but the case of complainant is put upon the allegations of the bill, and we shall so treat the case. However, we may add that the evidence sustains the substance of the bill, and also sustains the averment of the answer that the defendant order is composed of colored people.

We are of the opinion that the injunction was properly awarded and made perpetual.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

While the complainant was not engaged in business for profit, in the sense of commerce and trade, yet it employed certain business activities for the purpose of maintaining itself and to procure funds to carry out the purpose of its organization, and it maintained certain business institutions, its club-houses, and its home for aged and invalid members. The name it had acquired and appropriated had become very valuable, in the nature of a trade-name, by which it was accustomed to appeal to the public, and on the faith and reputation of which it was accustomed to obtain and receive from the public large sums of money. The name of the defendant is so similar that in the nature of things it will cause the one order to be mistaken for the other, and the enterprises of each to be confused with those of the other. The fact that the defendant's membership is composed of colored people will not materially change the result. In addition to the close similarity in the names, if a badge the same in appearance as that of complainant be worn by one of defendant's members, the inference is bound to be immediate in the public mind that the membership is the same. Few will take the trouble to inquire, or have the means of inquiring, whether such person is a member of complainant organization or of a different organization. This confusion of the two orders will, as shown in the record, result in great financial detriment to the complainant. The complainant first used the name, and gave to it the great financial, business, and social value, which is now attached to it, to say nothing of the fact that complainant is a prior corporation, which is entitled to have its corporate name protected. Under the facts stated, we think the complainants were entitled to the relief sought in the bill. *Ladies' Good Samaritan Society of Nashville v. Nashville Ladies' Good Samaritan Society*, 1 Tenn. Ch. 97; *International Committee of Young Women's Christian Association v. Young Women's Christian Association of Chicago*, 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 838; *Rickard v. Caton College Co.*, 88 Minn. 242, 92 N. W. 958; *Merchants' Detective Ass'n v. Detective Agency*, 25 Ill. App. 250; *Nokes v. Mueller*, 72 Ill. App. 431; *International Soc. v. International Soc. (Sup.)* 59 N. Y. Supp. 785; *Woodward v. Lazar*, 21 Cal. 449, 82 Am. Dec. 751; *Marsh v. Billings*, 7 Cush. (Mass.) 322, 54 Am. Dec. 723; *Devlin v. Devlin*, 69 N. Y. 212, 25 Am. Rep. 173; *Hopkins Amusement Co. v. Frohman*, 103 Ill. App. 613, 1d., 202 Ill. 541, 67 N. E. 391; *Gamble v. Stephenson*, 10 Mo. App. 531; *Red Polled Cattle Club of America v. Red Polled Cattle Club*, 108 Iowa, 105, 78 N. W. 808; *Atlas Assurance Co., Limited, v. Atlas Assurance Co. (Iowa)*, 112 N. W. 232, 15 L. R. A. (N. S.) 625.

The application for certiorari will therefore be refused.

KNAPP et al. v. SUPREME COMMANDERY, UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD, et al.

(Supreme Court of Tennessee. September Term, 1908.)

1. CORPORATIONS (§ 393*)—REGULATION—EQUITY JURISDICTION.

Courts of equity have jurisdiction to define and determine the extent and limitations of the powers of corporations, and declare contracts or other corporate actions, made or threatened by the corporation or its officers, in excess or violation of those powers, invalid, and to restrain and prohibit the performance of them.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1574, 1575; Dec. Dig. § 393.*]

2. CORPORATIONS (§ 206*)—STOCKHOLDERS—RIGHT TO SUE.

Minority stockholders of a corporation may maintain suits to declare corporate action ultra vires and void after having first demanded action by the corporation and been refused.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 791-796; Dec. Dig. § 206.*]

3. PROCESS (§ 87*)—PUBLICATION—JURISDICTION—BENEFICIARY ASSOCIATIONS.

In a suit by minority certificate holders in a Tennessee fraternal beneficiary association to declare illegal an attempted merger with another nonresident similar society, and for a return to the nonresident society of any funds or property received by the Tennessee association pursuant to such merger, jurisdiction of the latter association having been obtained by personal service and appearance, and the property having been impounded by injunction, the court acquired jurisdiction to determine the entire controversy, though the nonresident society was brought in only by constructive service by publication.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 101; Dec. Dig. § 87.*]

4. CORPORATIONS (§ 370*)—POWERS.

Corporations, being mere creatures of the Legislature and existing solely by virtue of the act of incorporation, can exercise no powers not expressly granted or necessarily implied from the powers expressly given.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1511-1515; Dec. Dig. § 370.*]

5. CORPORATIONS (§ 372*)—POWERS—STATUTES—CONSTRUCTION.

All statutes under which corporate power is asserted must be construed in favor of the state from which the power emanated, and against the grant of power.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1517, 1518; Dec. Dig. § 372.*]

6. CORPORATIONS (§ 581*)—CONSOLIDATION—POWERS.

Corporations have no general power to consolidate or merge with another corporation, unless express power so to do is found in their charters or the statutes of the state which created them.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2322-2329; Dec. Dig. § 581.*]

7. CORPORATIONS (§ 439*)—CONSOLIDATION—STATUTES—APPLICATION.

Acts 1887, p. 329, c. 198, authorizing the lease and disposition of the property of a corporation, provided it is approved by a vote of a majority of the stock in a meeting of the stockholders held for that purpose after notice

given, applies only to quasi public corporations, and does not embrace private corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1774; Dec. Dig. § 439.*]

8. INSURANCE (§ 696*)—FRATERNAL BENEFICIARY ASSOCIATIONS—CONSOLIDATION.

Acts 1887, p. 329, c. 198, authorizing a corporation to lease or dispose of its property, if approved by a majority of "the stock" in a meeting of "the stockholders" held for that purpose after proper notice, did not authorize a fraternal beneficiary association, having neither stock nor stockholders, incorporated under Shannon's Code, § 2524, providing for the organization of such corporations for the general welfare of society, and not for individual profit, to consolidate with another similar association.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 696.*]

9. CORPORATIONS (§ 690*)—CONSOLIDATION—STATUTES.

Acts 1887, p. 329, c. 198, providing for the lease and disposition of the property of a corporation, does not authorize a consolidation and union of a domestic with a foreign corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2672; Dec. Dig. § 690.*]

10. INSURANCE (§ 696*)—BENEFICIARY ASSOCIATIONS—MERGER.

A contract, in form and substance a merger of two beneficiary associations, by which one of them took over and absorbed the other, admitting the absorbed society's members to full membership without the medical examination required by the continuing society's by-laws, though some were ineligible on account of age, etc., which was ultra vires the power of the continuing association, could not be supported as a sale or lease of the merged association's franchise.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 696.*]

11. INSURANCE (§ 694*)—BENEFICIARY ASSOCIATIONS—MERGER—OBJECTIONS BY MEMBERS—RIGHT TO SUE.

Objecting members of a beneficiary association, having applied to the corporation's officers to sue to set aside an ultra vires merger with another association, could maintain a bill to have the merger declared void and to enjoin the corporation's officers and agents from doing any act in the furtherance thereof, and as incidental to such relief to have an account taken of the assets of the merged society, which have come into the hands of the continuing association, and have the same returned.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 694.*]

Appeal from Chancery Court, Knox County; Joseph W. Sneed, Chancellor.

Bill by Charles Knapp and others against the Supreme Commandery, United Order of the Golden Cross of the World, and another. Decree for complainants, and the defendant named appeals. **Affirmed.**

Webb, McClung & Baker and H. T. Cooper, for appellant. Jourlmon, Welcker & Smith, for appellees.

SHIELDS, J. The complainant Charles Knapp and some 200 others, members of and holders of benefit certificates in Supreme Commandery, United Order of the Golden Cross of the World, a fraternal beneficiary

association, filed the bill in this cause, November 6, 1906, in the chancery court of Knox county, against that association, which for brevity will be called the "Golden Cross," a corporation created and organized under the laws of Tennessee, and having its chief office and domicile in Knox county, Tenn., and the Supreme Council of the Home Circle, which for brevity will be called the "Home Circle," also a fraternal beneficiary association created and organized under the laws of the commonwealth of Massachusetts, and having its chief office and domicile in that state, for the purpose of having a merger and union of the two corporations, which was then being attempted to be made by the executive officers and committees of the same, declared and decreed unauthorized by the charter of the Golden Cross and the laws of Tennessee, ultra vires, and void, to enjoin the Golden Cross and its officers from consummating and executing it, and to have all proper accounts stated and decrees pronounced necessary to place the two corporations in the condition and status in which they were before the attempted union and merger.

The defendant Golden Cross was served with process and made defense by answer. The Home Circle was served with constructive process by publication, as provided by the statutes of this state in suits brought against nonresidents, and, failing to make defense within the time required by the practice of the court, an order pro confesso was duly taken and entered against it. The chancellor, upon a hearing upon the pleadings, the order pro confesso entered against the Home Circle, and the proof offered by complainants and the Golden Cross, sustained the bill and granted the relief prayed. The Golden Cross perfected an appeal from that decree to this court, and assigns error.

The complainants, Charles Knapp and others, sue as members and holders of benefit certificates of the Golden Cross, in their own behalf, as well as that of all others in like case who may desire to unite with them as co-complainants.

The Golden Cross was incorporated July 7, 1876, under the provisions of section 2, c. 142, p. 234, of the Acts of the General Assembly of Tennessee of 1875, providing for the creation of corporations "for the general welfare and not for profit," as an insurance order based upon the principle of mutual assessment of its members, and is what is known to the laws of Tennessee as a "fraternal beneficiary association." When the merger and union complained of was attempted to be consummated in April, 1906, it had about 18,500 members, residing in various states of the Union, more than 5,000 of them being residents of Massachusetts, and was solvent, having in its treasury funds suffi-

cient to meet the death claims of its members as they matured and were presented. It was a strong and prosperous association.

The Home Circle was incorporated under the laws of Massachusetts, and has its domicile and chief office in that state. It was an older, but weaker, association, having only about 1,900 members, chiefly residents of Massachusetts. It was unable to meet the death claims against it as they matured, and on that account was much involved in debt. In this condition, to relieve its embarrassment and that of its members, it sought a union with the Golden Cross.

The executive committees of the two associations, after conference and negotiation, on April 12, 1906, agreed upon a consolidation of the two corporations, the terms of which were reduced to writing and signed by the members of those committees. These terms need not be set out in full. They provided for a consolidation of the two associations, whereby the Golden Cross absorbed the Home Circle, accepting and admitting to membership in it, in a body and without medical examination, the entire 1,900 members of the Home Circle, conceding and according to certain officers of the Home Circle certain rank and privileges in the Golden Cross, and certain of the members rights and benefits which they had as members of the Home Circle, but could not have obtained if admitted as members of the Golden Cross in the usual way, received and took over all of the assets of the Home Circle, and assumed and agreed to discharge all its obligations. This contract, made by the executive committees of the two associations, is called therein a "merger" or "union," and is such in form and substance, and is so treated in the subsequent proceedings attempting to carry the same into effect.

A meeting of the members and holders of benefit certificates of the Golden Cross, to be held in the city of Boston June 21, 1906, was called by the officers of that association, notice of which was given to all the members by a circular letter, in which was set out in full the terms of the proposed merger, for the purpose of considering the agreement made, and approving or rejecting the same. The meeting was held, and the proposed merger approved, to take effect August 1, 1906; but in some financial matters it was not to be complete and effective until January 1, 1907. There were present in person and by proxy at this meeting 4,482 members, of which 3,464 voted in favor of the merger, and 1,018, among whom were the complainants, protested and voted against it. After this, July 21, 1906, Edward S. Kemper, a member of the Golden Cross, and one of those who opposed the proposed merger, brought his bill in the Circuit Court of the United States for the Southern Division of New York, against the two associations, for the purpose of enjoining the proposed union,

for want of authority of the Golden Cross, under its charter and the laws of the state creating it, to consolidate with another corporation, and, further, if such power exists, that it had not been lawfully exercised; but, for want of jurisdiction by that court over the Golden Cross, his bill, on September 27, 1907, was dismissed.

Complainants, having first demanded of the Golden Cross that it bring a bill for the purpose of having the said merger and union declared void, and to enjoin the consummation of the same, which demand was peremptorily refused, on November 6, 1906, filed the bill in this cause and obtained a temporary injunction enjoining further action under the proposed consolidation; and such proceedings were had that the accounts of the two associations have been kept separate and distinct, so that the funds due them or their members can be ascertained and restored to them. No benefit certificates have been issued by the Golden Cross to the members of the Home Circle, admitted by the consolidation to membership in the former order, and the affairs of the two associations are in such condition that the respective rights and interests of all parties can be protected.

Complainants' contention is that the Golden Cross was and is wholly without power or authority, under its charter and the general laws of Tennessee, to make and enter into the merger and union attempted to be consummated with the Home Circle, and that its action in the premises is ultra vires and void, and that as members and holders of benefit certificates of the Golden Cross they have a right to maintain this bill in the courts of Tennessee to have it so declared, and the corporation and its officers enjoined from carrying it and any subsequent proceedings had by them thereunder into effect.

The validity of the merger is also challenged upon a number of other grounds; but, in the view we have taken of the case, it is not necessary that they be here stated. There is also much in the record in regard to the advantages and disadvantages which will accrue to the members of the Golden Cross from the proposed consolidation, which we have not stated, because these are all matters of policy for the officers and members of the two associations to consider, and with which courts have nothing to do.

The Golden Cross denies that the agreement, merger, and union made by it with the Home Circle was ultra vires and invalid. It insists that both of these corporations, the Golden Cross by the laws of Tennessee, and the Home Circle by those of Massachusetts, had full power and authority to merge and consolidate, and that, having done so in a proper manner, the merger is valid and binding upon all of their respective members.

Before considering the question thus made we will dispose of the one challenging the

jurisdiction of the chancery court of Knox county to grant complainants the relief they seek, for want of proper parties before the court. This contention is predicated upon the insistence that the object of the bill is to cancel and annul a contract or agreement made by the two defendants, a proceeding in personam, to which both of the defendants are necessary parties, and must be brought before the court by personal service of process, and the constructive service by publication upon the Home Circle is insufficient to give the court jurisdiction over it, and bind it by any decree made in the cause.

The jurisdiction of the chancery court of Knox county of the subject-matter of the litigation cannot be controverted.

It is well settled that courts of equity have jurisdiction to define and determine the extent and limitations of the powers of corporations, and to declare contracts, or other corporate action, made or threatened by the corporation or its officers, in excess and violation of those powers, invalid, and to restrain and prohibit the performance of them. The right of stockholders in proper cases to maintain suits for these purposes is also well settled.

In a leading case upon this subject, decided by the Supreme Court of the United States, Mr. Justice Wayne, speaking for the court, said:

"It is now no longer doubted, either in England or in the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust; and the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise or the denial of a right growing out of it, for which there is not an adequate remedy at law." *Dodge v. Woolsey*, 18 How. 331, 341, 15 L. Ed. 401.

Mr. Pomeroy, in his great work on Equity Jurisprudence, at section 1093, says:

"In a second class of cases, where the directors are not charged with any misapplication of the corporate property for their own benefit, nor with any breach of their fiduciary duty to the corporation, but, although purporting to act for the common welfare, they have adopted, or are about to adopt, some measure which is ultra vires or beyond the scope of their corporate powers, a suit may be prosecuted against them by stock-

holders to obtain the appropriate relief, either of rescission or of prevention. Under some circumstances even a single dissenting stockholder would not be bound by such an act, done by a unanimous board of directors, and approved by all the other stockholders except himself. The theory of this class of suits is that a stockholder has the right that the operations of the corporation should be kept by the directors within the powers conferred by its charter. Every measure which transcends those powers, although done in good faith, violates the rights which inhere in the ownership of the stock and puts the value of the stock itself at hazard. The suit may be brought by a single stockholder suing on his own account alone, or by a stockholder suing on behalf of all others who are similarly situated. The corporation is, of course, made a codefendant, and any other corporation or person who has joined in the ultra vires transaction may also be made a codefendant."

In *Clark & Marshall on Private Corporations*, vol. 2, pp. 1668-1671, the doctrine is thus stated:

"In equity, therefore, a trust is created by implication in favor of the stockholders that the corporation will not so manage its business or affairs as to defeat the object for which it was created, and that it will use and apply its assets for the purpose of carrying out those objects, and not divert them to other purposes. Nothing, therefore, is now more surely settled in the law of corporations than the doctrine that any unauthorized act or contract by the directors or a majority of the stockholders of the corporation, which will destroy the existence of the corporation or render it unable to perform its functions, or any misapplication or diversion of assets to purposes not authorized by its charter, even though all other stockholders may consent, is a breach of trust towards a dissenting stockholder, against which he is entitled to relief in equity."

"To give a court jurisdiction to enjoin ultra vires acts upon the part of a corporation at the suit of a stockholder, it is not necessary that there shall be any intentional wrong or actual fraud upon the part of the officers or other stockholders. It is enough that the act is ultra vires. Nor need there be any loss to the corporation. The fact that an ultra vires act of business will be beneficial to the corporation, and cannot injure its stockholders, makes it none the less ultra vires, and is no answer to a suit by a dissenting stockholder to enjoin the same."

There can be no denial of the jurisdiction of that court over the Golden Cross and its property. The corporation was before it by personal service of process, and made defense by answer, and the property was impounded by injunction.

The contention of the defendant is solely that the complainants cannot maintain their

bill for the relief sought, without having the Home Circle before the court by actual service of process or voluntary appearance. The cases of *Pennoyer v. Neff*, 95 U. S. 734, 24 L. Ed. 565, and others of the Supreme Court of the United States following it, and our own case of *Paper Company v. Shyer*, 108 Tenn. 444, 67 S. W. 856, 58 L. R. A. 173, are relied upon to sustain this contention. We do not think these cases are applicable to the one under consideration. They only hold that, where the proceeding is solely in personam, publication or other authorized form of substitute service is insufficient, and that where only such service is had a decree affecting the rights of a defendant, not otherwise brought before the court, is void for want of notice or due process of law. In the cases cited, judgments for debt without attachment of property, or in excess of the value of the property attached, were held to be void against nonresidents, made parties defendant by publication under state statutes and without voluntary appearance.

This is not a case of that character. Complainants bring this bill to have the powers and purposes of a corporation, the Golden Cross, chartered under the laws of Tennessee and domiciled in this state, declared, and an act done by it, claimed by them to be in excess of those powers and in violation of its charter and the laws of this state, declared void, and to restrain the corporation from a threatened and unauthorized use of its franchises and other personal property, presumed to be at its domicile, and within the jurisdiction and under the control of the court. It is brought to fix the status of a Tennessee corporation, a citizen of the state, and to protect property impounded by proper injunction from an unlawful and authorized appropriation. In cases of this kind all nonresidents of the state who are necessary parties can be brought before the court by substituted service of process and full relief decreed. They are not within the rule announced in *Pennoyer v. Neff*, supra, as therein expressly stated. It is there said:

"Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon, and by similar laws in other states, where actions are brought against nonresidents, is effectual only where, in connection with process against the person for commencing the action, the property in the state is brought under control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem. As stated by Cooley, in his treatise on Constitutional Limitations (page 405), for any other purpose

than to subject the property of a nonresident to valid claims against him in the state, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'

"It is true that in a strict sense a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a large and more general sense the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclosing a mortgage, or enforce a lien. So far as they affect property in the state they are substantially proceedings in rem in the broader sense which we have mentioned."

The same doctrine has been announced and followed in many other cases. Among them are *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 206; *Dunham v. Dunham*, 162 Ill. 610, 44 N. E. 841, 35 L. R. A. 79; *Butler v. Washington*, 45 La. Ann. 281, 12 South. 356, 19 L. R. A. 816; *Peaslee v. Peaslee*, 147 Mass. 180, 17 N. E. 506; *Amy v. Amy*, 12 Utah, 286, 42 Pac. 1121; *State v. Duket*, 90 Wis. 276, 68 N. W. 83, 31 L. R. A. 515, 48 Am. St. Rep. 930; *Reed v. Reed*, 52 Mich. 123, 17 N. W. 720, 50 Am. Rep. 251; *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Am. & Eng. Ann. Cas. 1.

And it is now well-settled law that in cases involving the status of their citizens and proceedings in rem the several states may by statute provide for substituted or constructive service of process against nonresidents who may be interested, so as to bring them before their courts and bind them by decrees there pronounced. Jurisdiction thus obtained is continually exercised by the courts of all the states in suits brought to wind up and administer the affairs of insolvent corporations, to collect debts due from nonresidents where property of the debtor is within the state, and under the control of the court by attachment, or other equivalent process, and in divorce cases. There could not be a stronger case for the application of this rule than the one under consideration. The chief question involved is the extent and limits of the corporate power of a corporation created and organized in this state and under its laws.

Can it be said that the courts of the states are without jurisdiction to construe their own laws, and define and declare the powers of corporations created under them, determine whether acts which those corporations have done or are contemplating doing are within the powers granted, and restrain them from exceeding them and violating the

law of their creation, merely because nonresidents of the state have made contracts with them, and especially where such contracts are illegal and void? This has never been held in any case brought to our attention, and we do not think it will be. It would deprive the several states of the control of their own corporate creatures, and violate their sovereignty. If the law was as insisted by defendant, the several states could not maintain in their own courts proceedings to forfeit the charters of corporations created under their laws, for violation of the provisions of the charter or the general laws of the state, where such corporations had contracted with a nonresident. This case not only involves the status—that is, the corporate powers—of a Tennessee corporation, but the court in which it was brought obtained jurisdiction and control of its personal property impounded by injunction, and thus it is within both exceptions recognized in the case of *Pennoyer v. Neff*, supra, and others following it.

Complainants do not seek any personal decree against the Home Circle. There is no attempt to compel that corporation to do anything, and as against it this is in no sense an action in personam. The gravamen of the bill is to determine the corporate powers of the Golden Cross, a domestic corporation, have a contract made by it, and claimed to be in excess of the powers granted it by its charter, declared ultra vires and void, to restrain it from disposing of its assets under such void contract, and to require it and its officers to return to the Home Circle such assets of that corporation as it has illegally and wrongfully received. We have no doubt of the jurisdiction of the courts of this state to entertain a bill for these purposes, and to bring before them, by publication under the statutes of this state providing for substituted process of this character against nonresidents, all parties residing in other states or countries who may be interested or affected by the ultra vires and void act complained of.

We now come to the determinative question in the case; that is, whether or not the Golden Cross could lawfully enter into the contract of merger and union with the Home Circle. We think it could not, and that the consolidation attempted was and is void.

Corporations are creatures of the legislative department of the government, and exist solely and alone by virtue of the act of incorporation. They can exercise no powers which are not expressly granted them, or are necessarily implied from the express powers given. Authority for all their acts must be found in their charters, or the general laws of the state of their creation. Where the charter or law is silent as to the power sought to be exercised, it does not exist; and wherever a grant of corporate power is claimed by a corporation it must clearly appear and will not be inferred or presumed.

All statutes under which a power is asserted must be favorably construed to the state from which the power emanated, and against the grant of it. These are well-established principles of the common law, and have been frequently applied by the court. *Deadrick v. Wilson*, 8 Baxt. 133; *Memphis Gayoso Gas Company v. Williamson*, 9 Heisk. 326; *City of Memphis v. Memphis Gayoso Gas Co.*, 9 Heisk. 533; *Elevator Co. v. Railroad Co.*, 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798; *Miller v. Insurance Co.*, 92 Tenn. 176, 21 S. W. 39, 20 L. R. A. 765.

The law upon this subject is clearly and forcefully stated by Chief Justice Gray in *Davis v. Old Colony Railroad Co.*, 131 Mass. 259, 41 Am. Rep. 221, and quoted with approval by this court in the case of *Elevator Company v. Railroad Co.*, supra, in these words:

"A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its charter powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on application by a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation."

Corporations have no general power to consolidate or merge with another corporation unless the express authority to do so is found in their charters or the statutes of the states which created them, respectively. In *Thompson's Commentaries on the Law of Corporations*, vol. 1, § 315, it is said:

"The consolidation of the funds of two incorporated companies, so as to form a single corporation, has, generally speaking, the effect of dissolving both the old corporations as distinct entities, and of creating a new corporation. This new corporation can no more be created without the sanction of the Legislature than could either of the original constituent corporations. Accordingly it is held in England that, in the absence of any special power for that purpose in their deeds of settlement, an amalgamation between two joint-stock companies is ultra vires and invalid, and that the obligations and liabilities arising out of such attempted amalgamation, and assumed by the directors of the purchasing company, cannot be enforced against the shareholders of such company."

In *Clark & Marshall on Corporations*, vol. 2, § 349, it is said:

"The consolidation of corporations is not within the objects of a corporation, in the absence of provisions therefor, and cannot be implied. It is well settled, therefore, that corporations cannot lawfully consolidate, however desirable and beneficial consolidation may be, unless the state has expressly authorized them to do so. 'Legislative authority is just as essential to a valid consolidation of existing corporations as it is to the creation of a corporation in the first instance. It follows that an agreement between two or more corporations to consolidate, in the absence of legislative authority, is *ultra vires*, and will not be enforced, even though it may have been partly performed.'

"An *ultra vires* agreement to consolidate is void, and cannot be enforced by the courts at the suit of either party, and it can make no difference that it has been partly performed." *Id.*, p. 1057.

It is conceded on behalf of the defendants that there is not to be found in the charter of the Golden Cross any authority to consolidate with another corporation; but it is said that this power is given it by chapter 198, p. 329, of the Acts of the General Assembly of 1887. This statute is as follows:

"Be it enacted by the General Assembly of the state of Tennessee, that all corporations now or hereafter existing under the laws of this state, whether incorporated under special or general laws of the state, shall have the power, and they are hereby authorized and empowered, to lease and dispose of their property and franchises, or any part thereof, to any corporation of this or any other state engaged in or carrying on, or authorized by its charter to carry on in this or any other state, the same general business as is authorized by the charter of any such lessor corporation, and said corporations shall likewise have the power, and are hereby authorized to make, any contract for the use, enjoyment, and operation of their property and franchises, or any part thereof, with any other such corporation of this or any other state, on such terms and conditions as may be agreed upon between the contracting corporations; and such lessee corporation or corporations is authorized and empowered to carry out such leases and contracts: Provided, however, that any such leases or contracts, when made by or under the direction of the boards of directors of the contracting corporations, shall be authorized or approved by the vote of a majority, in amount of the stock of the lessor corporation present or represented at a regular or called meeting of the stockholders of said corporation: And provided further, that sixty days' notice of such meetings be given in a Memphis, Knoxville and Nashville daily newspaper of the time, place, and purposes of such meeting: And provided further, that where the lessee corporation is a corporation of this state, the authority or

approval of its stockholders shall in like manner be obtained to the contract or lease: And provided further, that this act shall not be so construed as to authorize any corporation of this or any other state to lease or purchase any railroad and line that is a competitor for the same business with any line already owned or under control, by lease or otherwise, or two lines of railway that are competitors for the same business in this state."

This court had this statute before it in the case of *Coal Creek Company v. Tennessee Coal Co.*, 106 Tenn. 651, 62 S. W. 162, and held that it did not embrace private corporations, but only quasi public corporations. We have again examined the question, and are satisfied with the soundness of that case, for the reasons therein stated, and without further discussion adhere to the construction there given the statute.

But, if it did embrace private corporations, it could not be held to apply to those of the character and class to which the Golden Cross belongs; that is, "corporations for the general welfare of society, and not for individual profit." The statute by its terms clearly contemplates corporations which have a capital stock, stockholders, and which may and do own property to be used and disposed of in carrying on and conducting some sort of business, in which earnings may be made for the individual profit of the stockholders. It provides for the lease and disposition of the property of the corporation, provided that the same be approved of by a vote of a majority of "the stock," in a meeting of "the stockholders" held for that purpose, of which notice as therein required shall be given.

Fraternal beneficiary associations, as known to the laws of Tennessee, have neither capital stock, stockholders, nor property to be used in business for individual profit. Those interested in such associations are not denominated "stockholders," but "members." They are so styled by the statute under which the Golden Cross was incorporated (chapter 142, p. 232, Acts 1875; Shannon's Code, § 2524), where, in referring to this class of corporations, it is provided: "The general welfare of society, not individual profit, is the object for which this charter is granted, and hence the members are not stockholders in the legal sense of the term, and no dividends or profits shall be divided among the members." They are also called and known as "members," and not "stockholders," in all the subsequent statutes enacted by the General Assembly for the purpose of regulating and controlling fraternal beneficiary associations, organized under the laws of this state, or of other states doing business in this state. We refer to chapter 19, p. 144, Acts 1897; chapter 113, p. 163, Acts 1901; and chapter 480, p. 1021, Acts 1905. They have no stock in the corporation, for the good reason that none can be subscribed or issued. These associations have no franchises and

property, which are susceptible of lease or sale, so as to be used and operated by another corporation. The very nature of the corporation is a conclusive argument in support of this proposition. We cannot see, under any construction that can be placed upon the statute, how it could be made to apply to a corporation like that of the defendant, and we hold that it does not.

Nor does the statute authorize a consolidation and union of a domestic corporation with a foreign corporation. A lease of the property of one corporation to another, to be operated by it, is entirely a different thing from a merger or union of the two corporations. But it is unnecessary to construe the statute in this respect, as it does not embrace the defendant corporation, and therefore cannot be relied upon to support its action attacked in this case.

It is said for the defendant that it is held, in the case of Coal Creek Co. v. Tennessee Coal Company, *supra*, that private corporations have the power under the common law to sell and dispose of their property. This is true, and it is sound law; but it has no application to this case. The contract or agreement made by the Golden Cross with the Home Circle does not involve a sale or lease of its property or franchise. It has no property to sell or lease in that sense. The contract is in form and substance a merger of the two corporations, by which the Golden Cross takes over and absorbs the Home Circle, admitting its 1,900 members to full membership, without medical examination, as required by the by-laws of the former, although some of them were ineligible to such membership on account of age, secures to some of them certain rights which they would not be entitled to under those by-laws and the laws of Tennessee, if admitted as members of the Golden Cross in the usual way, and conceding some of the officers of the Home Circle certain rights and rank to which they were entitled as members of the Home Circle.

It is styled a "merger and union" of the two companies in the original agreement made by the executive committees of the two corporations and all subsequent proceedings had for the purpose of approving and carrying it into effect. It is so styled in the pleadings in this case, and in fact and legal effect is a consolidation of the two associations. It is, therefore, a contract which the Golden Cross had no authority, under its charter or the laws of Tennessee, to make, or, having made, to carry into effect.

The complainants have a right to maintain a bill in the courts of Tennessee to have it declared *ultra vires* and void, and to enjoin the defendant and its officers and agents from doing or performing any act in compliance with its stipulations and terms, and, as incidental to that relief, to have an account taken of any assets of the Home Circle which

have come to the hands of the Golden Cross, the same ascertained and returned to it, or its proper representatives, in all things as ordered by the chancellor.

The decree of the chancellor is therefore affirmed, with cost.

WEST et al. v. BURKS.

(Supreme Court of Arkansas. April 12, 1909.)

1. APPEAL AND ERROR (§ 1009*)—FINDINGS—CONCLUSIVENESS.

A finding of the chancellor, supported by a preponderance of the evidence, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

2. PLEADING (§ 409*)—WANT OF ANSWER—WAIVER.

A defendant going to trial on his cross-complaint, without insisting on an answer, and treating the allegations thereof as having been made issues in the cause, waives the filing of an answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1376; Dec. Dig. § 409.*]

3. JUDGMENT (§ 170*)—VACATING JUDGMENT ON CONSTRUCTIVE SERVICE—REMEDY—STATUTES.

Under Kirby's Dig. § 6259, authorizing a defendant against whom a judgment has been rendered on constructive service to move within two years for a retrial of the cause, a defendant against whom a decree has been rendered on constructive service may move a retrial of the cause, but the decree will not be set aside until on the retrial it is found erroneous, and then the court will either confirm, modify, or set it aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 331, 332; Dec. Dig. § 170.*]

4. APPEAL AND ERROR (§ 1074*)—HARMLESS ERROR—ERRONEOUS RULINGS.

The refusal to stay process for the enforcement of a decree rendered on constructive service until a retrial on the merits is had is not prejudicial, where on the final hearing the court properly refused to set aside the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4248, 4249; Dec. Dig. § 1074.*]

Appeal from Little River Chancery Court; Jas. D. Shaver, Chancellor.

Suit by J. B. Burks against Clarence West and another, in which defendants moved to set aside a decree rendered on constructive service of process. From an order refusing to set aside the decree originally rendered and confirming the same, defendants appeal. Affirmed.

J. T. Cowling, for appellants. J. B. Burks, pro se.

MCCULLOCH, C. J. Plaintiff, J. B. Burks, instituted this action in the chancery court of Little River county against defendants, Clarence West and his wife, Ollie West, to foreclose a mortgage on real estate executed to him by the defendants. The defendants were nonresidents of the state, and were constructively summoned to appear in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

action. A decree was rendered at the November term, 1906, foreclosing the mortgage and ordering the sale by a commissioner of the land described in the mortgage for the satisfaction of the debt secured. On a later day of the same term the defendants appeared and filed their motion to set aside the decree in accordance with the statute, and asked to be permitted to make a defense to the plaintiff's cause of action. They filed their answer and also a cross-complaint, setting up certain defenses and counterclaims against plaintiff; and at a subsequent term of the court a retrial of the cause was had before the chancellor, who refused to set aside the decree formerly rendered, and confirmed the same. It would serve no useful purpose to discuss in detail the evidence adduced at the trial. The testimony was conflicting, and we are of the opinion that it clearly preponderates in favor of the finding of the chancellor, and that his findings should not be disturbed.

It is contended on behalf of defendants that, as the plaintiff filed no answer to their cross-complaint, the same should have been taken as confessed, and a decree in their favor should have been rendered thereon. They went to trial on their cross-complaint without insisting on an answer, and treated the allegations thereof as having been made issues in the case. They therefore waived the filing of an answer to their cross-complaint. *Pembroke v. Logan*, 71 Ark. 364, 74 S. W. 297; *Cribbs v. Walker*, 74 Ark. 104, 85 S. W. 244.

During the pendency of defendant's motion for retrial of the case the commissioner proceeded with the sale of the land under the orders of the court, and sold it to the plaintiff. It is contended that the order of sale should have been set aside pending the hearing of the motion, and that the court erred in allowing the sale to stand. The statute provides that a defendant against whom a judgment has been rendered on constructive service may appear at any time within two years after the rendition thereof and move to have the cause retried; "and, security for the costs being given, such defendant or defendants shall be permitted to make defense, and thereupon the action shall be tried anew as to such defendant or defendants as if there had been no judgment, and upon the new trial the court may confirm, modify, or set aside the former judgment and may order the plaintiff in the action to restore to any such defendant or defendants any money of such defendant paid to them under such judgment, or any property of such defendants obtained by the plaintiff under it and yet remaining in his possession," etc. Section 6259, Kirby's Dig. This court in speaking of the remedy under this statute in *Porter v. Hanson*, 36 Ark. 591, said: "They [de-

fendants] risk the costs, and are entitled to have the matter of merits determined on demurrer, or evidence after the doors are opened. They have no right, however, to have the former judgment meanwhile vacated on motion. It remains until the case is retried, to be then confirmed, modified, or set aside." The same rule was announced by this court in *Pearson v. Vance*, 85 Ark. 272, 107 S. W. 986. It follows from this that no part of the judgment or decree should be set aside, until, on the retrial of the case, it shall have been found to be erroneous, and then it is the duty of the court either to "confirm, modify, or set aside the former judgment." The court may sometimes in the interests of justice, where a motion by a nonresident defendant for retrial is made, stay process for the enforcement of the judgment until a retrial on the merits can be had. But in the present case the court was not asked to do this; and, even if it had been asked, no prejudice resulted, inasmuch as on the final hearing of the case the plaintiff prevailed, and the court refused to set aside the decree.

We find no error in the record, and the decree of the chancellor is affirmed.

BATTLE, J., absent.

CITY OF CONWAY v. WADDELL.

(Supreme Court of Arkansas. March 22, 1909.)

1. HAWKERS AND PEDDLERS (§ 3*)—WHO ARE "PEDDLERS."

A "peddler," within Kirby's Dig. § 5438, authorizing cities and towns to license peddlers, is one who goes from place to place and from house to house carrying for sale and exposing to sale the goods, wares, and merchandise he carries. [Quoting Words and Phrases, vol. 6, p. 5260.]

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. §§ 3-6; Dec. Dig. § 3.*]

2. HAWKERS AND PEDDLERS (§ 3*)—SALE OF ONE'S OWN BOOK.

That defendant sold his own book made him no less a peddler, within Kirby's Dig. § 5438, authorizing cities to license peddlers.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Dec. Dig. § 3.*]

3. HAWKERS AND PEDDLERS (§ 3*)—MEANING OF TERMS.

The words "peddler" and "hawker," within Kirby's Dig. § 5438, authorizing cities to license, etc., hawkers and peddlers, are used in the ordinary and common-law acceptation of the term and the sense in which the words are used in Const. art. 16, § 5, authorizing the General Assembly to tax such persons.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. §§ 3-6; Dec. Dig. § 3.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3220-3222.]

4. NUISANCE (§ 61*) — PUBLIC NUISANCE — PEDDLING.

Peddling on the streets is not necessarily a nuisance in itself.

[Ed. Note.—For other cases, see *Nuisance*, Dec. Dig. § 61.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. HAWKERS AND PEDDLERS (§ 4*)—TAXATION—MUNICIPAL RIGHTS.

Kirby's Dig. § 5488, authorizing cities and towns to license, tax, etc., hawkers and peddlers, authorizes a tax for revenue.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Dec. Dig. § 4.*]

6. HAWKERS AND PEDDLERS (§ 4*)—LICENSE ORDINANCES—REASONABLENESS.

A city ordinance imposing a license tax of \$25 a day on hawkers and peddlers is void as exacting an unreasonable fee or tax.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Dec. Dig. § 4.*]

Appeal from Circuit Court, Faulkner County; Eugene Lankford, Judge.

Charles W. Waddell was convicted in the mayor's court for violating an ordinance of the City of Conway by peddling without a license, and the City appeals from a judgment of the circuit court on accused's appeal declaring the ordinance void. Affirmed.

Conway, a city of the second class, has the following ordinance:

"Ordinance No. 165.

"An ordinance, entitled, 'An ordinance to regulate and license street peddling and street exhibitions, and to provide punishment for the violation of the regulations contained therein.'

"Be it ordained by the city council of the city of Conway, Arkansas:

"Section 1. It shall be unlawful for any person to sell, offer for sale, attempt to sell, peddle or attempt to peddle any goods, wares, merchandise, medicines or articles of any kind whatsoever, except meats, vegetables and farm produce, or to give any show, entertainment or exhibition of any kind for the purpose of advertising any goods, wares, merchandise, medicines or articles of any kind, on any of the streets, sidewalks, alleys, public squares or other public grounds, in the city of Conway, without first obtaining a license therefor from the city of Conway in the manner hereinafter set forth.

"Sec. 2. Any person desiring to obtain the license required by section 1 of this ordinance shall make application therefor to the recorder of the city of Conway, who shall issue such license upon the payment by such person of the following amounts for such license: * * * For license to sell, offer for sale, * * * goods, wares, merchandise or articles of any kind (except fresh meat, vegetables and farm produce) when no show, entertainment or exhibition is to be given in advertising said articles, * * * the sum of twenty-five dollars per day."

"Sec. 5. That any person who shall violate the provisions of section 1 of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof before the mayor or other proper officer, shall be fined in any sum not less than fifty nor more than one hundred dollars for each and every offense."

The appellee was convicted of a violation of this ordinance in the mayor's court. He was charged with the offense "of selling articles and books in a public place in the city of Conway without having a license therefor." He appealed to the circuit court. The circuit court held that the ordinance was void, and the city prosecutes this appeal.

R. W. Robins, for appellant.

WOOD, J. (after stating the facts as above). Section 5488 of Kirby's Digest gives cities or incorporated towns the power "to license, regulate, tax, or suppress hawkers, peddlers," etc. A "peddler" is one "who goes from place to place and from house to house carrying for sale, and exposing to sale, the goods, wares, and merchandise he carries." *Commonwealth v. Farnum*, 114 Mass. 287; *In re Wilson*, 8 Mackey, 341, 12 L. R. A. 624; 6 Words and Phrases, p. 5260, "Peddler," and cases cited. Appellee sold his own book, but he was a peddler within the meaning of this statute and ordinance. The words "peddler" and "hawker" in the statute and ordinance are used in the ordinary and common-law acceptance of the terms, and in the sense in which these words are used in our Constitution. Article 16, § 5. Under the statute it was within the power of the city to suppress peddling or to license it and to fix a license tax or fee for regulation and for revenue. The language of the ordinance nowhere indicates that it was the purpose of the city council to suppress peddling. Had such been the purpose of the council, it doubtless would have made it unlawful to peddle and made no provision for obtaining a license therefor. We do not feel warranted in saying from the language of the ordinance that the purpose of the council was to suppress peddling altogether. Peddling on the streets is not necessarily a nuisance in itself, and there is nothing in the ordinance to indicate that the council intended to treat it as such and to suppress it. On the contrary, the express language of sections 1 and 2 of the ordinance show that the intention of the council was to license it and to require the payment of a tax or fee for such license in the sum of \$25 per day. There is no prohibition of the business, but an express permission to carry it on upon the conditions prescribed. The tax was manifestly both for the purpose of regulation and revenue. The title of the ordinance declares that it was for the purpose of license and regulation, but the council also had the power to tax for revenue. *City of Little Rock v. Prather*, 46 Ark. 478. Considered as an ordinance to license and to tax for regulation and also for revenue, it was void on its face. It is inconceivable that it would require the sum of \$25 per day to reimburse the city for the expense of issuing the li-

cense and the efficient police surveillance of the business, and the amount is still unreasonable, when, in addition to the above, it is considered as a tax for the purpose of raising revenue for the city.

In *City of Fayetteville v. Carter*, 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509, Judge Battle, speaking for the court, said: "If the fee required is not plainly unreasonable, the courts ought not to interfere with the discretion exercised by the council in fixing it; and unless the contrary appears on the face of the ordinance requiring it, or is established by proper evidence, they should presume it to be reasonable." But here no presumption can be indulged. For the fee and tax of \$25 per day for the privilege of carrying on the business of a peddler or hawker on the streets or other public places in the town of Conway, and the regulation and taxation thereof, is plainly excessive, and, as we have said, renders the ordinance for such purposes void on its face.

The judgment is therefore affirmed.

GREER v. STROZIER.

(Supreme Court of Arkansas. April 12, 1909.)

1. EXEMPTIONS (§ 141*)—PROTECTION—ENJOINING SUITS IN OTHER STATES.

Where the debtor and creditor are residents of the same state, an attempt by the creditor to evade the exemption law of the state by bringing suit in a sister state may be enjoined by a chancery court.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 168; Dec. Dig. § 141.*]

2. PLEADING (§ 214*)—COMPLAINT—DEMURRER.

The allegations of the complaint must be taken as true on a demurrer thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 525; Dec. Dig. § 214.*]

3. EXEMPTIONS (§ 147*)—RESTRAINING SUITS IN OTHER STATES—COMPLAINT.

A complaint which alleges that plaintiff and defendant are residents; that defendant had instituted a suit in a sister state to deprive plaintiff of his exemptions; that defendant was the assignee and owner of the claim sued on, and that he had assigned it to a fictitious person in the sister state, and brought suit thereon for the fraudulent purpose of depriving plaintiff of his exemptions; and which prays that defendant be restrained from prosecuting the action in the sister state—states a cause of action as against a demurrer.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 171; Dec. Dig. § 147.*]

4. PLEADING (§ 192*)—DEFECTS—REMEDY.

A defect in a pleading arising from its failure to contain a sufficiently definite statement of the cause of action relied on can only be reached by a motion to make the complaint more definite and certain, and not by a demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 409; Dec. Dig. § 192.*]

5. PLEADING (§ 218*)—JUDGMENT ON DEMURRER—DAMAGES.

Under Kirby's Dig. § 6137, declaring that allegations of the amount of damages shall not be considered as true by a failure to controvert

them, a court rendering a decree granting the relief prayed for on overruling a demurrer to the complaint cannot award damages without proof thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 560; Dec. Dig. § 218.*]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by L. F. Strozler against W. L. Greer and another. From a decree for plaintiff, defendant W. L. Greer appeals. Affirmed in part, and reversed and remanded in part.

W. T. Tucker, for appellant. Edwin W. Lindsey, for appellee.

MCCULLOCH, C. J. Appellee, L. F. Strozler, instituted this suit in the chancery court of Pulaski county against appellant, W. L. Greer, and against the St. Louis, Iron Mountain & Southern Railway Company, to restrain appellant from prosecuting an action at law against him in the court of a justice of the peace in the state of Missouri wherein a writ of garnishment was issued and served on the railroad company. He alleged in his complaint that he was a resident of Pulaski county, Ark., and also set forth facts sufficient to entitle him to claim as exempt the wages due him by the railroad company which had been garnished in the action brought against him by appellant in Missouri, and alleged that the Missouri action was instituted for the purpose of depriving him of his opportunity to claim said exemptions. It is also alleged that appellant, Greer, had assigned the account upon which the action was based to a fictitious person, one C. M. Dart, in which name the action in Missouri was instituted. Appellee also set forth in his complaint that he had sustained damages by reason of the institution of the action in Missouri. Appellant Greer appeared and demurred to the complaint, which demurrer was overruled by the court, and final decree was then entered restraining said appellant from further prosecuting the action in Missouri; and the court also rendered a decree in favor of appellee and against appellant Greer for the sum of \$38 damages. Greer appealed to this court.

It has been settled by decisions of this court that, when a debtor and creditor are residents of the same state, an attempt of the latter to evade the exemption laws of the state of their domicile by bringing suit in another state may be enjoined by a chancery court. *Greer v. Cooke* (Ark.) 113 S. W. 1000; *Griffith v. Langsdale*, 53 Ark. 71, 13 S. W. 733, 22 Am. St. Rep. 182. According to the allegations of the complaint, which must be taken as true, appellant and appellee were both residents of Pulaski county, Ark., and appellant had brought a suit in the state of Missouri in an attempt to evade the exemption laws of this state. It was therefore proper to restrain him from so doing.

It appears from the allegations of the complaint that the Missouri suit was based on an open account alleged to have been originally claimed against appellee by Franklin Bros. Company, a corporation engaged in the grocery business in the city of Little Rock, and that said company had become bankrupt and its assets turned over to a trustee in bankruptcy. The complaint alleges, however, that the appellee was not, in fact, indebted to Franklin Bros. Company in any sum. It is contended on behalf of appellant that the Franklin Bros. Company was a necessary party to the action, and that Greer as attorney or agent should not have been enjoined from prosecuting the action. The statements of the complaint are to some extent ambiguous in failing to make clear whether or not it was intended to allege that Greer was the owner of the account and had assigned it as such owner. We think, however, that the allegations of the complaint, when fairly construed, meant to allege that Greer was the assignee and owner of the account formerly claimed by Franklin Bros. Company, and had assigned it to a fictitious person in Missouri and brought suit thereon for the fraudulent purpose of depriving appellee of his exemptions. If a more definite statement had been desired, the defect should have been reached by a motion to make the complaint more definite and certain. The demurrer did not reach to that question.

We conclude, therefore, that the chancellor was right in restraining the further prosecution of the suit in Missouri. He erred, however, in rendering a decree for damages without proof. Kirby's Dig. § 6187; Greer v. Newbill (Ark.) 117 S. W. 531. The decree restraining the prosecution of the Missouri suit is affirmed; but that part of the decree which awards damages is reversed, and the cause remanded to the chancery court, with directions to ascertain the damages, if any, and render judgment for same.

BATTLE, J., absent.

BOOKER v. BLYTHE et al.

(Supreme Court of Arkansas. April 5, 1909.)

1. APPEAL AND ERROR (§ 19*)—MOOT QUESTIONS.

Where defendant, whose lumber was attached under writs issued by a justice, sold it, before trial of the case on appeal to the circuit court, without obtaining an order releasing it, the issue as to the attachment became a moot question, which would not be considered by the Supreme Court on appeal, since though defendant was affected by the costs, such question could have been reached by motion to retax.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. § 19.*]

2. BANKRUPTCY (§ 391*)—STAY OF SUIT.

An appeal and supersedeas not operating to vacate a judgment, but only to stay proceedings thereunder, where a petition in bankrupt-

cy was not filed until more than four months after the rendition of judgment, and did not affect the same, the suit would not be stayed under Bankruptcy Act July 1, 1898, c. 541, § 11a, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), since no benefit to the bankrupt's estate would result from a stay.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 391.*]

Appeal from Circuit Court, Miller County; J. M. Carter, Judge.

Consolidated actions by K. R. Blythe and others against J. B. Booker. From the judgment, defendant appeals. Affirmed.

Frank S. Quinn, for appellant. Jno. N. Cook, for appellees.

HART, J. The appellees, K. R. Blythe, John Miller, J. W. Lummus, and Joe Miller, on the 30th day of October, 1907, instituted separate suits in a justice of the peace court in Miller county, Ark., against appellant, J. B. Booker, for wages due, and claiming a laborer's lien on lumber and ties at appellant's mill. On the same day the justice issued a writ of attachment in each case, and these writs were executed by attaching certain lumber and cross-ties in the lumber yard of appellant. On the day of trial the justice found in favor of appellees, both on the issue of the attachments and as to the amounts claimed to be due them; and judgment was entered accordingly. Appellant duly prosecuted an appeal to the circuit court, and executed appeal bonds according to the provisions of subdivision 3, § 4666, Kirby's Dig.

On a trial anew in the circuit court the cases were consolidated and tried together. Appellant admitted the indebtedness, and the jury found the issues on the attachment in favor of appellees. Judgment was accordingly entered by consent for the respective amounts of the indebtedness, and the attachments were sustained. Judgment was also rendered against the sureties on the appeal bonds. The case is here on appeal, and the only issue raised is as to the attachments.

The record does not disclose that the court ever made an order releasing the attached property, or in any other manner disposing of it; but it does show by appellant's own testimony that he sold all of the lumber attached. The attached property was sold by appellant before the trial in the circuit court, but the record does not show the exact time of the sale. Having disposed of the lumber before the date of the trial in the circuit court, without having procured an order releasing it, the issue as to the attachment is now a moot question, and will not be considered by the court. The appellant, having disposed of the attached property, can only be affected by the trivial amount of costs, and that could have been reached by motion to retax the costs, in-

stead of by appeal. *Stuckey v. Lindley*, 84 Ark. 594, 106 S. W. 482.

Appellant has also filed a petition to stay this suit under section 11a, Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426). The judgment in this case was rendered at the June term, 1908, of the Miller circuit court. An appeal was taken, and a supersedeas bond given, on the 10th day of July, 1908. The petition in bankruptcy was not filed until the 3d day of December, 1908, more than four months after the rendition of the judgment in the circuit court. The appeal and supersedeas did not have the effect of vacating the judgment, but only of staying proceedings thereunder. *Miller v. Nuckolls*, 76 Ark. 485, 89 S. W. 88, 113 Am. St. Rep. 101. Therefore no benefit to the bankrupt's estate can be derived by a stay of the proceedings, and the petition will be denied. *Hill v. Harding*, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083; *St. Louis World Pub. Co. v. Rialto Grain & Securities Co.*, 108 Mo. App. 479, 83 S. W. 781.

Judgment affirmed.

WILCOX et al. v. HEBERT.

(Supreme Court of Arkansas. April 12, 1909.)

1. MASTER AND SERVANT (§§ 101, 102*)—OBLIGATION OF MASTER—DUTY TO FURNISH SAFE MACHINERY.

A master must exercise ordinary care, in proportion to the dangers incurred, in selecting reasonably safe machinery, and in keeping the same in proper condition, but he is not an insurer of the safety of the machinery, and need not supply any particular kind, nor use any particular character, of safeguard against danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 171, 172, 180, 184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§§ 101, 102*)—OBLIGATION OF MASTER—DUTY TO FURNISH SAFE MACHINERY.

The liability of a master for having furnished unsafe machinery, proximately causing injury to a servant, depends on the care a man of ordinary prudence would have exercised under similar circumstances, and a mere error of judgment in selecting a more dangerous kind of machinery than could have been provided, or in altering a machine so as to render it less safe, does not necessarily convict the master of actionable negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 171-174; Dec. Dig. §§ 101, 102.*]

3. TRIAL (§ 253*)—INSTRUCTIONS—ISSUES—IGNORING EVIDENCE.

Where, in an action for injury to a servant operating a mangle by having her hand caught between the rollers, the evidence showed that the master had removed a guard rod, and had attached to the mangle a revolving feed apron, and the master proved that the guard rod could not be used on the machine with a feed apron attached, and that the alteration in the machine, even with the guard rod discarded, diminished the danger to the operator, an instruction that, if the master permitted the operation

of the machine without the guard rod, and its absence caused the accident, he was liable was erroneous, as cutting off the master's effort to show that the mangle was reasonably safe, and that he had increased the safety by attaching the feed apron, and had not diminished it by removing the guard rod.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613, 616; Dec. Dig. § 253.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by Emma Hebert against W. H. Wilcox and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Read & McDonough, for appellants. Edwin Hiner and Ira D. Oglesby, for appellee.

McCULLOCH, C. J. Appellants operated a steam laundry in the city of Ft. Smith, Ark., and appellee, a girl between 14 and 15 years of age at the time of the occurrence which is the subject-matter of this action, was working for them. She sustained a physical injury while working for them, and sues to recover damages, alleging that their negligence caused the injury. She was engaged at work at an ironing machine called a "mangle," and, while feeding a garment into the mangle, one of her hands became caught between two rollers, and was badly crushed and burned. She alleged in her complaint that she was, at the time she received the injury, inexperienced in the operation of said machine, and ignorant of the dangers attending its use; that it was a dangerous machine to one inexperienced in its use, and was rendered more dangerous by the removal of a guard rod, which she alleged was placed on the machine by its manufacturers as an additional protection to persons while operating it. Negligence of appellants is alleged (1) in failing to instruct her as to the performance of her work so as to avoid injury, and to properly warn her of the danger attending the work; and (2) in removing the guard rod from the machine and permitting its use without the guard rod.

Appellee and another girl about the same age were working together feeding garments into the mangle. They stood on a platform in front of the mangle, and took the garments to be ironed from a basket which was attached to the front of the feed apron. The feed apron revolved toward the rollers of the machine, so as to carry the garments, when laid on it, between the rollers, a large heated iron roller and the small felt rollers which pressed the garments against the heated roller. In this way the garments were ironed. In feeding the garments into the machine it was not necessary for feeders to permit their hands to pass between the rollers, and the first of the felt rollers extended over somewhat in front of the iron roller, so as to serve as a warning,

when touched, of the near approach to the heated roller. It was necessary, however, for the feeders to spread a garment out on the feed apron so that it would properly pass between the rollers, and to hold the end of the garment, after the other end started, between the rollers, so that it would pass through straight and smooth. Appellee and her companion were at the time of the injury ironing aprons, and she had one of the strings of the apron which she was ironing wrapped around her fingers, and was holding it by this string when she allowed her hand to be carried between the rollers. When her hand was extricated, it was found that the apron string was wrapped around three of her fingers, and her fingers were closed around the string. It is contended on behalf of appellants that, according to the undisputed evidence, appellee was fully instructed as to her duties, and warned of all the dangers attending the work, that according to her own evidence she was fully aware of the danger, and that the injury was caused by her own carelessness. On the other hand, it is contended by counsel for appellee that, according to the undisputed evidence, no instruction was given to her as to the proper way to do the work so as to avoid danger, and no warning of the danger given at all. It is unnecessary for us to attempt to decide which of these widely differing contentions is correct, as the case is to be reversed on other grounds hereinafter stated, and the evidence may be different in the next trial. The law is plain as to the duty of an employer to warn and instruct an inexperienced servant, and need not be stated now. The testimony establishes the fact that the machine in question had been in use about 17 years, and was originally made without a revolving feed apron, but with a guard rod in front of the first felt roll, so as to serve as a warning to the person feeding garments into the machine; that about 6 years before the injury appellants purchased and attached to the machine a revolving feed apron, which increased the space between the person feeding and the rollers, and that they then removed the guard rod, and operated the machine thereafter without it. Appellants adduced testimony tending to show that the guard rod could not be used on the machine with the feed apron attached, and that the alteration made in attaching the revolving apron even with the guard rod discarded, diminished the danger to the operator. And there was also evidence adduced by appellee that mangles are now manufactured with a revolving apron attached and with a guard roll, which is a different appliance from the guard rod.

The court, over the objection of appellants, gave the following instruction at the request of appellee: "(7) If the jury believe from the evidence that the machine at which plaintiff was at work was made with

a guard roll—that is, when constructed and put up by the manufacturers, contained such rod or roll—that this guard rod was put on the machine for the protection of persons using it, and that it was a protection, and contributed to the safety of persons using it, that defendants permitted the machine to be operated without such guard roll, and that its absence from the machine at the time plaintiff was injured caused or contributed to the accident by which she was injured, then defendant would be liable, if the accident was caused by the absence of the guard roll, or would not have happened if the machine had been provided with same." This instruction was erroneous. In the first place it ignored the difference, which appellants' testimony tended to explain, between a guard roll and a guard rod, and used the two terms interchangeably. This confusion of terms should perhaps have been met by a specific objection. But the fatal objection to the instruction is that it made appellants insurers of the safety of the machine, and ignored their contention that it was less dangerous after attaching the feed apron and removing the guard rod than it was before. The instruction, in the face of testimony tending to show that the machine in its altered condition was safer than it was before the alteration was made, and that a guard rod could not be used with the revolving apron, told the jury, as a matter of law, that if the guard rod was a protection, and contributed to the safety of persons using the machine, and that its absence caused the injury, its removal constituted negligence, and rendered appellants responsible for the injury. Its effect was to tell the jury that, even though the appellants exercised the care of a prudent person in providing a machine reasonably safe for the use intended, yet if it turned out to be less safe on account of the removal of the guard rod, it constituted negligence to remove the guard rod. This is not the law. The master is only held to the exercise of ordinary care, proportionate to the danger to be incurred, in the selection of reasonably safe machinery and appliances, and in keeping them in proper condition. *Harris Lumber Co. v. Morris*, 80 Ark. 260, 96 S. W. 1067; *Hough v. T. & P. Ry. Co.*, 100 U. S. 213, 25 L. Ed. 612; 1 *Labatt on Master & Servant*, §§ 14-16. He is not an insurer of the safety of the appliances furnished, and is not bound to supply any particular kind of machinery, nor to use any particular character of safeguard against danger. 1 *Labatt on Master & Servant*, § 35; *Dynen v. Leach*, 26 L. J. Exch. N. S. 221; *Bohn v. C., R. I. & P. Ry. Co.*, 106 Mo. 429, 17 S. W. 580.

The question of his liability for damages on account of having furnished a piece of machinery which turns out to be unsafe, and which proves to be the proximate cause of an injury to the servant, must be tested

by the question as to what care a man of ordinary prudence would have exercised under similar circumstances. A mere error of judgment in selecting a more dangerous kind of machine than could have been provided, or in altering a machine so as to render it less safe, does not necessarily convict the master of culpable conduct toward his servant, but it is a question for a jury to say whether or not it constitutes negligence. *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483; *So. Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391; *Smith v. Ry. Co.*, 69 Mo. 32, 33 Am. Rep. 484; *Grattis v. K. C. P. & G. Ry. Co.*, 153 Mo. 380, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721; *Foley v. Pettie Mach. Works*, 149 Mass. 294, 21 N. E. 304, 4 L. R. A. 51; *Wood v. Heiges*, 83 Md. 257, 34 Atl. 872. The error of the instruction was inherent, and it was not, and could not have been, cured by any other instruction. Its prejudicial effect is obvious, for it cut off appellants' effort to show that the mangle was reasonably safe for the intended use, and that they had increased the safety by attaching the feed apron, and had not diminished it by removing the guard rod.

For this error, the judgment is reversed, and the cause remanded for a new trial.

BATTLE, J., absent.

GREGORY et al. v. WELCH et al.

(Supreme Court of Arkansas. April 12, 1909.)

1. WILLS (§ 439*)—CONSTRUCTION—INTENTION OF TESTATOR.

A will should be construed so as to give effect to the intention of the testator as expressed by the language used, if such intent is not contrary to some positive rule of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 955; Dec. Dig. § 439.*]

2. WILLS (§ 449*)—CONSTRUCTION—PRESUMPTION AGAINST INTENTACY.

In the construction of a will, there is a presumption against partial intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

3. WILLS (§ 629*)—CONSTRUCTION—TIME OF VESTING OF ESTATE.

That construction of the language of a will is favored which will result in the early vesting of an estate created by the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

4. WILLS (§ 467*)—CONSTRUCTION—PRECATORY WORDS.

Testator gave to his wife "during her natural life all my land," and in a subsequent paragraph willed "that after my wife's death all my land shall be given to her daughters, M. and G." *Held*, that the contention that the words relating to the daughters were merely directory and expressive of testator's desire, and that an estate in remainder after the expiration of the widow's life estate was not vested in the daughters, was not well taken.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 954, 986; Dec. Dig. § 467.*]

Appeal from Pope Chancery Court; Jeremiah G. Wallace, Chancellor.

Action by A. F. Welch and others against C. H. Gregory and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. P. Strait, for appellants. Sellers & Sellers, R. B. Wilson, J. T. Bullock, and Brooks & Hays, for appellees.

MCCULLOCH, C. J. The question presented on this appeal is whether or not the seventh item of the last will of Hawkins Gregory devised an estate in remainder to the two persons therein named, which vested in them immediately on the death of the said testator. The seven items of the will are as follows:

"First. I give and bequeath to each one of my brothers and sisters, namely, Henderson, Robert, Hardin, Jones and Jedethum H. Gregory, Matilda Wooten and Elizabeth Davis, the sum of five hundred (\$500) dollars in gold.

"Second. I give and bequeath to my beloved wife, Fannie A. Gregory, during her natural life, all my land. I also give to her all of my personal estate, except the sums specified in the first article. In the item of personal estate I include all of my notes and accounts.

"Third. I give to my wife's two daughters, Margarette and Georgia Griffin, my two three year old fillies, which they claim respectively.

"Fourth. I will and order that all my debts and funeral expenses be paid out of any currency that may be on hands.

"Fifth. I will that immediately after my death the sums bequeathed to my brothers and sisters be paid to them respectively on their receipting for same.

"Sixth. I hereby appoint Fannie A. Gregory and William Griffin to carry out the provisions of this will.

"Seventh. I will that after my wife's death all my land shall be given to her daughters, Margarette and Georgia Griffin."

It is contended that words sufficiently apt to express an intention of the testator to devise a vested estate in remainder were not used, and that the clause in question must be construed as "merely directory, and expressive of a desire only, that after the termination of the life estate given the widow, the land shall be given to Margarette and Georgia Griffin." It is the duty of courts to so construe a will as to give effect to the intention of the testator as expressed by the language used. *Campbell v. Campbell*, 18 Ark. 513; *Cockrill v. Armstrong*, 81 Ark. 580; *Page on Wills*, § 460. "The intent of the testator," said Chief Justice Marshall in *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 701, "is the cardinal rule in the construction of wills; and, if that intent can be clearly perceived, and is not contrary to some positive rule of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

law, it must prevail." There is a presumption against partial intestacy. Page on Wills, § 466; Gardner on Wills, p. 369; Kenaday v. Sinott, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339.

The law favors an early vesting of the estate, and courts will place that construction upon the language of the will which will result in vesting the estate created by the will at the earliest moment, and will not adopt a construction which results in the postponement of the vesting of title. "Where the time when the interest shall vest is in doubt because the testator has used words which may mean either of two dates, the earlier date is to be selected. This rule that the executory estate shall be construed to be vested rather than contingent, whenever the former construction is possible, is the result of that other very old rule of the common law that the fee shall never be in abeyance if it can possibly be avoided." 2 Underhill on Wills, § 861.

Tested by the rules of construction thus announced, we are clearly of the opinion that the language used by the testator was sufficient to vest an estate in remainder, after the expiration of the widow's life estate, in the two persons named in the seventh clause of the will. Unless this construction be placed on the language, the testator must be deemed to have died intestate as to the remainder interest in his lands, for the will contains no other provision with reference to the lands after the expiration of the widow's life estate, which is expressly devised to her in the second clause.

Judgment affirmed.

BATTLE, J., absent.

WESTERN UNION TELEGRAPH CO. v. LONG.

(Supreme Court of Arkansas. April 19, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS FOR DAMAGES—BURDEN OF PROOF.

In an action against a telegraph company for mental anguish caused by the negligence of the telegraph company in sending a message to the wrong place, the burden is on plaintiff to show a cause of action.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 61; Dec. Dig. § 66.*]

2. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

Evidence in an action against a telegraph company for mental anguish caused by sending a telegram to the wrong place held insufficient to establish a cause of action.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.*]

Appeal from Circuit Court, Logan County; Jephtha H. Evans, Judge.

Action by Mary Long and another against the Western Union Telegraph Company.

Judgment for the named plaintiff, and defendant appeals. Reversed and remanded.

Mechem & Mechem, for appellant. Mary Long, for appellee.

BATTLE, J. Mary Long and her father, C. L. Wright, brought this action against the Western Union Telegraph Company to recover damages for mental pain and anguish suffered by them, alleging in their complaint: That on the 16th day of February, 1908 Charley Long, husband of the plaintiff Mary Long, died in Tulsa, Okl. That before his death he requested that his remains be taken to Caulksville to be buried. That Caulksville is a village in Logan county, Ark., and is about three-fourths of a mile from Ratcliffe, the nearest telegraph station. C. L. Wright lived in the vicinity of Caulksville, and had lived there for a number of years. That on said 16th day of February, 1908, the plaintiff Mary Long delivered to the defendant's agent at Tulsa, Okl., the following message for transmission, and paid the customary charges for the same, to wit:

"Tulsa, Okla., Feb. 16, 1908.

"C. L. Wright, Caulksville, Ark.

"Charley Long dead. Can he be buried there? He told me to ask you this. Answer quick.
Mary Long."

That the defendant carelessly and negligently sent said message to Paris, Ark., which was about nine miles from Caulksville, and that, by reason of such negligence, the plaintiff C. L. Wright failed to learn of the death of the said Charley Long in time to make arrangements for his burial, and Mary Long held the remains of her said husband expecting a reply to her message until the condition of the remains became such that she was forced to bury them in Tulsa, Okl. That, had said message been delivered promptly, the remains of Charley Long would have been taken to Caulksville for burial. That both of the plaintiffs suffered great mental pain and anguish by reason of the fact that the body of Charley Long was buried, contrary to his wish, in a foreign state and among strangers.

The defendant in its answer admits sending the message, but denies that it was negligent or that the plaintiffs suffered any mental pain or anguish by reason of negligence on its part.

Mary Long testified: That she was the widow of Charley Long. That the said Charley Long died in Tulsa, Okl., on the 16th day of February, 1908, which was Sunday.

That before the said Charley Long died he requested that his remains be taken to Caulksville, Ark., for burial. That, after the death of the said Charley Long, she delivered to the Western Union Telegraph Company's agent for transmission the message set out in

her complaint. That on the next day, Monday, February 17th, she received the following message from her father:

"Ratliffe, Ark. Feb. 16th, 1908.

"Mary Long, Tulsa, Okla.

"No need to bring him here. Bury him there.
C. L. Wright."

That, after receiving said message from her father, she waited for another message from him, and that she held the body until Friday, and, receiving no other message, she buried the same in Tulsa. That her husband and she were both strangers in Tulsa. That she had sufficient funds to take the remains of her husband to Caulksville, but that she did not want to do so without the consent of her father. That there was nothing to have prevented her from taking the remains to Caulksville for burial, but the fact that she "hated to do anything like that without letting him [her father] know it."

On redirect examination she testified that she did not have sufficient funds to take the remains to Caulksville at the time her husband died, but that it was raised by friends, and it took two or three days to get it up.

The jury returned a verdict in favor of Mary Long for \$300; and the defendant appealed.

The burden was upon the plaintiff to show a cause of action. There was no evidence to show that she was prevented from burying her husband at Caulksville. She had the means to do so. But she says that she did not wish to bury him there without the consent of her father. There was no evidence that she had any reason to believe that he would not consent. So there was no reasonable excuse for the failure to bury at Caulksville, and no cause of action against the telegraph company on account of mental anguish. Her own acts were the proximate cause of her mental anguish.

Reversed and remanded for a new trial.

BRAY CLOTHING CO. v. McKINNEY.

(Supreme Court of Arkansas. April 12, 1909.)

1. APPEAL AND ERROR (§ 928*)—PRESUMPTIONS—INSTRUCTIONS NOT IN ABSTRACT.

Where appellant fails to set out instructions in the abstract, it will be presumed that they were correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

2. SALES (§ 161*)—DELIVERY TO CARRIER AS DELIVERY TO CONSIGNEE.

That a delivery of goods to a carrier duly addressed to a consignee may constitute delivery to the consignee so as to pass title and make the consignee liable as for goods sold and delivered, the goods must correspond with all the terms of the consignee's order.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380; Dec. Dig. § 161.*]

3. SALES (§ 181*)—DELIVERY OF GOODS—EVIDENCE.

In an action for the price of goods alleged to have been shipped to defendant on his order, evidence held to support a verdict for defendant.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 181.*]

Appeal from Circuit Court, Cleveland County; H. W. Wells, Judge.

Action by the Bray Clothing Company against N. A. McKinney. Judgment for defendant, and plaintiff appeals. Affirmed.

E. A. Gibson, for appellant. Pitt Holmes, for appellee.

FRAUENTHAL, J. The plaintiff, the Bray Clothing Company, is a mercantile corporation located at Louisville, Ky., and the defendant is a merchant doing business at Rison, Ark. The plaintiff instituted this suit against defendant by filing an account with a justice of the peace for a balance, which it claimed that defendant owed it for goods sold and delivered to defendant. Upon the trial in the court of the justice of the peace a judgment was rendered in favor of the defendant, from which the plaintiff appealed to the circuit court; and on the trial de novo in that court a verdict was returned in favor of the defendant.

The plaintiff contends that on December 2, 1905, the defendant made an order for certain goods through its traveling salesman, but under the testimony it does not appear that a written order was made for the goods, so that it was only a verbal order given to the salesman. The plaintiff claims that it shipped a part of the goods to defendant on January 29, 1906, and that it shipped the balance on May 3d following. The controversy is over the amount of the goods that were shipped on January 29, 1906. The evidence on the part of the plaintiff tended to prove that the plaintiff delivered to the common carrier at Louisville, Ky., a package of goods directed to the defendant at Rison, Ark., and in the package were goods amounting to \$97.50, but made out in two bills, one of \$66 and one of \$31.50, and that they were made out in two bills because there was a difference in the amount of the cash discount allowed on the goods of the two accounts or bills. The evidence of the defendant tended to prove that the package arrived unbroken, and only contained goods amounting to \$66. It is conceded that defendant has paid that amount, as well as the entire amount of the account for the shipment of May 3d. The defendant testified that the goods amounting to \$66 and the goods covered by the shipment of May 3d were all the goods that he made the order for in December, and claimed that he did not make any order for the goods amounting to \$31.50, and denied receiving same at any time.

Upon the trial of the case the court gave

two instructions, but the appellant has failed to set them out in the abstract; and therefore the presumption is that these instructions were correct. *Carpenter v. Hammer*, 75 Ark. 348, 87 S. W. 646; *Koch v. Kimberling*, 55 Ark. 547, 18 S. W. 1040; *May v. Dyer*, 57 Ark. 441, 21 S. W. 1064; *Mine La Motte L. & S. Co. v. Con. Ant. Coal Co.*, 85 Ark. 123, 107 S. W. 174.

It is contended by the plaintiff that it delivered to the common carrier at Louisville, Ky., a package containing goods amounting to \$97.50 and duly addressed to the defendant at Rison, Ark., and that when said package arrived at Rison, even if it actually only contained goods amounting to \$66, still the defendant would be liable for \$97.50. It bases this contention upon the abstract principle of law that a delivery to the common carrier of goods directed as above is a delivery to the consignee, and therefore, if any loss occurs in transit, it is the loss of the consignee. *State v. Carl*, 43 Ark. 359, 51 Am. Rep. 565; *Burton v. Baird*, 44 Ark. 556; *Hope Lumber Co. v. Foster*, 53 Ark. 196, 13 S. W. 731. But this is not a correct presentation of the law as applied to the testimony of the defendant in this case. It is true that ordinarily the effect of any consignment is to vest the title in the consignee and to impose the risk on him. But this is only true when the goods are consigned in execution of a contract authorizing such shipment. Before a delivery to a carrier will constitute a delivery to the consignee so as to pass the title and make the consignee liable as for goods sold and delivered, the goods must correspond with the order in quantity and quality; and, in fact, with all the terms of the contract. A seller cannot send more goods than were ordered, and in such event claim a completed sale when same are delivered to the common carrier duly directed to the consignee. It is true that, after the arrival of such goods and inspection by the consignee, he may then accept them; but until then there would be no completed sale of the goods. 24 Am. & Eng. Ency. Law, p. 1062; *Tiedeman on Sales*, § 68; 2 *Mechem on Sales*, § 746. In this case the defendant testified that all the goods which he ordered he received, that in the consignment of January 29th he received goods amounting to \$66, and those goods, together with the goods received in May, are all the goods he ordered. Under that testimony, if plaintiff shipped any other goods in the package, the same were at the risk of the plaintiff. But the testimony of defendant tended to prove, further, that the package arrived unbroken, and that it only contained goods amounting to \$66, and did not contain the goods for which the plaintiff is now suing. He testified that the goods were carefully checked out and placed in his store, and that the only account rendered at the time was for the goods amounting to \$66, and that

plaintiff never sent to him an account or statement for the goods amounting to \$31.50 until the following September, and that it was not until then that his attention was called to such an alleged shipment. So that it became a controverted question of fact as to whether the goods now sued for were actually shipped in the package, or received by defendant, and also as to whether those goods were actually ordered by defendant so as to place the loss upon him in event they were lost in transit. These questions we presume were submitted to the jury upon proper instructions. They returned a verdict in favor of defendant, and there is sufficient evidence to sustain that verdict.

The judgment is therefore affirmed.

McMILLAN et al. v. MORGAN et al.

(Supreme Court of Arkansas. April 19, 1909.)

1. QUIETING TITLE (§ 10*)—TITLE TO SUPPORT.

In an action to quiet title, plaintiff must succeed, if at all, on the strength of his own title, and not on the weakness of defendant's title.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 36; Dec. Dig. § 10.*]

2. VENDOR AND PURCHASER (§ 105*)—RESCISION BY AGREEMENT—EFFECT.

Where the sale of land was rescinded by agreement of the parties on the discovery that by mutual mistake the land described in the deed was not the land intended to be conveyed, the purchaser cannot afterward claim any interest in the land actually described.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 105.*]

3. DEEDS (§ 211*)—EXECUTION—IDENTITY OF LAND—EVIDENCE.

Evidence held to show that the grantor knew what land was described in the deed and was not mistaken in its identity.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. § 211.*]

4. APPEAL AND ERROR (§ 510*)—RECORD—EXHIBITS.

Deeds and tax receipts which are made exhibits to the complaint are a part of the record on review, though they bear no file marks.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2318; Dec. Dig. § 510.*]

Appeal from Clark Chancery Court; Jas. D. Shaver, Chancellor.

Action to quiet title by W. S. Morgan and W. H. Fagan against Dougald McMillan and William Gerig. From a decree for plaintiffs, defendants appeal. Reversed.

W. S. Morgan and W. H. Fagan instituted this action in the chancery court of Clark county against Dougald McMillan and Wm. Gerig to cancel certain deeds as a cloud upon the title of the plaintiff Morgan in and to the following described lands, situated in Clark county, Ark., to wit: The S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 33, and S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 34, all in township 5 S., R. 22

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

W., containing 80 acres more or less. The plaintiff W. H. Fagan entered certain lands of the United States in Clark county, Ark., under the homestead act of 1862, and received a certificate of entry from the register of the United States land office at Camden, Ark. On the 3d day of February, 1883, a patent was issued to him by the United States, and in it the land was described as follows: The S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 33, and the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 34, township 5 S., R. 22 W., containing 160 acres. On the 24th day of December, 1881, Fagan conveyed by warranty deed to the plaintiff Morgan the land in controversy, together with 24 acres of adjoining land for the consideration of \$300 evidenced by two promissory notes of \$150 each, one payable to W. H. Fagan, and the other to J. E. Fagan, his brother. In the fall of 1883, Fagan says that he sold the east half of his homestead entry to T. T. Fendley. Fendley claims that Fagan sold him the whole of his homestead entry. In the fall of 1884, it was discovered that the lands upon which Fagan had made his improvements and had located his homestead were not the lands described in his patent, but were one mile west of the same. Both the lands described in the patent, and those upon which Fagan located his homestead, were public lands belonging to the United States. The lands described in the patent were back in the woods. They were hilly, had no improvements upon them, and were unfit for cultivation. When it was discovered that the lands upon which Fagan had made his improvements and had located his homestead did not correspond with the lands described in the patent, it was agreed that Morgan's notes should be returned to him, which was done, and that J. E. Fagan should keep \$22 which had been paid him on his note, and that the 24 acres should go back to W. H. Fagan. Morgan then left the land on which the homestead had been located and never returned to it, nor did he thereafter pay any taxes or otherwise assert any claim to the lands described in the patent and in the deed from W. H. Fagan to him. On the 31st day of October, 1902, W. H. Fagan and wife and T. T. Fendley and wife executed a quitclaim deed to the lands described in said patent to Dougald McMillan. The consideration paid to Fendley was \$20 and to Fagan \$5. It appears that the said lands described in the patent were assessed for taxes in 1885, one 80 in the name of W. H. Fagan, and the other in the name of T. T. Fendley. They were sold to the state for the taxes of 1885, and a redemption deed was executed to Dougald McMillan by the commissioner of state lands on the 13th day of November, 1902. Thereafter an undivided interest in the lands was conveyed to his codefendant, Wm. Gerig. Other facts appear in the opinion. The chancellor rendered a decree quieting the title of the plaintiff

Morgan in the lands in controversy, and the defendants have appealed.

McMillan & McMillan, for appellants. R. G. McDaniel and J. H. Crawford, for appellees.

HART, J. (after stating the facts as above). In the cases of Chapman & Dewey L. Co. v. Bigelow, 77 Ark. 347, 92 S. W. 534, and St. Louis Refrigerator & Wooden Gutter Co. v. Thornton, 74 Ark. 883, 86 S. W. 852, it was held that, in actions to quiet title, the plaintiff must succeed, if at all, as in actions of ejectment, upon the strength of his own title, and cannot rely upon the weakness of that of his adversary. Tested by this rule, we are of the opinion that the appellee Morgan was not entitled to prevail in this suit, because he has no title to the lands in controversy. The evidence of both himself and of his grantor, Fagan, shows that he did not purchase them, but purchased a part of the lands upon which Fagan had made improvements and located his homestead. By mistake the lands in controversy were described in the certificate of homestead entry issued to Fagan. The same mistake was subsequently made in the deed from Fagan to Morgan, and in the patent from the United States to Fagan. When the deed from Fagan to Morgan was executed, Morgan did not take possession of the lands in controversy, but did take possession of the lands upon which Fagan resided, and which he claimed as his homestead, and made improvements upon them. Both he and Fagan testify that the lands so occupied by him, and not the lands in controversy, were the lands he intended to purchase. When the mistake in description was discovered in 1884, Morgan left the lands on which he resided, and the notes which he had given for the purchase money were returned to him, and the possession of the 24 acres (the land described in the deed of Fagan to him with the land in controversy) was restored to Fagan. We think the undisputed evidence shows that Morgan never intended to purchase, and that Fagan never intended to sell, the lands in controversy. The evidence also shows that the execution of the deed, too, was a mutual mistake, and that the contract was rescinded as soon as the mistake was discovered. The record shows that the lands in controversy are wild and unimproved, and that Morgan has never paid taxes on them, or in any manner attempted to assert title to them since his rescission of his contract with Fagan and abandonment of whatever interest he had acquired under the deed from him. It necessarily follows from this conclusion as to the facts under the rule above announced that Morgan has no title to the lands, and that his complaint should have been dismissed for want of equity.

This brings us to a consideration of the interest, if any, of the appellee Fagan. Fagan

says that he cannot read and write, that he did not understand that he was conveying to McMillan the lands in controversy, that in 1883 he had conveyed to Fendley 80 acres of his homestead entry, and that the deed to the same had been lost. He further says that he thought he was only making another deed to this land, and did not know that he was conveying the land in controversy. In this he is flatly contradicted by Fendley and by H. J. Runyan, who took the acknowledgment to the deed. Runyan testified that Fagan on two different occasions before signing the deed talked with him about the propriety of executing it, and also talked with other friends about it. He said: "My recollection is that W. H. Fagan made two trips to Amity and talked with me at two different times before he decided to sign and acknowledge the deed conveying the above land to D. McMillan. I know that he talked with other parties, who were his friends, and he talked with J. B. Boyd, who was a notary public here at that time, as to whether it would be improper for him to give a quitclaim deed to this land; he having given a prior deed to it to Thos. T. Fendley. I am quite positive that W. H. Fagan knew at the time that he signed the deed and at the time I took his acknowledgment that it conveyed the land described in said deed. He took several days before signing the deed. My recollection is it took about a week or 10 days." Fendley testified that Fagan understood what land he was conveying, and stated that it lay in the hills and was not worth anything to any one. The other testimony in the case shows that the land was wild and unimproved, that it was not fit for cultivation on account of being in the hills, and was only valuable for the timber that was on it, and that at the time the deed was made to McMillan there was no market for the timber because the land was so remote from a railroad that it was not practicable to use it. After McMillan's purchase, a railroad was constructed near it, and this fact gave the timber a market value. Up to the time of McMillan's purchase, Fagan had not thought it of sufficient value to pay taxes on it, or to redeem it from tax sale, nor had any one else considered it of sufficient value to buy it at a sale for taxes. Moreover, Fagan testified: "I have no interest to the land in controversy in this action other than to see that W. S. Morgan should get the land under the deed which I made him." We think at the time of McMillan's purchase the land had no value except a speculative one, and that he is an innocent purchaser for value. Counsel for appellees contend that the deeds and tax receipts recited in the decree as being a part of the evidence upon which the case was heard bear no file marks, and therefore are no part of the transcript. The

complaint alleges that the homestead patent from the United States to W. H. Fagan was executed. The deeds from Fagan to Morgan and from Fagan to McMillan are made exhibits to the complaint, and in that way become part of the record. *American Freehold Land Mtg. Co. v. McManus*, 68 Ark. 263, 58 S. W. 250.

The undisputed evidence shows that no taxes were paid by appellees on the land after 1884. Hence the contention of appellee in this respect is upon an immaterial matter, and it is not necessary for us to determine it.

It is ordered that the decree be reversed, and that the cause be remanded, with directions to dismiss the complaint for want of equity.

A. G. BROWN & CO. et al. v. McKNIGHT.
(Supreme Court of Arkansas. April 19, 1909.)

1. APPEAL AND ERROR (§ 1002*)—QUESTIONS OF FACT—CONFLICTING EVIDENCE—REVIEW.

Controverted questions of fact are for the jury in the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action for the balance for railroad construction work, including clearing and grubbing stations of the right of way, the contract provided that removing weeds, grass, etc., should not be considered clearing and must be done free, it was error to refuse to instruct that plaintiff could not recover for removing weeds, grass, etc., under defendant's agreement to pay for grubbing and clearing.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

3. APPEAL AND ERROR (§ 1140*)—AFFIRMANCE—REMISSION OF PART OF RECOVERY.

In an action for the balance due for railroad construction work, including clearing and grubbing stations of the right of way at the contract price of \$10 a station, where the contract provided that removing weeds, grass, etc., should not be considered clearing and must be done free, the prejudicial effect of refusing to instruct that plaintiff could not recover for removing weeds, grass, etc., will be obviated by deducting from the verdict the contract price of \$82 for the 8.2 stations which defendant claimed were covered only by weeds and grass; defendant admitting that plaintiff was entitled to payment for clearing the other stations.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.*]

4. CONTRACTS (§ 247*)—ACTIONS—WEIGHT OF EVIDENCE.

One asserting a subsequent modification of the contract by the parties must prove it by a preponderance of the evidence.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 247.*]

5. CONTRACTS (§ 247*)—ACTIONS—BURDEN OF PROOF—MODIFICATION.

The burden is on the party asserting the subsequent modification of a contract to show the assent of the other party thereto.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 247.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Calhoun County; Geo. W. Hays, Judge.

Action by W. F. McKnight against A. G. Brown & Co. and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded for a new trial, unless plaintiff consents to remit part of the judgment, in which event judgment is affirmed.

Instruction No. 3 requested by defendant, which was given as modified by the part italicized is as follows:

"You are instructed that, under the contract between the parties herein, if dirt which should have been deposited in the dump was, with the consent of the engineer in charge, wasted and not placed in the roadbed with the understanding that dirt would be hauled from borrow pits and take its place without charge, this agreement would be binding on the parties, and the plaintiff would not be entitled to recover for hauling such dirt, *provided you find this from a preponderance of the evidence, but the burden is on the defendants to show that this agreement was made by the plaintiff.*"

Thos. S. Bugbee and Geo. B. Pugh, for appellants. J. S. McKnight (Thornton & Thornton, of counsel), for appellee.

FRAUENTHAL, J. The plaintiff, W. F. McKnight, instituted this suit to recover from the defendants A. G. Brown & Co. a judgment for a balance which he claimed was due to him for work done in the construction of a railroad owned and built by the defendant the Rock Island, Arkansas & Louisiana Railroad Company, and to have such judgment declared a lien upon said railroad. A. G. Brown & Co. had entered into a contract with the said railroad company by which they had agreed to build and construct its railroad according to certain specifications, and these contractors thereafter entered into a written agreement with plaintiff by which they employed him to construct three miles of said railroad in Calhoun county. The written contract provided that plaintiff should do said work in compliance with said specifications and named the prices per cubic yard for earth, loose rock, and solid rock which he should remove, and the price per station of 100 feet square for clearing and grubbing. The plaintiff claimed: That in pursuance of said contract he did the following work: Cleared and grubbed 169.8 stations of right of way, of the value of \$1,638; removed 42,025 cubic yards of earth, of the value of \$5,463.25; and removed 7,720 cubic yards of loose rock, of the value of \$2,161.60—making a total value of labor performed amounting to \$9,322.85. That he had been paid thereon the sum of \$7,638.85, leaving due to him the sum of \$1,684. The defendants claimed: That the following is all the work and labor that was done by plaintiff: Cleared and grubbed 161.6 stations of

right of way, \$1,616; removed 30,025 cubic yards of earth, of value of \$3,903.25; removed 7,720 cubic yards of loose rock, of value of \$2,161.60; and other items of work amounting to \$130.19—making a total of \$7,811.04. That defendants had paid thereon the sum of \$7,739.81, leaving a balance of \$71.23 due to plaintiff. The jury returned a verdict in favor of plaintiff for "\$71.23 plus \$428.77, aggregating \$500."

Upon the trial of the cause the plaintiff in his testimony admitted that he had been paid \$7,739.81. The only questions therefore that are involved in this case are: (1) The amount of earth that was removed by plaintiff, and for which he should receive payment under the terms of the contract; and, (2) the number of stations of right of way which he cleared and grubbed under the terms of the contract. These are greatly questions of fact, but they also involve a construction of the terms of the contract which apply to the above two kinds of work. The written contract between plaintiff and Brown & Co. specifically provides that the work should be done in compliance with the specifications of the Rock Island, Arkansas & Louisiana Railroad for the construction of said railroad, and therefore the terms of those specifications became a part of that contract.

1. By the contract it is provided that plaintiff should receive 13 cents per cubic yard for earth removed; but neither the contract nor the specifications state anything further, so, to make more definite the places from which the earth was to be moved or the exact character of the removal: As a matter of fact, in the execution of the work, the earth was moved from two different character of places. It was removed from cuts made in the bed of the railroad, which are called "excavations." The earth from these excavations would be hauled to points in the roadbed that had to be filled, in order to make the dump for the roadbed. Earth was also removed from borrow pits and ditches along and at some distance from the sides of the roadbed, which was hauled to the roadbed to make the dump. The specifications provided that "material from all excavations must be deposited in embankments, except where otherwise directed by the engineer in charge," and they also provided that earth or other material from the excavations could be "wasted" by permission of said engineer; that is to say, that by permission of the engineer the earth from excavations would not have to be deposited in embankments. The evidence on the part of the plaintiff tends to prove that he removed from the borrow pits and ditches and hauled and put in the dump of railroad bed 10,100 cubic yards of earth for which he has received no payment, and for which the defendant refused to make any allowance of credit to plaintiff. The defendants contend: That the specifications

provided: "Hauling Material. The price per cubic yard shall include hauling material a distance of not exceeding five hundred feet, and for that necessarily hauled a greater distance, whether from cuts or borrow pits, an additional price per cubic yard for each one hundred feet hauled after the first five hundred feet will be paid." That by this provision, which became a part of the contract, the price of 13 cents per cubic yard not only covered the cost of the work and labor of excavating the earth, but also covered the cost of hauling the earth for a distance of 500 feet, and on that account the haul of the earth for that distance was sometimes denominated the "free haul." So that it is claimed by defendants that for the price of 13 cents per cubic yard the plaintiff had agreed to take the earth from the excavations and then haul it a distance of 500 feet and there deposit same in the embankment or dump of railroad bed. The defendants contended that the plaintiff "wasted" the material taken from excavations by not hauling same, as above provided, and depositing same in embankments; and instead of taking the material from the excavations and putting same in dump, the plaintiff removed the earth from the borrow pits and put that in the dump; and that he should not be paid therefor, for the reason that the material taken from excavations and "wasted" would have equaled the amount of earth that plaintiff removed from borrow pits and ditches and put in the dump, and for which therefore plaintiff was not allowed any estimate and pay. But the testimony of the plaintiff tended to prove that, soon after he began to "waste" earth from excavations, the engineer in charge and plaintiff, after some negotiations, came to an agreement by which the plaintiff was permitted to "waste" the earth from the excavations on account of the great cost in making the "free haul," in comparison with the price paid to plaintiff for moving the earth; and plaintiff further testified that it was then understood and agreed that he was to receive payment for the earth thus removed from borrow pits and ditches and placed in dump as provided for by the contract. By the terms of the specifications the engineer was authorized to permit the plaintiff to "waste" the earth taken from the excavations, and to deposit same in places other than in the embankments. The plaintiff was entitled to 13 cents per cubic yard for earth removed from borrow pits, and the earth thus removed from borrow pits should not be set off against the earth taken from excavations and "wasted," if the engineer gave that permission. The plaintiff testified that the engineer gave that permission. This was controverted by the engineer; but that was a question of fact to be determined by the jury, and there

was sufficient evidence to sustain a verdict in favor of plaintiff upon that issue.

2. It is contended by the plaintiff that he is entitled to \$1,698 for having cleared and grubbed 169.8 stations of right of way, and that he was only paid \$1,616 thereon. The defendants contend that the plaintiff only cleared and grubbed 161.6 stations of right of way, that in the entire distance there were 169.8 stations, but that 8.2 stations were covered only with weeds and grass and were not therefore actually cleared and grubbed within the terms of the contract. The specifications provided in terms for what constituted clearing and grubbing, and further stipulated that: "Removing weeds, grass and all like growth will not be considered clearing and must be done without charge." Upon the trial of the case the defendant asked, amongst others, for the giving of the following instruction: "You are instructed that under the contract between the plaintiff and the defendants A. G. Brown & Co. the plaintiff is not entitled to recover for removing weeds, grass, and such like growth under the agreement of the said A. G. Brown & Co. to pay for grubbing and clearing." Under the terms of the contract, we are of the opinion that said instruction should have been given, but the only prejudice that the refusal by the court to give the above instruction could have worked against defendants was to permit the jury to allow the plaintiff to recover for removing weeds and grass. Now the total number of stations that defendants claim were covered with weeds and grass amounted to 8.2 stations, and, at the contract price of \$10 per station, amount to \$82. The defendants concede that plaintiff was entitled to payment for the clearing and grubbing of all other stations claimed by him. So that by disallowing the above sum of \$82 all prejudice growing out of the refusal of the above instruction will be removed.

The defendants also contend that the court erred in modifying instruction No. 3 asked for by defendants; but we are of the opinion that the court was correct in making the modification.

There is quite a sharp conflict in the evidence in this case, and while in some particulars the evidence on the part of the defendants seems more definite and satisfactory, nevertheless the questions of fact were within the province of the jury to determine, and we cannot say that there is not sufficient evidence to sustain their finding.

If the plaintiff will within 15 days remit from the amount of the judgment herein the sum of \$82, the judgment of the lower court will be affirmed; otherwise the judgment will be reversed, and the cause remanded for a new trial.

ST. LOUIS SOUTHWESTERN RY. CO. v. WALLACE et al.

(Supreme Court of Arkansas. April 12, 1909.)

1. CARRIERS (§ 177*)—TRANSPORTATION BEYOND CARRIER'S LINE—LIABILITY FOR INJURY.

Independent of statute a carrier is not bound to assume responsibility for the transportation of property safely and promptly beyond its own road; but where a carrier contracts to transport and deliver property beyond its own line, thereby continuing the liability which it assumes at the beginning of the carriage throughout the transit to the point of delivery, it renders itself liable for any loss, injury, or delay on the line of the connecting carrier, though under the traffic agreement the initial carrier's trains, while on the connecting line, may be under the control of the connecting carrier's servants, the connecting carrier in such case becoming the agent of the initial carrier, and its employees and agents become those of the initial carrier, for whose negligence it is liable to the owner of the property.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-803; Dec. Dig. § 177.*]

2. CARRIERS (§ 150*)—LIMITATION OF LIABILITY—NEGLIGENCE.

A carrier cannot contract for exemption from liability for its own negligence or the negligence of its servants, though not inhibited from making such exemption by statute.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 654-659; Dec. Dig. § 150.*]

3. CARRIERS (§ 104*) — TRANSPORTATION OF FREIGHT — NEGLIGENCE — DELAY FROM WRECK.

The derailment and wreck of a train causing delay in transportation of property by a carrier is prima facie evidence of the carrier's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 439-444; Dec. Dig. § 104.*]

Appeal from Circuit Court, Green County; Frank Smith, Judge.

Consolidated actions by W. A. Wallace and others against the St. Louis Southwestern Railway Company. Judgment for plaintiff in each action, and defendant appeals. Affirmed.

On April 1, 1908, the plaintiff W. A. Wallace delivered to the defendant, a common carrier of goods, a car load of cattle at Paragould, in the state of Arkansas, to be transported to and delivered at the National Stockyards in East St. Louis, in the state of Illinois. The plaintiff alleged that the cattle were greatly damaged by reason of the unnecessary and negligent delay on the part of the defendant in the transportation and delivery of the cattle, and he instituted this suit to recover said damages. On the same day the plaintiffs I. H. Wood and A. D. Grayson delivered to defendant two car loads of hogs at Paragould, Ark., to be transported to and delivered at the National Stockyards in East St. Louis, Ill. And the plaintiff I. H. Wood on the same day delivered to the defendant at Paragould, Ark., one car load of cattle to be transported and delivered to the same place. The last-named parties instituted separate and independent suits

against the defendant, alleging that the said hogs and cattle were greatly damaged by reason of the unnecessary and negligent delay on the part of the defendant in the transportation and delivery thereof, and in their respective complaints asked for the recovery of their respective damages. The defendant filed separate answers to the complaints in these three suits. In its answers the defendant admitted that it had received and accepted the shipments, and had agreed to transport the same from Paragould, Ark., to the National Stockyards in East St. Louis, Ill. But it alleged that a portion of the route or railroad track over which the shipments were to be carried lay in the state of Illinois, and was not owned by defendant, but that such portion of the track was owned by the St. Louis, Iron Mountain & Southern Railway Company, and that it had an arrangement or contract with said last-named railway company by which it used said track and ran and operated its trains over the same. It alleged that the transportation of said shipments was delayed by reason of the derailment and wreck of a train on that portion of the track and route, and that, inasmuch as the said portion of the track or line was under the supervision of the trainmaster and servants of the St. Louis, Iron Mountain & Southern Railroad Company, the negligence by which the shipments were delayed was not caused by the defendant or by its agents and servants, and it further alleged that, at the time it undertook and agreed to transport the cattle and hogs, the several plaintiffs entered into contracts, whereby it was agreed upon valuable consideration that the defendant should not be liable for any loss or damage arising from derailment of trains or collision of trains or delay in the delivery of the cattle and hogs not arising from the negligence of defendant.

Upon the motion of the defendant, the three cases were consolidated and were tried by the court sitting as a jury. In the trial there was an agreed statement of facts by the parties, by which it was agreed that the several plaintiffs sustained damages in the sum of \$50 per car to the cattle and hogs by reason of the delay in the transportation of same; that the delay occurred and was occasioned by the derailment of a train or wreck on that portion of the track or line of railroad in the state of Illinois which was owned by the St. Louis, Iron Mountain & Southern Railroad Company, and which was under the supervision and direction of the trainmaster and train dispatcher of the latter railway company; that all the damages accruing to the plaintiffs resulted from that delay, that the defendant had an arrangement or contract with the latter railway company by which it operated its own trains and cars over that portion of the route, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

used that portion of the line of railroad in conjunction with said latter named railway company. Each shipment was made under a contract by which the defendant agreed to transport and carry the same from Paragould, Ark., to said above point in East St. Louis, Ill.; and the contract also contained the following provision, made upon a valuable consideration: "It is stipulated that the live stock covered by this contract is not to be transported within any specified time, nor delivered at destination at any particular hour, not in season for any particular market, and that the parties of the first part are exempted from liability for loss or damage arising from derailment or collision, or other accidents or causes not arising from negligence of the first party." The defendant asked the following declaration of law, which was refused: "The court declares the law to be that where a carrier undertakes to transport and deliver live stock to a foreign market, and in the transportation of the stock it has to transport them part of the distance over a leased line of road used in conjunction with the owner of the line, and on the account of the wreck on the leased line without the fault or negligence of the carrier the delivery has been delayed 10 hours, the carrier is not liable for the damages resulting from such delay."

The court found in favor of the plaintiffs for the respective amounts of damages as agreed on, and rendered judgments accordingly; and from these judgments the defendant now prosecutes this appeal.

S. H. West and J. C. Hawthorne, for appellant. Huddleston & Taylor, for appellees.

FRAUENTHAL, J. (after stating the facts as above). The liability of the defendant in this case is determined by the contract of carriage which it made with the plaintiffs, and the arrangements which it had for using and running its own trains over that portion of the route on which the delay occurred that caused the damage. By the common law, and independent of any statutory provision or regulation, a common carrier is not bound to assume responsibility for the transportation of property safely and without unnecessary delay beyond the terminus of its own road, and after the property has been turned over to a connecting carrier. But, independent of any statutory liability, a carrier may accept and contract to transport and deliver property beyond the terminus of its own line, so that the liability which it assumes at the beginning of the carriage will continue throughout the transit to the point of delivery, and thereby render itself liable for any loss, injury, or delay on the line of another carrier over which a part of the transportation is carried. And, when such contract is made, the subsidiary carrier becomes the agent of the contracting carrier, and the employes and agents of such owner of the connecting line become his servants

and employes for whose negligence and default he becomes liable to the owner of the property. The carrier can thus bind himself to carry to any destination; and, if it is necessary in order to make the carriage that the goods be transported over the line of another, he assumes the responsibility of the employment of all subsidiary carriers and agents, and is liable for their defaults. 1 *Hutchinson on Carriers* (3d Ed.) § 226; 6 *Cyc.* 481; *Railway v. Woodward*, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; *Kansas City, Ft. Scott & Memphis Rd. Co. v. Washington*, 74 Ark. 9, 85 S. W. 406, 69 L. R. A. 65, 109 Am. St. Rep. 61; *Little Rock & Hot Springs Western Rd. Co. v. Record*, 74 Ark. 125, 85 S. W. 421, 109 Am. St. Rep. 67. In this case the defendant admits in its answer that it accepted the property and agreed to transport same from Paragould, Ark., to East St. Louis, Ill., and there deliver the same. It thereby entered into a contract whereby it bound itself to carry the goods over the entire route, and it did not concern the plaintiffs as to what agencies or lines it employed to effect the carriage. In making the transportation to the destination it secured running power for its own trains over the line of another railroad company for a portion of the route. That did not absolve it from liability, although the damage occurred on the portion of the line which was owned and managed by the other railroad company. It employed the agency of such other road, and is liable for its defaults, whether it had any direct control over it or not. As is said in 1 *Hutchinson on Carriers* (3d Ed.) § 240: "If the contract clearly provides for through carriage or the facts and circumstances disclose an undertaking to transport the goods to their ultimate destination, all subsidiary carriers employed in the transportation will become the agents of the contracting carrier to effect the performance of the contract, and he can no more stipulate for exemption from liability for the negligent acts or omissions of such agent than he can stipulate for exemption from liability for his own." *Murray v. Lehigh Valley Railroad Co.*, 66 Conn. 512, 304 Atl. 506, 32 L. R. A. 539; *Railway v. Martin*, 59 Kan. 473, 53 Pac. 461; 2 *Hutchinson on Carriers* (3d Ed.) § 915; *Eureka Springs Railroad Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690.

It is contended by defendant that by the contract it was not liable for loss or damage arising from derailment or other accident or causes not arising from its own negligence. The defendant could not contract for exemption from liability growing out of its own negligence or the negligence of its servants, even though not inhibited from making such exemption by any statutory provision or regulation. *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; 1 *Hutchinson on Carriers* (3d Ed.) § 450; 6 *Cyc.* 387; *Taylor v. L. R., M. R. & T. R. Co.*, 39 Ark. 148; *L. R., M. R. & T. Ry. Co. v. Talbot*, 39 Ark.

523; *St. L., I. M. & Sou. R. Co. v. Lesser*, 46 Ark. 236. When the defendant runs its trains over a portion of the road of another company pursuant to an agreement that its trains while on such road should be under the control and direction of the servants of the lessor company, it constituted the employes of such company its own agents and servants over such portion of the road, and became liable for their negligence by which the property carried by the defendant became damaged. In the above case of *Murray v. Lehigh Valley Railroad Co.*, 66 Conn. 512, 34 Atl. 506, 32 L. R. A. 539, it was held that, if one railroad company runs its trains over a portion of the road of another company pursuant to a contract providing that its trains while on such portion of the line should be under the control and direction of the servants of the lessor company, such servants became the agents of the lessee company, and it will be liable for any injury to a passenger carried by it caused on said portion of the route by the negligent act of such servants as though they were its own employes. And this applies equally to the carriage of goods.

Now, the derailment of the train and the wreck, by which the transportation of this property was so delayed that it caused the damage, made out a prima facie case of negligence against the defendant which has not been overcome. *Railway Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883; *St. L., I. M. & Sou. R. Co. v. Sandiage*, 85 Ark. 589, 109 S. W. 551. It follows, therefore, that the lower court was not in error in refusing the instruction asked by the defendant, and that its finding herein is sustained by the evidence and its judgment by the law. The rights of the plaintiffs in this case are determined by the common-law liability of the defendant under the contract which it entered into herein for a through transportation and carriage of the property to the point of destination; and they are not dependent upon the provisions of the act of Congress commonly known as the "Hepburn Act," approved June 29, 1906 (chapter 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]), amendatory of the interstate commerce act approved February 4, 1887 (chapter 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and it is not necessary, therefore, in this case to pass upon the provisions of that act.

It is urged by the defendant that the state court has no jurisdiction over this cause of action because the shipment was an interstate shipment. We do not think that there is any merit in this contention. We presume that it bases this contention on the provisions of the act of Congress entitled "An act to regulate commerce" approved February 4, 1887, as amended by what is commonly known as the "Hepburn Act," approved June 29, 1906. But, as before stat-

ed, the cause of action in this case is not necessarily founded upon the rights created or given by that act. The question of the liability of the initial carrier for the negligence of the connecting carrier is not involved in this case; and it is not necessary, therefore, in this case, to pass upon the question as to whether the state courts have jurisdiction to enforce such rights.

The judgments are therefore affirmed.

HUGHES BROS. v. REDUS.

(Supreme Court of Arkansas. April 12, 1909.)

1. EVIDENCE (§ 230*)—DECLARATIONS OF GRANTOR—IMPEACHING DEED.

In an action for possession of land, claimed by defendant under a deed to him, evidence of statements of the alleged grantor to the effect that the alleged grantor had not executed a deed to defendant, but had allowed him to have the use of the property as long as the grantor lived, which were alleged to have been made long after the time that defendant claimed that he had purchased the land, and long after the time that he claimed the deed had been executed, and in defendant's absence, when he was in the sole possession of the property, claiming it as owner, was inadmissible to impeach the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 837; Dec. Dig. § 230.*]

2. EVIDENCE (§ 230*)—DECLARATIONS—STATEMENTS SHOWING CHARACTER OF POSSESSION OF LAND.

When a person is in possession of land, his acts and declarations are admissible to show the character and extent of his possession and claim; but, after he has sold the land, and given possession to another, his declarations as to his claims thereto, made in the purchaser's absence, are only self-serving, and therefore inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-851; Dec. Dig. § 230.*]

3. VENDOR AND PURCHASER (§ 232*)—INNOCENT PURCHASER—NOTICE—ACTUAL POSSESSION.

Actual and visible possession of land by a person claiming to be the owner thereof is notice to all the world of his title; and the fact that he has not recorded his deed would not make one who had purchased the land of the heirs of the former grantor, without notice of the deed, an innocent purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

Appeal from Circuit Court, Craighead County; Frank Smith, Judge.

Action by Hughes Bros. against James Redus. Judgment for defendant, and plaintiff appeals. Affirmed.

F. G. Taylor, for appellant.

FRAUENTHAL, J. The plaintiff, Hughes Bros., a corporation, instituted this ejectment suit against the defendant, James Redus, for the possession and recovery of a house and lot in the city of Jonesboro, Ark. Both parties deraigned their title to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

property from a common source. The plaintiff claimed that Mattie I. Hughes was the owner of the lot at the time of her death, in February, 1906, and that her heirs conveyed the property to plaintiff on June 4, 1906. The defendant claimed that Mattie I. Hughes sold the lot to him in 1886, and that on the 13th day of March, 1887, she executed to him a deed therefor; that in 1887 he inclosed the lot and built a house thereon, and continuously since then has been in the possession of the property under the claim of ownership by virtue of his said purchase and deed, and he claimed to have paid the taxes on the land continuously since 1887. The deed from Mattie I. Hughes to defendant had never been recorded; but, on the trial of the cause, the alleged original deed was introduced in evidence, and there was a great deal of testimony pro and con as to the execution and authenticity of the deed. The plaintiff claimed that Mattie I. Hughes placed defendant in possession of the lot under a verbal agreement that he could retain possession as long as she lived. There was a trial of the cause by a jury, which returned a verdict for the defendant, and from the judgment given thereon the plaintiff prosecutes this appeal.

There are two assignments of error of the lower court urged here by appellant. It is urged that the lower court erred in refusing to permit the introduction of certain statements alleged to have been made by Mattie I. Hughes. The alleged statements were made long after the time that defendant claimed that he had bought the lot, and long after the time that he claimed the deed had been executed to him, and at the time they were made the defendant was in the sole possession of the property, and was claiming to be the owner thereof, and they were made in the absence of the defendant. These alleged statements of Mattie I. Hughes were, in effect, that the defendant was to have the use of the property as long as they lived, and that she had not executed a deed to him. This testimony was not competent. The statements made by a grantor in a deed to impeach the deed are not admissible if made in the absence of the grantee. *Hargus v. Hayes*, 83 Ark. 186, 103 S. W. 163. When a party is in the possession of land, the acts and declarations of such party are admissible in order to show the character and extent of such party's possession and claim. *Seawell v. Young*, 77 Ark. 309, 91 S. W. 544. But after the alleged sale, and after the party has turned over the possession of the

property, such declarations are only self-serving, and are therefore inadmissible. It has been uniformly held by this court that the declarations of a vendor made subsequent to the sale, and in the vendee's absence, cannot be admitted to impeach the validity of the sale; and the title of the purchaser cannot be impaired, or in any wise affected, by such declarations and statements. *Gullett v. Lamberton*, 6 Ark. 109; *Humphries v. McCraw*, 9 Ark. 91; *Finn v. Hempstead*, 24 Ark. 111; *Smith v. Hamlet*, 43 Ark. 320; *Crow v. Watkins*, 48 Ark. 169, 2 S. W. 659; 16 Cyc. 988.

It is urged that the lower court erred in refusing to give instructions, on behalf of the plaintiff, which, in substance, stated that, if the deed to defendant was not acknowledged in manner prescribed by law, or if the deed was never recorded, then plaintiff was an innocent purchaser, and could not be affected by it. But, at the time that the plaintiff claims that it purchased the property, the defendant was in the actual and open possession of it, claiming to be the owner thereof. Actual possession of the lot by defendant was notice to the plaintiff, and all the world, of his title. It was not necessary for defendant to place his deed on record to give plaintiff notice of his title. When plaintiff purchased the lot, the defendant was in possession of it, and the law imputed to the plaintiff, under such circumstances, notice of whatever right, title, or equity the defendant had in the property. Plaintiff could not in such event be an innocent purchaser of the property. No statements made by the vendor at such time should have been relied on by it; and, under the law, it ought not to have been, and could not be, misled thereby. Because the defendant was in the actual and visible possession of the property when plaintiff purchased, if it did not seek the defendant to learn the nature of his claim and title, the law makes the plaintiff take notice of that title. *Hamilton v. Fowlkes*, 16 Ark. 340; *Shinn v. Taylor*, 28 Ark. 523; *Rockafellow v. Oliver*, 41 Ark. 169; *Atkinson v. Ward*, 47 Ark. 533, 2 S. W. 77; *Strauss v. White*, 66 Ark. 167, 51 S. W. 64; *Thalheimer v. Lockert*, 76 Ark. 25, 88 S. W. 591; *Sproull v. Miles*, 82 Ark. 455, 102 S. W. 204.

The court, therefore, did not err in refusing to give the instructions asked by plaintiff.

The verdict of the jury was amply sustained by the evidence. The judgment is affirmed.

MCCARTHY et al. v. TROLL.

(Supreme Court of Arkansas. April 19, 1909.)

1. JUDGMENT (§ 944*)—ACTION ON FOREIGN JUDGMENT—EVIDENCE.

To maintain an action on a foreign judgment against a plea of nul tiel record, a certified copy of the judgment is not sufficient, but the pleadings and proceedings on which the judgment is founded, and to which, as matter of record it necessarily refers, must be produced.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 944.*]

2. JUDGMENT (§ 944*)—ACTION ON FOREIGN JUDGMENT—EVIDENCE.

In an action on a foreign judgment, evidence held to show that the judgment sued on was rendered in the action in which the complaint, answer, and summons introduced in evidence were filed, and to identify defendants as the defendants in the action in which the judgment sued on was rendered.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 944.*]

3. EXECUTORS AND ADMINISTRATORS (§ 517*)—PUBLIC ADMINISTRATORS—SUBSTITUTION.

Where a court of a sister state had the power, on the discharge of a public administrator, to substitute another as public administrator, an order of substitution was conclusive on the courts of Arkansas in an action by the substituted administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 517.*]

4. EXECUTORS AND ADMINISTRATORS (§ 524*)—ACTION BY ADMINISTRATOR.

Where an administrator has recovered a judgment in an action, brought by him in his representative capacity in the jurisdiction of his appointment, he may sue thereon in his own name in another jurisdiction, without taking out ancillary letters of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2330; Dec. Dig. § 524.*]

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

Action by Henry Troll, public administrator of Don C. Thatcher, deceased, against P. J. McCarthy and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action by Henry Troll, public administrator in charge of the estate of Don C. Thatcher, deceased, of St. Louis, Mo., upon a judgment which, it was alleged, one William C. Richardson, who was then public administrator of the city of St. Louis, in the state of Missouri, and who, as such administrator, was in charge of the estate of said Don C. Thatcher, deceased, had recovered against the said P. J. McCarthy and Nellie McCarthy, on the 7th day of May, 1900, in the circuit court of the city of St. Louis, within and for the state of Missouri. The judgment was for the sum of \$8,000. The defendants demurred to the complaint because it did not state facts sufficient to constitute a cause of action, and also filed an answer denying the allegations of the complaint. Subsequently they filed an amendment to their answer, in which they denied that plaintiff had the legal right or authority to

prosecute this suit. There was a trial by jury, and a verdict for \$8,000, with 6 per cent. interest from May 12, 1900. Judgment was entered upon the verdict, and the defendants have duly prosecuted an appeal. The facts are sufficiently stated in the opinion.

Wood & Henderson, for appellants.

HART, J. (after stating the facts as above). In the case of Hallum v. Dickinson, 47 Ark. 120, 14 S. W. 477, it was held that: "To maintain an action on a judgment against a plea of nul tiel record, a certified copy of the judgment is not sufficient, but all the pleadings and proceedings on which the judgment is founded, and to which as matter of record it necessarily refers, must be produced." See, also, Hall v. Roulston, 70 Ark. 343, 68 S. W. 24; Swing v. St. Louis Refrigerator & Wooden Gutter Co., 78 Ark. 246, 98 S. W. 978, 115 Am. St. Rep. 38. Counsel for appellants contend that this requirement was not complied with in the present case. This action was commenced on the 4th day of January, 1908, and a copy of the judgment sued on duly certified by the clerk of the court in which it was rendered, and his certificate, duly authenticated by the judge of said court, was filed with the complaint as an exhibit, and was introduced in evidence in the case. Copies of the complaint, summons, with the return showing service, and the answer of the defendants, P. J. and Nellie McCarthy, separately certified by the clerk and authenticated by the judge of said court, were also introduced in evidence.

Counsel for appellants contends that there was no evidence to show that the complaint and judgment were parts of the same action, and that therefore the complaint and judgment, being authenticated by separate certificates of exemplification bearing different dates, were insufficient proof to sustain the judgment now in question. The record shows that all the proceedings were, in a case in the circuit court of the city of St. Louis, within and for the city of St. Louis and state of Missouri, styled "William C. Richardson, Public Administrator in Charge of the Estate of Don C. Thatcher, Deceased, v. William H. Stevenson, J. Brooks Johnson, Albert Thatcher, Thatcher Restaurant Company, a corporation, Edward Ketchum, Patrick J. McCarthy and Nellie McCarthy, Howard Realty Company." The record also shows that the complaint in that case was filed May 25, 1898, and summons was issued on it the same day. A part of the return on the summons is as follows: "I further executed this writ in the city of St. Louis this 25th day of May, 1898, by delivering a copy of the writ as furnished by the clerk to Patrick J. McCarthy, a defendant herein. Henry Troll, Sheriff, by Wm. D. McManus, Deputy"—and also, "I further executed this writ in the city of St.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Louis on this 25th day of May, 1898, by delivering a copy of the writ as furnished by the clerk to Nellie McCarthy a defendant herein. Henry Troll, Sheriff, by Wm. D. McManus, Deputy." It also shows that the answer of Patrick J. and Nellie McCarthy was filed on October 15, 1898, and that the judgment was entered of record on May 7, 1900.

Wm. D. McManus, a deputy sheriff, testified that the signature attached to the return was his signature, and that, while he had no personal recollection of having made the service, he would not have made such return if he had not delivered a copy to the said defendants personally. Paul Reiss testified that he was acquainted with Patrick J. McCarthy, and that, as his attorney, he prepared and caused to be filed the answer above referred to; that he was employed as such attorney by said Patrick J. McCarthy for himself, and for his wife, Nellie McCarthy. The deposition of Patrick J. McCarthy, taken in the case above referred to, in the circuit court of the city of St. Louis, in which he testified that he was one of the defendants to the suit was read in evidence. L. Frank Artoffy testified that he was a lawyer, and lived in St. Louis, Mo.; that he was the attorney who brought the suit in the circuit court of the city of St. Louis, which resulted in the judgment sued on; that he became acquainted with Patrick J. McCarthy in that litigation, and that the Patrick J. McCarthy, the defendant herein, is the identical person who testified in that case, and that in July, 1900, he came to Hot Springs and talked with McCarthy about the judgment, which had been recovered against him; that McCarthy said

he did not have anything, and that nothing could be made out of him. The complaint showed that it was a suit in replevin. The prayer was for a return of the property and \$5,000 damages for its detention; and, in case a delivery of the property could not be had, judgment in the sum of \$10,000, the value thereof, was asked. This was sufficient to show that the judgment sued on was rendered in the action in which the complaint, answer, and the summons introduced in evidence were filed, and also to identify appellants as the defendants in the action in which the judgment sued on was rendered.

Under the laws of the state of Missouri, a public administrator is elected in each county in the state, and in the city of St. Louis. His term of office is four years. Rev. St. Mo. (1889) § 296. An order of said circuit court of the city of St. Louis, duly certified by the clerk and authenticated by the judge, was made on the 10th day of December, 1907, showing that Henry Troll, then public administrator of said city of St. Louis, was substituted as plaintiff in the place of said William C. Richardson. The court had the power to make the order of substitution upon the discharge of Richardson, and the order itself is conclusive upon us that it was made upon a proper showing. "Where a representative has recovered a judgment in an action brought by him in his representative capacity in the jurisdiction of his appointment, he may sue thereon in his own name in another jurisdiction without taking out ancillary letters of administration." 18 Cyc. p. 1239, and cases cited.

Finding no prejudicial error in the record, the judgment will be affirmed.

BENTON et ux. v. CITY OF ST. LOUIS.
(Supreme Court of Missouri, Division No. 1.
March 31, 1909.)

1. MUNICIPAL CORPORATIONS (§ 819*)—ACTIONS FOR DEATH—SUFFICIENCY OF EVIDENCE.

In an action for the death of a child drowned in a hole near a defective sidewalk, evidence held to show the city's negligence in maintaining the sidewalk, and that the negligence was the proximate cause of the death, if the sidewalk was in a public street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 819.*]

2. DOWER (§ 47*)—LAND SUBJECT TO—LAND DEDICATED TO PUBLIC USE.

If the fee of land held by a husband passed during his lifetime to a city for public use as a street either by prescription, by express dedication by deed or by acts in pais coupled with acceptance, or by condemnation, the wife's inchoate right of dower was extinguished.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 96; Dec. Dig. § 47.*]

3. MUNICIPAL CORPORATIONS (§ 755*) — STREETS—LIABILITY FOR DEFECTS.

If a strip of land was a public city street, the fact that people of the neighborhood or abutters built a sidewalk along the side of it, and from time to time repaired it without ordinance of the city or order from its officers, and constructed a manhole over a sink hole on the land at private expense and turned local drainage into it, would not relieve the city from liability for defects in the street or the sidewalk, or for a dangerous condition arising from a combination of the defects and the unguarded sink hole, since a city owns its streets as a trustee for the public, and is primarily bound to keep them free from defects caused by itself or by third persons, if it has notice of such third persons' acts in time to repair.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. § 755.*]

4. MUNICIPAL CORPORATIONS (§ 759*) — STREETS—LIABILITY FOR DEFECTS.

While the existence of sewer or water mains, a curb line established, or paving are evidence which may conclusively show acceptance of a dedication of the ground for street purposes, their absence or presence does not affect the city's liability for defects in the premises, if they are shown to be a public street, the city being liable for defects negligently allowed to exist whether the street is improved or not.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1595-1600; Dec. Dig. § 759.*]

5. DEDICATION (§ 44*) — EVIDENCE — LAND DEDICATED AS STREET.

Evidence held to show that a strip of land 50 feet wide, including a strip upon which a defective sidewalk and sink hole were situated, was dedicated to a city for a public street.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 44.*]

6. DEDICATION (§ 31*)—NECESSITY FOR ACCEPTANCE.

Mere dedication is not enough to constitute a street a public street, so as to impose on a city the duty to keep it clear of defects, nuisances, and obstructions caused by the acts of third persons or by the city itself, but there must be an acceptance of the dedication by the city.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 64, 65; Dec. Dig. § 31.*]

7. DEDICATION (§ 35*)—ACCEPTANCE.

An acceptance of a dedicated street may be either express or implied.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 69; Dec. Dig. § 35.*]

8. DEDICATION (§ 45*)—EVIDENCE—QUESTION FOR JURY—ACCEPTANCE.

Whether the dedication of land for a street was accepted by a city, held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 45.*]

9. MUNICIPAL CORPORATIONS (§ 762*) — STREETS—ACQUIESCENCE IN PUBLIC USE.

Where street lamps and poles of public service corporations had been in existence for a long time on a strip of land claimed to be embraced in a public street, the city will be held to have acquiesced in such public use of the strip, whether they were so placed in strict accordance with city charter regulations or not.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1605-1611; Dec. Dig. § 762.*]

10. MUNICIPAL CORPORATIONS (§ 818*)—DEFECTS IN STREETS—ACTION FOR DEATH—ADMISSIBILITY OF EVIDENCE—SUBSEQUENT REPAIRS.

In an action against a city for the death of a child caused by a defect in a street, where there was an issue as to whether the locus was in a public street, evidence that the city, in the August or September after the death in May, had made repairs at the place of accident, was competent as tending to show that the city recognized the locus as being in a public street, the remoteness of the repairs going to the weight and not the competency of the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1737; Dec. Dig. § 818.*]

Appeal from St. Louis Circuit Court; O. Orrick Bishop, Judge.

Death action by H. W. Benton and wife against the City of St. Louis. Plaintiffs took a nonsuit, and, their motion to have it set aside being denied, they appeal. Reversed and remanded.

Carter, Collins & Jones, for appellants.
Chas. W. Bates and Chas. P. Williams, for respondent.

LAMM, P. J. Plaintiffs, father and mother of George Benton, an infant between 6 and 7 years, sue for the wrongful death of George, drowned May 4, 1906, at a place in defendant city known as "Bruno Avenue," laying their damages at \$5,000. At the close of their evidence, defendant asks an instruction in the nature of a demurrer. The trial judge signifies his intention to give it. Thereupon plaintiffs request permission to take a nonsuit with leave. Permission going, they take a nonsuit. In due time they move to set it aside, and (their motion denied) they appeal.

The petition charges that Bruno avenue is a public street of defendant; that a duty lay upon defendant to keep it in safe condition; that at a certain point in said avenue there was for a long time a "sink hole, surrounded with a large excavation, ditch, or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

hole" about 5 feet deep and 12 feet in diameter, and coming up flush with the edge of the north sidewalk on said avenue; that there was no rail on the sidewalk at the point, and the boards of the walk were loose and insecure; that such dangerous and defective conditions were well known to defendant, or could have become known to it by the exercise of ordinary care in time to have made repairs before the death of George, but that it failed and neglected to put the street and sidewalk in safe condition, and that such negligence caused George's death; that in walking upon the sidewalk in said street at said point in the afternoon of May 4, 1906, he stepped or fell from the sidewalk into said excavation and was drowned—the excavation being then filled with water up even with the surface of the sidewalk and water in said street. The answer was a general denial. There is (among minor questions raised) a main proposition in the case in a sharp issue on the question of fact of a street or no street at the locus. Facts vital to the disposition of material questions made on appeal will appear in connection with their determination.

1. If the sidewalk was on a public street, there can be no doubt but what the charge of negligence was well made out, and that such negligence was the proximate cause of the death of George. It was an old, narrow, wooden sidewalk, the worse for wear and decay, built of boards nailed crosswise on stringers, and, at the point in hand, rested elevated on wooden posts several feet high. The boards were loose, the sidewalk tipped south towards a hole running under it, and thence out in the street. This hole was a large and deep affair. The combination of hole, tipped sidewalk, and loose boards shown by the evidence presents an inflamed case of a negligently maintained and dangerous pitfall to adult or child. Not only so, but for a long time, in not unusual rains, the hole filled with water gathered by surface gutters and drainage, and this water arose even with the walk. There had been a heavy but not unusual rainfall on May 4th. The water gathered in the hole caused the sidewalk to float; that is, it (as a whole) seemed not fastened and anchored down securely. George was of such tender age that contributory negligence could not be imputed to him as a matter of law. In fact, there is no plea of contributory negligence, and none that his parents were guilty of negligence in allowing him to be on the street at the time. It seems they had but moved into the neighborhood, and knew nothing of the bad sidewalk or of the hole, or of storm water usually accumulating there; nor did the child. A little bit before he was drowned, George had been seen busying himself placing planks, some distance away up street, for footmen to cross Bruno avenue dryshod. He had on rubber boots and a striped cap. He was next seen making his way on the sidewalk towards this hole—this,

a very few minutes before the alarm was given. No human eye saw him drown. But a neighbor woman saw him going toward the spot immediately before. She had but turned to her household duties, and, hearing a cry (a death cry, obviously), hurried out doors. On investigation, his cap was seen floating on the hole of water, and his body was presently fished out by hooking a pole into one of his rubber boots. Some witnesses describe the sidewalk as "wobbly" and "rickety" right close where his body lay. In this condition of proof the jury could reasonably infer that the defects in the sidewalk hard by the treacherous pool caused him to slip or step off and drown. There was proof, too, that these defects were of long standing, so that the city could not claim it had neither actual nor constructive notice in time to remedy them. Hence the demurrer cannot be upheld on the theory that plaintiffs made no case on the facts, if it be once further determined that the issue of fact of street or no street at the locus should have been put to the jury.

2. Plaintiffs' theory of the case is that the sidewalk is on a public street; contra, defendant insists it was on private ground, and hence the city owed no duty to keep it safe. Such controversy (assuming facts already stated) seeks additional facts, viz.: Bruno avenue runs east and west in the west part of the city. McCausland avenue, a public street, crosses it (with a slight jog) east of the locus. Blendon place, another street, comes into it from the north a little ways west of the locus. With a jog, Blendon place then runs on south. At an early date, not disclosed, the land in that region seems to have been platted into blocks of irregular dimensions, and ways were left open between them. At a time, not disclosed by the evidence, but many years ago, a street was dedicated by deed and called "Bruno Avenue." The whole region was then an outlying country district, apparently. Bruno avenue, as dedicated by deed, was 30 feet wide. Ten feet off the south side of this deeded street was, many years ago, inclosed by the abutting proprietors by a permanent fence, as a part of their grounds, and this fence has ever since been maintained to the exclusion of the public. A city plat or survey shows that a strip of ground 20 feet wide lying north of and adjacent to the 30-foot street, so dedicated, is marked as a "private road." When this plat was made is dark, but the paper private road antedates the oral evidence in the case, which, in turn, covers a period of 15 or 20 years next before the trial. Hard by and north of the private road is a strip of ground 10 feet wide, marked on the same city map or plat with the name "George W. Campbell." In point of fact, however, these three strips so severally designated on paper as "private road," as "Bruno Avenue," and as "George W. Campbell" (barring said 10 feet on the south taken into a private inclosure),

make on the earth's surface a strip of ground 50 feet wide inclosed for 15 or 20 years on the north and south by such permanent fences as commonly earmark a public road, and the whole strip is known in the neighborhood as "Bruno Avenue." The record is dark as to whether the said 10 feet on the south was vacated by legal steps. It is dark as to whether the original Bruno avenue was ever widened by legal steps on the north by taking in the private road and the Campbell strip. The next parallel streets, north and south of Bruno, are, severally, say 600 feet away. The distance from McCausland avenue to Blendon place is, say, 600 feet, but (while the abstract is not clear) it is not our understanding that Bruno avenue ends at McCausland on the east and Blendon place on the west. It crosses said streets and runs on. On the north side of Bruno at the locus are a church, some residences, and some inclosed grounds. On the south side of said 600-foot section of Bruno is probably a residence and some lots used for gardening. On the south side of Bruno there never was a sidewalk. On the north side there has been for 15 or 20 years a straight sidewalk, one section of it laid in cinders and another with boards and stringers. This sidewalk, as we grasp it, is on a straight line with that on the north side of Bruno east of McCausland. From photographs presented here we infer that the neighborhood north of Bruno is quite thickly settled. There is no testimony showing that the sidewalk in question was built by the city or by its order. There is testimony to the contrary, to the effect that when originally put down, as said, 15 years or more ago, it was voluntarily laid by the abutting property owners or by the neighborhood, and wholly on the Campbell strip of 10 feet. There is no testimony that the sidewalk itself was ever repaired by the city or by its order. To the contrary, there is evidence that some repairs were voluntarily put on by neighborhood subscription and individual effort. There is no testimony that any curb line was ever established on Bruno, or that the city sewer or water system is extended along the street. In the center of the 50-foot strip is a roadway for vehicles, 20 or 30 feet wide. This roadway the city practically admits is a public street. It is partly on the old private road, and partly on Bruno avenue as originally dedicated by deed. The city has graded it, repaired it, and claims it as a street; whether by condemnation, by prescription, or by dedication and acceptance is not shown, nor is it material. On Bruno avenue, a little ways from Blendon place, is a hole called a "sink hole." The neighbors once used it for drainage purposes, and probably do so now. Into this sink hole drain pipes run, crossing under the sidewalk. A manhole was there constructed long ago by private enterprise to serve some purpose of rustic and rural

drainage. At spells the water, eating into the roadway from the sinkhole, enlarged the hole, and from time to time city teams and employes hauled in filling and repaired the roadway at the hole and elsewhere. The record shows that weeds and some small bushes were at times allowed to grow about this hole. At times a temporary barricade of some sort protected travelers in vehicles on the roadway from getting into the hole, and photographs presented to us show that the traveling public are somewhat protected and warned by a rude stone curbing running south of the hole and next to the roadway for a short distance, and, further, that there is a rude gutter made of flagging leading from the hole a little ways and draining it off on the side of the street. At times, covered by the oral evidence, the hole was of such dimensions that the traveled way referred to bended from the center of the 50-foot strip to the south, and returned to its central course when the hole was passed. At the corners of McCausland and Bruno and Blendon place and Bruno the usual city signs are put up on posts, naming the streets crossing there, and indicating the 50-foot strip as "Bruno Avenue." These signs have been there for many years. At intervals Bruno avenue was temporarily closed by barricades for repairs, and on these was the usual sign used in the city indicating that the street was, for the nonce, put out of use because of its bad condition. On Bruno avenue close to the locus is a street lamp, maintained by the city for years, just at the south edge of the sidewalk and on the 10-foot Campbell strip. One or more lamps of a similar nature are maintained on the same strip by the city between McCausland and Blendon place. It seems from the evidence that there fell a time in the history of St. Louis (mysteriously and by way of metaphor) referred to as the "moon yet" period. Before that period, electricity was used to light the ways of that town in the suburbs. During the electricity, as over against the "moon yet," period, the city maintained an arc light at the corner of Blendon place and Bruno, and we infer that poles sustaining the wires were on the 10-foot strip. On this same strip, under permits granted by the city, are telephone and lighting poles erected by public service corporations.

It seems that many years ago George W. Campbell owned quite a tract of land in that region; that he is dead, but when he died is not shown; that he left a widow—whether she is dead or alive is not shown; and it appears that long ago he parted with all his holdings, barring, maybe, the 10-foot strip on which the sidewalk is laid. One of the minor contentions of the city is that dower in the widow of George W. Campbell would seem to be outstanding, and that this fact interferes with a prescriptive right of way in the city or public, or with a right of

way arising from dedication. There was testimony tending to show that the fence long maintained along the north side of the sidewalk as a visible boundary of Bruno was in line with the north line of Bruno as continued east of McCausland. We infer that this extension was also known as "Bruno Avenue," and that it ran east with a uniform width of 50 feet. There was testimony that the sidewalk in question had long been used by pedestrians in that neighborhood; that many people passed to and fro over it daily for many years, and that there was nothing during all that time to indicate to any one coming afoot on Bruno avenue from McCausland or Blendon place that the walk was not a public walk for footmen as part of the street.

The foregoing is sufficient of the record to pass upon the issue of law raised by the demurrer as to whether the sidewalk, or, what amounts to the same thing, the 10-foot Campbell strip, was part of a public street. On that record, we observe:

(a) The suggestion that dower is outstanding in the widow of George W. Campbell in the 10-foot strip deals only with the surface of things. The case really turns on another question, viz.: Is that strip a component part of a public street? If it be, then, under the reasoning of *Venable v. R. R.*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68, and *Chouteau v. R. R.*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299, we must hold that such widow has no dower in a public way. *Chrisman v. Linderman*, 202 Mo., loc. cit. 615, 100 S. W. 1090, 10 L. R. A. (N. S.) 1205, 119 Am. St. Rep. 822; *Baker v. R. R.*, 122 Mo. 396, 30 S. W. 301. In the *Venable* Case it was decided that a widow had no dower in a strip conveyed by her husband during coverture to a railroad company for a right of way. In *Chouteau v. R. R.*, it was held, in effect, that a widow was not endowable in land dedicated to public use as a railroad right of way. The argument runs on the theory that the land was subject to the sovereign right of eminent domain; that a widow was not endowed of land condemned for public use under statutes regulating the exercise of eminent domain; therefore, if the land was subjected to public use by a conveyance, instead of by condemnation under the exercise of the right of eminent domain, the same result follows.

The proposition that a widow is not endowed in land impressed with an easement for public use accords with the general law. In 14 Cyc. 930, the doctrine is announced as follows: "Where land is dedicated by the owner to a public use, as for a street, highway, or market place, such dedication divests the wife's right of dower. And where a quasi public corporation, such as a railroad company, having authority to acquire lands for public use and hold the same in fee, takes lands by grant from the owner

for a right of way or other public purpose, the wife's right of dower is effectually barred." As to dower, we can conceive of no difference in principle whether the public use arises by prescription, by dedication through a deed or acts in pais coupled with acceptance, or by condemnation. In each instance the husband during his lifetime held the fee, and, the fee in each instance passing to the public for its use, the inchoate right of dower is extinguished. We pass from the question of dower outstanding in Campbell's widow, deeming it of no significance on the merits.

(b) If Bruno avenue from side to side and end to end is a public street, then the mere fact that the people of the neighborhood, or the abutters, or both together, built the sidewalk originally along its north side and from time to time repaired it without ordinance of the city or order from its officers, and the further fact that the local drainage was conducted by pipes into the sink hole by the neighbors, and that a manhole was constructed there at private expense, each, or all combined, cannot relieve defendant city from liability for defects in its street or a sidewalk laid thereon, or from a dangerous condition arising from a combination of said defects and the unguarded sink hole adjacent to the sidewalk. *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528. This, because: A city owns and controls its streets as a trustee for the public. It, therefore, stands charged by the law with the primary and bounded duty of keeping them free from nuisances, defects, and obstructions caused by itself or by third parties if it (in the latter instance) had actual or constructive notice thereof in time to abate the nuisance, remove the obstruction, or repair the defect. It cannot shirk that duty, or shift it over to, or halve it with, others. So much is clear law in Missouri. *Welsh v. City of St. Louis*, 73 Mo. 71; *Oliver v. City of Kansas*, 69 Mo., loc. cit. 83; *Carrington v. St. Louis*, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Beaudeau v. Cape Girardeau*, 71 Mo., loc. cit. 395 et seq., and cases cited; *Streeter v. Breckenridge*, 23 Mo. App., loc. cit. 250; *Hill v. Sedalla*, 64 Mo. App., loc. cit. 501 et seq.

(c) The case is put to us by respondent's learned counsel somewhat as if the absence of sewer or water mains, or a curb line established, or paving, guttering, etc., had something to do with the city's liability. Such indicia of a highly finished street in a great city may conclusively show acceptance of a dedication of the ground for street purposes, but they have not a whit to do with liability for defects, if once the fact of the existence of a public highway is determined. Otherwise we would have to write the law this way for the little and that way for the big, one way for villages with no paved streets, no water or sewer mains,

and no curb line established, and another way for cities where such things exist. A city like the humble village or country town may leave its streets as dirt roads, and yet be liable for defects negligently allowed to exist in them. *Warren v. Independence*, 153 Mo., loc. cit. 599, 56 S. W. 227; *Dinsmore v. St. Louis*, 192 Mo. 255, 91 S. W. 95; *Conner v. Nevada*, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314; *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637.

(d) The foregoing subsidiary questions put at rest, we face the main proposition of the case, viz.: Was Bruno avenue, at the locus, a public street 50 feet wide? In considering that question, it may be assumed that the street was not condemned for public use by legal proceedings. So, while a question of the existence of a street by prescription is in the case, yet it would be unprofitable to consider it, because the question of dedication seems uppermost and controlling.

Speaking to that question in the light of the facts, there ought to be no doubt that the animus dedicandi existed; that is, that the abutters intended to dedicate the street for public use from side to side 50 feet wide. This conclusion, we think, reasonably follows from facts established by proof. For example, permanent fences, long maintained on either side, earmark a public street. Again, the fact that these fences are practically in line with the north and south fences of the continuation of Bruno avenue adds strength to that idea.

In the next place, the practical abandonment of the whole 50-foot strip for many years by the abutting property owners and their failure to impress upon the strip the usual earmarks of private use and ownership, like possession, alienation, cultivation, etc., lend force to the conclusion by leading up to it. Especially so when such abandonment seems related and responsive to the public need of a street at that point because of the distance away of parallel streets and the number of people to be accommodated by a thoroughfare there. That Bruno avenue as now existing is an aggregation of various strips of land, which smaller strips at an early time bore different designations on maps and plats and possibly were turned out to the public on different dates, somewhat complicates the matter, but can have no adverse bearing on the issue of the dedication of the whole strip; for if each component part was dedicated, then the blanket of dedication covers the whole. But mere dedication is not enough to constitute the street a public street in the eye of the law. There must be an acceptance of the dedication by the public before the dedicated grant becomes a street such as raises the municipal duty to keep it clear of defects, nuisances, and obstructions caused by the acts of third parties or by the city itself. It seems clear law that where a street is a mere paper

one, as distinguished from a street in fact, then the common sense of it is that a municipality is not charged with the duty of clearing it of obstructions and dangerous defects resulting from the laws of nature or the acts of man. Hence we need not bother with the refinements of the law in that behalf because this case is not such case.

So, there is conflict of doctrine as to whether a city must put its traveled streets from side to side and from end to end in condition for reasonable safety for travel by night as well as by day. It is maintained on one hand, and denied on the other, that a city can leave portions of its de facto streets in a "state of nature," without liability for damage from defects. We need not enter into that inviting field of speculation and canvass the authorities pro and con on the proposition, because this case is not such case. The student in jurisprudence may find phases of that question considered in the *Ely Case*, 181 Mo. 723, 81 S. W. 168; in the *Tritz Case*, 84 Mo. 632; in *Golins v. Moberly*, 127 Mo. 116, 29 S. W. 985; in *Walker v. City of Kansas*, 99 Mo. 647, 12 S. W. 894; in *Roe v. City of Kansas*, 100 Mo. 190, 13 S. W. 404, where the doctrine of the *Tritz Case* is repudiated; in *Baldwin v. Springfield*, 141 Mo. 205, 42 S. W. 717; in *Meiners v. City of St. Louis*, 130 Mo. 274, 32 S. W. 637; in *Johnson v. St. Joseph*, 96 Mo. App. 663, 71 S. W. 106; in *Brown v. Glasgow*, 57 Mo. 156; and in many other cases.

Attending now to the fact of acceptance of the dedication, we think it clear that a case was made for the jury. An acceptance of a dedicated street may be either express or implied. It may be conceded to respondent that no express acceptance is shown, but we think an implied one was made out.

Judge Elliott, in his excellent work on *Roads and Streets* (2d Ed.) says: "An implied acceptance arises in cases where the public authorities have done acts recognizing the existence of the highway, and treating it as one of the public ways of the locality. Where control of a way is assumed by the authorities representing the public corporation, an acceptance will be implied. * * * One of the principal indications of acceptance is that of improving or repairing the road or street. In one case it was held that digging a public well in the way was evidence of acceptance, and we have no doubt of the soundness of this decision; for no matter what the particular act is, if it be one which could only be rightfully done upon a highway, it should be regarded as evidence of acceptance. * * *" Elliott on *Roads and Streets* (2d Ed.) §§ 151-153.

Continuing, that author says (Id. section 154): "There has been much diversity of opinion as to whether user by the public will amount to an implied acceptance and cast the burden of maintenance upon the local

government. Professor Greenleaf says: 'It does not follow, however, that because there is a dedication of a public way by the owner of the soil, and the public use it, the town, or county, or parish is bound to repair. To bind the corporate body to this extent, it is said that there must be some evidence of acquiescence or adoption by the corporation itself, such as having actually repaired it, or erected lights or guideposts thereon, or having assigned it to the surveyor of highways for his supervision, or the like.' This statement, it is noticeable, is a very careful and guarded one, and is indicative of the doubt in the mind of the writer. In another treatise (Angell, Highways, § 159) appears language more clearly exhibiting the uncertain state of the law. This uncertainty is removed by the later authorities, and it may now be considered as the prevailing opinion that an acceptance may be implied from a general and long-continued use by the public as of right. The later decisions upon this subject will, when analyzed, be found to be well bedded in principle. The 'town, county, or parish,' using Professor Greenleaf's terms, is represented by the town, county, or parish officers, but the officers are not the corporation. The municipal corporation consists of the inhabitants and not the officers; the officers are, in truth, nothing more than the agents of the corporation. The inhabitants, therefore, stand to the officers as principals, and if the principals have, by their conduct, accepted the dedication, it is of no great importance that the agents have taken no action in the matter. The inhabitants of a locality having by long-continued use treated the way as a public one, they make it such without the intervention of those who derive their authority from them. Creating towns, cities, and other public corporations is 'but the investing the people of the locality with the government thereof,' and they may themselves exercise the powers of government of highways quite as effectually by continued use as by any other method. Of course, user cannot constitute a way a public one in cases where the incorporating act requires an acceptance by some officer or body expressly designated. * * *

We have liberally borrowed from Judge Elliott's text, because he well formulates the general law under this head, and the doctrine announced agrees with the general trend of the decisions of this court and other appellate tribunals in this state. It is needless to lengthen this opinion by excerpts from opinions in those cases, citing a few of them will do, viz.: *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637; *Baldwin v. Springfield*, 141 Mo. 205, 42 S. W. 717; *Hunter v. Weston*, 111 Mo. 176, 19 S. W. 1098, 17 L. R. A. 633; *Maus v. Springfield*, 101 Mo. 613, 14 S. W. 630, 20 Am. St. Rep. 634; *Beaudan v. Cape Girardeau*, 71 Mo. 392; *Rose v. St. Charles*, 49 Mo. 509; *Becker v. St. Charles*, 37 Mo. 13; *Heitz v. St. Louis*, 110 Mo. 618, 19 S.

W. 735; *Golden v. Clinton*, 54 Mo. App. 100; *Garnett v. Slater*, 56 Mo. App. 207; *Hill v. Sedalia*, 64 Mo. App. 494; *Johnson v. St. Joseph*, 96 Mo. App. 663, 71 S. W. 106.

In determining the fact of acceptance of a dedication for street purposes, it must be borne steadily in mind that the roadway proper primarily is for wheeled vehicles and horsemen, whereas the sidewalk is that portion of the street intended for the use of footmen and which they are invited to use under the due guards of the law. In this case the long public user as of public right, the location and maintenance of street lamps on the Campbell strip and the poles of public service corporations, the barricading of the whole street when out of repair, and the employment of the usual city signs on such barricade, the maintenance of street signs at the corner of the street, and other acts in pais, show such condition of things as would permit the jury to draw the conclusion of acceptance. The fact that there was no sidewalk or other provision for footmen except the sidewalk in question occupying the usual place of a sidewalk, and the further fact that there was nothing to indicate to a passer-by that the sidewalk was not for public use or on public ground, coupled with other facts shown, tend to estop the city from denying its acceptance of the Campbell strip as part of the street. Such facts amount to an invitation held out to the public to use the sidewalk as of public right.

Some confusion exists in the record as to whether the proper officers in charge of the proper departments of city government permitted the use of the Campbell strip for street lamps and the poles for public service corporations. If these poles and lamps had been erected but a short time, it might be proper to go into these questions on this appeal. But they existed there for a long time, and, whether put there in strict accordance with the red-tape and minutiae of detail of city charter regulations or not, the city must be held to have acquiesced in such public use of the strip.

We are cited by learned counsel for respondent to the *Ruppenthal Case*, 190 Mo. 218, 88 S. W. 612, as direct authority in favor of sustaining the demurrer. Because of the strong reliance put on that case, we have re-examined it with anxious care. The *Ruppenthal Case* is somewhat grounded on the *Ely Case*, 181 Mo. 723, 81 S. W. 168, but the law in the *Ely Case* must be read in the light of the facts of that case, and those facts do not accord with the facts in the *Ruppenthal Case*.

In the *Ely Case* there was a roadway graded down on the western side of an 80-foot street. There was an ordinance requiring the street to be partially graded. When this was done, it was cut down so that the eastern side of the street was elevated several feet above the graded wagon road and "left as nature had made it." There never

was any sidewalk on the street, and nothing to designate a way for footmen except a foot-worn path made by pedestrians on this elevated portion of the street on the eastern side. Weeds grew on both sides of this path, and storm water washed a gully across it. Into that gully Ely fell on a dark night. The question in the case was whether it was the city's duty to make a sidewalk, or, failing to make one, was it responsible for the condition of the path? The conclusion reached was adverse to the plaintiff. (See, in this connection, *Conner v. Nevada*, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314, written by the same learned brother.)

In the *Ruppenthal Case* the facts were these: There was a granitoid sidewalk laid by abutting property owners on a public street. This sidewalk had been there for a long time (eight years, the syllabus says), and it was not constructed by order of the city. At the end of the granitoid walk there was a drain pipe put in by some abutting property owner long before, which pipe did not extend for the width of the sidewalk by 18 inches at either end. Commencing from that pipe, and continuing in line with the granitoid, there was what is denominated a "dirt pathway" as wide as the pipe was long, i. e., 8 feet narrower than the granitoid walk. This pathway was used by pedestrians who came on the street and traveled the granitoid walk to its end. The storm water, rushing through this pipe, cut away the dirt at the end of this walk next to the granitoid and made a dangerous hole there. Plaintiff, in the nighttime, passed along this granitoid walk. He had lived in the neighborhood for seven years, but knew nothing of this hole, and, reaching the end of the walk, fell into the hole and was hurt. The street dealt with in the *Ruppenthal Case* was 80 feet in width, the macadamized roadway 50. Outside of the macadamized part, the street had not been graded, and the city seems to have elected to pay no attention to it. Weeds grew on the unimproved sides and the roadway was higher than those sides. Along those unimproved sides were natural water drains.

Based on the theory that the city had not taken possession of the 15-foot strip on each side of the macadamized roadway for the purposes of a street and had done nothing to improve it, but had left it in "a state of nature," we held, first, that the city was not liable as a matter of law for the dangerous hole made by the flowing of water through the drain pipe where the dirt pathway connected with the granitoid, and, second, that plaintiff was guilty of such contributory negligence as defeated recovery.

I agreed to that opinion when handed down, but am now satisfied it is out of line with general principles of law declared over and over again by this court. My conclusion, by way of amends, is that my agreeing to that case can be best told in the dispatch sent his government by Sir Charles Napier (was it not?) when in India. Having been forbidden to take Scinde, he took it, and announced his action in one word: "Peccavi." I am sorry I agreed to it. There was no "state of nature" in the *Ruppenthal Case*. There was a public street, and the city had allowed the works of man to change the works of nature by marring the street and making it dangerous where foot travel was invited. The existence of that granitoid walk on a public street was an unmistakable invitation to foot travelers to use it. The existence of that pitfall at the end of that granitoid walk in the line of travel, ostensibly provided for footmen, was a defect in a public street, and the city, barring *Ruppenthal's* contributory negligence, was liable in damages for injuries received at that pitfall.

We will not follow the *Ruppenthal Case*, but will overrule it, except its holding on the question of contributory negligence.

We conclude it was error to give the instruction in the nature of a demurrer.

8. As the case must go back for another trial, it is well to pass on a ruling on evidence. There being an issue of street or no street, subsequent repairs made by the city are competent as tending to show that the city recognized the locus as a public street. *Brennan v. St. Louis*, 92 Mo., loc. cit. 488, 2 S. W. 481, and cases cited; *Bailey v. Kansas City*, 189 Mo., loc. cit. 510, 87 S. W. 1182; *City of Jeffersonville v. McHenry*, 22 Ind. App., loc. cit. 12, 53 N. E. 183; *Elliott on Roads and Streets* (2d Ed.) § 865.

Having put in some evidence of prior repairs, plaintiff tendered evidence of subsequent repairs made in the August or September, after George was drowned in May. The court excluded the evidence, and committed error in doing so. The only justification offered for this ruling is that the repairs were too remote, but the remoteness merely affects the force of the evidence, not its competency. It was not so remote that it could be said as a matter of law to have no bearing at all.

Other rulings on the exclusion of testimony are either sufficiently covered by the opinion on the main propositions, or will not likely arise on a rehearing, and may therefore be put aside.

The judgment is reversed, and the cause is remanded to be proceeded with in accordance with this opinion. All concur.

VAN PELT et al. v. PARRY.

(Supreme Court of Missouri, Division No. 1
March 31, 1909.)

1. COUNTIES (§ 108*)—SALE OF LAND—LAND DEDICATED TO SEAT OF JUSTICE.

Rev. St. 1855, c. 44, relating to the organization of counties, authorized, by section 6, the commissioners appointed to select a seat of justice for the court to purchase or receive a donation of land. Section 8 provided that the title to the land so acquired should vest in the county, and the place be the permanent seat of justice thereof. The act also provided that lots necessary for sites for county buildings should be reserved from sale. Chapter 45, relating to the removal of seats of justice, made it exceedingly difficult to remove county seats. *Held* that, though chapter 44 did not specifically provide for establishing a seat of justice upon lands owned by the county prior to the location, the power was assumed to exist, and where a county seat was located on swamp lands vested in the county by the state, and the land platted into town lots which were sold, the town became a permanent seat of justice, and a conveyance by the county of a tract of land, including the town site, as swamp land to a person with full notice, would not pass the unconveyed town lots, county buildings, streets, etc., of the county seat.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 108.*]

2. EVIDENCE (§ 83*)—PRESUMPTIONS—OFFICIAL ACTS—COUNTY OFFICERS.

As to ancient official acts of county officers, it will be presumed that they performed the duty imposed on them as the law contemplated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

3. COUNTIES (§ 104*)—ACQUIRING PROPERTY.

Where one holding land as an entryman conveyed it to a county for a county seat which was established, and it subsequently appeared that his entry was void because the land was swamp land and as such belonged to the county, and the county conveyed to him as purchaser of swamp land a tract embracing the county seat town, a subsequent deed by the purchaser to the county of the land previously conveyed by him to the county as entryman, excepting parcels which he had subsequently acquired, executed to take the place of his former deed which had been destroyed, was a confirmation of the appropriation to the public purpose of the land by his former deed, and in effect was an admission that it did not pass to him by the county's conveyance to him, unless in trust.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 104.*]

4. DOWER (§ 12*)—ESTATES SUBJECT TO DOWER.

Where a person who, with full notice that swamp land had been permanently dedicated as a county seat, took a deed to it from the county, thus acquiring at most only a seisin to the use of the county, his widow was not entitled to dower therein, under Rev. St. 1859, §§ 2933, 2956 (Ann. St. 1906, pp. 1690, 1704), giving a widow dower in real property of which he or anybody to his use was seised of an estate of inheritance during coverture with her, though he may not have been in actual possession, and though he may have held it as joint tenant, etc.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 48; Dec. Dig. § 12.*]

5. EVIDENCE (§ 178*)—ANCIENT TRANSACTIONS.

In an action to establish interests in land, involving ancient transactions, the primary evidence of which has been lost, where secondary

evidence is necessary to establish lost records, deed, plats, to reconstruct for judicial purposes facts and a situation dimmed by time, rules of evidence will be much relaxed.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 178.*]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by Charles Van Pelt and others, minors, by Charles Van Pelt, their guardian and curator, against Nancy C. Parry. Judgment for plaintiffs, and defendant appeals. Affirmed.

Wright Bros. and Jas. T. Blair, for appellant. Cole, Burnett & Moore, for respondents.

LAMM, P. J. This suit was brought under section 650, Rev. St. 1899 (Ann. St. 1906, p. 687), to try, define, and adjudge title to a part of lot 3 in block 13 of the city of Lamar (original town), said part being 15 by 120 feet, set forth by metes and bounds. The petition alleges that Charles Van Pelt has a life estate under the will of Mary E. Van Pelt, deceased; that the two minors, Robert and Stanley, own the reversion, to wit, a fee simple subject to the life estate of Charles; and that the defendant, Nancy, claims an interest or estate in the premises adverse to plaintiffs, although without right or title to do so. By her amended answer Nancy denies the allegations in the petition, and states her claim to be that she was married to one Joseph C. Parry in 1862; that during the existence of that marriage Joseph was seised of a fee-simple estate in the land; that she had never released her right of dower; that Joseph died in 1902, and that she is entitled to dower as his widow. The cause went to the Jasper circuit court on change of venue. In that court plaintiffs filed an amended reply traversing the allegations of the answer; averring that the Joseph C. Parry mentioned therein was twice married; that his first wife was Josephine, who died prior to 1862; that in the month of December, 1856, he and his then wife, Josephine, executed a good and sufficient deed conveying all the right, title, and interest in and to said lot and other land to Barton county, Mo., as a "county site" and for county seat purposes; and that for 10 years and more immediately subsequent to the date of said deed, and at all times since said date, said county and its grantees, under whom plaintiffs hold, were in open, actual, adverse, exclusive, continuous, and notorious possession of the lot in controversy under a claim of ownership, and that said Joseph, after the execution of said deed, never had title or was seised or was in possession, or made any claim thereto. The issue being whether Nancy has dower in the locus, the court rendered judgment against her, and she appeals.

The case in some phases is singular. The original town of Lamar, the county seat of Barton county, is located on what the record calls the "Parry forty" and the "Peters ten," i. e., on 50 acres of land designated in that way. The lot in question is part of the "Parry forty," described as the southwest quarter of the northwest quarter of section 30, township 32, range 30. In 1855 Barton county was established by an act of the Legislature, commissioners were named to locate its county seat, and the new county was added to the Thirteenth judicial circuit. Said commissioners were required to meet at "the dwelling house of George E. Ward." They met at the designated place and located the county seat, selecting the site as the Parry 40 and the Peters 10. Thereupon early in 1857 a town, named "Lamar," was surveyed and platted with streets, alleys, and a public square, all under the auspices of the county authorities in establishing a county seat—witness an order of the county court recorded in the recorder's office and fortunately preserved from the wreck of that period:

"It is ordered by the county court of Barton county that Allen Petty, the commissioner of county seat of Barton county, proceed to lay off said seat of justice, commencing with a square of 400 feet extent each way, with streets around said square of 80 feet width, crossing at right angles and extending through the whole extent of the town. Then to lay off blocks of 400 feet front and 160 feet back, and lay off said blocks into lots with 80 feet front and 160 feet back. Then proceed to lay off another tier of blocks similar in every respect to the former. The last-named tier of blocks to be separated from the first by alleys 14 feet width, running at right angles and extending through the whole length of the town. Then proceed to lay off another tier of blocks to be separated on the rear of said second tier by streets of 50 feet width, running at right angles through the whole extent of the said blocks to be divided into four lots each. Then proceed to lay off another tier of blocks similar in extent to said blocks to be separated from the next succeeding blocks by alleys 14 feet in width. Then proceed to lay off another tier of blocks similar in extent to be divided into two lots each, the last-named blocks to be separated from the next succeeding blocks by alleys 14 feet in width. Then proceed to lay off another tier of blocks similar in extent to be divided into two lots each, the last-named blocks to be separated on the rear by streets of 50 feet width, running at right angles and extending the whole length of the town. It is further ordered by said court that said commissioner advertise and sell said lots on the second day of February, A. D. 1857, and that he sell the same on a credit of twelve months, the purchaser giving bond with approved security. It is ordered that no front

lot on the public square shall be sold for less than \$25.00.

"I, Branch T. Morgan, clerk of the county court of Barton county, certify the above to be a true copy of an order passed by the county court of Barton county as the same remains among the records of said court. In testimony whereof, I have hereunto signed my name and affixed the seal of said court.

"Done at office this 1st day of January, 1857.

"[L. S.] Branch T. Morgan, Clerk."

Courts were presently opened and regularly held in Lamar until the Civil War, the official machinery of the new county was set running, and the county offices were located there.

It seems that Joseph C. Parry in December, 1856, met with said commissioners, and, being then the apparent owner of said 40 as entryman, joined with his then wife, Josephine, in a conveyance of it to Barton county for a seat of justice; that the deed purported to convey an indefeasible estate in fee simple absolute, and was put of record; and that, after the town was surveyed and the land platted, the county commenced selling lots, and a town grew up there before the Civil War. The record shows that Lamar was in the track of irregular marauding and warlike maneuvering on the border during that war, the county was harried by both sides, and the town was devastated. Many of its houses were burned, its inhabitants (save 200 or so) were scattered to the four winds, its temporary courthouse on a lot adjoining the locus and its permanent one built on the square went up in smoke and flame, and the records of the county were mutilated, lost, or destroyed through the vicissitudes of that war. The Parry deed has never been seen since the war. If recorded, the record perished. The same may be said of the official survey and plat of the town. However, some fragmentary records exist; for example, assessment lists and books for the years 1859-60-61. Some mutilated records have been deciphered and recorded, and were put in evidence. A few old citizens are spared who remember somewhat faintly these ancient transactions, and plaintiffs sought to supply the lost deed and record data as best they could by them. Of the company assembled at the home of George E. Ward when the commissioners met, located the county seat, and examined and accepted the deed from Parry, one is alive. The rest are dead. The survivor testified, in effect, that the deed was made by Joseph and his then wife, Josephine, and delivered. The assessment lists aforesaid show that in 1859-60-61, lots in Lamar were assessed by their platted number and proper block, and in the names of a great many owners, indicating that the records accessible to the then assessors showed

deeds had been made and the lots had passed to purchasers, and that the town was a de facto town. An ancient map was put in evidence, shown to have been long used by county officers for taxing purposes, and by conveyancers and the business public generally, though not official. This map showed Lamar laid out with a public square, with named streets, lots, and blocks, in the form designated by the foregoing order of the county court, requiring it to be surveyed and platted, and this map has been universally accepted as accurate.

It seems, when the war ended, the former inhabitants of Lamar in part returned to their homes, and the town, taking on new life, has grown to be a flourishing city. It has been the county seat of Barton county ever since 1857.

Prior to making this deed, if it was made, Parry had in 1856 entered the whole northwest quarter of said section 30 on a land warrant. He never received a patent from the government. Some time after the war it was discovered that the tract was not subject to entry, and his entry was canceled by United States government officials, as in conflict with the act of Congress in 1850, relating to swamp lands; said northwest quarter being part of the swamp lands granted to the state of Missouri by that act. After the cancellation of Parry's entry which was in 1867, as we understand it, the record shows that he and the county court assumed to deal with said northwest quarter on the theory it was swamp land. Accordingly, in that year, on the theory he had paid to the county \$1.25 per acre for said northwest quarter, Parry received a deed from Barton county and a patent from the state of Missouri to said northwest quarter, which deed and patent, under the general description of the land conveyed, included the entire original county seat, then for 10 years gone having a situs and a name as such county seat. We have no concern with any of the northwest quarter except the county seat land. If these conveyances are held valid and operative as to the Parry 40, ignoring everything done from 1857 to that date, then Joseph thereby became the owner of all the unconveyed lots and blocks in the platted town of Lamar, with its streets, alleys, its public square, and the courthouse and jail of Barton county, in a job lot (lock, stock, and barrel) at \$1.25 per acre.

Some time after this he (then married to Nancy) executed the following deed, in which Nancy did not join:

"Whereas, I, Joseph C. Parry, did on the first day of December, 1856, convey to Barton county, state of Missouri, the following described real estate for a seat of justice for said county, to wit: The southwest quarter of the northwest quarter and the west half of the west half of the southwest quarter of the northwest quarter of section 30, town-

ship 32, range 30, which said deed of conveyance was duly deposited in the recorder's office of said county on or about the 1st day of December, 1856, for record; and, whereas, said deed has since been lost or destroyed, together with the record thereof. Now, therefore, know all men by these presents, that I, Joseph C. Parry, in consideration of the premises and the sum of one dollar to me in hand paid, for the purpose of supplying the record of said deed, do by these presents remise, release and forever convey unto the county of Barton and state of Missouri, and to her assigns, the real estate above described. To have and to hold the same, with all the rights and privileges, immunities and appurtenances thereunto belonging unto said county of Barton, expressly excepting and reserving from this conveyance any and all town lots or parcels of real estate to which I may have acquired title since the execution of the deed first aforesaid by purchase from the seat of justice of said county or his assigns. Witness my hand and seal this 1st day of March, A. D. 1869.

"Revenue stamp 50 cents.

"Joseph C. Parry. [Seal.]"

From that date to his death, in 1902, Joseph C. Parry lived in and about Lamar, and at no time questioned the validity of his original conveyance as confirmed by the last one, or laid any claim whatever to any land within the limits of the original town of Lamar, except such as he afterwards acquired to certain lots through mesne conveyances from the county. The fact is that after the original location of the county seat in 1856 he never by act or word laid claim to the 40 acres platted as the town site of Lamar, other than by taking a deed from the county and a patent from the state in 1867, and by his said subsequent confirmatory deed back.

Defendant's right to dower, if any, is based on the proposition that she was married to Joseph in 1862; that he became seized, during coverture, of the whole northwest quarter of section 30, to wit, in 1867; that, coverture and seisin uniting, she became endowed; and that, not having released her dower and Joseph dying, she has an interest as dowress.

Plaintiffs deraign title through a conveyance from the county in 1869 to one W., and through him by mesne conveyances to their testator. They insist that the title, if any, acquired by Joseph in 1867 to the Parry 40 inured at once to the benefit of the county under its former grant from him in 1856 for county seat purposes. Moreover, they question the power of the county to convey to Joseph C. Parry the site of the county seat as swamp land in 1867. Further, they argue that there was no seisin in Joseph after his marriage to Nancy, hence she could not be endowed. And, finally, they say that, the land having been dedicated to public

purposes by Joseph, that dedication discharged it of Nancy's dower.

In our opinion Nancy O. Parry is not entitled to dower in the Parry 40. This, because:

1. It is well to settle some things at the start. For example:

(a) As we grasp the position of respondent's counsel, they do not controvert the proposition that Parry, as original entryman on his land warrant, got no title legal or equitable; nor the proposition that his entry was properly canceled by the United States government. The doctrine of such cases as *Prior v. Lambeth*, 78 Mo. 538, therefore, has no application to the case at bar.

(b) Moreover, respondent's counsel by unmistakable inference concede that the legal title to the whole northwest quarter (barring lots theretofore sold), including, as of course, the Parry 40, was in the county of Barton in 1867. This concession renders it wholly unnecessary to consider the various United States statutes confirmatory of the prior well-known swamp land act of 1850 (Act Sept. 28, 1850, c. 84, 9 U. S. Stat. 519 et seq.), whereby the United States granted to the several states the swamp lands within their respective borders. Nor need we review the various acts of the General Assembly of Missouri in the 50's and 60's whereby title to swamp lands, granted to Missouri under the federal act of 1850, was vested absolutely in the various counties of Missouri within which they lie. The inquiring mind of the student of statutory law, curious to trace the evolution of swamp land enactments, may find them reviewed and discussed in many cases; for example, in *Cramer v. Keller*, 98 Mo. 279, 11 S. W. 734, and *Simpson v. Stoddard County*, 173 Mo. 421, 73 S. W. 700.

(c) No question is made on the form of the deed from Barton county to Parry in 1867. We need not, therefore, inquire whether it was properly executed by the proper official. The case proceeds on the theory that the title to swamp lands could pass (under ordinary circumstances) from the county by its deed to a purchaser, and that the county under the existing statutes could convey. Irregularities in such deeds seem largely obviated by a confirmatory and curative act. Laws 1868, p. 67; *Barton Co. v. Walser*, 47 Mo. 189.

(d) With the foregoing propositions at rest, we come to a main proposition which is of use as a postulate to reason from, viz.: It must be assumed for the purposes of the case that the question (once vexed) whether county courts in dealing with swamp lands dealt with them strictly in a trust capacity, with fixed limitations on their powers and under a trust which ran with the lands, is no longer an open one since the case of *Simpson v. Stoddard Co.*, supra. That case was in banc. It was decided by a divided court, but it is the last authoritative utterance on

the question in hand. It is there held that, under the acts of 1855 and 1857 and other acts of the General Assembly, the absolute title to swamp lands was vested in the respective counties, divested of all trusts, and the county court of such county was authorized to dispose of them as it might think conducive to the interests of said county. That case further held, in effect, that estoppel might be invoked against a county to prevent it from questioning its disposition of such lands, and the doctrines of ratification and laches might be applied in exceptional cases where facts warranted an application. We do not understand that case to say that a county can sell swamp land as such and divert the proceeds (if any) to anything but school fund purposes, and nothing we say here must be construed that way.

2. Assuming that *Simpson v. Stoddard County* announces good doctrine as summarized under paragraph "d" aforesaid, can that doctrine be applied to the facts in this case, and does it determine it? We think so. This, because: Barton county was organized under chapter 44, Rev. St. 1835, entitled "An act to provide for the organization of counties hereafter established." A close reading of that chapter shows that it does not specifically provide for establishing a "seat of justice" upon lands owned by the county in its own right prior to the location of its seat of justice, but we conclude such power is assumed to exist. By section 6 of that act the commissioners appointed "to select a seat of justice for such county" were authorized to purchase or receive a donation of such parcels of land and town lots, including the place selected as a seat of justice, for such county, as they may think proper, not exceeding 160 acres (if purchased), and not less than 50 acres in any case. By section 7 there is a provision safeguarding the county as to the title of the land deeded by the vendor or donor for a seat of justice. By section 8 it is ordained that "the title of the land so conveyed shall vest in such county, and the place selected shall be the permanent seat of justice thereof. By section 9 it is directed that if the land be purchased, then the county court shall order the purchase money to be paid out of the first proceeds of the sale of lots to be laid out on such lands. Section 11 directs that the county court appoint a competent person "as a commissioner of the seat of justice of such new county." Sections 13 and 14 provide a complete scheme for laying off a town at the place selected as the permanent seat of justice "into lots, squares, avenues, streets, lanes and alleys, in such manner and under such regulations" as the county court shall prescribe. Lots and squares of ground necessary to erect county buildings shall be reserved from sale by the county court, and the scheme contemplates that the residue of the lots shall

be sold as lots and deeds made. By section 21 it is ordained that: "The money arising from the sale of lots, after paying all the expenses accruing in the selection of the seat of justice, in laying out the town and selling lots, shall be applied, first, to paying for the land purchased (if any) and the residue shall be set apart, as a specific fund, for the purpose of erecting county buildings, and shall be applied to no other purpose, until all the county buildings, required by law to be erected, shall be fully completed and paid for." Other sections of the act provide for setting up the machinery of the newly fledged county and putting its courts and offices in running order.

The next chapter of the Revised Statutes of 1855 (chapter 45) relates to the "Removal of Seats of Justice." We are not concerned with its provisions further than to point out that the idea of permanency is dominant, and that the statutes make it exceedingly difficult to remove county seats, and have safeguarded the subject-matter in many ways, the controlling thought being that when a seat of justice is once established it is established for all time, unless removed strictly according to written law.

All must agree that the law is related to reason. There are encomiums on the law to the effect that it is the perfection of reason. What reason could be given for the proposition that county seat commissioners, through the acquiescence of the county court or its ratification, could not locate a seat of justice and lay out a town upon land that already belonged to the county? Observe, that when, under the statute, land was donated or purchased the sole effect of that donation or purchase was to invest the county with title. Here the county already had land and title, i. e., all it needed for a seat of justice. Keeping that fact well in mind, we conclude that a statute which authorizes land to be bought or begged by way of gift, for a seat of justice, must be held, in reason, to assume by way of necessary implication that, if there is no necessity of buying or acquiring land as a gift (as in this case), the seat of justice may be rightly located on land it already owns. Otherwise, we would come to the most lame and impotent conclusion that a county must buy or beg when it had the wherewithal ready at hand to avoid doing either. No individual in his sober senses, moving on right lines, would act that way, and we shall not presume that the statutes of this state intended a county should act otherwise than with common sense.

It matters little either to law or justice that the commissioners in 1856 may have believed, and that the county court of Barton county then may have been of the opinion, that the Parry 40 was not swamp land, and that the county got title through Parry's original deed in 1856. The thing done is the

substance and heart of the matter, not what was believed, and the thing done in this instance was to locate a county seat upon the county's own land in 1856. To these ancient official acts the presumption is applied that officials charged with a duty performed that duty by tracking the law and doing what the law either commanded or contemplated they should do. (See authorities cited by respondent's counsel.)

Here, then was a permanent appropriation and disposition of the land for the purpose of establishing a permanent seat of justice, and that visible, actual, palpable appropriation for that important public purpose, coupled with acts in pais in platting the land into lots and blocks, streets, alleys, lanes, avenues, public squares, etc., and dealing with the property by making sales of lots to build up a county town, made Lamar a permanent seat of justice to all intents and purposes, and effectually for all time took the Parry 40 out of the salable list of swamp lands as such. It was no longer swamp land, but land appropriated for county seat ends, i. e., county seat land. Barton county, having irrevocably devoted it to county seat purposes, could not turn about in after years and trade or sell it as mere swamp land to a purchaser having full notice that it had been devoted to a seat of justice and that such purpose was alive, on foot, and being carried out. Its power to deal with it as swamp land was *functus officio*, we think. Parry's deed of confirmation in 1869, in legal effect, is a solemn recognition by him of a prior, subsisting, irrevocable, and dominant appropriation of the land and its proceeds to a public purpose distinct from swamp land and swamp land funds. In legal effect, it is equivalent to his admission that the fee-simple estate did not pass by the 1867 conveyances to him as to the Parry 40, and that he was merely seised to the use of the county in a trust relation, if at all.

If Parry did not have title, and if his deed in 1856 was not operative to convey title, yet that deed was good for something. It, at least, showed his participation in the establishment of the seat of justice—a participation also shown allunde. It at least contributed any rights he thought he had as entryman to the establishment of the seat of justice, and removed any then apparent cloud from the title. His deed of confirmation in 1869 tends to the same end, and in terms related back to his former deed. *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. 346; *Brawford v. Wolfe*, 103 Mo., loc. cit. 399 et seq., 15 S. W. 426.

We conclude that Joseph O. Parry (taking with full notice, as he did), if seised at all under his swamp land deed and patent of 1867, was seised to the use of Barton county under the aforesaid permanent appropriation of the Parry 40 made 10 years before; and that such seisin, if any, could not support

dower under sections 2933 and 2956, Rev. St. 1899 (Ann. St. 1906, pp. 1690, 1704), because he was not seised of an "estate of inheritance" during coverture with Nancy, as required by those sections.

It is insisted that, the land having been dedicated to public use, Parry's wife could not be endowed under the doctrine of the Venable Case, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; the Chouteau Case, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; the Baker Case, 122 Mo. 396, 30 S. W. 301; the Chrisman Case, 202 Mo. 606, 100 S. W. 1090, 10 L. R. A. (N. S.) 1205, 119 Am. St. Rep. 822. See, also, *Benton v. City of St. Louis* (just decided, and not yet officially reported) 118 S. W. 418. The doctrine of those cases might well apply to the public square and the streets and alleys and the jail lot, etc., but we need not inquire whether it would apply to the lots and blocks in Lamar. That question is reserved.

3. In their briefs counsel discuss interesting questions on the legal effect of the narrations in Parry's deed of 1869; for instance, whether his wife, Nancy, is bound by the narration made in that deed to the effect that a former deed was executed by him in 1856 for county seat purposes which had been lost or destroyed. Further, whether, assuming his 1856 deed was a warranty, the title acquired under the patent from the state and county deed of 1867 inured to the benefit of the county under the 1856 deed. In the view we take of the case, such questions are somewhat afield, the case being disposed of on other grounds.

Counsel discuss with force and acumen many questions relating to the admissibility of evidence. As to those it may be said that the situation and transactions developed at the trial by the oral evidence and fragmentary records introduced were ancient ones. The primary evidence being lost, secondary evidence was allowed to establish lost records, deeds, surveys, plats, and to reconstruct for judicial purposes facts and a situation dimmed by time. It is a commonplace of the law that the rules of evidence are much relaxed under such conditions. We shall not incur the opinion by citing authorities to the point. They will be found in the briefs of counsel. We have examined the assignments of error in this regard, and find none materially affecting the merits of the case. It was well tried.

This court has been liberal in allowing dower. *Chrisman v. Linderman*, 202 Mo. 606, 100 S. W. 1090, 10 L. R. A. (N. S.) 1205, 119 Am. St. Rep. 822, and cases cited. It has never stood on dry and lifeless technicalities in endowing widows; but we can find no substantial merit in Mrs. Parry's claim for dower in the lot in question. Accordingly, the judgment should be affirmed. It is so ordered. All concur.

MORRIS v. PARRY.

(Supreme Court of Missouri, Division No. 1.
March 31, 1909.)

LOST INSTRUMENTS (§ 3*)—ESTABLISHMENT—EQUITY.

Equity will not establish a lost or destroyed deed as a link in a chain of title, where, if established, it would convey no estate, but merely tend to show that the grantor thereby removed an apparent claim he had as entryman on the land, which entry was afterwards canceled by the United States government.

[Ed. Note.—For other cases, see *Lost Instruments*, Cent. Dig. § 8; Dec. Dig. § 3.*]

Appeal from Circuit Court, Bates County; Chas. E. Denton, Judge.

Bill by Joseph Morris against Nancy C. Parry. Judgment for defendant, and plaintiff appeals. Affirmed.

H. W. Timmonds, for appellant. Wright Bros. and Jas. T. Blair, for respondent.

LAMM, P. J. Whatever may be the legal conclusions pleaded and in the coloring matter injected into the bill, this is clearly a suit in equity to establish a lost or destroyed deed, and nothing more. Brought in Barton county, it went to the Bates circuit court on defendant's application for a change of venue. There it was tried as in equity, and the chancellor took time to consider. The final disposition, final, is shown by an excerpt from the judgment, viz.: "The court doth therefore order and adjudge that the plaintiff take nothing by his bill, and that the defendant have and recover of the plaintiff her costs here laid out and expended, and have execution therefor." From that judgment plaintiff appeals.

In view of the disposition to be made of the case, the petition and answer are useful to understand the subject-matter of the litigation.

The petition follows:

"Action to Establish Deed.

"Plaintiff, Joseph Morris, respectfully represents to the court that he is the owner and in possession of the following described real estate, situate in the county of Barton, and state of Missouri, to wit: Ten (10) feet off of the east end of sixty (60) feet off of the south end of lot one (1), in block twelve (12), of the original town, now city, of Lamar, Mo.

"That on or about the 1st day of December, 1856, one Joseph C. Parry, now deceased, by deed of conveyance containing covenants of warranty in the ordinary form, conveyed to Barton county, Mo., for county seat purposes of said county, the following described real estate, situate in said county, to wit: The southwest quarter (¼) of the northwest quarter (¼), and the west half (½) of the west half (½) of the southeast quarter (¼) of the northwest quarter (¼), of section thir-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ty (30), township thirty-two (32), of range thirty (30), consisting of 50 acres.

"That the tract of land above described, and by said Joseph C. Parry conveyed to Barton county by said deed of conveyance containing covenants of warranty as aforesaid, was, on the — day of —, 1867, duly selected as the permanent county seat, and the town of Lamar was duly laid off on said tract of land into lots, blocks, squares, streets, and alleys, and a plat of said town was duly made and approved.

"That the parcel of land above described as belonging to this plaintiff is a part of the land so conveyed by said Joseph C. Parry and platted as aforesaid, upon which the town of Lamar was duly laid off.

"That, on the — day of December, 1856, the said deed of conveyance from said Joseph C. Parry was filed for record and duly recorded in the office of the recorder of deeds of said county, and then became an important link in the chain of conveyances, and a part of the record title of said tract of land from which said county seat had been located as aforesaid, and the town lots platted thereupon, and became, and was, and now is, one of the evidences of plaintiff's title to the premises first above described.

"That, at the time of the execution of the said deed by the said Joseph C. Parry, his then wife, Josephine Parry, joined with him in said deed, and, in due form of law, released the dower interest therein. That since said date said Josephine Parry departed this life.

"That, during and by reason of the late War of Rebellion, said deed of conveyance from said Joseph C. Parry and his then wife, Josephine Parry, and also the record thereof, together with the plat of said town and the record thereof, as well as nearly all the public records of said county, were lost or destroyed by the ravages of war, and the destruction of the public courthouse, in which said records were kept, the contents thereof being destroyed by fire.

"That, long subsequent to the execution, delivery, and recording of said deed of conveyance from the said Joseph C. Parry, and the loss and destruction of the same, and the records thereof, the said Joseph C. Parry married the defendant, Nancy C. Parry, and she is the surviving wife of the said Joseph C. Parry.

"That after the destruction of said deed, and the records thereof, and the marriage of said Joseph C. Parry to the defendant, Nancy C. Parry, he (the said Joseph C. Parry) made, executed, and delivered a deed, conveying all his right, title, and interest in and to said real estate so conveyed to Barton county for county seat purposes, to wit, on the — day of —, 18—, but the said Nancy C. Parry failed to join in said last-named conveyance.

"That, by reason of the loss and destruction of said first deed, and the record there-

of, plaintiff's record title to the parcel of land first above described, as well as the record title to all the town lots located on the said 50-acre tract of land above described, and so conveyed by said Joseph C. Parry and his then wife, Josephine Parry, to Barton county for county seat purposes, is defective, and, by reason of said defect, the defendant, Nancy C. Parry, now wrongfully seeks to take advantage of plaintiff, and all others owning town lots located as aforesaid, and wrongfully asserts that she has dower interest in all of said lands, including the parcel owned by this plaintiff as aforesaid, and the said wrongful assertion of said interest by the defendant, Nancy C. Parry, coupled with the fact that said deed, and the record thereof, was executed by the said Joseph C. Parry and his then wife, Josephine Parry, to Barton county, Mo., has created a cloud upon the plaintiff's title, to his great injury and detriment; that the establishment of said deed so made by Joseph C. Parry and his then wife, Josephine Parry, will remove such cloud and prove by the records a clear and merchantable record title to said tract of land so owned and in his possession at this time.

"Wherefore, the plaintiff prays the court to hear and make record of such evidence as plaintiff may produce touching or concerning his interest in and to the parcel of land aforesaid, and that, upon the final hearing of this petition, a decree be made and entered of record, establishing such first deed of conveyance from Joseph C. Parry and his then wife, Josephine C. Parry, to Barton county, and that the plaintiff be adjudged and seised of an estate in fee simple in and to the tract of land as above described, and that this defendant be forever barred from setting up any claim or interest in and to said real estate, and that plaintiff's actual title, whether record or otherwise, be fully and completely established, and for such other and further relief as to the court may seem meet, just, and proper."

The trial answer follows:

"Now comes the defendant in the above-entitled cause, and, first having obtained leave of court, for her second amended answer to the petition of the plaintiff herein, denies each and every allegation therein contained, except such as are hereinafter admitted.

"And, further answering, defendant admits: That defendant and Joseph C. Parry intermarried with each other on the — day of —, 1862, and that said Joseph C. Parry died on the 21st day of July, 1902; that she never at any time, with her husband or otherwise, executed a deed to the 10-foot strip of land mentioned in the petition; that she asserts that she has dower in the parcel of land described in the petition, but denies that said assertion and claim are or were wrongfully made.

"And defendant, further answering, avers

and says that plaintiff has a full, complete, and adequate remedy at law; and, further, defendant says that there is now pending in this court a suit wherein the defendant in this suit is plaintiff and the plaintiff in this suit is defendant, and wherein the existence of the pretended deed mentioned in plaintiff's petition herein is put in issue, and wherein the defendant here is suing for her dower; and defendant states that said suit was pending before the institution of this suit by plaintiff.

"And, further answering, defendant says that plaintiff and his grantors have been guilty of laches in the institution of this suit, by reason of delaying their action for 35 years; that by reason of said delay defendant will be greatly prejudiced if plaintiff's suit is entertained by this court."

The trial took substantially the same course as that of *Van Pelt et al. v. Parry* (just decided by this division, and not yet officially reported) 118 S. W. 425, and the record here is substantially the same as there, mutatis mutandis.

The lost deed sought to be re-established in this suit is the identical one from Joseph C. Parry and Josephine, his then wife, dated in December, 1856, held in judgment in the *Van Pelt* Case. In the case at bar, as in that, defendant relied on the same patent from the state in 1867, and deed from Barton county in the same year purporting to convey to Joseph C. Parry the land theretofore appropriated and devoted by Barton county to county seat purposes. She claims dower under those conveyances on the theory that her husband, Joseph, became thereby seised of an estate of inheritance. The facts relating to the appropriation of that land in 1856 and 1857 to county seat purposes being substantially the same on this record as disclosed in that, that case must control this, and this should be read with that. We held there, in effect, that Parry's 1856 deed (lost or found) conveyed no legal or equitable title. We held, furthermore, that Barton county owned the land, and that, having permanently appropriated it for county seat purposes, it, by that appropriation, ceased to be swamp land, and that Parry's subsequent patent from the state, and deed from the county in 1867 purporting to convey it to him as swamp land, vested no estate of inheritance in him on which Nancy C. Parry could be endowed, but that Joseph, if seised at all under those deeds, was seised merely to the use of Barton county. In this case plaintiff holds under a deed from Barton county to Charles R. Logan and Nathan Bray in 1869 and mesne conveyances.

We cannot see how the establishment of the lost deed in any way affects plaintiff's title. At most, that deed would merely tend to show that Parry participated in the locating of the county seat by removing an ap-

parent claim he had as entryman, which entry was afterwards canceled by the United States government. When established, the deed would be no muniment of title, and in point of law it conveyed no estate. What reasons may have influenced the chancellor below to dismiss the bill, we need not consider, but under the ruling in the *Van Pelt* Case the result reached was right; for equity does not require useless things to be done, and ought not to do them.

This view makes assignments of error on rulings on the admission and exclusion of evidence merely academic, and the case itself a moot case. It is disclosed by the record that there is a suit pending between the present parties for the assignment of dower to Nancy in the locus. That suit, when disposed of as ruled in the *Van Pelt* Case, will settle the rights of the parties in the subject-matter of this litigation, if the record is the same as this on the merits.

Let the judgment be affirmed. All concur.

COLLINS et al. v. HARRELL et al.

(Supreme Court of Missouri. July 8, 1908.)

1. JURY (§ 14*)—RIGHT TO TRIAL BY—EQUITABLE ISSUES.

Where an interplea and answer in partition stated a cause of action for specific performance, a jury trial was properly refused.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 80; Dec. Dig. § 14.*]

2. SPECIFIC PERFORMANCE (§ 121*) — CONTRACTS ENFORCEABLE — PAROL CONTRACT — EVIDENCE—SUFFICIENCY.

Where a court of equity is called upon to establish and enforce a parol contract to convey real estate, the proof of the contract must be clear and convincing.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 392-395; Dec. Dig. § 121.*]

3. SPECIFIC PERFORMANCE (§ 28*)—CONTRACTS ENFORCEABLE—CERTAINTY—NECESSITY.

A contract must be definite and specific in order to be specifically enforced.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 61; Dec. Dig. § 28.*]

4. SPECIFIC PERFORMANCE (§ 28*)—CONTRACTS ENFORCEABLE—CERTAINTY.

A statement that, if a child would stay with the party making it, he would see that she had plenty, give her clothing and educate her, and her assent thereto, falls far short of such a promise to convey to her a particular tract of land as can be specifically enforced.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 62, 64; Dec. Dig. § 28.*]

5. APPEAL AND ERROR (§ 1009*)—REVIEW—QUESTIONS OF FACT—FINDINGS OF CHANCELLOR.

Though in an equity case the Supreme Court may examine and weigh the evidence, it will defer largely to the judgment of the chancellor.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3970; Dec. Dig. § 1009.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. SPECIFIC PERFORMANCE (§ 64*)—CONTRACTS ENFORCEABLE.

A statement, in a general conversation, that the party making it had made up his mind to give a child a particular tract of land if she would stay with him, does not amount to a contract to convey, capable of being specifically enforced, but is no more than a declaration of an intention subject to change or abandonment.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 195; Dec. Dig. § 64.*]

7. EVIDENCE (§ 313*)—DECLARATIONS—CONCLUSIVENESS.

Evidence of declarations of a decedent, though admissible, does not amount to direct proof of the facts claimed to have been admitted by the declarations, and, when unsupported by other evidence, is entitled to but little weight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1166, 1167; Dec. Dig. § 313.*]

8. SPECIFIC PERFORMANCE (§ 42*)—CONTRACTS ENFORCEABLE—ORAL CONTRACT—PART PERFORMANCE.

Part performance of a parol contract to convey real estate must be unequivocal and referable alone to the contract to warrant specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 124; Dec. Dig. § 42.*]

9. SPECIFIC PERFORMANCE (§ 121*)—EVIDENCE—SUFFICIENCY.

Evidence, in an action to compel specific performance of an alleged parol contract by a decedent to convey to a child a particular farm if she would stay with him, *held* not to establish the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 392; Dec. Dig. § 121.*]

10. SPECIFIC PERFORMANCE (§ 121*)—EVIDENCE—SUFFICIENCY.

Evidence, in an action to compel specific performance of an alleged parol contract by a decedent to convey real estate, *held* to show that decedent only contemplated deeding the real estate in question to plaintiff as a voluntary gift, prompted by affection for her, and not because of any contract obligating him to do so.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 392-394; Dec. Dig. § 121.*]

Woodson, J., dissenting.

In Banc. Appeal from Circuit Court, Schuyler County; Nat. M. Shelton, Judge.

Action by Thomas F. Collins and another against Iowa Harrell and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Henry C. Taylor and C. C. Fogle, for appellants. Payne & Sowers and Higbee & Mills, for respondents.

GANTT, J. This is a suit to partition 152 acres of land in Schuyler county and 80 acres of land in Macon county, Mo. The suit was brought in Schuyler county circuit court. The plaintiffs and the defendants are the collateral kindred of Caleb Collins, who died intestate without widow or issue, in Davis county, Iowa, on August 11, 1905, in which last-mentioned county he owned at the time of his death about 500 acres of land. At the trial the defendants Albert Collins, Ira Collins, James Collins, Edward Collins, and

Sarah Gibson filed a joint answer disclaiming any interest in the land in suit. Iowa Harrell, a minor, on motion of her guardian, was made a defendant and filed a separate answer claiming title to the 152 acres of land in Schuyler county, and known in the record as the "Queen City farm," by virtue of an alleged oral contract entered into by and between her and Caleb Collins in his lifetime in the summer of 1898, when she was less than nine years old, to the effect that if she, the said defendant, would live with him, the said Caleb Collins, stay with him, and comfort him until his death, he would give, transfer, and convey to her all of the said Schuyler county land above described in consideration therefor; that she accepted said proposition on the part of Caleb Collins and contracted and agreed with the said Caleb Collins to live with him, to stay with him, and comfort him until his death, and, in pursuance of said agreement, she did live with him and stay and comfort the said Caleb Collins from the time the said agreement was entered into until his death, and fully performed the said agreement on her part; that the said Caleb Collins died August 11, 1905, by reason of which said contract and the performance thereof by the defendant the said real estate situated in Schuyler county, Mo., was owned absolutely by this defendant; that the said Caleb Collins failed and neglected to keep his part of said contract prior to his death, and failed to convey, transfer, or deed said land to this defendant; and that the plaintiffs herein and the other defendants have no interest in said land. Wherefore she prayed the court for a decree declaring her to be the absolute owner of said real estate and to divest all the title and interest of the plaintiffs and the other defendants in and to said tract of land in Schuyler county, Mo. Thomas R. Hollingsworth, a minor, by his guardian ad litem, prayed the court to strictly protect his interest. The plaintiffs, in reply to the answer of Iowa Harrell, denied all of the allegations therein, and for further reply stated that the alleged pretended promise and contract of the said Caleb Collins pleaded in said defendant's answer to give, transfer, and convey the said land to the said defendant, if ever made, was not in writing, signed by Caleb Collins.

The case was tried at the November term, 1905, without the intervention of a jury, though the defendant and interpleader, Iowa Harrell, demanded a jury. As her interplea and answer stated a cause in equity for the specific performance of an alleged contract, the issue was not triable before a jury, and the court properly refused a jury. To sustain her claim to the land in question, the defendant introduced her mother, Mrs.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Maggie Harrell, who testified that she was 46 years old, and that the defendant Iowa was her only child. The witness was married in March, 1878. Iowa Harrell was born in 1889. Caleb Collins married the sister of the witness, and the witness lived with Mr. and Mrs. Collins until witness was married in 1878. Dr. Harrell died in 1890. After the death of her husband, the witness and the defendant Iowa went to the home of the deceased, Caleb Collins, where they continued to reside as members of the family until the death of Mrs. Collins in 1898, save and except a portion of that time witness was away settling up her husband's business. In April, 1902, after Mrs. Collins' death, the witness bought a small hotel at Leroy, Kan., took her goods and moved there, taking the defendant Iowa with her for the purpose of giving her a better education and getting her into better society. Witness was for a time a stenographer in a lawyer's office, but her health failed, and she and her daughter returned to the Collins' home in Iowa, where they made their home until the latter's death in 1905. During all of this period Caleb Collins gave them a home, clothed and gave them half of the produce, and cared for them and sent Iowa to school and paid their medical bills. Caleb Collins became greatly attached to Iowa, and on frequent occasions remarked that he intended doing something for her, and on several occasions stated that he intended to give her the Queen City farm. Mrs. Collins died August 24, 1898, and it was on this day that the alleged contract upon which defendant claims the land in suit was entered into. At that time she was less than nine years old. From that day until Caleb Collins' death, some seven years later, Mrs. Harrell made her home with him, except the short time she resided in Kansas. She could recall but four conversations with him wherein he mentioned giving Iowa the Queen City farm. The first of these conversations occurred on the day of her sister's funeral in the yard of Mr. Collins' residence. She and her brother Zeke and his wife and Caleb Collins were standing in the yard talking. Iowa was playing with her cousins. Thereupon the witness, Mrs. Harrell, said to Iowa, "We will get our things and go home with brother Zeke and make our home." Mr. Collins said, "No." Iowa was in the yard, and he went up to her and said, "You are not going to leave me now in my bereavement and leave me here alone," and he began to cry, and the little girl sympathized with him. She ran to him and put her hands in his hands, and he said: "No, Iowa, stay with me, and I will school and educate you and give you all your clothes. You live with me, and I will see that you have plenty." And then Iowa put her hands in his and said, "I am going to stay with Uncle," and then the two went off in the house together. On cross-examination she gave this version of

that conversation, speaking of Mr. Collins: "Cale said: 'You are not going to leave me now when I am in so much trouble. She is all I have got.'" On redirect examination she stated it in this way, "Cale said, if Babe stayed with him until he died, he had made up his mind to give her the Queen City farm."

Mrs. Ezekiel Dooley, the wife of Mrs. Harrell's brother, detailed this conversation in this way: "I remember Mr. Collins came up and said to her, she was not going to leave him, and commenced to cry. The little girl went up to him and took him by the hands, and he said: 'Babe, you are not going to leave me? You are all I have got now.' He talked on, and said, if she would stay, he would always see that she had a home, and he would school her. That is about all." The second conversation occurred about six months later. She stated that he went on doing for her. She stayed there with him, and he said that he had made up his mind to give her the Queen City farm; that she was to stay with him and take care of him until the last, or as long as he lived. On cross-examination, she restated it in these words: "Cale said 'I have made up my mind to give Babe the Queen City farm.' We were talking about the home place that we lived on in Iowa, and the two farms that he owned, and he said he had concluded to give her the Queen City farm. He thought it would be better, on account of the wood being there, than the one we lived on." The following question was propounded to the witness: "Q. Now what, if any, condition did he couple with giving her the Queen City farm? What did he say she would have to do after that? A. She would have to stay with him as long as he lived." When asked what Iowa said, she answered: "She said she would do it. She never gave a word of inclination that she wanted to leave him." The next conversation occurred on one occasion when Ezekiel Dooley was visiting at Mr. Collins'. It was during the World's Fair at St. Louis. Zeke's daughter was with him. This conversation was in the presence of the witness Mrs. Harrell, Iowa, and Ezekiel. She said: "Iowa wanted to go to school in St. Louis and stay with Ezekiel. Cale said to her, 'You know you agreed to stay with me if I would give you the Queen City farm,' and Iowa said, 'Yes,' and told him she wanted to go, but she would stay with him for that." On cross-examination she stated this conversation thus: "Zeke was in the east room with Cale, and witness went in to listen. Cale said to Iowa: 'Babe, I cannot do without you. Stay with me and go to school at Stiles another year. You know you promised to stay with me if I would give you the Queen City farm.' And she said, 'Yes.' Q. Cale said: 'I cannot do without you, Babe. I promised to give you the

he heard Caleb talk about the Queen City farm. Collins said to him: "Jim, I want to see Sam Carruthers to see about making a deed. I told them I promised Iowa the Queen City farm, and I want to make a deed to it so that they cannot beat her out of it." This conversation occurred in February, 1903. He spoke about building a house on this land, wanted to fix it up for Iowa. On cross-examination this witness stated that he also had a suit then pending in the district court of Davis county, Iowa, in which he claimed that Caleb Collins had made him an oral gift of a farm of 172 acres to him, known as the "Savannah farm," and that he expected on the trial of that case to have Mrs. Maggie Harrell and Iowa Harrell as witnesses for him.

John W. Cooksey testified that Caleb Collins said to him in 1904: "I am going to fix her so she won't have to work when I am gone." That he was going to deed her the Queen City farm.

Mrs. Stella Dooley testified that she was Zeke Dooley's wife, and that she heard Caleb Collins say he was going to give Iowa this Queen City farm and fix up a house on it for her. "Q. Did he say how he was going to give it to her. A. No, sir. Q. Did he say anything about deeding it to her. A. No, sir." She also testified to the conversation in the yard on the day of Mrs. Collins' funeral. She heard him say to Iowa, she was not going to leave him, and commenced crying, and he talked on and said, if she would stay, he would always see that she had a home, and he would school her. That was about all. He did not say he had given her the farm, but said he was going to do it. Iowa was not present at this conversation.

D. B. Burchette testified that he lived at Bloomfield, Iowa, and had been sheriff four years. Knew Mr. Collins in his lifetime, and was intimate with him. Had a talk with him about the Queen City farm. He talked about this young lady. Said she was the sweetest child he ever knew. She could not be any closer to him if he had been her father. He was proud of her. Said she had a lady's head on her shoulders, and he was going to school her and make a lady of her so that anybody would be proud of her. When she was in Kansas, he spoke of going out there to make his home with them. "I was at his house, and he spoke of a couple of land buyers having come from Missouri to buy the Queen City farm, and said he thought it would make Iowa more money for him to sell that farm and invest it in Iowa lands, but he said, 'Recently Missouri land is enhancing in value, and I am not sure but that it will come up to ours here.'" He went to see Mr. Collins twice while he was sick. The first time he just dropped in, and Mr. Collins said: "I knew Bern would run in here. I knew he would come to see me." He was rather emotional, and tears ran down

from his eyes. "He made me promise to come back. I went back, and I took him some wine. I think I took a bottle of Old Quaker liquor. At the request of one of the Collinses, I asked him if his business was in the condition in which he wished it to be. One of them asked me to do this, said I could do it better than anyone else, so I said to Mr. Collins: 'Cale, we do not think you are going to die, or anything worse is going to happen, but we cannot always tell what might occur, and the boys wanted me to ask you if your business was in the condition in which you desired it to be.' And he said: 'No, it is not. I want to make a deed to Iowa to a piece of land, and I want to make a will.' He said he had told Sam Carruthers what he wanted to have him make, and he wanted to have him make a will the next time he came out. I think he said he had written him. I won't be sure he had written him in regard to it, or whether he told me he told him about it. I told him 'I am going right to Bloomfield and will send Carruthers right down if you say so,' and he said: 'I am too weak, sick, and nervous to-day. If he was here, I do not know as I could sign my own name. I am awfully weak. But hold yourself in readiness so if I don't get any better—Ira told me I would be much better to-morrow. If I do not, I will phone you to have Carruthers come down.'" The witness told him he would deliver the message. The next time he heard from him he was dead. It was Jim Collins who requested him to see Caleb Collins in regard to fixing his estate.

On the part of plaintiffs, the evidence tended to show that in a suit for the partition of the lands of Caleb Collins in the district court of Davis county, Iowa, among his heirs at law, the witness James Collins had pleaded that he was the owner of and entitled to a tract of the said lands, amounting to 172 acres, by reason of a sale of said tract to him by Caleb Collins for services rendered said Caleb Collins by said James Collins, and that said Caleb Collins had not conveyed the same to him, and he prayed for a decree of specific performance thereof, which cause was then pending in said court. Plaintiffs also offered in evidence the record of a suit by Ezekiel Dooley v. Caleb Collins to quiet the title to certain lands as against a certain mortgage executed by Obadiah Dooley to Caleb Collins and a decree accordingly. Hybarger, a witness for plaintiffs, testified: That he was in the real estate business in Centerville, Iowa, and had been since 1893. That in 1902 he accompanied W. A. Burkhardt and E. A. Duckworth to the residence of Caleb Collins. That he and Duckworth went into the house, and witness inquired of Caleb Collins if the Queen City farm was for sale, and his price. Collins said he had not put it on the market; that if he was going to sell his price would be \$30 or \$35

an acre. Witness thought price too high, and told Collins he had better consider it, that maybe the money would pay him more than the farm. Defendant Iowa and her mother were present. Mrs. Harrell said he had better sell. The farm had never brought more than enough to pay the taxes and repairs. Collins said he did not care to sell then, but she urged him, and he said, "I didn't know but that I would want to give it to Babe and you some time for a home." Mrs. Harrell said she did not want it if she had to live on it as a home. Burkhart was not in the house during this visit. J. W. Cooksey, being recalled, testified that he had filed a claim of \$1,200 against estate of Caleb Collins, covering a period for 1891 to 1905, inclusive, for work and labor done, and the same was then pending. There was other evidence to the effect that, after the death of Caleb Collins, Mrs. Harrell only claimed two cows and a calf and a mare as belonging to Iowa. Also, evidence that Mrs. Harrell had stated to different witnesses that, if Caleb had not left a will, she and Iowa would get nothing. Also, that Mrs. Harrell had told Le Grand he ought to buy the Queen City farm, that Mr. Collins was not able to look after it, and could loan his money to better advantage.

As already seen, this is a bill in equity on the part of Iowa Harrell to enforce the specific performance of a verbal agreement on the part of Caleb Collins in his lifetime to convey the 152 acres of land, specifically described in her interplea and answer, and lying in Schuyler county, and known in the record as the "Queen City farm," to said Iowa Harrell. The circuit court denied the relief prayed for in said interplea and answer, and defendant, Iowa Harrell has appealed to this court. Caleb Collins was nearly 80 years old at the time of his death in 1905. He had no children. His wife died in 1898. Mrs. Maggie Harrell was a sister of Caleb Collins' wife. Mrs. Harrell had one child, Iowa Harrell, the defendant. Dr. Harrell, the father of Iowa, died in 1890. Prior to her marriage in 1878 to Dr. Harrell, Mrs. Maggie Harrell lived in the family of Caleb Collins, as a member thereof. After her husband's death, Mrs. Maggie Harrell and her child, Iowa, again became members of the family of Caleb Collins and were living with him when his wife died. Caleb Collins had been and was a successful business man. He had become the owner of three or four farms in Davis county, Iowa, aggregating about 500 acres, and two farms in Missouri, of which the Queen City farm in Schuyler county was one. He was a man of considerable education. Had taught school and been a merchant in his younger days. He seemed to have been a man of note and influence in his neighborhood. He maintained his mental vigor up to his death. He seemed to have been a generous man and was very fond of defendant Iowa, who had lived with him

from the time she was 9 years old until she was about 16 at the time of his death. During all the time, beginning with the death of Dr. Harrell up to the death of Caleb Collins, except the few months Mrs. Harrell and Iowa lived at Leroy, Kan., Caleb Collins furnished Mrs. Harrell and Iowa a home, free of charge, clothed them, and paid their medical bills, sent Iowa to school, and gave Mrs. Harrell for her pin money one-half the eggs, chickens, etc. They seemed to have entertained a strong affection for him, and he became greatly attached to Iowa. He always expressed interest in her welfare, and there can be little doubt that he not only purposed to make a provision for her out of his property, but repeatedly announced his intention to do so.

With this preliminary statement of the relations existing between Caleb Collins and Iowa Harrell prior to August 24, 1898, the date of the funeral of the wife of Caleb Collins, we come to the averments of the interplea or equitable answer of defendant Iowa in this case, to wit, "That shortly after the death of the said Caleb Collins' wife, the said Caleb Collins contracted and agreed with this defendant that if this defendant would live with him, stay with him, and comfort him until his death, he would give her all of the Schuyler county land above described in consideration therefor." That this defendant accepted said proposition and agreed to live with him, stay with him, and comfort him until his death, and in pursuance of said agreement she did live, and stay with him, and comfort him until his death, and fully performed her part of said contract, but that said Caleb Collins failed and neglected to keep his part of said contract prior to his death and failed to convey the same to her. The time when this alleged specific arrangement was made is fixed in the testimony as the day of the funeral of Mrs. Collins, and the promise made that day by Caleb Collins to Iowa is the one upon the faith of which Mrs. Harrell abandoned her expressed intention of taking her things, leaving the house of Caleb Collins, and making her home with her brother Ezekiel Dooley, and it was on this occasion that the testimony on the part of Iowa tends to establish her acceptance of Caleb Collins' proposition, for it is then that she put her hand in his and said, "I am going to stay with Uncle," and went into the house with him, and thereupon Mrs. Harrell abandoned her intention of making her home with her brother.

Now the testimony as to the promise of Caleb Collins is variously stated, as follows: "He (Caleb) said: 'You are not going to leave me now in my bereavement and leave me here alone. No, Iowa, stay with me, and I will school you and educate you and give you all your clothes. You live with me, and I will see that you have plenty.' And to this she replied, 'I am going to stay with Uncle.'" It is too plain for discussion that, if this

were all the testimony, it utterly failed to sustain the averments of the answer as to an agreement to convey this specific real estate. There was no reference by either party to the land which the defendant claims she was to have conveyed to her upon her staying with him, as long as he lived. Mrs. Ezekiel Dooley in her testimony gave this conversation in practically the same words. She says that Caleb Collins said: "If she would stay, he would always see that she had a home. He would school her. That is about all." Ezekiel Dooley was present, but he did not testify to this contract alleged to have been made that day. It is significant that, after Mrs. Harrell had been examined and cross-examined and re-examined, until her testimony covered 45 printed pages, she had never stated that Caleb Collins had mentioned this real estate. Finally, counsel for defendant Iowa again re-examined her, and requested her to repeat again the conversation that took place up at the house immediately after the death of Mrs. Collins. Up to that time she had invariably stated the alleged agreement was made in the yard. She had been asked again and again to state the place, time, and substance of each conversation she had or had heard in which Caleb Collins referred to this matter, and had never mentioned a conversation in the house, and she stated that: "After we were in the house, we were talking in the south room, and he said he had made up his mind to give Iowa the Queen City farm. Counsel: That is not what I want. What else did he say, if anything? A. If she stayed with him, he would give her the Queen City farm. Q. How long did he say for her to stay? Ans. Until the last—until he died." On her previous examinations, she had been pressed by counsel for plaintiffs to state anything else that Caleb had said, and she had repeatedly testified that she had stated all that he had said. Obviously counsel for defendant was not satisfied with her testimony, as up to this time she had completely failed to sustain the averment as to this real estate. She had testified to an arrangement which all the evidence establishes had been fully complied with by Caleb Collins. This long-belated testimony as to the Queen City farm was only forthcoming after the question of counsel had suggested a new place, and a different time, and then the answer was that Caleb had said, "He had made up his mind to give Iowa the Queen City farm," and, this also being unsatisfactory, counsel stated this was not what he wanted, as obviously it was not. Then for the first time, in response to a call for something more, she answered, "If she stayed with him he would give her the Queen City farm." Then came the suggestive question: "How long did he say for her to stay with him?" and the answer, "As long as he lived." Previous to this she had stated that, after the talk in the yard, nothing more had been said about the matter for about six

months. No other witness testified to this statement in the house. When it was made the mutual agreement in the yard had been consummated. To this last voluntary statement, which was that he had made up his mind to give Iowa the Queen City farm if she stayed with him until the last, or his death, there is no pretense that there was any assent or agreement on the part of Iowa. It was wholly *ex parte*, and the mother does not state that thereupon she agreed that they would remain. The court was made to understand that the alleged contract in the yard had proven satisfactory and its performance begun when all parties adjourned from the yard to go to dinner, and that the proposed removal to Ezekiel's had been abandoned.

In *Kinney v. Murray*, 170 Mo. 674, 71 S. W. 197, the principle governing courts of equity in this class of cases was well stated to be that: "When, as in this case, and in consonance with this doctrine, a court of equity is called upon to establish and enforce a contract of this character, in the teeth of the statute of wills, and of the statute of frauds and perjuries, and to set aside the disposition of valuable property made in conformity with the requirements of those statutes, there is devolved upon the chancellor the gravest responsibility, perhaps, that ever attaches to his high office. And nothing short of the inherent justice of the claim, supported by evidence that can be relied upon with the utmost confidence, proving the existence of the contract, its terms and conditions, and a substantial and meritorious compliance therewith, with such certainty and definiteness as to leave no room for reasonable doubt, can ever justify the exercise of such an extraordinary prerogative." In the same case it was elsewhere stated: "A court of equity in this state will specifically enforce an oral contract to make a will in a particular manner, where a valuable consideration has been received for the promise, and a fraud would be perpetrated upon the promisee or beneficiary unless the contract be performed; but the proof of such a contract must be so cogent, clear, and forcible as to leave no reasonable doubt in the mind of the chancellor as to its terms and character, and, where the consideration consists of acts to be performed, there must be like proof that the acts performed refer to and result from that contract and are such as would not have been done unless on account of that very agreement and with a direct view to its performance. "There must be no equivocation or uncertainty in the case." This doctrine is established, and its application illustrated, in a long line of cases." That case has since been followed and approved in *Rosenwald v. Middlebrook*, 188 Mo. 58, 86 S. W. 200; *Kirk v. Middlebrook*, 201 Mo. 289, 100 S. W. 450. In *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 149, Chancellor Kent observes: "It is well settled that, if a party pleads part performance to take a parol agreement out of the

statute, he must show acts unequivocally referring to and resulting from that agreement, such as the party would not have done unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the same with the one partly performed. There must be no equivocation or uncertainty in the case. The ground of the interference of the court is not simply that there is proof of the existence of a parol agreement, but that there is fraud in resisting the completion of an agreement partly performed." And the chancellor concludes by observing: "This case, like many others, shows the utility of the statute of frauds, and the danger of relaxing the sanction of its provisions. I agree with those wise and learned judges who have declared that the courts ought to make a stand against any further encroachment upon the statute, and not to go one step beyond the rules and precedents already established."

Turning now to the first essential exacted by all the authorities in this class of cases, to wit, that the contract itself must be definite and specific for the conveyance or devising of the specific land in suit, and that the proof of the contract must be cogent, clear, and convincing, it must be evident that the statement of Caleb Collins that, if the defendant Iowa would stay with him, he would school her and educate her and give her clothing and see that she had plenty, and her assent to that proposition, fell far short of the alleged agreement to convey her the Queen City farm. As already remarked, in the testimony of those who heard these statements by Caleb Collins, no mention whatever is made of any statement by him that, if she would remain with him as long as he lived, he would convey to her or give to her the said farm. As to the unsupported evidence of Mrs. Harrell that after this conversation, and after her assent to the arrangements made in the yard, they then went into the house, and during the afternoon, while they were talking in the south room, Caleb Collins said he had made up his mind to give Iowa the Queen City farm if she stayed with him until he died, it must be borne in mind that this was the testimony of the mother who had been examined, cross-examined, and re-examined until her evidence in the record covered over 45 printed pages, and never until after all this long and searching examination and re-examination did she testify to any such a contract or statement. She had repeatedly said that she had detailed everything that had been stated by Mr. Collins in regard to providing for her daughter. Now the evidence tends to show that Mrs. Harrell was an intelligent witness and certainly a deeply interested one; one who was fully alive to the importance of testifying to facts which tended to establish the alleged contract for the conveyance of this piece of land. It

must have impressed the trial judge as being at least remarkable that she had forgotten to mention this highly important statement during all of her long and tedious examination. While this court has often said that in an appeal in an equity case it would not abdicate its right to examine and weigh the testimony, yet it will defer to a large extent to the judgment of the chancellor who hears and tries the cause on the circuit, and who has an exceptional advantage in weighing the testimony of witnesses, which this court cannot in the nature of things have. So, in this case, the circuit court was present, and it must have appeared significant to it that this statement alleged to have been made in the house on the day of the funeral of Mrs. Collins had not been testified to by Mrs. Harrell during all of her previous examinations, when the great purpose of her testimony was to establish the existence or nonexistence of this particular contract; but, when the testimony itself is closely scanned, it will be noted that, when left to herself, without suggestion of counsel, her statement was that Mr. Collins simply said in a general conversation that he had made up his mind to give Iowa the Queen City farm. Certainly this was not the language of an irrevocable contract to specifically convey or will to this young girl that particular tract of land. In the language of the courts, it was no more than a declaration of an intention which he might abandon, or change altogether, or substitute another piece of land in lieu of that tract; but taking altogether the interest of the witness, the circumstances under which this testimony was elicited, the fact that the witness was before the court, and he had an opportunity to observe her manner and her interest in the case, this court should hesitate a long time in reaching a different conclusion from that reached by the circuit court in finding that the alleged contract was not made, and that the evidence fell far short of that clear and satisfying testimony which courts of equity uniformly require in cases of this character.

Mrs. Stella Dooley, in her evidence as to what occurred on the day of Mrs. Collins' funeral, did not corroborate Mrs. Harrell as to the statement of Caleb Collins that he had made up his mind to give Iowa the Queen City farm. All that she heard him say on that day was that, if she would stay with him, he would always see that she had a home, and he would school her and clothe her, and all the testimony shows that he fully complied with his agreement in that respect. Ezekiel Dooley, who was there that day, did not hear either of the statements attributed by Mrs. Harrell to Caleb Collins in regard to this farm. Now Mrs. Harrell states in her testimony that the only persons present at the conversation in the yard with her were her brother, Mr. Dooley, and his wife, Stella Dooley, and Mr. Collins, the witness, and her little girl. As

already said, Ezekiel Collins heard neither of the statements which Mrs. Harrell says Caleb Collins made on that day. So that, as far as the alleged contract made on the day of the funeral of Mrs. Collins in regard to the land in suit, the cause stands upon the uncorroborated evidence of Mrs. Harrell, unless the subsequent declarations of Caleb Collins can be said to have sustained her evidence as to the contract. Now, as to these, many of them are of the most unsatisfactory character, declarations made in the most casual conversations. Thus, Masterson testified that on one occasion, perhaps in 1903, Caleb Collins stayed all night with him, and in talking to his wife Caleb said that he had a girl living with him, and he had given her a calf, and she had made a cow, etc., but that was not all he was going to do for her; that he was either going to deed her the farm or give her a farm, he would not say which. But in the same conversation witness asked why he did not sell the Queen City farm, and Mr. Collins said land was raising in price, and if he sold it he would have to purchase other land. When he said he thought of deeding the farm, he did not say what farm, nor when he intended to deed it. Rinehart's testimony was to the effect that, when he offered to purchase this farm, Mr. Collins said that he had thought of deeding it to the girl. Ezekiel Dooley testified that he was at Caleb Collins' in 1904 with his daughter. Iowa, the defendant, wanted to go home with him to go to school in St. Louis. The old gentleman objected, and said that she ought to go to Stiles that winter, and said "You know, Iowa, I told you I would give the Queen City farm if you would stay with me until the last." Mrs. Harrell testified that she heard this statement. James Collins also testified that Collins told him that he had promised Iowa the Queen City farm and wanted to make a deed to it. Cooksey testified that Mr. Collins said to him in 1904, when Iowa was absent in St. Louis, that he was going to deed her the Queen City farm, and that that was about all he ever said to him about it. And Mrs. Stella Dooley also stated that he said he was going to give her the Queen City farm, and was going to fix it up. Burchette simply testified that, when some parties wanted to buy this farm, Mr. Collins said he thought it would make Iowa more money for him to sell the farm and invest it in Iowa land, and on another occasion he said he wanted to make a deed to Iowa to a piece of land. But defendant also introduced another witness, Mr. Melvin, who testified that he was the justice of the peace in Lancaster, Mo., and that Mr. Caleb Collins came into his office and desired to make a deed to a piece of land in Iowa, and the justice told him that he was not the proper officer to take the acknowledgment, and he left. Mr. Collins did not call

the grantee's name, but said it was a girl that he had raised.

Now of this character of testimony this court has often spoken. In *Kinney v. Murray*, 170 Mo., loc. cit. 706, 71 S. W. 197, this court said: "Evidence of such declarations, it is true, is admissible, but it never amounts to direct proof of the facts claimed to have been admitted by those declarations; and it is sometimes doubted whether it ought to be received at all when introduced for the purpose of divesting a title created by deed." *Johnson v. Quarles*, 46 Mo., loc. cit. 427. "This kind of evidence has always been received with great care, and when not supported by other evidence is generally entitled to but little weight." *Cornet v. Bertelsmann*, 61 Mo., loc. cit. 127. "The evidence, consisting as it does, in the mere repetition of oral statements, is subject to much imperfection and mistakes; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. * * * When we reflect upon the inaccuracy of many witnesses in their original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transaction, and the impossibility of recollecting the precise terms used by the party, or of translating them by exact equivalents, we must conclude there is no substantial reliance upon this class of testimony." 1 *Greenleaf*, § 200; *Johnson v. Quarles*, supra; *Ringo v. Richardson*, 58 Mo. 385; *Cornet v. Bertelsmann*, supra; *Berry v. Hartzell*, 91 Mo., loc. cit. 137, 3 S. W. 582; *Fanning v. Doan*, 139 Mo. 392, 41 S. W. 742. "The intrinsic weakness of this class of evidence is further enhanced in any given case by the length of time that has intervened since the declarations were made, and the ease with which it can be manufactured, and the temptation to do so, when all those by whom it could be contradicted are in their graves." *Fanning v. Doan*, 139 Mo., loc. cit. 412, 41 S. W. 747. "Such evidence can and ought to have very little weight, when it is sought by it to asperse the memory, and set aside the last will and testament of worthy and just persons, executed in contemplation of death, and in the manner required by law, disposing of their own property according to the dictates of their own conscience."

When given full consideration, it will be seen they were at the most but the expression of affection by Mr. Collins for the defendant Iowa and of an intention on his part to make provision for her, but it will be observed: That to one witness he stated that he was going to deed her a piece of land in Iowa;

to another witness he said he had thought of giving her this Queen City farm, but he did not know but what it would be better to sell it and invest the money for her in other property. But as already said of the conversation in the house, on the day of the funeral, none of these expressions measure up to the statement that he had made an irrevocable contract with the defendant Iowa to convey her this specific land. We can add nothing to what was said by this court in *Kinney v. Murray*, supra, as to the unsatisfactory character of such evidence to make out a case of specific performance; but, more than that, the chancellor had all these witnesses before him, and he heard the evidence, showing the motives which prompted James Collins, who was at that time prosecuting a similar action for 172 acres of the land left by his uncle, Caleb Collins, and his admission that he expected to rely upon Mrs. Harrell and the defendant Iowa to establish his right to the specific performance of a contract by Caleb Collins to convey him that land. Cooksey also was shown to have an action at that time pending against the estate of Caleb Collins for \$1,200 for work and labor done, and the court must have been strongly impressed with the interest which these parties had in testifying against the heirs of this estate. The evidence consisting, as it did, of the testimony of the mother and uncle and aunt of the defendant Iowa, on the one hand, and the testimony of parties who were seeking to prove up like verbal claims to the estate of this old gentleman against whom no such claims had been preferred in his lifetime when he could defend against them. In our opinion this testimony was peculiarly a matter for the consideration of the court, who saw these witnesses and heard them testify, and who could weigh that testimony much better than we can. Scanning this evidence as closely as we can, we have been forced even at this distance to reach the same conclusion as he did, that it failed of that satisfactory character which a court of equity requires; but there is still a further consideration, and that is this, in many of the adjudicated cases stress has been laid upon the fact that the party who was seeking this specific performance had severed the natural ties of affection and left his or her home and gone to the family of the decedent, and had fully performed the contract of service for which the deed or will was to be made, but no such state of facts appears in this case. The defendant Iowa and her mother had long been inmates of the home of Caleb Collins, and had received support and maintenance at his hands, without any demand for service, and without any pretense of any contract. The defendant Iowa had not been called upon to sever her relations with her mother in any degree. She remained in the same home of this kind old gentleman and benefactor just as she had been for the most of her life, and she had her mother's care and

protection and affection, and the same benefaction had been extended to the mother as to the daughter. According to the alleged contract, she was simply to stay in and not to go from the home of Caleb Collins, and was not called upon to make any sacrifice whatever, but simply to continue to receive the same protection and support and care that he had already generously given to her, and in this respect the facts of this case differentiate it from that character of cases which appear in our reports.

When we consider the further essential that the performance must be unequivocal and must in its own nature be referable alone to the very contract sought to be preferred, because it is only by performance (whereby the party to be charged is benefited) that the conscience of the promisor and those claiming under him is bound, it is hard to conceive that Mrs. Harrell and her daughter, considering their financial condition would have refused to continue making their home with Mr. Collins unless he had stipulated to convey them a farm, in addition to giving them a home which he had for years furnished them from the motives of kindness, generosity, and relationship. On his part, left alone, without wife or children, naturally he desired their society, and was willing to continue to give them a home and protection and act the part of a father to Iowa without the thought that he could only procure their assent to his bounty, without making an irrevocable contract to convey them a large portion of his estate. Surely, if their presence and society would sweeten his declining years, a like feeling of gratitude on their part, after all his benefactions to them, they would not, without some urgent reason, abandon him and that home, when the invitation to remain was extended to them. Indeed, it would seem that such a step had never occurred to him, and, when the announcement came to him in the hour of his distress, he naturally urged them to remain, and all that occurred in the yard was entirely consistent with human experience and was in itself, under the circumstances, all that could have been expected.

Why Mrs. Harrell should have announced her intention of leaving him on that day of all others, without having consulted him about it, is inexplicable. Surely it was not because of any thought of impropriety on her part in living there, when his age and the relationship that had existed so long are considered, for, if it was improper to remain without the contract, it was equally immodest and improper to remain with it. We think the circuit court might well have refused to believe, as it did, that Iowa Harrell and her mother continued in the home of Caleb Collins for the sole reason that he had agreed to convey Iowa this farm, and that their acceptance of Mr. Collins' bounty was referable alone to such a contract. We prefer to believe that they felt that they owed him

a debt of gratitude to render him some return for all his unselfish kindness to them by remaining with him in his loneliness, and at the same time securing to themselves a home, which they so much needed. That Caleb Collins was very fond of Iowa Harrell we have no doubt whatever. She had lived in his home from the time she was a babe. He had no children of his own. He had been generous to her and her mother all her life. Neither do we question that he purposed to make some provision for her out of his property, but we think the whole evidence indicates that he had not fully determined what that provision should be. At times he thought of giving her this farm, and then he thought of giving her some of his Iowa land; but that he ever made such a contract to give her this specified farm we think the evidence fails to establish. We think that whatever he thought of doing for her he considered it would be a voluntary gift, and not because he was bound by an irrevocable contract to give her this specific property.

In our opinion the circuit court correctly held that the defendant Iowa Harrell had not established her right to a decree of specific performance of a contract to convey or devise her the Queen City farm, and its judgment is therefore affirmed.

VALLIANT, C. J., and BURGESS, FOX, LAMM, and GRAVES, JJ., concur.

WOODSON, J. (dissenting). This suit was instituted in the circuit court of Schuyler county, and had for its object the partition of certain real estate, described in the petition, situate in Schuyler and Macon counties, among the plaintiffs and defendants, collateral heirs of Caleb Collins, deceased. Iowa Harrell filed an intervening petition, claiming the Schuyler county land, which is set out later. The petition was in the usual and proper form.

On the application of John H. Jeffries, guardian and curator of Iowa Harrell, she was made a party defendant to the suit, and she filed the following intervening petition, the formal parts omitted: "Now comes Iowa Harrell, one of the defendants by leave of court, by her guardian and curator, John H. Jeffries, and for her answer to plaintiff's petition denies each and every allegation therein contained and set forth. Defendant further answering admits: That Caleb Collins, late of the county of Davis, and state of Iowa, died intestate and without issue or widow on the 11th day of August, 1905. That the title to the following described tracts of land situated in Schuyler county, Mo., appears of record to be owned by the said deceased, Caleb Collins, at his death, to wit: The northeast one-fourth ($\frac{1}{4}$) of the southeast quarter of section thirty-one (31) and the north half of the southwest quarter, and the southwest quarter of the northwest quarter of section thirty-two (32), ex-

cept eight (8) acres, described as follows, to wit: Commencing at the northeast corner of said southwest quarter of the northwest quarter; thence running west about thirty-two (32) rods on the north line of said tract to a stake ten feet from a double white oak tree, the smallest one being about six inches in diameter in the year 1870 and marked with two blazes; thence on a straight line to the southeast corner of said tract; thence north to the place of beginning—and all in township sixty-five (65), range fifteen (15), Schuyler county, Mo. Defendant admits that the deceased, Caleb Collins, owned the south half of the southeast quarter of section eight (8) in township fifty-seven (57) in range fourteen (14) in Macon county, Mo., at the time of his death. Defendant admits that the heirs of the said deceased, Collins, are properly set forth in plaintiff's petition. Defendant, further answering, says: That her father died and left her when she was a small child, as his only child. That about six years ago the said Caleb Collins' wife died, and left him alone without issue. That he was a man of considerable real and personal property, both. That his father and mother were dead. That his wife was a sister to the mother of this defendant. That, shortly after the death of the said Caleb Collins' wife, the said Caleb Collins contracted orally and agreed with this defendant that if this defendant would live with him, stay with him, and comfort him until his death, he would give, transfer, and convey to her all of the Schuyler county land above described in consideration therefor. This defendant answering accepted said proposition on the part of said Caleb Collins and contracted and agreed with said Caleb Collins to live with him, stay with him, and comfort him until his death; and in pursuance of said agreement this defendant lived with, stayed with, and comforted the said Caleb Collins from the time said agreement was entered into until his death, and performed the said agreement on her part fully. The death of said Caleb Collins occurred on the 11th day of August, 1905. By reason of which contract and the performance thereof by defendant, the said described real estate situated in Schuyler county, Mo., is owned absolutely by this defendant. That the said Caleb Collins failed and neglected to keep his part of said contract prior to his death, and failed to convey, transfer, or deed said land to this defendant. That the plaintiffs herein and the other defendants have no interest in said land. Wherefore this defendant prays the court that a decree be entered in this cause declaring this defendant to be the absolute owner of said real estate, and that the other plaintiffs and defendants in this cause be decreed to have no interest whatever in said real estate, and that the title to said land be vested in this defendant, and the plaintiffs and the other defendants be divested of all right, title, and interest in and

to said tracts of land, situate in Schuyler county, Mo., aforesaid, and for all proper and general relief."

Defendants Albert H., Ira W., Ed. R., James, and Lina D. Collins, and Sallie Gibson filed the following answer: "That it is their distinct understanding that said land in Schuyler county set out in the petition belongs to Iowa Harrell of Stiles, Iowa, and that she obtained same from her uncle, Caleb Collins, during his life. We further state that it was distinctly understood shortly before the death of said Caleb Collins that said land should be and was the property of said Iowa Harrell, and this understanding came from a statement made by said Caleb Collins to certain of the parties hereto. We therefore disclaim any interest in said land, and ask the cause to be dismissed as to us, and that there be no costs taxed to us in the final judgment in said cause, but that the costs, if any, be taxed against those only who make the claim to the land."

The answer of Thomas R. Hollingsworth was as follows: "Now comes Thos. R. Hollingsworth by his guardian ad litem, P. O. Sansberry, for answer to plaintiffs' petition, and asks the court to strictly protect his interest."

Plaintiffs' reply to the answer of Iowa Harrell was a general denial and a plea of the statute of frauds. When the cause was called for trial, Iowa Harrell, the intervenor, demanded a trial by a jury, which was by the court denied, and proceeded to try the cause as a chancellor, to which ruling and action of the court she duly excepted. The court found the issues for plaintiffs, and entered a decree partitioning the land as prayed for in the petition. In due time Iowa Harrell filed her motions for a new trial and in arrest of judgment, which were by the court overruled, to which action of the court in so overruling her said motions she duly excepted, and timely appealed the cause to this court.

1. Counsel for intervenor, Iowa Harrell, insists that the findings and decree of the circuit court denying specific performance of the contract set out in her intervening petition are not supported by and are against the great weight of the evidence, and that, this being a case in chancery, it is our duty to review the evidence and pass upon the weight thereof; and, if found to preponderate in her favor, to reverse the decree and enter one in this court in her favor specifically enforcing the contract.

This court has uniformly held that in equity cases it would on appeal proceed de novo to hear and determine the cause, deferring somewhat to the findings of the trial court; but, if its findings and decree were not sustained by the evidence and the law, then this court would proceed to make its own findings and enter such a judgment as equity and justice might require. *Gibbs v. Haughwout*, 207 Mo., loc. cit. 891, 105 S. W. 1067. Under

the rule above announced, we have reviewed the entire evidence, as presented by the abstract of record, which is very voluminous, and have carefully considered and weighed the same. According to the record disclosures, the following facts stand undisputed, viz.: Plaintiffs and defendants are collateral kindred of the deceased, Caleb Collins, who died intestate, without a widow or legal descendants, in Davis county, Iowa, on August 11, 1905. At the time of his death he owned about 500 acres of land, situate in that county, besides what he owned in this state. The land involved in this case is 152 acres and is located near Queen City, Schuyler county, and is known and referred to in the record as the "Queen City farm." Caleb Collins was an elderly gentleman at the time of his death, and was a man of more than ordinary intelligence. He was secretary of the school board, counselor for many of his neighbors, kept the Iowa statutes, regarded as a safe legal adviser, a successful business man, and commanded the respect of his neighbors. He was kind, sympathetic, and charitable. For a number of years prior to his death Maggie Harrell, his wife's sister, her daughter, Iowa Harrell, and her aged and afflicted father had made their home with him. Intervenor's father, Dr. Harrell, died in 1890, when she was only eleven months old, and upon his death her mother, Maggie Harrell, took her to the home of Caleb Collins, where they resided as members of his family practically all the time, until the death of his wife, who was the sister of Mrs. Harrell, which occurred in 1898. During a short period of that time she was absent attending to her deceased husband's business, and for a few months in the year 1902 she conducted a hotel at Leroy, Kan. The intervenor was in Kansas with her mother during those few months. Mrs. Harrell went to Kansas for the purpose of giving her daughter, Iowa, a better education and placing her in better society. The mother was a stenographer, and she served as such for a short time in a lawyer's office in Leroy. While in the hotel business, her health failed, and she and Iowa returned to the home of Mr. Collins, where they resided until his death, which occurred, as before stated, in 1905. From 1890 to 1905 Collins gave the mother and daughter a home, clothed and fed them, and sent Iowa to school, and paid their medical bills. During the time they resided with him, he became very much attached to Iowa and spoke to and of her in very affectionate and endearing terms, and frequently said he intended to do something for her, and on several occasions stated that he intended to give her the Queen City farm. Intervenor claims the contract set up in her intervening petition was entered into on August 24, 1893, the day of Mrs. Collins' funeral. At that time she was about nine years old. Mr. Collins grieved greatly over the death of his

wife, and on the day of her death Mrs. Harrell concluded to change her and her daughter's place of abode, and discussed the matter with her brother, Ezekiel Dooley. She testified that when Collins heard them discussing the matter he pleaded for them to remain with him, and then and there made and entered into the contract in question with Iowa, to the effect if she would stay with and take care of him until his death he would deed to her the Queen City farm. She also testified that Iowa accepted his proposition and agreed to live with him and care for him until his death, and that she fully performed her part of the contract. The contention of the respondents is that the evidence fails to establish the contract stated in the petition, or its performance by Iowa Harrell; while, upon the other hand, her counsel insist that the evidence shows beyond a reasonable doubt that the contract was entered into by Caleb Collins and Iowa Harrell, and that she fully performed and executed her part of it, and that a denial of specific performance thereof would be unjust, inequitable, shocking to the conscience of the chancellor, and would work a fraud and irreparable injury upon her. These contentions of the respective parties present the vital question involved in this case for determination.

Intervener starts out in the contest with the laboring oar and undertakes the burden of overcoming the statute of frauds, which requires such a contract to be in writing, by showing beyond peradventure that the contract was actually made, and that it was fully executed on her part. Learned counsel for respondent assails the sufficiency of the evidence to make out a case for appellant for two reasons: First, because the probative force of the evidence shows that Mr. Collins only contemplated giving the land in question to her as a voluntary donation, prompted by love and affection entertained by him for her, and not based upon a contract obligating him to do so; and, second, for the reason that the record discloses the fact that all of the evidence tending to prove the alleged contract comes from interested parties, some of whom have claims pending against the estate, and so marked with fraud and collusion between them that it is unworthy of belief, and that the chancellor was wholly justified in refusing to give it credence. We will discuss those two propositions in the inverse order, in which they are stated.

Before we proceed to the consideration of the evidence of the case, it might be well to state that the principles of law governing this case are so well and firmly settled in this state that it would be a supererogation of labor to re-discuss them in this opinion. We will content ourselves by simply stating the rule which has been so often stated by this court in similar cases. The clearest and strongest statement of the rule to which my attention has been called is by Lamm, J.,

and is found in the case of Kirk v. Middlebrook, 201 Mo., loc. cit. 289, 100 S. W. 462, which is in the following language: "As equity follows the law, it (the contract in such case) is nonenforceable in equity, except on one high condition, and such condition arises when the nonenforcement of the contract would work an equitable fraud upon the promisee; that is, the conscience of the chancellor is stirred and relief is extended in his open palm when, and only when, it is certain beyond peradventure of a doubt that to deny the relief would be to strike down the underlying purpose of the statute of frauds, to wit, the prevention of frauds and perjuries. When a court of equity is called upon to exercise its high and delicate function, it asks, as an irreducible minimum of those who seek relief, proof showing beyond a reasonable doubt: First, not only that some contract existed, but that the precise contract in suit existed; second, the terms of the contract should be so clear and definite as to leave no doubt in intentment and certainty; third, performance on the part of the promisee should be shown, and that performance must be unequivocal, and must in its own nature be referable alone to the very contract sought to be performed, because it is only by the performance * * * that the conscience of the promisor and those claiming under him is bound; fourth, and the acts relied on to show performance must point to the contract in suit and none other." The last utterance of this court upon the subject is found in the case of Wales v. Holden (decided at the present term) 209 Mo. 552, 108 S. W. 89.

We will now consider and weigh the evidence of this case, and apply to it the rule above stated. In the first place, Mr. Collins was an elderly gentleman (his exact age not appearing from the record, for the reason he was averse to telling his age), with more than ordinary intelligence, kind and affectionate in his nature, charitable in disposition, and possessed of 700 or 800 acres of land, and \$8,000 or \$10,000 worth of personal property. He was married, but of that union there were no children born. He and his wife lived together for many years upon a farm in Davis county, in the state of Iowa. She was a sister of Mrs. Maggie Harrell, the mother of Iowa Harrell, the appellant in this case. Dr. Harrell, the father of Iowa, died in the year 1890, and from that time until the death of Mr. Collins, which occurred in August, 1905, Iowa and her mother lived with him practically all the time, and after the death of his wife, which occurred in the year 1898, they kept house and cared for him until his death. At the time Iowa and her mother first went to reside with Mr. Collins and his wife, the former was only nine months old, and from that time up to the time of the death of Mrs. Collins, Mr. Collins had become greatly attached to Iowa,

and loved her as affectionately as a father would love one of his own children.

The following facts were shown to exist by the great preponderance of the evidence, to wit: That after the death of Mrs. Collins, and on the day of her funeral, Maggie Harrell, Ezekiel Dooley, and his wife, Stella Dolley, were standing in the yard at the home of Mr. Collins, and in his presence and hearing, and in that of Iowa Harrell, Mrs. Harrell, while discussing the death of her sister and the further plans of herself and her daughter, said to her brother, Ezekiel Dooley, that she and Iowa were going to gather up their belongings, load them in the wagon, and go home and live with him. That when Mr. Collins heard that remark he said "No," and came up to where Iowa was standing and said to her: "You are not going to leave me now. * * * You are not going to leave me now in my bereavement and leave me here all alone?" And that he then began to cry, and Iowa ran to him and placed her hands in his and sympathized with him, when he again said to her: "No, Iowa, stay with me, and I will school you and educate you and give you all your clothes. You live with me, and I will see that you have plenty." Iowa then put her hand in his and said, "I am going to stay with Uncle," and they then started off and went into the house together. Shortly after that occurrence, they were talking about the home place and the other farms he owned, and he said to her in their presence that he had concluded to give to her the Queen City farm because he thought it would be better for her than the one on which they were living on account of the wood being there. He also said to her that the conditions upon which he gave her the farm were that she would have to stay with him as long as he lived, to the last, and care and comfort him in his old age. In reply to that she said she would do it. He then said, "If you will, I will give you the Queen City farm."

A portion of Maggie Harrell's testimony regarding the terms of the contract was in the following language: "Well, the day after my sister's funeral, we had the wagon, my brother and I, my brother Zeke and his wife, Mr. Collins, and several of them, I don't recall who all they were now. There were several standing in the yard talking. I don't remember who all were there. I don't just now. I could recall there were several out there, though I don't know who they were now. I don't remember talking to them about that. It impresses me Mr. Caleb Collins was out there. My daughter was there. She was playing there with her cousins. Q. What conversation, if any, took place there by Mr. Collins with reference to Iowa. By Mr. Fogle: Q. Now you confine yourself to the conversation that took place between Mr. Collins and your daughter, Iowa. A. I said to the little girl, 'We will get our things and go home with brother

Zeke and make our home,' and Mr. Collins said, 'No.' Iowa was in the yard. He came to where the little girl was, and he said, 'You are not going to leave me now?' Q. To whom was he directing his talk? A. To the group. He said Iowa was my babe, and he turned to the little girl, and she looked up at us, and he said, 'You are not going to leave me now?' By Mr. Fogle: Q. What did he say? A. He said, 'You are not going to leave me now in my bereavement and leave me here alone?' and he began to cry, and the little girl sympathized with him. She ran to him and put her hands in his hands, and he said: 'No, Iowa, stay with me, and I will school you and educate you and give you all your clothes. You live with me, and I will see that you have plenty.' Q. Go ahead and state what occurred? A. Iowa put her hand in his, and said, 'I am going to stay with Uncle.' They started off and went into the house together. She said she was going to stay with her uncle. Q. What was the next conversation you heard between Mr. Caleb Collins and Iowa? A. Well I don't know as I understand the question. By the Court: Relative to her staying there. A. They went in for a little while after that, and he went on doing for her. We stayed there with him, and afterwards he said that he made up his mind to give her the Queen City farm. Q. Talked to her? A. Yes, sir. Q. What did he say to her? A. In the talk that came up afterwards we were talking about the home place that we lived on and the two farms that he owned, and he said that he had concluded to give her the Queen City farm—he thought it would be better, on account of the wood being there, than the one we lived on. Q. How soon after the other conversation in the yard? A. Well, it was maybe some little time after that before this other came up. Q. Did Iowa then continue to stay with him? A. Stayed with him; yes, sir. Q. Now, what, if any, conditions did he couple with giving her the Queen City farm? What did he say she would have to do after that? A. She would have to stay with him as long as he lived, to the last. Q. And what, if anything, would Iowa say to him when he said she would have to stay with him as long as he lived, or until the last? A. She said she would do it. She never gave a word of inclination that she wanted to leave him. Q. Then on his statement that if she would stay with him as long as he lived, or until the last, what did he say he would do for her, if anything? A. He said he would give her this farm, the Queen City farm. Q. Now, I want you to commence and detail that conversation that occurred between Mr. Collins and your daughter, just state exactly what happened, give it all, give the statement, how it came up, and everything. A. Well, we were at home, and we were talking about different farms that he had, and the suitableness of

them. He lived on that farm, and he said that he had made up his mind to give Iowa the Queen City farm, if it would suit her, and she said she accepted that, if I understood you. He said he had made up his mind to give her the Queen City farm; that she was to stay with him, take care of him until the last, as long as he lived."

As contended, if the foregoing testimony is read alone, then there is some confusion about the date the contract was actually entered into; but when the entire evidence is read together, and the interruptions of counsel for respondents are considered, it is perfectly clear that the contract was entered into the day after the death of Mrs. Collins. Mrs. Harrell and her brother, Mr. Dooley, also testified: That in 1904 the latter was living in St. Louis, and that he and his daughter were visiting her and Iowa at the home of Mr. Collins, when the daughter of Mr. Dooley expressed a wish that Iowa would return to St. Louis with her in order to attend school down there. That some time later in discussing that question with Iowa, Mr. Collins said to her: "No, Iowa, I cannot get along without you. It is so lonesome without you. I want you and your mamma to stay with me. You can go to school a winter longer here at Stiles. You know you agreed to stay with me if I would give you the Queen City farm." She said in reply, "Yes," and told him that she still wanted to go to St. Louis, but she would stay with him. These same witnesses stated that they heard Mr. Collins say many times that he was going to give the Queen City farm to Iowa, and that he was going to fix up the house on it for her so she could live in it and make it her home. Mrs. Harrell also testified that Mr. Collins told her that he wished to make a deed to Iowa, conveying to her the Queen City farm, and that he went to Bloomfield, Iowa, to have Mr. S. S. Carruthers draw the deed for him, but that he forgot to take with him the description of the land, which prevented him from having the deed drawn; and that subsequent thereto he wrote the letter to Mr. Carruthers read in evidence, dated July 29, 1905, asking advice as to how to draw the deed, which, however, was never mailed, for the reason that he was taken sick and died before he had an opportunity of doing so.

James Collins testified: That he was a nephew of Caleb Collins. That he was at the latter's home frequently during the last five years of his life, and was there nearly all of the last two years thereof. That he knew Iowa Harrell. That she lived with Mr. Caleb Collins, and that he treated her like one of his own children, kindly and affectionately. "In 1905, the day when Hiram McLaughlin was buried, while he and Mr. Collins were standing at the gate leading into the farm, he said to me that he had promised the Queen City farm to Iowa Harrell, and that he wanted to see Sam Car-

ruthers and have him make a deed for him conveying the farm to her so they could not beat her out of it. At different times he discussed the matter with me, and also the condition the farm was in. In 1903 he spoke to me about making out a bill and a statement of the dimensions of the lumber and the amount it would take to build her a house on the farm. I made out the list and what it would cost. He talked of having the lumber sawed on the place. That was in July, 1903. He said he wanted to fix the place up for her and build a square house of four rooms. I figured on the job, but someone else built it. A man lived there then, and he built the house. I saw Mr. Carruthers and told him what Mr. Collins said regarding the deed." On cross-examination he said he had a similar suit pending in the district court of Davis county, Iowa, in which he was claiming that Mr. Collins made an oral gift to him in April, 1905, of the Savannah farm of 172 acres.

John W. Cooksey testified: That Mr. Collins spoke to him about deeding the Queen City farm to Iowa Harrell. "He was on his way to Kansas City at the time, and he said to me that 'Babe,' as he called her, 'had gone to the St. Louis Fair. * * * I am going to fix her so she won't have to work out when I am gone.' And I said, 'Uncle, what are you going to do?' and he said, 'Deed her the Queen City farm.' I heard him say she was good to him, and he never asked her to do anything for him but what she did it."

George W. Melvin testified: That he was a justice of the peace at Lancaster, Schuyler county, Mo.; that he knew Caleb Collins; that Mr. Collins called into his office one day and told him that he wanted to make out and take his acknowledgment to a deed conveying a certain piece of land in Davis county, Iowa, to Iowa Harrell; that he told Mr. Collins that he had no authority to take the acknowledgment to a deed conveying land located in the state of Iowa, and that he had better get a notary public to take the acknowledgment. He said he would do so, and he thought it was a duty he owed her, and he then went away.

D. B. Burchette testified: That he had been sheriff of Davis county, Iowa, for four years. That he knew Mr. Caleb Collins. That he had a talk with him one day about conveying a piece of land to Iowa Harrell. He said: "She was the sweetest child he ever knew, and that she could not be closer to him if he had been her father. He was proud of her." He said she had a lady's head on her shoulders, and that he was going to school her and make a lady of her so that anybody would be proud of her. He also said when she was in Leroy, Kan., that they had advanced schools out there, and that he aimed to fix his business here as best he could and go out there and make his home

with her and her mother; that he took a great interest in her and her advancement. "Some two or three years before his death, I was at his home and spoke of some land buyers from Missouri who wished to purchase the Queen City farm, and he said that he thought it would make Iowa more money for him to sell it and invest the proceeds in Iowa land, but he also said that, 'Recently Missouri land is advancing in value, and I am not right sure but that it will come up to ours up here.' I was at his house twice during his last sickness. The first time I just dropped in to see him, but the last time was at the suggestion of the Collinses, which I regretted to do, but did so at their earnest request. I asked him if his business was in the condition in which he wished it to be. He said, 'No, it was not.' He said, 'I want to make a deed to Iowa to a piece of land,' and also said he wanted to 'make a will.' He said that the last time he had seen Sam Carruthers he told him what he wanted to have him make. He said he had written Carruthers, or had spoken to him about what he wanted, and I am not sure which he said. I told him that, if he wanted me to, I was going to Bloomfield and would send Carruthers right down there if he said so, and he said: 'I am too weak, sick, and nervous today. If he was here, I don't know as I could sign my own name. I am feeling awful weak.' But he said, 'Hold yourself in readiness so if I don't get any better.' He said, 'Ira told me the symptoms were better, that you (I) will be much better to-morrow.' He said, 'If I do not, I will phone you to have Carruthers come down,' and I said, 'I will be in town to-morrow, and, of course, will do that much for you.' The next time I heard from him he was dead."

W. A. Rinehart testified: That in the fall of 1902 he had a talk with Mr. Collins about buying the Queen City farm, and he said he did not care to sell it; that he had talked of giving that particular piece of land to a young lady living at his house. He called her "Babe" and "Iowa." He called her by both names. "I never saw her before or since."

William Masterson testified: That he knew Mr. Collins. That when he visited the Queen City farm he would frequently stay with him. That Mr. Collins had a girl living with him, but he never knew her name until he heard it here in the courtroom. "That one time when Mr. Collins was at my house, he told me that he had given the girl a calf, and she had made a cow, etc., and he said, 'That is not all I am going to do for her,' and previous to this time he told me he was either going to deed her the farm or give her the farm, and I won't say which."

All the evidence on both sides shows, and it is undisputed, that Iowa Harrell and her mother lived with and kept house for Mr. Collins from the date of his wife's death down to that of his own death, about seven

years, with the exception of some three or four months spent by her and her mother in Leroy, Kan. It is also undisputed that they cared for him and administered unto his wants and necessities during all those years, and nursed and cared for him during his last sickness, and that Iowa treated him with the greatest kindness and with love and affection, as much so as if he had been her own father.

Mr. Harbarger testified on the part of plaintiffs, that he was at Collins' in an endeavor to buy the land in the fall of 1902. That Mrs. Harrell was present. That Collins was reluctant about selling the land, when Mrs. Harrell spoke up and urged him to sell it. To her Collins replied that he had an idea of his own about the farm; that he did not know but that he might want to give it to her and Iowa for a home, to which Mrs. Harrell replied that she would not have it for a home if she had to live on it.

Elmore Israel testified to a talk he had with Collins while Mrs. Harrell and Iowa were running the hotel in Kansas, whither they had gone in direct violation of the terms of the purported contract upon which the intervener bases this suit, that he sometimes thought they were trying to force him to make over some property to the child. That he intended leaving the child something, but not at present.

Thomas F. Collins, one of the administrators, testified that at the time he was taking the inventory Mrs. Harrell said to him, "Uncle Cale gave Babe these two cows and this calf and this mare." "I said, 'Is that all?'" and Mag said, "Yes, that is all." After the sale Mrs. Harrell told him she would like to have him give Babe and her the Queen City farm.

Al Ray, who lived at the Collins home, testified: That a few days after the death of Collins, Mrs. Harrell said to him: "If he (Cale) has not made a will, Babe and I will get nothing." That during his last illness Mrs. Harrell said to him: "If he gets well, he will do something for Babe and me. If he don't get well, we will get nothing." "I asked her if Cale had ever given Babe anything, and Mag replied, 'Nothing but a horse and a cow.'"

Dr. Grant Giles testified: That Mrs. Harrell said to him after Collins' death: "I and Babe would like to have the Queen City farm, and if Uncle had lived he would have given it to us." That a day or two after the sale she told them, "If Uncle had lived he would have given Babe and me something." She told him that Cale had said to her while he was sick: "Don't cry. Maybe I will get well, and if I do I will give you and Babe something." The doctor further testified that Ezekiel came to him and asked if Collins had left a will, as he was anxious to know whether or not Babe and Mag would get anything out of the estate.

Sam Le Grand testified that in 1901 he

went to Collins to see about renting the farm. While Collins was away, Mrs. Harrell said to him, "You ought to buy the Queen City farm," to which he replied, "I did not know Uncle wanted to sell it." Mrs. Harrell then said to him: "Uncle cannot look after it, and he is getting so old he cannot look after it, and he has more land here than he can take care of. He could loan the money and get more out of it than he does out of the farm with less trouble."

James H. Collins, one of the administrators, testified that Mrs. Harrell told him that "Cale always intended doing something for us, and we would like to have Iowa get the Queen City farm."

Plaintiffs also introduced evidence showing that James Collins had a similar suit to this pending in the district court of Davis county, Iowa, against the heirs of Caleb Collins, to recover 170 acres of land, based upon an oral contract of similar import to the one made with Iowa Harrell; also, showing that John W. Cooksey was prosecuting a claim against the estate for the sum of \$1,142.64 for work done and material furnished by him for certain buildings and other improvements made by him on one of Caleb Collins' farms, located in the state of Iowa, covering the period from 1891 to 1905. If this evidence is to be believed, then there can be no doubt but what Caleb Collins entered into the contract with Iowa Harrell stated in the petition, and that she fully and fairly performed her part thereof. One of them testified that she was present when the contract was made, and testified positively what the terms thereof were. Two others testified that Caleb Collins told them that he had agreed to give Iowa the Queen City farm in consideration of her agreeing to stay with him and to care for and comfort him during the remainder of his life.

Mr. Collins was old, and was left alone in the world by the death of his wife. He was greatly bereaved by her death and loss of his lifelong companion, with no children or other descendants of his own to lean upon or upon whom to bestow his generosity and affections; nor had he those of his own blood to love him, care for, or to administer unto him in his old and declining years. What was more natural than for him to turn his mind and affections to the niece of that beloved and departed wife, whom he had virtually reared from infancy, and whom he had learned to love, and around whom his affections had entwined as tenderly and fondly as if she had been his own child? What noble sentiment that springs from the human heart would have suggested his selection of some other one in preference to her to live with and care for him in his lonely, sad, and declining days, and upon whom he might bestow his affections and donate a portion of his worldly goods? Spontaneously comes back the answer—none. That being true, then what was more

natural than for him to make provision for the dependent object of his affections out of the amplitude of his fortune in consideration of the care and loving services to be administered unto him by willing and affectionate hands? The mere asking of these questions carry with them their own answer—nothing. Those were the conditions surrounding him, and the relations that existed between them at the time the alleged contract was entered into. The death of Mrs. Collins suggested to Mrs. Harrell the propriety of the departure of herself and daughter from the home of Mr. Collins, which severed all her claims and natural ties to that hospitable home, and prompted her to make other arrangements for a home for herself and Iowa. While discussing that matter with Mr. Dooley, her brother, Mr. Collins entered a protest against their leaving him and taking up their abode with her brother. He reminded them of his old age, helpless condition, and sad bereavement, and pleaded with tears in his eyes with the young and affectionate child, who knew no other father, not to leave him in that sad plight, and very naturally said to her in the presence of her mother, and afterwards repeated in the presence of her uncle and many of his and their neighbors, that if she would stay with and care and comfort him to the end that he would provide a home for her, clothe and educate her, and give her the Queen City farm, which at that time was not worth more than \$3,500, with the beneficial use thereof withheld from her until death should remove him, which, of course, largely detracted from that value. Why should he not have made that arrangement with her? It was the most natural thing in the world for him to do, not only from a financial point of view, but also from one of care, comfort, and ease in his declining days. He thereby made his home permanent, surrounded by those who were nearest and dearest on earth to him, who were ever willing to administer with a kind hand unto his wants, and contribute to his pleasures and happiness. By so doing he took nothing from any one who had any claims upon him or his bounty. He had no children or other lineal descendants, or ascendants for that matter, who were dependent upon him; none but collateral kindred, whom the record fails to disclose had any claims whatsoever upon him, or who ever contributed in the slightest degree to his comfort or well-being.

Those are the matters testified to by Mrs. Harrell, Ezekiel Dooley, and Stella Dooley, his wife; but it is argued that Caleb Collins did not agree to give Iowa the farm because her mother did not testify to the terms of the agreement until after she had been asked several times about it. That is true, but upon an inspection of the record it will be seen that, when interrogated re-

garding the contract, the shrewd objections of counsel would divert her mind from the question, and it was not answered fully until she did so upon her redirect examination; but those facts do not rest exclusively upon their testimony. There are other persons who testified in the case whose evidence is just as convincing as theirs. James Collins testified that he was a nephew of Caleb Collins, and that he heard his uncle say upon several different occasions that he was going to convey the Queen City farm to Iowa Harrell. Also, that he wanted to see Sam Carruthers about drawing the deed for him. In this he is corroborated by the testimony of Mrs. Harrell, who said Mr. Collins went to Bloomfield to see Mr. Carruthers about the same matter, but failed to have the deed executed because he forgot to take with him the description of the land. She also testified that upon his return home from Bloomfield he wrote the letter before mentioned to Mr. Carruthers regarding the deed. Both James Collins and Mrs. Harrell are corroborated upon that point by the testimony of Mr. Burchette, an ex-sheriff of Davis county, Iowa, and who visited Mr. Collins twice during his last illness. During his last visit Mr. Collins expressed a desire to deed the Queen City farm to the intervener, and stated to him that he had either written Mr. Carruthers regarding the deed, or that he had consulted him orally regarding the matter, and that he was not sure which. James Collins also testified that his uncle told him that he wished to build a house on the farm for Iowa, and had him make out a bill for the lumber required for that purpose, and to make an estimate of the probable cost of the house. The evidence shows that he afterwards built the house, but got some one else to build it. Mr. Cooksey testified that he heard Mr. Collins say he intended to leave Iowa in such shape that she would not have to work out, that he was going to convey the Queen City farm to her, and that he was going to have it deeded to her so they could not beat her out of it. Mr. Rinehart testified that he knew Mr. Collins and the land in question, that he went to Mr. Collins with a view of purchasing the land, but he refused to sell it, and assigned as his reason for such refusal that he thought he would give it to Iowa. Mr. Masterson testified that he resided near the Queen City farm, and that Mr. Collins frequently stayed with him while visiting the farm, and that upon one or more of those occasions he heard Mr. Collins say that he was going to give the farm to the young lady, whose name he did not know at the time, but subsequently learned that her name was Iowa. Mr. Burchette, who seemed to be an absolutely disinterested witness and a gentleman of good sense, testified: That he had known Mr. Collins about 20 years. That he knew him well, and frequently visited him, and visit-

ed him twice during his last illness. The last visit was made at the request of some one of the Collinses for the purpose of ascertaining what disposition, if any, he had made of his property. He told Mr. Burchette that he had made no disposition, but that he wanted to deed to Iowa the Queen City farm, and wanted to make a will also, but did not state what property he wished to will, or to whom he intended to will it. He made arrangements with Mr. Burchette to hold himself in readiness to go on a moment's notice after Mr. Carruthers, an attorney at law, at Bloomfield, Iowa, with whom he had previously consulted orally or by letter regarding the execution of said deed and will. Death, however, intervened and prevented their execution.

If this evidence is true, and if it was not the intention of Caleb Collins to make a voluntary gift of the Queen City farm to Iowa Harrell, then there can be no reasonable doubt about the fact that they entered into the contract mentioned, and that she fully and faithfully performed her part of it, and that he at all times fully intended to execute his part thereof by conveying the farm to her by a proper deed of conveyance, which was prevented by his unexpected death. Counsel for respondents insist that this evidence is not worthy of credence, and for that reason the trial court disbelieved it and found the issues against the intervener. The basis of that contention is predicated upon the facts that several of the most important witnesses for her are either blood relations, or that some of them have claims pending against the estate, and that they testified in her behalf in consideration of and in expectation that she and her relations would in return testify for them, and thereby establish their respective claims, and by that fraudulent conspiracy rob and loot the estate of Caleb Collins, deceased. That is a very serious and grave charge and should be well established before concurred in by this court. After a most careful review of all the evidence preserved in the record, we find that there are but three facts appearing therefrom which are relied upon by counsel as supporting that alleged fraudulent conspiracy. One is that two of the witnesses mentioned are blood relations of appellant, namely, her mother, Mrs. Harrell, and her uncle, Ezekiel Dooley; second, that two other of her witnesses, James Collins and J. W. Cooksey, have claims pending against the estate; and, third, that the latter two expect appellant to testify in their favor when their claims are heard. It will be noticed that the majority opinion lays great stress upon the fact that James Collins and Ezekiel Dooley, two of Iowa Harrell's witnesses, had those claims pending against the estate of Caleb Collins, and it holds that their testimony is unworthy of belief for that reason; yet there was not a word of testimony introduced tending in the remotest degree to show that ei-

ther of them were not just demands, or that a fraudulent conspiracy had been entered into between them to loot and sack the estate of Caleb Collins. There was no charge of conspiracy presented by the pleadings, and she was given no opportunity to meet such an issue. Without plea or evidence it is arbitrarily held that there was a conspiracy existing between them, simply because they had claims pending against the estate, and, as before stated, without a word of testimony tending to show that they were unjust, the majority opinion virtually holds such conspiracy actually existed, and that all of the claims were fraudulent, and that none of her witnesses were worthy of belief. In reply to that contention, it might be suggested that those facts are more in the nature of coincidences, rather than evidence of the existence of fraudulent conspiracy. The existence of those facts is not unusual or out of the ordinary; but, if fraudulent, that fact should have been proven. If a child of that age had made a contract of the character mentioned, who would most likely know of it? Of course, her mother and relations. Many estates have one or more claims presented against them, and it is not unusual for the owner of one claim to have knowledge of the existence of the other which would make him a material witness if the claimant should see proper to use him as such. Fraud is never presumed to exist, but must be established by evidence just as any other fact must be established; and, in the absence of all such evidence, as in this case, the court would not be justified in drawing the conclusion from those facts alone that a conspiracy existed among the various persons mentioned to defraud the estate. While such interest should be weighed and considered along with all the other facts and circumstances in determining what weight should be given to their testimony, yet their co-existence alone should not, as a matter of law, brand all of the claims as spurious and fraudulent, as is virtually held in this case. Besides all that, there is not a breath of suspicion cast against the honesty, morality, or veracity of any of the witnesses, except in one or two instances, where it was attempted to show contradictory statements regarding matters which were wholly irrelevant and immaterial to the issues involved in the case. Under our statute interest alone in the result of a suit does not disqualify a witness from testifying, but such interest may be shown to affect his credibility; but that alone, as a rule, does not destroy the total weight of such witness' testimony. If that were true, then it would be a vain and useless thing to place an interested person upon the witness stand for any purpose. We have carefully considered the testimony of respondents' witnesses, and there is nothing therein to contradict or militate against the conclusions before stated.

This brings us to the consideration of re-

spondents' second contention, namely, that even though the court should believe that the testimony of intervenor's witnesses is true, yet it is insisted that all the evidence shows that Mr. Collins only intended to make a voluntary gift of the farm to appellant, and not a contract by which he bound himself to convey it to her, and, that being true, a court of equity will not specifically enforce such proposed gift. If we correctly understand counsel for respondents, this is their main reliance in this case, and that they lay much more stress upon this contention than they place upon the question previously discussed regarding the credibility of the witnesses; but, preliminary to the observations I desire to make in this case, I wish to state that I am not unmindful of the importance of section 3418, Rev. St. 1899 (Ann. St. 1906, p. 1951), commonly called the "statute of frauds," which requires all contracts for the sale of land to be in writing, and signed by the party thereto who is sought to be charged thereby. So impressed am I with the wisdom of that enactment, that I am thoroughly convinced in my own mind that one of the most serious errors this court has ever committed was in holding that, when such a contract has been executed by one of the parties thereto, equity should relieve him from the operation of that statute. By so doing it has written into the statute an exception which the Legislature never enacted or intended to exist. That judicial interpolation owes its existence to what is known in the law as "hard cases make bad laws." That is literally true in this instance, and if the courts would only bear in mind, when dealing with hard cases, that bad laws produce so much more wrong and injustice than hard cases do, then I apprehend there would be less bad laws and fewer unjust decisions found in our reports. And I am also deeply impressed with the wrong and injustice which is constantly growing out of that exception that I would, if my voice would wipe it from our jurisprudence, not hesitate one moment in so expressing myself. The original object the courts wished to accomplish by writing that exception into the statute was to relieve a party from its harsh operation who had performed his part of the contract, and thereby avoid the unjust results flowing from the refusal of the other party to perform his part thereof, and at the same time retain the consideration paid to or received by him; but later, during the growth and development of that doctrine, designing persons availed themselves of that exception by bringing suit upon trumped-up contracts, and relied upon perjured testimony for their specific performance. So numerous were those cases, the courts again felt called upon to improvise another rule by which to qualify the broad exception before written into the statute, and thereby circumscribe and prevent the wholesale frauds which were slipping through that exception. They adopted

the rule now in force, which requires the plaintiff to plead the contract of sale with certainty in all of its details, and to prove the same by such a preponderance of the testimony so as to leave no room for reasonable doubt in the mind of the chancellor as to its existence, as it is written in many of the reported cases. By reading those cases it will be seen that many a designing landowner has taken advantage of the strictness of that rule, and has under the cloak thereof approached minors, widows, and orphans, also ignorant and confiding persons, who are not infrequently ignorant of the statute of frauds and of the law of contracts, and by means of vague and indefinite promises and innuendoes has caused them to believe he intended to give them lands in consideration of services to be performed by them for him during his old and declining days, and by that means has secured their services for years without being required to pay one cent therefor. In my judgment the rule, if tolerated at all, should operate alike upon both parties to the contract. If the promises and innuendoes are sufficiently specific and definite as to cause the minor to believe, and the members of her family and friends to believe, as in the case at bar, she was working for and in consideration of his promise to give her the farm, then when he received her services under that promise the courts should not hesitate in holding that it was sufficiently definite and certain to bind the landowner also; otherwise he would receive the benefit of her services without paying one cent therefor. Before concluding these preliminary remarks, I wish it to be distinctly understood that I do not mean hereby to cast any aspersion whatever upon the character or reputation of Mr. Caleb Collins, but, upon the contrary, by reading this record, one must conclude that he was a good, just, and charitable man; and, if Iowa Harrell is deprived of that which she has earned by serving him, then that wrong and injustice cannot be charged up to him, but must be laid at the door of those who are claiming unjustly that which they did not earn.

If we were to ignore the relations that existed between Mr. Collins and the appellant at the time of and prior to the date of the alleged contract, and also disregard the testimony of Mrs. Harrell, Ezekiel Dooley and his wife, Stella Dooley, and consider only the testimony of the remaining witnesses introduced by her, in conjunction with respondents' evidence, then there would be some force and plausibility in that contention, for, when thus segregated and considered alone, it might look as though he intended to deed her the farm as a voluntary gift or donation; but when we consider the fact that Mr. Collins was not related to appellant, that he had no natural claims upon her, that she owed him no legal duty to keep house and serve him free of charge, that, in the absence of an understanding to

the contrary, he would have been legally liable to her for all such services she might render unto him, and when we consider the positive and unequivocal testimony of Mrs. Harrell, Mr. and Mrs. Dooley, who above all others ought to have known of the existence of the contract if it was actually made, instead of looking upon their testimony with suspicion because of the relations existing between them and the appellant, we are of the opinion that such fact should be reckoned in her favor, and we would look upon the contract with much suspicion if the record had disclosed the fact that her mother and near relations had no knowledge of its existence. Of course, and as before stated, that relationship should be considered in weighing their testimony, as in any other case, but should not, in the absence of all evidence, brand the transaction as a fraudulent conspiracy to rob the estate of Mr. Collins. When the entire case is thus viewed, the conclusion to our minds seems to be irresistible that the contract stated in the petition was actually entered into by them; and if we view and weigh the testimony of the other witnesses in the case in connection with and in the light of the above facts, it corroborates and strengthens the position above stated, rather than militates against it, for the reason that it shows that the statements of Mr. Collins made to the various witnesses, regarding his intention to deed the farm to Iowa, related to and were prompted by his contractual obligation to do so, and not out of a spirit of charity and benevolence entertained by him, and thereby ignore all legal and moral obligations he owed her for the years of care and toil she had so faithfully performed for him. Such a view by Mr. Collins of the situation would have detracted from the merits and virtues of appellant by treating her services as practically worthless, when all the evidence is to the contrary, and would brand him as being a penurious, unjust man, designingly accepting her years of faithful toil without compensating her therefor. This idea is also in conflict with all the evidence in the case—in fact, all parties admit that he was a liberal-minded, generous man, upright and just in all of his dealings. The fact that he had a fixed and definite purpose to deed the farm to her and to will his other property to his kindred indicates that his intention was not to make her a present of the property, but that it was his intention to convey it to her in fulfillment of his contract with her. While, upon the other hand, if it had been his intention to make a gift of the farm to her, he would most likely have said that he intended willing it to her, as that was the mode by which he repeatedly expressed his intention of giving away his other property.

We are therefore clearly of the opinion that the contract stated in the petition was made and entered into by and between Mr.

Collins and the appellant, and that it was fully and completely executed on her part, and to deny specific performance of the contract at this time would work irreparable injury to her, deprive her of all compensation for the years of faithful care taken of him, honest services performed in his behalf, and turn that justly earned compensation over to his collateral kindred, who had no moral or equitable claims upon him or his bounty outside of the cold letter of the statute of descent and distribution. Such a descent and distribution of the land in question under the facts and circumstances of this case would be unjust, inequitable, and shocking to the mind of the chancellor, and should not be tolerated for a moment.

2. It is next insisted by counsel for appellant that, if it be conceded the contract was actually entered into by and between Mr. Collins and Iowa Harrell, still specific performance of the contract should be denied, for the reason, they contend, that the evidence shows that she violated the provisions of the contract by leaving him and going to Leroy, Kan., with her mother, and there remaining for three or four months without his consent or permission. It is a conceded fact that she did leave the home of Mr. Collins in the year 1902 for a period of about four months and resided with her mother during that time in the town of Leroy, Kan., but why she left, and whether it was with or without his permission, does not satisfactorily appear from the record. It is true, one witness for respondents testified that Mr. Collins stated to him, not, however, in the presence or hearing of Iowa or her mother, that he thought they left him for the purpose of compelling him to convey them some of his property, but that he did not propose to do so. Conceding the competency of that evidence, without deciding it, we are of the opinion that it is entitled to no weight or consideration, for the reason that no such issue was made in the case, and, even though it had been made, the undisputed evidence shows that she returned to his home within a few months and resumed her former position and performed the same services without objection on his part from that time until the day of his death, which was in August, 1905. Under those facts he himself would not be heard to say, after accepting her services for a period of three years or more after her return, that she violated the contract, and on that account she should not be permitted to recover, much less should his collateral heirs be permitted after his death to enter that objection against her right to recover in this case. Besides all that, Mr. Burchette testified that, in a conversation he had with Mr. Collins while appellant and her mother were in Leroy, Kan., he said that they had advanced schools out there, and that he intended to fix up his business the best he could and go out there and make

his home with appellant and her mother. This evidence was competent and was apparently wholly disinterested. It shows there was no estrangement existing between them during the period of her absence from home, and strongly indicates that her stay in Kansas was agreeable to him, and that he was going to shortly join them at Leroy. So, if we view this question from any point we may, the evidence shows that it is totally destitute of all merit and should not operate in any manner to bar specific performance of the contract.

3. Learned counsel for respondents insist and argue with much force and ingenuity that Mrs. Harrell was not a competent witness to testify in the case, for the reason, alleged, that she was a party to the contract; that is, her assent to the contract made between Mr. Collins and her infant daughter was necessary before the contract would have become binding on the latter. Concede that to be true, then the contract would have been only voidable and not void on account of her infancy, and after she went on and faithfully performed her part of it, it would not now lie in the mouths of respondents, after the contract had been fully executed, to say it was voidable at the time it was entered into, because of her infancy. That being true, it was wholly immaterial, in so far as the binding force of the contract was concerned, whether her mother, her natural guardian, assented to the contract or not. But returning to the question in hand. There is not a scintilla of evidence in the case which tends to show Mrs. Harrell was a party to the contract, or that she was requested to, or that she ever gave her assent to, her daughter's entering into the contract in question, without silent acquiescence might be considered such assent; but, however that might be, such assent would not make her a party to the contract in a legal sense. If so, then all parents would become parties to contracts made by their minor children, provided they know of the contract and failed to protest against it. If they protested, of course, such protest would nullify the contract; ergo there could be no contract with a minor without the parent of the child is also a party to it. Such is the logical sequence of counsel's argument, and effectually refutes the soundness thereof. We must therefore hold that Mrs. Harrell was not a party to the contract within the legal signification of those words, and, consequently, that she was a competent witness in the case.

4. After deferring somewhat to the findings of the trial court in this cause, a careful reading of the evidence and a due consideration thereof have fully convinced us that the findings of the learned court are against the weight of the evidence, as disclosed by the record, and that the judgment rendered thereby in favor of respondents is

for the wrong parties, and is against right, justice, and equity.

We therefore, under and by authority of the law as stated in the case of Gibbs v. Haughwout, supra, reverse the judgment of the lower court, and remand the cause, with directions to that court to enter a decree in favor of appellant, specifically enforcing the contract stated in her cross-bill according to the prayer thereof.

CHILDERS v. PICKENPAUGH et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 25, 1909. Rehearing Denied
April 13, 1909.)

1. EVIDENCE (§ 593*)—WEIGHT AND SUFFICIENCY—HEARSAY EVIDENCE.

Hearsay testimony, though not objected to, has no weight or probative force.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 593.*]

2. FRAUDULENT CONVEYANCES (§ 295*)—EVIDENCE—SUFFICIENCY.

Evidence held to warrant a finding that a debtor conveyed property with intent to defraud his creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 295.*]

3. FRAUDULENT CONVEYANCES (§ 301*)—FRAUD OF GRANTEE—EVIDENCE.

Evidence held to show that a grantee participated in the fraud of the grantor conveying land to defraud creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 301.*]

4. FRAUDULENT CONVEYANCES (§ 74*)—GIFTS BY INSOLVENT.

A gift by an insolvent is a fraud in law on his creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186-190; Dec. Dig. § 74.*]

5. FRAUDULENT CONVEYANCES (§ 74*)—FRAUDULENT INTENT—EFFECT.

A gift by a debtor to defraud his creditors is a fraudulent disposition of his property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186-190; Dec. Dig. § 74.*]

6. FRAUDULENT CONVEYANCES (§ 295*)—EVIDENCE—SUFFICIENCY.

Evidence held to show that a conveyance by a father to his son was fraudulent as against creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 295.*]

7. EVIDENCE (§ 83*)—PRESUMPTIONS.

Under the rule that the law presumes that an officer properly performs his duty, it is presumed that a deed is correctly recorded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 106; Dec. Dig. § 83.*]

8. EVIDENCE (§ 590*)—WEIGHT OF TESTIMONY—INTERESTED PARTY.

The court, in weighing the testimony of a witness, must consider his relationship to the parties to the litigation, and his personal interest in the case, and his conduct and connection with the transaction involved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2439; Dec. Dig. § 590.*]

9. ALTERATION OF INSTRUMENTS (§ 29*)—EVIDENCE—FRAUDULENT INTENT.

Evidence held to show that an alteration in a deed was made and executed by the grantee therein in fraud of the creditors of the grantor, authorizing the setting aside of the same.

[Ed. Note.—For other cases, see Alteration of Instruments, Dec. Dig. § 29.*]

Appeal from Circuit Court, Putnam County; Geo. W. Wannamaker, Judge.

Action by William H. Childers against Napoleon B. Pickenpaugh and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

This is a companion suit to the one involved in appeal No. 13,657, now pending in this court, the two cases growing out of a former suit by the law firms of Harber & Knight and Childers Bros., as plaintiffs, against Napoleon B. Pickenpaugh, one of the respondents in the case at bar, as defendant, in which said Harber & Knight and Childers Bros., on the 26th day of April, 1904, obtained a judgment for \$1,750 against said N. B. Pickenpaugh for attorney's fees for services rendered in a suit by said N. B. Pickenpaugh against the Chicago, Milwaukee & St. Paul Railroad Company for \$20,000 damages for personal injuries. That suit was filed in the circuit court of Sullivan county on the 18th day of March, 1902, and at the April term of said court following the railroad company appeared and filed its application and bond for a change of forum, and the change was awarded to the United States Circuit Court, Western division, Western district, at Kansas City, Mo. After reaching the federal court, the cause was first continued on motion by the railway company to compel plaintiff therein to file cost bond, and at the next term the cause was again continued, because plaintiff's injuries rendered him unable to appear in court. These continuances in the federal court carried the case over until the April term, 1903, of that court, it being at that term set for hearing on May 12th. Some time the last of April, or the first of May, that year, the plaintiff in that suit, without the knowledge or consent of his attorneys, entered into some sort of an agreement, the nature of which is not shown, with the railroad company, by which he agreed to and did dismiss it when it was called for trial; plaintiffs claiming he compromised and settled the case against the railroad company for a large sum of money, and in consequence thereof agreed to dismiss the suit, while, upon the other hand, N. B. Pickenpaugh, the plaintiff in that suit, testified that he never received a cent in compromise of the case, but that he voluntarily dismissed the same.

When plaintiffs in this suit learned of the agreement of compromise or dismissal, they

requested a settlement and payment to them of their proportionate part of the amount received from the railway company on compromise as per his contract with them, but he refused to pay them one cent, and defiantly told them if they could get anything off of him "they were welcome to it." After this interview a number of letters were addressed to him requesting settlement, the last one on August 23d, and is as follows:

"Milan, Mo., Aug. 23rd, 1903. N. B. Pickenpaugh, Esq., Lucerne, Missouri—Dear Sir: We have repeatedly, on behalf of Harber & Knight and ourselves, written you requesting that you take some steps toward a settlement with us for time, services and expenses while caring for your interests in the case against the Milwaukee Railroad Company. To all these requests you have turned a deaf ear, and each letter you have absolutely ignored. Now we beg to say to you frankly and positively that unless you make some satisfactory settlement with us for this fee in the next few days we will submit our claim to the November term of the Putnam county circuit court, and abide its judgment as to the amount you should pay. Please give this matter your immediate attention. Respectfully, Childers Bros."

Plaintiffs failing to receive a reply to this letter, and failing to reach any settlement of their claim for fees due them for services rendered by them in the case of Pickenpaugh against the railroad company, did, on October 22, 1903, bring suit therefor in the circuit court of Putnam county, at the November term, 1903. On application of defendant that case was continued until the April term, 1904. Defendant answered at that term, and on the 26th day of April a trial was had—the defendant, though present took no part therein—which resulted in a judgment for plaintiffs for the sum of \$1,750.

No part of this judgment having been paid, the plaintiffs therein, on the 7th day of August, 1905, caused to be issued out of the office of the clerk of the circuit court of Putnam county, Mo., an execution against the defendant therein, and delivered the same to the sheriff, who, on the 9th day of August, 1905, seized and levied on the north half of the northeast quarter of section 7, and the northwest quarter of the northwest quarter of section 8, all in township 65, of range 20, Putnam county, together with other lands, and sold the same to satisfy that judgment. At that sale, under that execution, which occurred September 8, 1905, the plaintiff, and appellant herein, became the purchaser, and received, filed, and recorded his sheriff's deed. Possession of the land being refused, he brought this action in two counts, the first to set aside a deed dated on the 28th day of August, 1903, by N. B. Pickenpaugh and wife to his son, C. A. Pickenpaugh, on the ground that it was made to defraud creditors, and for the further reason that, after the is-

suance, levy, and seizure under the execution, the defendant, C. A. Pickenpaugh (one of the respondents herein), has changed, altered, interlined, and placed in said deed other lands at that time belonging to the defendant, N. B. Pickenpaugh, to wit, the northeast quarter of the northeast quarter of section 7, township 65, of range 20. The second count of the petition was ejectment.

The evidence tended to prove the following facts on behalf of plaintiffs: That, when N. B. Pickenpaugh employed plaintiff and others to prosecute his suit against the railroad company, he had in his own name 480 acres of land, 97 head of cattle, 20 head of horses and mules, a number of sheep and hogs, and some other personal property, all of which was reasonably worth \$14,000; and that the lands involved in this suit were a part of the lands above mentioned, belonging to N. B. Pickenpaugh.

On August 28, 1903, respondent, N. B. Pickenpaugh, and wife conveyed to their son and co-respondent, C. A. Pickenpaugh, the west half of the northeast quarter of section 7, and the northwest quarter of the northwest quarter of section 8, all in township 65, of range 20, leaving N. B. Pickenpaugh the record owner of the northeast quarter of the northeast quarter of said section 7. That he remained the owner thereof until after the issuance and levy of the execution on the 9th day of August, 1905, which was issued August 7th, upon the judgment aforesaid for \$1,750. After the levy and seizure as above mentioned, this deed was changed and erased, and when so changed it was a deed to the north one-half of the northeast quarter, instead of the west one-half of the northeast quarter, as it was at the time of its execution and delivery, and at the time of the issuance and levy of said execution. The deed in this changed condition was, on the 17th day of August, 1905, refiled and re-recorded, without being reacknowledged. That respondent C. A. Pickenpaugh had the scrivener who wrote the deed to make the change above mentioned by erasing the letter "W" from the deed and writing the word "North" in lieu thereof, making the deed read "North one-half" instead of "West one-half," as it read at the time it was acknowledged and recorded.

The date of the contract by which N. B. Pickenpaugh employed Harber & Knight and Childers Bros., to bring suit for him against the railroad company was November 30, 1901.

Some little time prior to the time N. B. Pickenpaugh conveyed the 120 acres to his son, he also conveyed 120 acres to one Williams, and on the 26th day of April, 1904, he conveyed to Jacob W. Pickenpaugh, his father, a resident of Iowa, 120 acres.

On May 22, 1903, an execution was issued on a judgment, dated April 10, 1903, in favor of the National Bank of Unionville and against N. B. Pickenpaugh, for \$261.36, in-

terest, and costs, amounting to \$310.11. The sheriff's return shows that on May 28, 1903, he made diligent search, and finding no personal property belonging to N. B. Pickenpaugh on which to levy the execution, etc., proceeded to and notified him that he could claim his homestead exemptions, but that he refused to do so; whereupon the sheriff selected three disinterested householders who valued and set off his homestead. Then follows a description of the land so set off to him, which was a part of the 480 acres of land he owned in Putnam county. The sheriff's return on the execution further shows that he, on the same day (May 22, 1903) levied upon all the right, title, and interest of said N. B. Pickenpaugh in and to the following described lands, to wit: The north half of the southwest quarter and the southeast quarter of the southwest quarter of section 6, and the north half of the northeast quarter of section 7, and the northwest quarter of the northwest quarter of section 8, all in township 65, range 20. The return also shows that all of this land was advertised to be sold on August 27, 1903, and that on the 26th, the previous day, N. B. Pickenpaugh paid the sheriff \$310.11, the full amount due on the execution in the manner hereafter stated, and the execution was returned fully satisfied. This return was made two days before the date of the deed from N. B. Pickenpaugh to C. A. Pickenpaugh.

Plaintiff also showed that Jacob W. Pickenpaugh, the father of N. B. Pickenpaugh and the grandfather of C. A. Pickenpaugh, the son of N. B., knew of the contract existing between N. B. Pickenpaugh and Harber & Knight and Childers Bros. regarding their attorney's fees in the railroad damage suit, and that he did not intend to pay it if he could prevent doing so, and that Jacob did not think their claim was an honest claim against N. B. Pickenpaugh.

C. A. Pickenpaugh had lived with his father up to the date of his marriage, which was on the 10th day of April, 1901, and he was then 22 years of age. Shortly after his marriage he moved to the 120-acre tract of land his father subsequently sold to Williams, and lived there almost a year. He then moved from there to the land conveyed to him by his father and mother on August 28, 1903, and has lived there ever since. The annual rental of those lands was worth from \$1.50 to \$2 per acre, and that he paid no rent therefor whatever during the two years he lived on them. Before his father sold the 120 acres to Williams he gave C. A. Pickenpaugh a house, which was standing on the Williams tract, and C. A. moved it over on the tract he had acquired from his father, but the record nowhere discloses the value of the house. At the time C. A. Pickenpaugh acquired the 120 acres of land from his father he had no money and but little property, a horse or two, a cow, and about \$100 worth of corn. That the consider-

ation expressed in the deed from N. B. Pickenpaugh to his son C. A. was \$3,600.

After N. B. Pickenpaugh had agreed to dismiss his suit against the railroad company, C. A. Pickenpaugh, his son, telephoned Childers Bros., at Milan, that the suit had not been settled, and that there was then in the neighborhood a railroadman subpoenaing witnesses in the case, and thought they should look after the case, etc. In response to that telephone message, Childers Bros. wrote the following letters:

"Milan, Mo. May 9, 1903. N. B. Pickenpaugh, Esq., Lucerne, Mo.—Dear Sir: We had a 'phone message from your son this morning, purporting to be authorized by you, stating that the case against the R. R. Co. had not been dismissed, and that the Co. was now subpoenaing witnesses to appear at Kansas City on Monday. We are exceedingly sorry that matters are as they are, but feel that it is no fault of ours. You took the matter in your own hands and notified us that the case would be dismissed, and that our services were no longer needed. We thought at the time the R. R. Co. had taken advantage of your unfortunate condition and had worked upon your fears of defeat until you had concluded that it was useless to proceed further. It is now impossible in the limited time we have to subpoena witnesses in the case for Monday, and all we could hope for would be a continuance. We are only too sorry that matters are not in a shape so we could present your injuries in all their seriousness at this term of the court, but it is impossible to do so now. We beg to say, however, if you desire either ourselves, or Col. Harber, to go to Kansas City Monday and do what we can to secure a continuance, you can wire us or him, and your rights will be strenuously protected. Again expressing our sorrow, we are, respectfully, Childers Bros."

"Milan, Mo. May 28, 1903. N. B. Pickenpaugh, Esq., Lucerne, Missouri—Dear Sir: A few days since we had a 'phone message from your son, C. A. Pickenpaugh, purporting to be authorized by you, in which he said you had instructed him to 'phone us and tell us the case against the Milwaukee Railroad had not been dismissed, and trying to induce us to still make another trip to Kansas City and incur still further expenses to protect your interests in the case. At that time we told the boy you had secretly come to Milan and had secretly attempted to settle with the stenographer for taking depositions at Harris, and that when we learned you were here you refused absolutely to talk with us, or to have anything further to do with us, informed him you had told us the case was dismissed and settled, and that we were discharged, and that you had then said to us you would not pay us one cent for time or expenses. We then told him that under the circumstances we would not, and could not go to Kansas City, and for him to tell

you to arrange at once to pay us a fee of \$2,000. Now Mr. Pickenpaugh, we learned that at the time you sent C. A. Pickenpaugh, to 'phone us, you had secretly accepted from the railroad company a large sum of money as a compromise and settlement of the case, and at that time had agreed and arranged that the case should be dismissed, and that in pursuance to this compromise and arrangement it was called and dismissed on the 20th day of this month. Now, you have run us all over the states of Iowa and Missouri, and we have been going here and there at every beck and call that it pleased your mind to make, and at the cost of our own time and money, and now you swear for all this you will not refund or pay us one cent. Is this your idea of justice between man and man? Now, the firm of Harber & Knight and this firm together have spent in cold hard cash of their own money about \$500, in chasing evidence, which in your imagination would assist you in securing compensation for your injury, and it is not our purpose to lose this, or the time consumed in running round for your benefit. How much you got for this compromise and settlement we are not advised, but under the contract we are entitled to one-third of it, and we demand that you remit that pro rata at once, or in lieu of the one-third if you will pay us \$2,000 we will accept that sum and be satisfied. Take your choice, one-third of the amount compromised for or \$2,000. Let us hear from you by return mail, and without delay. Respectfully Childers Bros."

Childers Bros. received no reply to any of the three letters before copied.

That on April 26, 1904, without notice to Jacob W. Pickenpaugh, his son, N. B. Pickenpaugh, conveyed to him the 120 acres of land before mentioned for a consideration of \$3,000, and started at noon on that day to the home of Jacob W., in Iowa, for the purpose of delivering the deed and collecting the purchase money, and by a circuitous route reached there that same night, some time between 9 and 12 o'clock. That was the same day the judgment, of \$1,750 was rendered against him for the attorney's fees.

Plaintiff offered and read in evidence tax-book for the year 1902, showing the assessment of N. B. Pickenpaugh, which shows under the head of "horses," 18, value \$400; "mules," 1, \$10; "neat cattle," 105, value \$1,280; "sheep," 5, value \$5; "hogs," 8, value \$20; "other personal property," \$470—total valuation by assessors, \$1,785.

Claud Pickenpaugh, horses, 3, value \$60; live stock, neat cattle, 2, \$25; hogs, 3, \$10; all other property, \$35—total value, \$130.

Plaintiff offered and read in evidence tax-book of assessment of 1903, showing the assessment of N. B. Pickenpaugh, horses 22, value \$460; mules, 1, value \$20; neat cattle, 97, value, \$1,648; sheep, 4, value, \$4; hogs, 24, value, \$48; all other personal property, \$179—total \$2,359.

Claud Pickenpaugh, same year, same book: Horses, 3, value \$75; cattle, 3, value \$40; hogs, 2, value \$5; all other personal property, \$25—total \$145. The tax list first read, being made in the year 1901, for the year 1902, tax list second read being made in the year 1902 for the taxes for the year 1903.

Plaintiff offered and read in evidence tax-book list for N. B. Pickenpaugh and C. A. Pickenpaugh, made in 1903, for the year 1904; Pickenpaugh, N. B., horses, 8, value, \$175; neat cattle, 84, value \$475; sheep, 3, value \$5; hogs, 7, value \$20; all other personal property, classes 3, 4, and 10, \$80—total value, \$755.

Pickenpaugh, C. A., horses, 5, value \$125; neat cattle, 4, value, \$60; hogs, 5, value \$15; all other personal property, \$45—total value, \$240. There being no lands at either year mentioned assessed to C. A. Pickenpaugh.

It was also shown that prior to the rendition of this judgment, N. B. Pickenpaugh had disposed of all his live stock, and on that day had no real or personal property which was subject to execution.

The testimony introduced by defendants will elucidate some of the transactions before mentioned.

The testimony for defendants tended to show: A deed of trust from N. B. Pickenpaugh and wife to the Connecticut Mutual Life Insurance Company, dated November 20, 1901, for the sum of \$4,200, with interest, conveying the southwest fractional quarter of section 8, the north half of the north half of section 7, and the northwest quarter of the northwest quarter of section 8, all in township 63, range 20, containing 243 acres, including the land involved in this suit; also a second deed of trust executed by N. B. Pickenpaugh and wife to B. H. Bonfoey, of same date, conveying same land to secure a note for \$300 with 7 per cent. interest; also a note for \$210, payable in five annual installments. Both of said deeds of trust were duly recorded.

Defendants introduced the execution before mentioned in the statement of plaintiff's case, which will render it unnecessary to restate its contents here.

Squire Valentine testified, substantially, as follows:

Direct examination:

"Q. Where do you live? A. I live about 10 miles south and west of here, Jackson township. Q. Do you know N. B. Pickenpaugh and wife? A. Yes, sir. Q. And C. A. Pickenpaugh? A. Yes, sir. Q. I will ask you to look at plaintiff's 'Exhibit C,' being the deed from N. B. Pickenpaugh and wife to C. A. Pickenpaugh, and state to the court who wrote that instrument? A. Yes, sir; that is this deed; I wrote it myself. Q. Do you know what land N. B. Pickenpaugh sold to C. A. Pickenpaugh? A. Yes, sir, I know; don't know as I could call the number of it. Q. You may refresh your mind by looking at the description in the deed. A. Northwest

of north section 8, township 65, of range 20, and 80 acres of the north half of the northeast quarter of section 7, township 65, range 20. Q. Now, Squire, when the parties came there they told you what land Pickenpaugh had sold to his son? A. Yes sir; I went to Mr. Pickenpaugh's house to make that deed. Q. And that's the land they told you? A. Yes, sir. Q. You notice there where the word 'North' is written over an erasure; how did you write that in the first place? A. N. half, instead of north. Q. Well, how does it come that the word 'North' is written in place of that? A. Claud Pickenpaugh came to my place and said that there had been a mistake in the recording of it, and they couldn't make it out anything only a 'W' instead of an 'N,' and wanted to know what to do about it, and I erased the word 'N,' and wrote 'North,' and wrote a note to Underwood and told him that I had erased that. Q. Do you know who took the deed when it was first written and acknowledged? A. I think I turned the deed over to Claud Pickenpaugh. Q. The parties were all present? A. Yes, sir; and N. B. Pickenpaugh and his wife both read the deed. Q. Do you know the land out there that was conveyed? A. Yes, sir; I am pretty well acquainted with it; been all over it. Q. Do you know whether N. B. Pickenpaugh owned the west half, south 40, of the west half? A. Don't think he did. Q. Do you know who does own it? A. No sir; I don't."

Cross-examination:

"Q. When did you first learn that N. B. Pickenpaugh wanted to make a deed? A. The day I made it. Q. Never heard of it before? A. No, sir. Q. His son was living there at that time? A. Don't think he was living in the house with N. B. Q. Was his son married at that time? A. Yes, sir. Q. How long have you known the young man, C. A.? A. I have known him ever since we were boys together. Q. He was raised on his father's place and in his father's household? A. Yes, sir. Q. The consideration is \$3,600. Who told you to put that in? A. I suppose they did; I don't remember. Q. What else did they tell you there, if anything? A. I don't remember what they told me, what they did tell me, now. Q. No mention in it about assuming a debt or anything of that kind? A. I don't know; the deed will tell it. Q. Was you informed anything about that? A. No, sir. Q. Don't know anything about it, from what you learned of them? A. They didn't tell me anything themselves, I don't think. Q. You don't know anything about that trade? A. No, sir; just suppose it was a trade and they called me in to make the deed. Q. You didn't see any money paid? A. No, sir. Q. Didn't see any notes given? A. Well, I don't know as I did; I don't remember about that. Q. Do you have any recollection of seeing any money paid or notes given there that day? A. Well, I don't recollect whether I did or not. The understanding was, the way I understood it was,

that C. A. Pickenpaugh was getting the money from his grandfather to pay. Q. Who did you understand that from? A. Well, I understood it from C. A. Pickenpaugh and his grandfather. Q. His grandfather, wasn't there? A. Yes, sir. Q. Did you make a deed to his grandfather at that time? A. I made a trust deed or mortgage. Q. What was done with that? A. His grandfather took it. Q. You knew C. A. Pickenpaugh had nothing? A. I don't know anything about what he had. Q. You lived there in the neighborhood and knew all the land in the neighborhood? A. Of course he didn't own any land. Q. You knew he had no personal property? You never knew him owning any up to that time? A. Owned some; a team, and cows, and such as that. Q. I say was that all you ever knew of him owning. A. It is all I ever knew personally of him owning; I know he had a team and some cows and horses, and such as that. Q. How much was all the personal property that you knew of him owning worth at that time? A. I don't know. Q. Couple hundred dollars? A. Yes, sir; I expect more. Q. Well, how much? A. I don't know. Q. Some time in August last C. A. Pickenpaugh came to you and told you this deed was recorded as being the west half in place of the north half? A. Yes, sir; some time this last summer. Q. Who else was present at that time? A. My wife and children. Q. And you observed the deed at that time? A. Yes, sir. Q. He had been to the recorder with it prior to coming to you to get the recorder to correct it? A. I think he had. Q. And told you the recorder would not correct it? A. Yes, sir. Q. The recorder said it was recorded as it was written? A. Said it was recorded as the west half in place of the north. Q. Then there was nobody else there except you and your family and C. A. Pickenpaugh? A. No, sir. Q. You made this correction there perfectly apparent putting the north half in place of the west half? A. Yes, sir. Q. And handed it back to C. A. Pickenpaugh? A. Yes, sir. Q. And that was the 17th of August? A. Don't remember what time it was. Q. You never took a reacknowledgment of it? A. No, sir. Q. And the deed—he left with the deed for the purpose of having it recorded? A. Yes, sir, he told me he wanted to get it changed on the record, or re-recorded. Q. This correction that you made there now is perfectly apparent, isn't it? A. Yes, sir; there's where I corrected it; it was an 'N' there in place of 'North.' Q. You have erased the letter that was recorded by the recorder and written in the word 'North,' adding the figure $\frac{1}{2}$? A. The figure $\frac{1}{2}$ was there. Q. Were these figures that appear there now there then? A. I think they are. Q. Wasn't that $\frac{1}{2}$ made at the same time you wrote the word 'North' there? A. Well, I don't remember, but I had to erase that to get the word 'North' in. Q. You did erase something in the deed? A. I erased the letter

'N.' Q. And the '1/2' was in there? I will ask you if you didn't also erase the '1/2'? A. I don't know. Q. Wasn't that '1/2' made at the same time and with the same pen and ink as the word 'North'? A. It looks like the same ink, and it might be. I erased it to get the word 'North' in; looks like the same ink. Q. It was not made at the same time the body of the deed was written in? A. It don't look like the same ink."

Redirect examination:

"Q. Mr. Harber gets you to say that you erased 'W' there and wrote 'North.' Did you mean to say that? A. I didn't erase 'W,' I erased the letter 'N,' that's the letter that I erased was the letter 'N.' Q. Do you know whether or not he did make a loan of his grandfather? A. I think, if I ain't mistaken, I wrote the mortgage or trust deed. Q. You wrote the note? A. I think so, from Claud to his grandfather. Q. And Claud and his wife both signed it? A. Yes, sir. Q. And signed the deed of trust? A. Yes, sir. Q. That was to Jacob, the grandfather? A. I don't remember his name, only Claud's grandfather Pickenpaugh."

Recross-examination:

"Q. If the letter 'N' was so plain, then what would be the use of erasing it? A. It was plain to me, but I don't suppose it was to the recorder. Q. He told you he had been to the recorder and tried to get him to record it as an 'N'? A. Yes, sir. Q. And when the recorder refused to do it and insisted upon it being a 'W,' then you took your pen and erased it and changed it? A. Yes, sir; I did, and it was the letter 'N.'"

Mr. Arthur Young testified as follows:

Direct examination:

"Q. What official position do you hold? A. Collector of Jackson township; township taxes. Q. You know the Pickenpaughs? A. Yes, sir. Q. Do you know of this land that Claud bought of his father? A. Yes, sir. Q. Can you give the numbers of it? A. Well, I don't say that I can, but I think the north half of the northeast quarter of section 7; but the 40, I couldn't say I could give that. Q. It is right east of it? A. Yes, sir. Q. Can you give the numbers of it? A. Yes, sir. Q. You have a farm adjoining that? A. Yes, sir. Q. Do you know whether or not this land that Claud bought of his father in 1903 was advertised for sale under an execution? A. Yes, sir. Q. Was there anything said to you about buying it? A. Yes, sir. Q. Why did they want to sell it? A. For to pay off a security note. Q. A bank judgment? A. Yes, sir. Q. What did they offer you the land for? A. \$25 an acre. Q. What would you say the land was worth? A. I had offered him \$25 before that, and he wouldn't take it. Q. Who had been paying the taxes for that since that time? A. Claud Pickenpaugh. Q. Who has been farming it? A. Claud Pickenpaugh as a renter. Q. Wasn't he farming it that year, 1903; remember when he rented it?

A. Well, I think he plowed some that fall; I think he bought it in 1903."

Cross-examination:

"Q. How long have you been collecting taxes up there? A. I collected two years before this year. Q. You collected in 1903-04-05? A. Yes, sir. Q. How much property has Claud Pickenpaugh been paying taxes on aside from this land, if any? A. Well, I don't know as I can say exactly. Q. I don't expect you can tell exactly. A. Two or three hundred—about three hundred. Q. How long have you known him? A. We were boys together. Q. How old are you? A. Thirty-two. Q. Prior to his marriage where did he live? With whom? A. With his father then. Q. How long has he been married? A. Four years. Q. How long after he was married until he moved onto this land? A. About a year and a half, I reckon. Q. Where did he live that year and a half? A. North of Central City. Q. On part of his father's land? A. Yes, sir. Q. The part that he afterwards conveyed to Claud's grandfather? A. No, sir. Q. Conveyed to Mr. Williams? A. Yes, sir. Q. Where did his grandfather live then? A. I think in the east end of the county. Q. How long has it been since he lived in this county, the grandfather, Jacob Pickenpaugh? A. Well, I can't just say when he left, but he came from Plano, Iowa, to pay his taxes last year. Q. And this is about the same quality of land as they conveyed to the grandfather? A. Yes, sir."

Mr. Jacob Pickenpaugh testified as follows:

Direct examination:

"Q. Mr. Pickenpaugh, where do you live? A. I live at the present time in Plano, Iowa. Q. Where had you lived before going to Plano? A. In Grant township, east part of this county. Q. How long had you lived in this county? A. About 40 years. Q. You are the father of N. B. Pickenpaugh and grandfather of Claud Pickenpaugh? A. Yes, sir. Q. Were you present at your son's, N. B. Pickenpaugh, in August two years ago, when N. B. Pickenpaugh and his wife made a deed to Claud Pickenpaugh? A. Yes, sir. Q. You may state, Mr. Pickenpaugh, whether or not you made a loan of money to your grandson at that time? A. Yes, sir; I loaned him \$310.20, if I am not mistaken. Q. Did you take your grandson's note for it? A. Yes, sir; took a mortgage on the 40's of land. Q. Were these the same 40's of land that his father deeded to him? A. Yes, sir. Q. You saw the land, did you? A. Why, yes, sir; I have seen the land a number of times. Q. Can you tell if it lays, the three 40's, in a string, east and west? A. Yes, sir. Q. And joins right up to his other land on the west of it? A. It corners with the land that N. B.'s house is on, I think. Q. Do you know what their purpose was in selling this land? A. Well, yes, sir; I think I

do. Q. Tell the court. A. The purpose was to pay his honest debts. Q. Was there any debts then pressing him? A. Yes, sir. Q. What debt was it? A. A debt that the bank had against N. B. Q. Had an execution out? A. Yes, sir, and the land advertised for sale. Q. Now, to whom was that \$310 paid? A. Why, that \$310 was paid to Sheriff Crooks. Q. Who paid it? A. I did. Q. And your grandson gave you a note and deed of trust for it then? A. Yes, sir."

Cross-examination:

"Q. Let me see that note, please. You say this was all one transaction, the making of the deed and the giving of the note? A. All done at the same time. Q. And all on the same date? A. Yes, sir; Mr. Valentine drew the note and drew the mortgage. Q. And you still have the note? A. Yes, sir; I have the note and mortgage. Q. Mortgage on the same land? A. Yes, sir. Q. Recorded? A. Yes, sir. Q. Note has never been paid to you? A. Why, no; if it was, I wouldn't have the note, I presume. Q. Mr. Pickenpaugh, your son, N. B., at that time had a considerable amount of stock on hands, did he not? A. Well, yes, sir; I think he had some stock; I don't know how much, though. Q. Had 97 head of cattle, didn't he, on the place at that time? A. No, I think not that many at that time. Q. You don't know whether he had 97 head of cattle and 27 head of horses? A. No, sir; he had some horses and cattle, but how much he had, I don't know. Q. He was quite a large farmer, and continued so until he conveyed his land, part to his boy and part to you? A. Why, he had some left. Q. He conveyed part of it to you afterwards? A. He conveyed 120 acres to me, but I paid him for it. Q. Conveyed it to you when you were not in this state? A. I lived—when the deed was brought to me, I lived in the state of Iowa. Q. He conveyed the land to you when you were not here, and not even in the state? A. I have told you. Q. Tell me again. A. He brought the deed to me in Plano in Iowa. Q. And did pretend to have a deed made to you on the 26th day of April, 1904? Was you in this county or state at that time? A. No, not on that date, I wasn't. Q. Then you wasn't here when that pretended deed was made to you, and even when it was recorded? A. No, sir; I sent it to the recorder. Q. When did you first learn of that deed? A. If it is necessary for me to go into details, I will tell it. When I first learned of the deed— Q. By the Court: That is what he asked you. A. I had let N. B. have \$600 in money, and at the time I made a contract with him that I was to have a 120 acres of land there and assume a mortgage of \$2,400 and give him \$600 when he made me a deed; and he brought me the deed and I gave him the \$600. Q. Were you in this county or in this state at the time that the deed purported to have been made to you on the 26th day of April, 1904? A.

No, I was in the state of Iowa. Q. You know nothing about him going to Squire Helferstine at that time and try to have him make a deed and take his wife's acknowledgment over the telephone? A. I don't know anything about the deed; all I know about the deed is simply this: We had a contract that I was to assume the payment of that \$2,400, and when he made me a deed I was to pay him \$600, and that's what I done. He brought me the deed in Iowa. Q. When was it brought to you? A. I think he brought it—I wouldn't say positively as to the date. I think, though, it is just probable, maybe the next day after it was made; I ain't sure about that; wouldn't say positively. Q. Did you know court was in session here at that time? A. Well, I don't remember. Q. Did you know there was a suit pending against him at that time? A. Probably I did. Q. Don't you know as a matter of fact that the very day that this deed purports to have been made to you for the 120 acres of this land, the 26th day of April, 1904, that your son, N. B. Pickenpaugh, was right in this court pretending to desire a continuance in this very case in order that his lawyer might get here, and during the time that he was so pretending that he made this deed? A. I don't know about that. Q. Didn't he tell you there was a suit against him? A. I don't recollect whether he did or not. Q. Do you pretend to tell the court that you don't know there was a suit pending then at that very time? A. I may have known it; I am not positive about that; don't know whether I did or not. Q. Didn't he tell you he had left his wife in town and that they would telephone for him, and he came there to tell you about the suit? A. I don't know anything about that; I know he brought me the deed, and that's all I know about it; I wasn't there. Q. Did you give him \$600 by check or count it out in cash? A. Counted it out in cash. Q. Had it there in the bureau drawer; where did you have it? A. I had it in the safe. Q. At home? A. I have got a safe and I keep my valuables there. Q. How much other money did you have there? A. Well, I don't just remember how much; probably from \$600 to \$800 more. Q. You had from \$1,200 to \$1,400 in your safe? A. I think I had about \$1,500. Q. And you just counted him out the cash on the day he brought you the deed? A. Yes, sir. Q. You don't know whether he told you he left court and there was a suit pending against him? A. No, sir; don't recollect of him telling me anything about it. Q. You say you had some kind of an agreement before that at some time, when he would make a deed to a 120 acres—the time was not set? A. I don't think there was any specific time set for him to make it. Q. But at such time as he saw fit to make it you would assume \$2,400? A. He wanted me to take the land and pay the

\$2,400 debt for him and let him have some money to pay some other debts that he was owing, and, in order to help him out, I done it. Q. You had some talk with him before making this deed, in which you had told him that if at some time he would make you a deed to this land, that you would assume \$2,400 and give him \$600? A. Yes, sir; I think we had a kind of a written contract. Q. Where is that written contract? A. I don't know just where it is. Q. When did you see it last? A. I think when I paid him the money I gave him up the contract. Q. Who wrote it? A. I think I wrote it myself. Q. Well, you knew there was no time as to when the conveyance was to be made? A. I don't think there was, if I remember right. Q. Or when the money was to be paid? A. I think, as near as I remember about the matter is this: That when he made me a deed for that 120 acres of land that I was to give him \$600 in money and assume the payment of this \$2,400, and I gave him the money and notified Mr. Brawford—he was the agent—that the money was got through, and notified Mr. Brawford that I had got the land. Q. Have you ever paid the \$2,400? A. No, sir; I have not paid the \$2,400, but I have paid the interest on it. Q. At that time Pickenpugh, your son, wasn't owing you anything? A. After I paid him the \$600. Q. The consideration for the land was, you was assuming the debt of \$2,400 and paying him \$600? A. Yes, sir; there was other notes that I had paid for him at other times. Q. Did you count them? A. Not in that transaction. Q. You was just paying him the \$600 and keeping these notes and other obligations to him? A. Yes, sir. Q. And in your talk about the purchase of this land there was nothing said about you taking out your accounts against him? A. Well, he wanted the money, and wanted me to carry the other notes. I had a note against him that I paid Mr. Bonfoey \$321, I think it was; I have that note yet. Q. You was simply trading for the 120 acres of land? A. I simply bought the 120 acres of land to help him pay his honest debts. Q. You didn't know what the effect would be on a suit pending and judgment rendered if you wouldn't do this, did you, or stop to inquire? A. Why, no; I didn't know that, or stop to inquire anything about it. I just paid him the money as I had agreed to do when he made me the deed. Q. When had you been down to his house prior to this? A. Why, I hadn't been there prior to that. The day I let Claud have this money and this mortgage and notes to Claud was executed, that was the last time I had been there. Q. That was in 1908? By the Court: Was that when you made that contract? A. No, sir; when we made this contract about the 120 acres of land he was at my house—come to see me. Q. When was the first time you ever talked about it? A. As near as I remember the time, kind of made a contract and wrote up

a kind of agreement, was, I think about the 18th of March, 1904. Q. No time specified when he was to make the conveyance? A. No particular time. Q. Do that whenever it suited him, or if it ever suited him? A. If he didn't do it he wouldn't have got the money. Q. It was a matter of choice entirely with him? A. Yes, sir. Q. You entered into an agreement that if he ever saw fit to convey you the 120 acres of land you would assume \$2,400 or the mortgage, and pay him \$600? A. That was the contract. Q. You kept it after it was written? A. I had it until he brought me the deed, and when he brought me the deed I think I gave it up to him. Q. Didn't he tell you he came from court here? A. I don't remember that he did or didn't. There's a direct railroad from our place, or within three miles of it, it goes down to Lucerne, and when he come to my place he came on that road. Q. Do you know what became of all his horses and cattle that he had at the time he was making you this deed? A. Don't know anything about that. Q. Nearly 100 head of cattle and 22 head of horses and 1 mule? A. I think the Drumm Commission Company had a lien on his cattle and horses, too, probably, though I never saw it. Q. Do you know what became of the \$600 you paid him? A. Well, I think he paid the Drumm Commission Company a part of it, but just how much of it I don't know—they were pressing him. Q. And when he made this conveyance to you he made such sales as to entirely strip himself of all property that could be got at upon execution? A. Well, probably he sold all the property that would be subject to execution. Q. Prior to that time he had always been good upon execution, hadn't he? A. I think so. Q. But after that time there was no chance to collect a dollar from him, after you and the son got through your dealing? A. We paid every dollar the property was worth. Q. You know the usual rule is not to loan to exceed 40 per cent. of the appraised value? A. I don't know. Q. You don't know who appraised it? A. No, sir; I don't. Q. You say you wrote this contract that you have mentioned between you and your son? A. I think so. Q. Where? A. At home. Q. When? A. If my memory serves me right, I think it was on the 18th, may be, of March—somewhere about that time. Q. You had talked with your son about this conveyance before that? A. Before? Q. The 18th of March, the day of your sale? A. Well, it is my mistake. Q. The day of the sale was the 28th of March? A. Yes, sir. Q. And you had talked with your son about it prior to the 18th of March? A. Yes, sir; I think so. Q. And when first? A. Well, now, I couldn't tell you positively when; some time during the latter part of the winter, or about that time. Q. You lived in about 25 miles of your son ever since you left this county? A. Well, I guess it is further than 25 miles—80 or 85. Q. You.

keep in touch with his affairs all the time? A. Why, no, I don't keep in touch with his affairs. Q. What is this land worth an acre, for rent—the 120 acres you have got—\$2.50? A. I don't suppose it would bring that. Q. Well, about what? Give your estimate. A. I suppose probably bring \$1.75 or \$2. Q. It is about the same value as land of your grandson? A. Yes, sir. Q. When did you leave? A. I left—well, my sale was on the 28th of March, and I left, I think, the thirteenth day afterward. Q. 1904? A. Yes, sir. Q. All the papers in this county published the circuit court docket preceding court? A. Probably they do. Q. You always observed that as well as other news items from this county? A. Sometimes I look at it; most generally look over the docket. Q. Don't know why he said he should make a deed at this inopportune minute? A. Didn't make any statement. Q. He came and handed you the deed and you went down in your safe and got him the \$600 and the contract, and said, "Go, son"? A. I paid him his money according to the agreement. Q. How far from your house to Lucerne? A. Three miles. Q. To the railroad? A. About three miles, not quite three miles. Q. And you think he walked? A. I think so. Q. Now, Mr. Pickenpaugh, this suit here upon which this suit was rendered on April 26, 1904, was brought to and pending in the November term, 1903, of this court; did you know that? A. I don't know whether I did or not. Q. Do you want this court to believe there was a suit pending for attorney's fees against your son for \$2,000 before he made this deed, and you was intimate with him, you at his house and he at yours, and you didn't know anything about it? A. I might have known there was a suit against him; I think likely I did. Q. Did you know there was a suit pending for \$2,000 at the November term, 1903, and didn't you know that if your son told you it was continued, that he got a continuance because he couldn't get a lawyer that he pretended to employ in Iowa to come and try it? A. No, I know this: I know he went some time to see Howell on some business but my impression was that he was going to hire Howell to conduct a suit against the railroad company. Q. Tell the court whether or not prior to November, 1903, you were not taking a paper in this county? A. Prior to November? Q. Yes, sir, 1903? A. I think I was taking, prior to November, two of them. Q. How many times do you say your son Napoleon, between the 22nd day of October, 1903, and the time of the delivery to you of this deed, in April, 1904, was in Iowa, at your house? A. Well, I couldn't tell positively. Q. Some half dozen times? A. Well, probably not that often; I don't remember just how often I saw him."

Redirect examination:

"Q. Mr. Pickenpaugh, something said here about a suit your son intended to bring

against the railroad company; when was your son hurt? A. Well, I couldn't give the date; I don't remember. Q. About four years ago, wasn't it? A. I think so. Q. In 1901? A. Yes, sir. Q. What has been his health and ability to carry on his farm and conduct his business since that time? A. Well, he has had no health, and a good deal of the time he is incapacitated for business, even to look after his interests. Q. Well, his business has been in a failing condition ever since he was hurt? A. Yes, sir. Q. Been going down? A. Yes, sir. Q. Well, Mr. Harber asked you about him having something like 97 head of cattle and a lot of horses? A. Yes, sir. Q. Do you know whether there was a mortgage for a considerable sum on that stock? A. Yes, sir. Q. Do you know what the mortgage amounted to? A. I don't know. Q. To what proportion of their value? A. I never knew what the amount of that mortgage was. Q. Now, you say that your recollection is that you executed that contract for the purchase of this land, you think, on the 18th of March, 1904? A. Yes, sir. Q. Did you give it up when you got the deed? A. I think so. Q. Do you recollect whether or not you entered a memorandum on the back of the contract of the date when you received the deed? A. Why, probably I did. Q. Look at this paper and see if you can tell what it is (witness here handed paper)? Q. You say you gave the contract up at the time you got the deed; have you seen it since? A. No, sir. Q. Look at that and see what it is, please? A. Well, that's a memorandum of the contract. Q. Is that the contract, the written contract, that you and your son signed? A. Yes, sir. Q. Read it, please. By Mr. Harber: Let me see it. (Paper handed Mr. Harber.) By Judge Higbee: Now, read it, please. A. 'March 18, 1904. This day N. B. Pickenpaugh has sold to J. W. Pickenpaugh the northwest quarter of section No. 7, township 68, and range 20 in Putnam county Missouri, for \$3,000; \$2,400 on a loan on said land and \$600 cash when deed is made.' Q. Whose signature to that? A. N. B. Pickenpaugh and J. W. Pickenpaugh. Q. Are those the signatures of yourself and son, N. B.? A. Yes, sir. Q. And that the contract you spoke of as having written at the time? A. Yes, sir. Q. What memorandum is on the back of that? A. 'Delivered April 26, and \$600 paid.' Q. What date is that—what year? A. 1904. Q. Who wrote that on there? A. I did; it is my handwrite. Q. Was that the day he delivered the deed to you? A. I think so. Q. That whole contract is in your handwriting? A. Yes, sir. Q. Now, Mr. Pickenpaugh, I will ask you to state to the court whether or not you know of your son being indebted in any sum to Harber & Knight or Childers Bros? A. Well, I know there was a contract drawn up between Harber & Knight, and they was to prosecute a case

for him for 33 per cent. of what they would get, and after that, some time afterward, they drew up another contract for 15 per cent. more. Q. I will ask you if you know whether or not your son owed them any money at the time you made this contract for the land? A. I knew that the contract existed, that they had never done anything in the case, and wasn't justly entitled to a cent. Q. Did you know whether there was any indebtedness on the part of your son to them at that time? A. No, sir; he didn't owe them anything justly. Q. Why did you buy that land? A. To help him pay his honest debts. Q. The debts on these cattle and horses? A. I think part of the cattle and \$2,400 of it was borrowed money, mortgage given for— Q. He used this money in payment of debts—this \$600? A. Yes, sir. Q. Had you any purpose in buying this land to assist your son in defrauding any of his creditors? A. No, sir; I simply done it because I had the money and wanted to help him out if I could. I advanced him money several times; two or three different times. Q. He was owing you other money? A. Yes, sir. Q. To what amount? A. Well, to the amount of \$300 that I paid to Bonfoey; \$331, I believe, it was I paid Bonfoey a year ago last November, probably."

Recross examination:

"Q. That mortgage has never been satisfied, has it—the Bonfoey mortgage? A. No, sir. Q. Now, you know sufficient in detail of your son's business to know that there was a suit instituted against the Milwaukee Railroad Company for \$25,000 for personal injuries? Answer 'Yes' or 'No.' A. I don't know what the amount of the suit was brought for. Q. You know of the details of it, even the contract, the amount they were to receive? A. I saw the contract. Q. He showed you the contract? A. I think so; yes, sir. Q. Then afterwards the case was removed to the United States court? A. I don't know. Q. You know it got down to Kansas City? A. Yes, sir. Q. And then you know it was suggested that other lawyers be employed at Kansas City; your son informed you of that? A. No, sir; don't remember that he did. Q. You know very well that a question arose as to the lawyers, and increased the fee from 33 per cent. to 15 per cent. more? He told you that? A. Napoleon showed me the contract. Q. And that was the purpose of employing other lawyers. Harber & Knight and Childers was to pay half the fee of what they got, and wanted him to pay the other half? A. I didn't understand it that way. Q. Then you understood he settled or dismissed the suit; you knew that? A. Yes, sir. Q. And you know of your son dismissing the suit? A. Yes, sir; I know he dismissed it. Q. Then he told you that Harber & Knight and Childers Bros. were claiming a fee off him, but they never done anything, and you say

that, didn't he? A. Yes, sir; he told me that Harber & Knight took four depositions was all he done in the case. Q. But he told you they were claiming a fee, did he not? A. Don't remember at the time that him and I had that talk about it; I don't think he made any claim of a fee. Q. When was that? A. That was some time after the case was dismissed; some time after, I think. Q. And you say they never done anything because he told you that, you don't know yourself? A. No, sir. Q. You don't know how many trips they made to Kansas City, or how many trips to Iowa, in taking depositions and otherwise? A. All I know about what was he said and other parties. Q. Who took Davis' deposition? A. I think Knight, maybe; I ain't sure about it; but some one took his deposition. Q. How did Pickenpaugh come to tell you they hadn't done anything if they wasn't making a claim for fees? A. Dillydallying the case along. Q. That's what he told you? A. That's the history of the case. Q. That's the history you got from your son Napoleon, ain't it? A. Well, yes, I got it from him. Q. Then he has kept you in touch? A. And other parties. Q. What others? A. Mr. Culler out here, for one. Q. Mr. Culler was one of the securities? A. Yes, sir. Q. So, you have talked to different parties about it? A. Yes, sir. Q. Was you down here at the November term of court when the case was to be tried? A. No, sir. Q. You supposed it would likely be tried at the November term, didn't you? A. I supposed likely that the case would be continued. Q. Why did you suppose that? A. Because he wasn't ready. Q. Who wasn't? A. Napoleon. Q. How do you know that? A. Well, he told me that he wasn't. Q. Told you he wasn't going to be ready before court met? A. Don't know as he told me before. Q. Well, during the term? A. I learned it from him or other parties; I don't remember. Q. You learned he was not going to be ready at the November term, 1903? A. I am not positive about it now; I couldn't tell where I learned he wasn't going to be ready. Q. You tell the court you didn't think it would be tried at that term, because you thought it would be continued? A. Yes, sir. Q. How did you get the impression? A. I couldn't say. Q. You said you understood your son wouldn't be ready, and that it would be continued; that's the understanding you had? A. That was an impression of mine; don't know as I had a correct inference in the matter. Q. And you supposed it would be continued because you understood your son wouldn't be ready; isn't that true? A. That's my impression about the matter. Q. Why didn't you come down at the April term, or was you fixing to come when your son came there. A. No, sir. Q. Why didn't you come at the April term? A. Because my business was such it required my attention. Q. You knew

there hadn't been any services rendered, and this suit was coming up against your son; didn't you think you could do him good down here? A. Probably I could if I had been here; but I couldn't very well leave. Q. You testify you didn't come because your business demanded your attention? A. Yes, sir. Q. Otherwise you would have come? A. Yes, sir. Q. Had it not been for your business demanding your attention at home, you would have been here? A. In all probability I would. Q. Now, if it was continued at the November term, you knew it would come up at the April term? A. If it had been continued, certainly. Q. And you knew the terms of court here? A. I had lived here in this county for a number of years and knew when the terms of court came. Q. What time in the day did your son get up to your house that day he brought this deed? A. I think it was along in the evening. Q. How far was it from here to where you lived then—you now live in the same place? A. Yes, sir. Q. How far? A. I don't really know the distance, I suppose probably 35 or maybe 40 miles. Q. How do you go to get there? A. Go from here to Sedan on this railroad, and then you take the K. & W. west from Sedan, and this town is 18 miles west of Centerville."

Mr. Claud A. Pickenpauh testified as follows:

Direct examination:

"Q. You are one of the defendants in this case? A. Yes, sir. Q. What is your age? A. Twenty-six. Q. Where were you born? A. In Putnam county, I think. Q. How long have you lived in the neighborhood of this land? A. Well, I have lived there ever since I was seven or eight years old. Q. When were you married? A. April 10, 1901. Q. And before you were married you lived at home, did you? A. Yes, sir. Q. Where have you lived since your marriage? A. Two years north of Central half a mile. Q. Where is that? A. It was a mile north of home. Q. You lived there a while, and then where have you lived since that time? A. Well, I lived down on the place Pa sold to Grandpa; moved there some time in March, and moved off some time in September onto the place where I now live. Q. What year? A. 1903. Q. Now, you may tell the court about the circumstances of your buying this 120 acres of land from your father. A. Well, the land was advertised. Q. By whom? A. By the National Bank. Q. Under an execution? A. Yes, sir. Q. Then what did you do? A. Well, I talked to him about it and asked if he was going to pay it off, and he said he didn't know where he could raise the money; I told him if he would sell me 120 acres I would try and raise it, which I did. Q. You brought up the matter of the sale? A. Yes, sir. Q. What was your purpose in doing that? A. To pay off the execution and stop the sale. Q. What did you agree to give your father for this land? A. \$3,000

and a little over. Q. How was it to be bought? A. I agreed to raise the money to pay off the execution; that was \$310.21; I borrowed that of Grandpa. Q. Where did you see him and get the money? A. He was at home. Q. You went to his home? A. I sent Pa to see if he had the money, and if he had, if he would loan it to me. Q. Go ahead and tell what occurred. A. Well, Grandpa came up, and I told him before this; he owed me in the first place \$128 for corn. Q. Who? A. Pa; and owed me \$100. Q. For what? A. For a horse. Q. When did you let him have it? A. Didn't let him have it; James Alexander got the horse; he owed Alexander, and I let Alexander have the horse, and took the account off him—\$100. Q. What else? A. Well, sir, during harvest I hired a hand and helped him put up his hay; we exchanged work, and the creek washed my hay down and I paid the hand \$28 in cash, and he owed me the same, and he owed me \$128 for corn. And I turned him over two horses at \$200. Q. \$56 for help with the hay, \$128 for corn, \$100 to Alexander, and \$100, two other horses; and this \$310 you borrowed from your grandfather? A. Yes, sir. Q. Know whether incumbrances on this land? A. Yes, sir. Q. How much? A. On the 240 acres there was \$4,500, I bought half of the land and assumed half of the incumbrance, which would be \$2,250. Q. How about this \$300 to Bonfoey? A. That makes \$4,500. Q. So the items you have enumerated and the \$2,250, makes how much? A. \$3,044.25. Q. This \$210 note—did you assume that \$210? A. That \$210 note I think was payable in installments as interest; I paid my part of the interest. Q. Well, the amount that you assumed was \$2,250? A. Yes, sir; and I placed \$310 on it myself. Q. Now, Mr. Pickenpauh, why did you buy this land? A. To save the home place. Q. Did you buy it to defraud creditors? A. No, sir. Q. Did you know of your father owing these gentlemen? A. No, sir. Q. Childers Bros. or Harber & Knight? A. I did not. Q. Had you ever heard anything about that? A. He never did tell me his business, and I never meddled with it. Q. This was before the suit? A. Yes, sir. Q. This was in August? A. Yes, sir, 1903. Q. And the suit was October 22d following? A. Yes, sir; I think so. Q. Who wrote the deed? A. W. A. Valentine. Q. Can you give the description of the land that you bought from your father? A. Well, I bought the north half of section 7. Q. Well, take the deed and see if you can describe it? A. Forty acres of the northwest of the northwest of section 8, township 65, range 20, and 80 acres of the north half of the northeast quarter of section 7, township 65, and range 20. Q. Now, then, Mr. Pickenpauh, did your father own the west half of the northeast quarter? A. No, sir. Q. You bought the north half? A. Yes, sir. Q. Is that what you and your father told Valentine to write in the deed? A. Yes, sir; and

he told me when I took the deed to him the letter was an 'N.' Q. Did you see and read the deed? A. Yes, sir. Q. What was the letter? A. I presume it was an 'N.' That's what I thought it was, and he said positively it was; said it was as plain as the nose on a man's face. Q. Now, Mr. Pickenpaugh, when did you discover that there was any misunderstanding about this being an 'N'? A. Well, I discovered to the best of my knowledge on the 16th of August. Q. What did you have done then? A. I went to the justice that made it and had him correct it. Q. You talked to the recorder about it, didn't you—Mr. Underwood? A. No, sir; I never talked to him myself about it; I had Mr. Little, too. Q. Did Mr. Little read it? A. I presume he did. Q. He is a pretty good hand at reading writing, isn't he? A. Yes, sir. Q. When was that you made this discovery that the recorder had written it as 'W'? A. Well, it was day or two, probably three days before I took it to Valentine. Q. That was last August? A. Yes, sir. Q. And that's when he made the erasure and wrote the word 'North' in there? A. Yes, sir. Q. After you bought the land, did you take possession of it? A. I had possession of it when I bought it. Q. You were cultivating it? A. Yes, sir; part of it. Q. Have you had possession of it ever since? A. Yes, sir. Q. What doing? A. Farming the most of it. Q. Who has paid the taxes? A. I have, also the interest. Q. Paid the interest on the mortgage, have you? A. Yes, sir. Q. What improvements? A. I moved a house and fixed it up and built a barn and corncribs; dug a well. Q. Living on the land? A. Yes, sir. Q. For how long? A. Since September, 1903. Q. Lived on the land? A. Yes, sir."

Cross-examination:

"Q. Up to the time of your marriage you lived at home? A. Yes, sir. Q. How long after your marriage did you live there? A. Two weeks. Q. What land did you move to then? A. Half mile north of Central. Q. What land? A. Land now owned by Williams. Q. Your father owned at that time? A. Yes, sir. Q. How long did you live there? A. Two years. Q. And from there you moved where? A. Moved down to the land that is now owned by Grandpa. Q. You lived there one season? A. Just a part of a season. Q. When did you move on the land in question? A. September. Q. What year? A. 1903. Q. You had worked at home all the time prior to your marriage? A. Yes, sir. Q. What property did you have at the time of your marriage? A. I had a team and some hogs, don't remember how many, and a couple of cows. Q. You gave in the amount you had? A. Yes, sir. Q. For each year? A. Yes, sir. Q. So the assessment will show? A. Yes, sir. Q. The amount and value? A. The assessor's value. Q. Half their value, say? A. Don't know whether it is or not. Q. That was the only property you had, the property you gave in to the assessor? A. That was

all except the crop I raised. Q. You seem to have had about the same number of horses each year; how did you get some to sell to your father? A. Look up the records and see, I had two in 1904. Q. How many in 1903? A. Five, sold three. Q. How many in 1902? A. Had three, I think. Q. Now then, how many in 1902? A. I think I had three. Q. And how many in 1903? A. Had five. Q. You say you never interfered or meddled with your father's business? A. No, sir. Q. How did it happen at that minute you stepped in and said, 'I will pay off this execution'? A. It was necessary. Q. He had 97 head of cattle? A. I don't know how many. Q. He was a large feeder at that time? A. No, sir; not at that time. Q. That was 1903? A. Yes, sir. Q. Assessment for 1903, how many head do you say he had in 1903? A. I don't know. Q. He was a large stock feeder and grower? A. Not so very large. Q. Averaged from 94 to 97 cattle, and had horses? A. Had some, but I don't know how many. Q. You had never borrowed any money before in your life? A. No, sir, never any money. Q. Never tried to do any business before of that kind in your life? A. What business I had to do I had the capital to do it with. Q. You never bought any land before? A. No, sir. Q. Never traded with your father any before? A. Yes, sir; I traded with him before. Q. What had you traded? A. Sold him hogs and such like several times. Q. Never traded him lands? A. No, sir. Q. Now, your trade was you to assume \$2,400? A. \$2,250 and the interest. Q. These coupons or notes that have been taken on the \$300 and \$500 were coupon notes? A. I suppose so. Q. You pay them annually? A. Yes, sir. Q. Take them up annually? A. Yes, sir. Q. You get this coupon when you pay the annual interest? A. That \$300 is a loan. Q. That's in the \$4,500? A. Yes, sir. Q. \$4,200 mortgage and \$300 mortgage and \$210 was commission note to Mr. Bonfoey? A. Yes, sir. Q. You traded along, and your father got to owing you for a horse and stacking the hay and some horses you sold somebody else, and all at once you concluded you would borrow money from your grandfather and buy this land? A. I thought if I could raise the money and pay off the judgment I would buy the land, and done it. Q. You didn't pay your father a dollar at the time? A. Turned him over two horses at \$200, and he paid me what he owed me. Q. And you receipted him for the stacking of the hay account? A. Yes, sir; and also for the hired hand. Q. Valued the land at \$3,000? A. Yes, sir. Q. That's what it is worth to-day? A. Ain't worth any more. Q. What worth an acre to rent? A. I don't know. Q. Your deed was made, when? A. August 28, 1903. Q. Had you talked with Childers Bros.—you know them? A. Yes, sir. Q. Had you talked with them at any time regarding the suit of your father? A. I think, once. Q. Over the telephone? A.

Yes, sir. Q. Where was you at that time? A. I was at Arthur Young's. Q. That was the time you told them that your father had told you to tell them the case against the Milwaukee had not been dismissed? A. I didn't tell them that; I told them that Ma told me. Q. And the railroad was subpoenaing witnesses? A. Yes, sir. Q. And you were talking to them with respect to the suit? A. Ma told me to talk to them. Q. You told them the suit had not been dismissed, that the railroad company was subpoenaing witnesses? A. Yes, sir. Q. On that day you were talking to them pretending to them your father had told them not to dismiss the suit, you took this deed from your father? A. I don't remember what date it was. Q. It was a few days before you took this deed? A. I know nothing about it. Q. You knew at the time your father had dismissed the suit? A. I know that he said in the spring that he had a notion to dismiss it, but didn't know. Q. But you told them your mother told you to tell them it had not been dismissed, and that was before you took this deed from your father? A. I don't remember whether it was or not. Q. Didn't Childers tell you in the talk over the phone that it certainly had been dismissed, that your father had come to Milan and secretly tried to settle with the stenographer that took the evidence, and would not come to their office? A. I don't think he did. Q. Why did Childers tell you he thought the suit had been dismissed? A. I don't know that he told me that; he told me to watch the case carefully and let him know if anything occurred. Q. Didn't he tell you your father had been to Milan and settled with the stenographer, and didn't come to his office? A. Don't think he did, to the best of my knowledge. Q. What became of all this stock your father had there? A. Sold it, I guess. Q. What did he do with the money? A. I don't know. Q. What became of the \$600? A. I don't know. Q. How frequently did you see your grandfather between October 22d and April, 1904? A. Don't remember that I saw him at all. Q. Might have seen him a half dozen times? A. No, sir. Q. Was you at your father's house frequently? A. I was there several times. Q. How can you tell he put in the wrong description? A. I know what land I was to get; I never gave the justice any description. Q. Who did? A. Pa and Grandpa gave him the description. Q. You don't know by numbers; you don't know the land by numbers? A. No, sir; but I know it. We got a tax receipt. Q. But you can't tell now what it was? A. No, sir. Q. Can you tell whether the deed was dated 28th or 29th? A. I used to know figures. Q. Look at that now, and see if you still know them? A. I think that's the 28th. Q. The 8 made over a 9? A. 28th. Q. Has there been a figure 9 made there? A. No, sir; I can't see there is any figure 9 made there."

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Redirect examination:

"Q. What was the condition of your father's health after he was hurt? A. Very poor. Q. How did it affect his business? A. It affected his mind greatly. Q. Business declined, did it? A. Yes, sir."

Mr. J. W. Alexander testified as follows:

Direct examination:

"Q. Where do you reside? A. At the present time I live at Pollock. Q. Where did you reside during the summer of 1903? A. Well, sir, my home partly was at my father's mostly. Q. Where was that? A. West of here about 12 miles. Q. Do you know Claud Pickenpaugh? A. Yes, sir. Q. You may state whether you got a horse from them; tell the circumstance of it. A. Yes, sir, I bought a horse from—well, I got the horse from Claud, or it come through Claud, got it from Poly, but Poly got it from Claud; Poly owed me \$180.15. Q. Who do you mean by Poly? A. Poly is the father of this boy, and I was over there to see him, and he was poorly, had poor health, and he proposed to sell me a horse, and he showed me a black horse that he wanted to sell me, and I told him I didn't want it. By Mr. Harber: Never mind, let us get at the facts. A. Well, we looked through the horses, and I didn't care to buy anything he had for the price that he had on it, and I went over to his son's, where he had this 120 in controversy rented at that time. And he had a black filly there, and I and Poly was looking at his colts, and I told him I wouldn't mind having this, and he wanted to know what I would give for her on that debt; said she belonged to Claud. I told him I would give him \$100 on that debt, and so we went over to the field where the boy was plowing corn, and he said I could have the filly and he would take his father for the debt. Q. Which Pickenpaugh was that? A. Claud Pickenpaugh."

Mr. U. G. Bishop testified as follows:

Direct examination:

"Q. Mr. Bishop, do you know the defendants in this case, Mr. Pickenpaugh and Claud Pickenpaugh? A. Yes, sir. Q. You worked for Claud along about the winter and spring and summer of 1908? A. Yes, sir. Q. Do you know anything about Poly buying corn from Claud during the winter and spring? A. Yes, sir; I was there when Poly's hand hauled the corn off. Q. Then what work did you work at during the summer? A. Through harvest. Q. Who paid you? A. Claud. Q. Who hired you? A. Claud. Q. Where did you work? A. On Poly's place; they exchanged work; and this other field washed down. Q. How many days did you work? A. Fourteen days. Q. Furnished a team? A. Yes, sir. Q. What did Claud pay you for that work? A. \$28. Q. I believe you testified you saw Poly hauling the corn? A. His hand, Mr. Jacobs."

Cross-examination:

"Q. Was you out there at any time when

corn was hauled at night for fear of a levy on it? A. No, sir. Q. Ever hear of it? A. No, I don't know as I did. Q. You mean to say you can't tell whether you heard of it or not? A. No, sir; I can't say whether I did or not. Q. There was a good deal of shuffling going on among Napoleon's property? A. I couldn't say; I wasn't there. Q. Don't remember of hearing of the circumstances? A. I might have heard of it, but never interested me. Q. Circumstance of that kind would be so ordinary it wouldn't impress itself upon you? A. No, sir; don't think it would; if I heard it I probably forgot it. Q. Where was the corn you saw Napoleon get from Claud there? A. North of Central. Q. What place? A. Williams' place. Q. When was it? A. 1903. Q. How much did he get? A. The biggest part of 20 acres; couldn't say the amount of bushels. Q. What was he feeding it to? A. Couldn't say. Q. What do you know about this corn being hauled to Napoleon's? A. I was there when Poly's hired hand hauled it. Q. How many loads? A. I couldn't say; there was several. Q. You were working for Claud at one time and went over and helped him work for his father? A. That wasn't corn gathering. Q. How long had you been working for Claud at that time? A. Well, he hired me, and we put up Poly's hay first, and then was to go to Claud's part, and it washed down and Claud paid me for the work. Q. You was exchanging work; wasn't Napoleon going to help him back with his hay? A. No, sir; it had washed down and he didn't want it. Q. Wasn't that the intention for them to exchange work, you and Claud help Napoleon, and Napoleon and his hand help Claud? You never heard of Claud having an account against his father until after this transaction came up? A. Yes, sir; I know of him buying this corn. Q. How much corn did he buy? A. I couldn't say. Q. How much was he paying for it? A. Thirty-five cents. Q. Where was you when the contract was made? A. Hauling corn for Claud to Lucerne."

Mr. N. B. Pickenpugh, of lawful age, being produced, sworn, and examined on the part of the defendants, testified as follows:

Direct examination:

"Q. How long have you lived in this county? A. I couldn't tell you exactly—30 years or more. Q. You got hurt on the Milwaukee Railroad? A. Yes, sir. Q. In 1901, I believe? A. Yes, sir. Q. Has that impaired your health? A. Yes, sir. Q. Where do you suffer? A. Well, I suffer in my hip, ankle, back, and head. Q. Any injury to your spinal column? A. Yes, sir. Q. Have you been able to carry on your farm work and manage your business since that injury? A. No, sir. Q. Well, now, you may tell the court how you come to sell this 120 acres of land in controversy to your son, Claud? A. Well, I owed the National Bank of Unionville here \$250; a man by the name of John Bishop

was my security, and he got restless. Q. There was a judgment and execution levied on your land? A. Yes, sir. Q. That sale was set for a day in August, 1903? A. I think so. Q. How did you come to deed it to your son, Claud? A. Well, I sent my wife over to Young; he told me he wanted to buy the land, and he said he had concluded not to buy it, and I was talking to my son, and he said if he could get the money he would take it; and I told him I believed he could get it from Father, and I went to see Father, and he said if Claud wanted the land he would let him have the money, and help him to buy it. Q. That was why you sold it? A. Yes, sir. Q. Did your father let Claud have the money? A. Yes, sir. Q. Who paid the money to the sheriff? A. Father. Q. Do you remember the amount? A. Well, I don't know whether I do exactly or not, but I think it was \$310.21. Q. Well, do you remember what incumbrance there was on the land, if any? A. There was \$4,200 going to Hartford, Conn., \$300 to the widow Webb, and there was a commission to Bonfoey. Q. How much of that did your son assume? A. One-half. Q. How much land did that deed of trust cover? A. Two hundred and forty acres. Q. Your son agreed to pay half of it? A. Yes, sir. Q. Now, how did he pay the balance of it? A. He let me have two horses. Q. At how much? A. One hundred dollars each. And he let Mr. Alexander have a horse for \$100, and I was owing Mr. Alexander paid \$100 for me, and he worked some in the harvest, and hired Mr. Bishop with a team helping. Q. Know what that amounted to? A. No, sir; I trusted to him to keep the account; I wasn't able to. I think \$50, as near as I remember. And they put my hay up first, and the creek come up and run over his grass and made it worthless. Q. Didn't cut his hay? A. Don't think they cut but very little of it. Q. Was there any corn in the deal? A. Yes, sir; I had a man by the name of Jacobs hired, and he hauled quite a number of loads, and my son kept an account of them. I trusted to him to attend to that. It was cold weather, and I wasn't able to be out to see after it. Q. Did you know the description of the land you sold him? A. Yes, sir. Q. What was it? A. Well, it was the north half of the northeast quarter of section 7, township 65, range 20, and there's a 40 in 8; it joins it on the east. Q. Do you own the 40 acres of land south of that? A. No, sir. Q. That's the 120 you sold to your son? A. Yes, sir. Q. Did you see the deed when Squire Valentine wrote it? A. Yes, sir. Q. Did you read it? A. Yes, sir. Q. How did it read? A. As near as I remember it read: "The north half of the northeast quarter, section 7, township 65, range 20." Q. You know the controversy about that letter 'N'? A. Well, I have heard about it since that time. Q. I will ask you now whether it was a letter 'N' or 'W'? A. I called it letter

N.' Q. That's what you read it? A. Yes, sir. And I was hurt, and I just got him a tax receipt to get the numbers from, and he also had an atlas. Q. What did you tell your son you wanted to sell it for? A. To keep it from selling."

Cross-examination:

"Q. You heard something last August about the recorder having misrecorded that letter, did you? A. Yes, sir. Q. Which farm was your son living on when he got this farm from you? A. He was living on what we called the 'Smith place.' Q. That's what has been mentioned as the 'Williams place'? A. Yes, sir. Q. What rent was he paying for it? A. Not any. Q. But when you got anything from him he charged you for it? A. Yes, sir. Q. You wasn't charging him any rent? A. No, sir. Q. And yet when you got a little corn from him he charged you? A. Yes, sir; he is my son. Q. How much land was that he was occupying? A. One hundred twenty-two acres. Q. What was it worth, rental value? A. It was my son and my land, and I let him have the proceeds of it. Q. You got how much corn from him? A. Couldn't tell the number of bushels. Q. Raised on your land? A. He farmed and raised it. Q. And you charged him no rent? A. No, sir. Q. And the horses he got there while he was living with you? A. Yes, sir; he got three horses from home. Q. And these horses you got from him from time to time, did you get all of them at the same time? A. He got the three horses at the same time. Q. When was the work you spoke of done—what year? A. He always helped me harvest until the last two years. Q. Always charged you for it? A. Yes, sir; he was 21 years old. Q. You never charged him anything you done for him? A. That was my business. Q. Now, give me the land that is conveyed in this deed from you to your son on the 28th day of August, 1903. A. Well, it was the north half of the northeast quarter of section 7, township 65, range 20, and then the other 40 is in section 8. Q. Can you describe it? A. I don't believe I can. Q. When did you last see that deed? A. I haven't seen that deed from the time it was made until now. Q. You saw it to-day? A. Yes, sir. Q. Up to that time from the time it was made until to-day you never have seen it? A. I never have; no, sir. Q. When did you go up to Iowa to see your father with reference to the April term of court? A. Didn't go with reference to the April term of court. Q. Was you there in April, 1904? A. I was, the latter part. Q. What time? A. I think it was about the 26th or 27th. Q. You left here—do you remember the day of the week the 26th was? A. It was on Tuesday. Q. This case was to be tried of Harber & Knight's against you, was set for Monday? A. Yes, sir. Q. It was continued over from Monday until Tuesday because Magee couldn't get here on account

of high water? A. I don't know as it was; it was passed over. Q. On Tuesday again you were here and insisting that both Magee and some lawyer you had in Iowa couldn't get here? A. No, sir. Q. On Tuesday you consulted with Judge Jones? A. Yes, sir; another man, Greenwood of Kirksville. Q. And it had been continued at the November term previous, at your instance? A. Yes, sir, it had been. Q. At your instance? A. Continued. I don't know; I wasn't here. Q. Wasn't here at the November term? A. No, sir. Q. You do know it was continued at the November term? A. Yes, sir. Q. You do know it was set for trial on the first day of the April term, 1904? A. I think it was. Q. And you do know in 1904 you was representing to the court that your lawyer, Magee, couldn't get here on account of high water? A. I suppose that was the reason. Q. And wasn't gentlemen called right in to show they had come from beyond the bridge you said Magee couldn't cross? A. They questioned some men here. Q. Then on Tuesday, and about noon, you consulted Judge Jones and Mr. Greenwood? A. I consulted Greenwood earlier in the morning. Q. About noon Judge Jones—you consulted him? A. Yes, sir. Q. Where did you go that day? A. To Plano, Iowa. Q. What time? A. In the afternoon. Q. Where did you strike the train? A. I got on the Rock Island, went to Seymour, and went from there to Jerome. Q. You didn't leave here until the afternoon? A. Yes, sir. Q. Where did you strike the Rock Island? A. Up here at—it was between Centerville and Seymour. Q. Belknap? A. No, sir; I forget the name. Q. How did you get from here there? A. I started and walked out a little ways, and a man overtook me going north, and I rode with him to the other side of Genoa. Q. The closest station of the Rock Island from this point is Seymour? A. No, sir. Q. The closest point from here on the Rock Island is Seymour? A. No, sir; it was on the Milwaukee & Rock Island also. Q. It is about 22 miles? A. I don't know; ain't that far, I don't think. Q. How far was it from here to the point where you took the Rock Island? A. I don't know exactly. Q. What time did you reach this point? A. Well, sir, it was after night, a little. Q. You took the night passenger? A. No, sir, it was just a freight. Q. Some time after night? A. Just getting pretty dark. Q. And you went where that night? A. Got to Seymour and waited until a train came going to Jerome, and got to Jerome after night—don't know what time—and then I walked to Plano. Q. What time did you get to Plano? A. Don't know, but it must have been 8 or 9. Q. You got on the Rock Island and went to Seymour? A. Yes, sir; and then went to Jerome. Q. You got on the Rock Island east of Seymour? A. Yes, sir. Q. And went west to Seymour? A. Yes, sir. Q. What kind of a train did you

strike on the Rock Island? A. Freight train. Q. Regular or extra? A. I didn't ask. Q. You got on a freight train on the Rock Island? A. Yes, sir. Q. Didn't get to the Rock Island until after dark? A. Getting pretty dark. Q. Did you take supper there? A. No, sir. Q. Then you came to Seymour? A. Yes, sir. Q. And got a freight at Seymour? A. Yes, sir. Q. How long did you wait in Seymour? A. Went from one depot to the other, and along came a train and I boarded it. Q. That was a freight? A. Yes, sir. Q. Do you know whether either one of the regulars carried passengers? A. No, sir; they carried me. Q. Any other passengers on either of them? A. Yes, sir. Q. On the Rock Island? A. Yes, sir. Q. What day of the month was that? A. The day after I left town, I think the 26th. Q. Then, after you got to Seymour, you went where? A. Jerome. Q. That's on the Milwaukee? A. Yes, sir. Q. How far from Seymour? A. It is the next station, ain't it? Q. Then how far was Jerome from your father's? A. Three and a half miles, I think they call it. Q. You got out to your father's about what time? A. I didn't just look at the clock; I was most awful tired and hungry, and my stepmother got my supper. Q. Was your father at home? A. Yes, sir. Q. What time was it? A. I don't know, might have been 9. Q. Somewhere between 9 and 12 o'clock? A. Yes, sir; somewhere along there. Q. Ever went that way before? A. No, sir. Q. Ever went that way since? A. No, sir. Q. You went from here starting to walk to strike the Rock Island? A. Yes, sir. Q. And got out how far? A. I expect a half mile north of town and some man overtook me. Q. Who was he? A. I don't know. Q. You rode? A. Up to Genoa. Q. That's where you took the Rock Island? A. No, sir. Q. How far was it from the place you struck this man to Genoa? A. I don't know; the first time I ever went over that road. Q. Have you any impression at all? A. No, sir. Q. How far was it from Genoa to the place where you struck the Rock Island? A. I don't know. Q. How did you travel from Genoa to the Rock Island? A. I went afoot. Q. You don't know how far it is from this town to Genoa? A. No, sir; never went it only this one time. Q. You can't tell the court what point on the Rock Island that you struck the train? A. I would remember the town if I heard it. Q. It was very muddy? A. Yes, sir. Q. And the creek up everywhere? A. Not much on Tuesday, that was down; but the banks and bottoms awful muddy. Q. The trains up on the Rock Island at Centerville and Eldon and Des Moines had all been delayed on account of high water? A. I expect they was. But I got a train just the same. I know I come down on Monday from Centerville and seen places where the water washed the track

out. Q. What time did your wife get in town that day? A. Early in the morning. Q. You tried to get the justice to take the acknowledgment of your wife to the deed before, over the telephone? A. No, sir. Q. You never visited your father in this way before in making this kind of a trip? A. What kind of a trip? Q. We have only been speaking of one; going from here to the Rock Island train, and from the Rock Island to the Milwaukee, and from the Milwaukee to this point, and then walking out. A. That's the only time. Q. You left here that day knowing that this case was for trial? A. Yes, sir. Q. And knowing the plaintiffs had been insisting upon Monday as well as Tuesday of disposing of the case? A. I think you did insist on trying it Monday. Q. And you knew upon Tuesday it was being insisted that we would dispose of it? A. I think you fellows wanted it disposed of. Q. And you left some time in the middle of the afternoon or later? A. About the middle of the afternoon. Q. For your father's, having to go at least 20 miles before you could strike a railroad at all? A. I don't think it was 20 miles. Q. You know you struck the Rock Island east of Seymour? A. Ain't there a place by the name of Dunlap, ain't that the name, between Centerville and Seymour? Q. There's a Belknap? A. I have forgotten the name. Q. What was your haste to get to your father at that time? A. I just wanted to go, and I went. Q. Why was it necessary to make such haste? A. You fellows had demanded papers, and I didn't intend to give them to you. Q. What papers? A. All my letters. Q. Was there any demand made for anything of that kind? A. Yes, sir. Q. And you went to keep from producing letters to be used—that was that the purpose? A. That was my main purpose. Q. If you had any other purpose, what was it? A. That was my purpose. Q. After you learned the recorder had recorded, in recording that deed, had recorded the letter that you thought was 'N' as 'W,' did your son speak to you about it? A. No, he didn't speak to me until after he had come to town and got the papers and had it fixed, and I think my wife told me. Q. What did you say about it? A. Well, I don't know just what I did say about it; I couldn't tell. Q. Did you express your satisfaction with it? A. Yes, sir, as near as I remember. Q. Don't remember exactly what you said? A. No, sir; but I was glad it was corrected."

Defendants introduced several witnesses who testified in their judgment that the land in controversy was worth not more than \$25 per acre.

Judge Brawford, of lawful age, being produced, sworn, and examined on the part of the plaintiff, testified as follows:

Direct examination:

"Q. What is your business? A. Loan and

real estate. Q. How long have you been engaged in that business? A. About 25 years. Q. How long have you lived in this county? A. About 50 years. Q. Are you acquainted with the west half of the northwest quarter of section 8, township 65, range 20, and also the north half of the northeast quarter of section 7, township 65, range 20, this county? A. Yes, sir. Q. Tell the court what that land was worth on the 29th day of August, 1903, and is worth now, in your judgment? A. From \$30 to \$35 an acre. Q. And is worth that now? A. Yes, sir. Q. You are acquainted with the land Pickenpaugh conveyed to his father about the 26th of April last? A. That was in section 7. Q. The land conveyed to his father on the 26th of April, what is that worth? A. I think about the same as the other; same kind of land."

Mr. Underwood, the recorder of deeds of Putnam county, testified in part as follows: (Having been shown the deed from N. B. Pickenpaugh to C. A. Pickenpaugh, his son.)

"Q. That contains the identical land as the deed before it was recently changed; it is the same description as was recorded as being contained in the original deed? (Defendants object. Objection sustained.) Q. What did you take that letter to be then, and now? A. Believed it to be a 'W.'"

Cross-examination:

"Q. You were not certain about that? A. Well, I was certain enough to tell them I couldn't record it as 'N.' Q. I believe you said yesterday it might have been read as an 'N' as well as a 'W,' didn't you? A. I said it looked a good deal like an 'N,' but I believed it to be a 'W.' Q. You wouldn't be absolutely certain it was an 'N,' would you? It is not a very good letter of either? A. No, not very good. Q. You had some little doubt about? A. Well, that was my judgment about it."

The findings and judgment of the trial court were for the defendants, and the plaintiff duly appealed from that judgment to this court.

E. M. Harber, A. G. Knight, and N. A. Franklin, for appellant. Edward Higbee, Lorenzo Jones, and B. L. Robinson, for respondents.

WOODSON, J. (after stating the facts as above). 1. The salient facts of this case are practically undisputed; and the differences existing between the parties do not question the existence of those facts, but go to the intention which underlie and gave them birth. In the discussion of the legal propositions involved in the case, I will, first, make a brief statement of the facts; and, second, will call attention to the evidence preserved by the record which throws light upon the intention of the respondents underlying those facts.

On November 30, 1901, the respondent, N. B. Pickenpaugh, resided in Putnam county,

this state, on a farm which he owned, consisting of 480 acres. As far as disclosed by record, his family consisted of himself, wife, and son, Claud A. Pickenpaugh, then about 22 years of age. The farm was worth \$12,000. The assessment books of the county made in the year 1901 for the taxes of 1902 show that his live stock located upon the farm was assessed at the sum of \$1,785, and that for the same year Claud Pickenpaugh's total assessment of all kinds of property was \$130.

On the day first above mentioned, November 30, 1901, N. B. Pickenpaugh entered into a written contract with the firms of Harber & Knight and Childers Bros., attorneys at law, to bring a suit for him against the Chicago, Milwaukee & St. Paul Railroad Company for the purpose of recovering \$20,000 damages for personal injuries alleged to have been sustained by him through the negligence of the company. That in pursuance of that contract they instituted a suit in the circuit court of Sullivan county on March 18, 1902.

At the April term following, the railroad company filed its application and bond for a change of forum to the Circuit Court of the United States sitting at Kansas City, which was granted by the Sullivan circuit court. The cause on reaching the federal court was continued until the next term thereof, in order that Pickenpaugh might file cost bond; and at the succeeding term thereof the cause was again continued because Pickenpaugh's injuries rendered him unable to appear in court. The last continuance mentioned carried the case over to the April term, 1903, of the federal court, and the cause was set for trial on May the 12th thereof. Because of those delays and continuances, as I gather it, and for certain other reasons not made perfectly clear by the record, Pickenpaugh grew restless and apprehensive of the results of that suit, and, fearing that he and his surety on the cost bond might be required to pay large sums of money in the way of costs, entered into an agreement on or about May 1st with the railroad company to dismiss the suit. This agreement was made without the knowledge or consent of his attorneys, and in pursuance to that agreement the suit was dismissed when reached on the docket. In the meantime his attorneys had taken depositions and made other preparations for the trial of the cause, which do not appear fully in this record. Harber & Knight and Childers Bros. contended, without any evidence introduced in this case in support thereof (which I suppose would have been incompetent had it been offered, as the questions of attorney's fees were fully and finally determined in the case of those parties against said Pickenpaugh, which will hereafter be mentioned), that Pickenpaugh had settled the case for a large sum of money. Pick-

enough, however, without objection, testified that he dismissed the suit in the federal court without receiving "one cent" in compensation of his injuries.

Upon learning of the agreement to dismiss the suit against the railroad company, said attorneys attempted to adjust, settle, and collect the fees due them under the said contract of employment. Pickenpaugh refused to pay them any sum whatever, and definitely told them that if they could get anything off of him that "they were welcome to it."

After this interview they wrote him several letters demanding a settlement, and one of them, dated August 23, 1903, heretofore copied in the statement of the case, informed him that if he did not settle for their fees they would institute suit against him for the same at the following November term of the Putnam county circuit court. Instead of replying to any of those letters, N. B. Pickenpaugh and wife, on August 28th five days after the date of the letter before mentioned, by deed of general warranty, conveyed to their son, C. A. Pickenpaugh, the 120 acres of land involved in this case. The consideration paid therefor, as stated in the deed, was \$3,600.

The attorneys, having been unable to make a settlement of their fees with N. B. Pickenpaugh, did, on October 22, 1903, institute suit against him therefor, returnable to the November term, 1903, of the Putnam county circuit court. The defendant therein appeared and filed answer, and upon his application the cause was continued until the April term, 1904, of said court. The case was set for trial Monday, April 25th, but at the suggestion of defendant therein it was passed until the next day. On Tuesday, the 26th, a trial was had of the cause, and defendant, although present in court, took no part in the trial, which resulted in a judgment in favor of the plaintiffs in that case against him for the sum of \$1,750. That judgment was not appealed from, and still remains in full force and effect.

Some little time prior to the date on which N. B. Pickenpaugh conveyed the said 120 acres to Claud Pickenpaugh, he also conveyed another 120 acres of his farm to a man by the name of Williams; and on the 26th day of April, 1904, the day on which the judgment for the \$1,750 was rendered against him, he also conveyed to his father, Jacob W. Pickenpaugh, a resident of the state of Iowa, still another tract of 120 acres of land for the consideration of \$3,000, as expressed in that deed.

The assessor's books for the year 1903 showed N. B. Pickenpaugh's live stock was assessed at the sum of \$2,359, and that Claud Pickenpaugh's total assessment of all kinds of property was valued at the sum of \$145.

No part of the judgment against N. B. Pickenpaugh for said attorney's fees having

been paid, the plaintiffs in that case caused execution to be issued thereon on the 7th day of August, 1905, and placed in the hands of the sheriff of that county, who, on August 9th, levied it upon the lands involved in this litigation, and advertised them for sale on September 6, 1905. On said last-named date said lands were sold by the sheriff, and were purchased by Wm. W. Childers, the plaintiff and appellant in this cause. After seizure and sale of this land, the scrivener, at the instance and request of Claud Pickenpaugh, altered and changed the deed, dated August 28, 1903, from N. B. Pickenpaugh and wife, conveying this land to him.

Prior to May 22, 1903, N. B. Pickenpaugh had disposed of all of his live stock and other personal property which was subject to execution; and on that day an execution was issued on a judgment, dated April 10, 1903, in favor of the National Bank of Unionville against said N. B. Pickenpaugh, for the sum of \$261.38, together with interest and costs, amounting to \$310.11. The sheriff, being unable to find any personal property subject to execution, first had 120 acres of the 480-acre farm appraised and set off to him as a homestead, and then levied upon the lands involved in this suit, and advertised them for sale on August 27, 1903, but on the previous day, the 26th, said N. B. Pickenpaugh paid said execution in full; and the sheriff returned the same satisfied in full. In this connection it should be borne in mind that this land was advertised for sale the day before the date on which N. B. Pickenpaugh and wife conveyed the 120 acres to their son, C. A. Pickenpaugh.

Both Jacob W. Pickenpaugh and Claud A. Pickenpaugh, the father and son of N. B. Pickenpaugh, knew of the indebtedness of the latter to his attorneys for their fees, and the former testified that he thought the indebtedness was unjust, and the son testified that he knew of the contract agreeing to pay the fees, but knew nothing about the suit which had been brought thereon.

Such additional facts as may be necessary for a proper understanding of the case will be stated in connection with the respective propositions to which they relate when we reach them for discussion.

From the foregoing recitation of the facts of this case it will be seen that between the time when N. B. Pickenpaugh conveyed the 120 acres of land to Williams, which was about July or August, 1903, the exact month not appearing from the record, and the 26th day of April, 1904, the day upon which Harber & Knight and Childers Bros., recovered their judgment against him for \$1,750 for their fees, he had disposed of all his property, both real and personal, which was subject to execution; and that there was nothing left of his \$14,000 worth of land and live stock out of which that judgment could be satisfied.

Bearing in mind those undisputed facts, we will now take up and consider, separately, in their inverse chronological order, the various conveyances made by N. B. Pickenpaugh disposing of his property, and, in the light of the testimony bearing upon them, try and correctly determine whether those conveyances were made in good faith in the ordinary course of business, or were made for the purpose of hindering and defrauding his creditors out of their just claims. For convenience, I prefer to consider each conveyance separately in the first instance, and also for the purpose of preventing confusion and a misunderstanding of the evidence in the case, and after so considering those questions we will briefly apply the conclusions reached thereon to the question of the good or bad faith of N. B. Pickenpaugh underlying the disposition of his property.

2. We will first consider the disappearance of his live stock, and I use the word "disappearance" for the reason that this record is as silent as the tomb as to what became of the 97 head of cattle and the 20-odd head of horses which were on the farm, and which were assessed for the year 1903 at the sum of \$2,359. That sum we know was far less than their actual value, for the reason that it is common knowledge that personal property is not assessed in excess of 50 or 60 per cent. of its market value; and if we look at the same assessment books we will see that the personal property of Claud A. Pickenpaugh, one of the respondents, for the same year was assessed at the sum of \$145, while his own testimony shows that three of his horses were worth \$300, and that his father allowed him \$200 for two of them in the trade for the land conveyed to him on August 28, 1903, and that Mr. Alexander paid him \$100 for the third. But independent of these passing observations, the record totally fails to show what became of that stock. It is true Jacob W. Pickenpaugh, the father of N. B., said in one place, in a casual statement, that the Drumm-Plato Commission Company held a mortgage on the cattle, but the record fails to show that he ever saw the mortgage; and he testified that he did not know the amount of money secured thereby, showing conclusively that he was testifying to hearsay testimony, which carries no weight or probative force whatever, whether objected to or not. In another place in his testimony Jacob W. Pickenpaugh said that "I think he," N. B., "paid the Drumm Commission Company a part of it," meaning that he had paid to the former as part of the purchase price of the land he purchased from N. B., on April 26, 1904, on said mortgage; but upon further questioning he said he did not know what sum N. B. paid on the mortgage. This, too, was clearly hearsay evidence, as clearly appears from the reading of the record. He did not pretend to be testifying from his own personal knowledge of

the facts, but for the purpose of telling a plausible story which would receive favorable consideration at the hands of the court. Jacob W. Pickenpaugh was unable, or, rather, did not, utter a word as to what disposition was made of said live stock, why it was sold, to whom, what it brought, or what became of the proceeds of the sale.

Upon this same point C. A. Pickenpaugh, the son and co-respondent of N. B. Pickenpaugh, though living in the immediate vicinity of his father, was likewise unable to say what became of the cattle and horses. And if there was a person on earth who should have known what became of said live stock, N. B. Pickenpaugh was that person. He went upon the witness stand and attempted to tell at great length and in minute detail what his indebtedness was, even to the dollars and exact cents, his inability to pay the same, and the circumstances surrounding the various conveyances he made of his real estate; one tract to Jacob W., his father; another to C. A. Pickenpaugh, his son; and a third to one Williams, for the purpose, as he says, to pay his honest debts; but not a word did he say about the \$3,000 or \$4,000 worth of live stock he had on hand just a few months before the judgment of \$1,750 was rendered against him, which he strenuously insisted was unjust, and which he said he did not intend to pay—that is, the claim upon which that judgment was based was unjust—but he did not contest it, though present in the courtroom with his able counsel on the day of the trial, and from which judgment he neglected to appeal. He could have told the court in no uncertain words what disposition he made of those cattle and horses, what sum of money they sold for, and what he did with the proceeds of that sale; but not a word did he utter upon those most important questions. If there had been an honest sale made of the stock, then it would have yielded him ample funds with which to have paid all of his indebtedness when due, including the claim of his attorney, and still there would have been several hundred dollars remaining; while upon the other hand, if he wanted to be dishonest and defraud his creditors, he would have done just what the evidence in this case suggests he did do, namely, secretly dispose of the stock, place the proceeds of the sale presumably in his pocket, and decline to give out any information regarding the disposition made of the stock or what became of the proceeds of the sale.

Again, what did N. B. Pickenpaugh do with the \$600 cash his father paid him for the land he purchased from him on the 26th day of April, the day on which the judgment was rendered against him for the attorney's fees? Upon the trial of this case he acknowledged he received that sum in cash from his father, and the record shows that he was practically free from all debts with

the exception of this judgment after his property had passed through this scheme of adjustment and settlement, portrayed in this series of lawsuits. If he was honest and wanted to pay his honest debts, as he so earnestly endeavored to convince the trial court, and which he seems to have done, why did he not then and there pay or offer to pay that \$600 on the judgment his attorneys held against him, instead of still opposing with all his power their efforts to collect the same? That is what an honest man would have done, and would have thereby proven his good intentions by deeds, and not by empty words and sounding cymbals.

Not only this, what became of the purchase money Williams paid him for the 120 acres he purchased of respondent, N. B. Pickenpaugh? That must have amounted to something near \$3,000, for the reason that the evidence shows that all of the 480 acres was worth not less than \$25 per acre, which would make that 120 acres worth the sum of \$3,000. This record does not attempt to explain what became of that money. If it had been honestly paid out or expended, that fact could have been easily shown to the satisfaction of the court; but no, not a word escapes his lips in explanation of these important matters.

If I have not overlooked any of the items of N. B. Pickenpaugh's indebtedness, the total amount thereof did not exceed \$5,600 when he started out to defeat the payment of the fees due his attorneys. At that same time this record shows that his real and personal property was worth not less than \$14,000, and that he had a good and prosperous business. And it is a most significant fact in this case, none of his creditors had ever pressed him for payment of their claims before or after he disposed of his property, not even down to this time, except the National Bank of Unionville, and that claim was only for \$310. And that burdensome demand is the sole cause of all of this trouble and litigation, if we believe respondent's story.

In view of those facts, the question naturally suggests itself to the mind, what became of all of that property? If we make a liberal allowance of \$2,000 for his homestead and other exemptions, and add that sum to the total amount of his indebtedness, the total would be \$7,600, which would leave unaccounted property worth the sum of \$6,400. We again repeat the question, what became of this money, or the property which the evidence shows N. B. Pickenpaugh had at the beginning of this trouble, and which all of the testimony shows was worth that sum? If there was no other evidence in this case than that which shows the existence of the facts stated in this and in paragraph 1 of this opinion, it would be sufficient in our judgment to warrant the court in finding that the respondent had conveyed his property with the intention to hinder and defraud his

creditors; and we might with propriety add, especially Harber & Knight and Childers Bros.

3. We will next devote our attention to the conveyance of the 120 acres of land made by N. B. Pickenpaugh to his father, Jacob W. Pickenpaugh, by the deed dated April 26, 1904. In the consideration of this proposition, the facts must not be lost sight of that the grantee in that deed was the father of the grantor, N. B. Pickenpaugh; that he knew of the claim the attorneys had against his son for their fees for legal services rendered by them for him in the railroad case; that he knew the son was using every means at his command to defeat the payment of those fees; that he was assisting the son in the payment of what he considered his just debts by purchasing part of his property and paying him the cash therefor, and by furnishing his grandson, Claud A. Pickenpaugh, with the means with which to purchase other lands belonging to him; and that he, Jacob W. Pickenpaugh, at all times considered the claim of the attorneys against his son to be an unjust demand.

Under that state of fact, without a word of explanation, we find that on March 18, 1904, about 20 days prior to the date of the rendition of the judgment against N. B. Pickenpaugh on the claim for the attorney's fees, the following contract of sale of real estate was entered into between the father and the son, to wit: "March 18th, 1904. This day N. B. Pickenpaugh has sold to J. W. Pickenpaugh the northwest quarter of section No. 7, township 65 and range 20, in Putnam county, Missouri, for \$3,000; \$2,400 on a loan on said land and \$600 cash when deed is made." This contract was signed by both parties named therein.

There was no evidence offered to show why this contract was made at this inopportune time, or of the facts or circumstances which led up to or induced its execution, and Jacob testified that it was optional with N. B. whether he would consummate the sale or not. And, when viewed in the light of the facts which existed at the time the deed was executed conveying the land to Jacob W. Pickenpaugh, that provision of the contract which stated that the \$600 purchase money should be paid in cash becomes significant, which will be noted later on. N. B. Pickenpaugh at noon, on the 26th day of April, 1904, only a few hours before or after the judgment for \$1,750 was rendered against him for the attorney's fees, which he was trying in every way in his power to prevent paying, and which Jacob W. Pickenpaugh thought was unjust, started afoot to the home of his father, some 40 miles distant, in the state of Iowa. Twenty miles of that distance he would have been compelled to have made on foot had he not by chance happened to have been overtaken by a wagon, on which he rode that 20 miles

to a station on the railroad, the name of which is not given, and from there he rode on the train to Jerome, 3 miles from Plano, the town where his father lived, and walked from the former to the latter place, and arrived there some time between 9 and 12 o'clock at night of the same day. When asked why he did not wait and go by rail via the usual route, and why he went afoot and over that unusual route, he replied by stating, in substance, that he went because he wished to get out of the way so that Harber & Knight and Childers Bros. could not get his papers or letters to use in the trial of their case against him. That answer was clearly untrue, for the reason that he had been in court that very morning the case was set for trial, and was attempting to have it again set over or continued, but being unable to do so, he immediately left the courtroom and started afoot to the home of his father in Plano, Iowa. The answer was not only false, but it was clearly a makeshift for the purpose of deceiving the court as to his real motive; and that was, in my judgment, to deliver the deed, dated that same day, April 26, 1904, which had evidently been previously drawn to his father, conveying to him the 120 acres of land involved in the other suit mentioned against him, hoping thereby to transfer the title to the land to his father before it could be seized under execution in satisfaction of said judgment, being ignorant, evidently, of the fact that the judgment when rendered would constitute a lien on the land, which would take precedence over the subsequently delivered deed; or he may have thought the trial might have been delayed or prolonged until he could reach his father and deliver the deed before the judgment could be entered. But, however that may be, N. B. Pickenpaugh appeared at the home of his father in Iowa on that same night, the 26th of April, 1904, and while there, and, according to his testimony, without telling his father a word about why he went there at that particular time, or the route he took, or anything about the case pending against him, or the trial thereof, which, as before stated, took place that same day, delivered the deed to his father, and the latter assumed to pay the \$2,400 mortgage debt existing against it, and paid him, in addition thereto, the sum of \$600 in cash, not by check, which would have been the usual and ordinary manner of transacting such business. This cash payment was provided for in the contract, and it is passingly strange, if the sale was made in good faith, that it was made on the very day the judgment was rendered against him, and upon the very heels of that unusual and most remarkable trip he made to his father's home. Not only that, but Jacob W. Pickenpaugh, his father, testified that he paid the son the cash for the land without knowing anything about what was

the cause of N. B. going to Iowa, and that he did not remember of asking him anything about the trial of said case. That story seems a little strange to me, when almost in the same breath the father said that he would have been in attendance upon the Putnam circuit court to have assisted his son in the defense of the case had it not been for the pressure of business, yet he testified that he had no recollection whatever of ever making inquiry as to the case; but according to his story, before the ink of the record entry of the judgment against his son was dry, he with one hand, in good faith, accepted the deed which conveyed to him the last vestige of property of every kind which was subject to execution, or out of which that judgment could be satisfied, and with the other innocently paid to the son the purchase price thereof in cash, which also placed it beyond the reach of execution. Yet in the face of these fraudulent acts both Jacob W. Pickenpaugh and his son testified that said sale was made in order to enable the latter to pay his honest debts, when no creditor was pressing except these attorneys; even the bank's little judgment had been paid long before this.

But the most remarkable part of the entire fabrication is that neither of them intimated that any debt was paid with the proceeds of the sale after that most remarkable journey was made by N. B. Pickenpaugh to Iowa, which he says was for the purpose of avoiding the production of his letters or papers in the suit to recover the attorney's fees.

The simple and plain truth of the matter is this: Jacob W. Pickenpaugh and his son, N. B. Pickenpaugh, started out some time prior to August 28, 1903, the day on which N. B. Pickenpaugh conveyed 120 acres of his land to his son C. A. Pickenpaugh, to cheat and defraud Harber & Knight and Childers Bros. out of their fees, which were due them under their contract with said N. B. Pickenpaugh, dated October 30, 1901, whereby he employed them to institute and prosecute a suit against the railroad company to recover damages for personal injuries received by him, and from a careful reading of this record no impartial, fair-minded man can reach any other conclusion; and in my judgment the whole scheme was concocted and executed under the advice and instructions of Jacob W. Pickenpaugh the father of N. B. Pickenpaugh.

4. The last question to be determined in the order suggested at the beginning of this opinion, and really the main proposition involved in this case, involves the validity of the deed, dated August 28, 1903, executed by N. B. Pickenpaugh and wife to Claud A. Pickenpaugh, their son, conveying to him the land involved in this suit.

Claud's version of that transaction is this: That when he became possessed of

the knowledge that his father's land had been seized under execution on a judgment for the sum of \$310, in favor of the Unionville National Bank against the latter, and which was advertised for sale on the 27th day of August, 1903, he made arrangements with his father and grandfather, Jacob W. Pickenpaugh, whereby he agreed to purchase the land involved in this suit from his father upon the following terms: He was to pay \$3,000 therefor, in the following manner, to wit, to assume a mortgage indebtedness standing against the land for the sum of \$2,250, and his father allowed him the following items upon the purchase price thereof, to wit: Fifty-six dollars due him for labor performed for his father; \$200 due him for two horses sold to his father; \$100 for a horse which he sold to one Alexander, with the understanding that Claud would look to his father for the pay, in consideration of the fact that Alexander had given N. B. Pickenpaugh credit for \$100 on a debt due him by the latter; \$128 for corn sold to his father; and the \$310 due the Unionville National Bank, which he says he paid for his father. He also testified that he authorized his father, N. B. Pickenpaugh, to make arrangements with his grandfather, Jacob W. Pickenpaugh, to lend him the \$310 with which to pay the debt due the bank; that his grandfather agreed to furnish the money, provided Claud would give him his note therefor, secured by a deed of trust on the land he was purchasing; that in pursuance to that agreement Jacob W. Pickenpaugh furnished him the \$310, and that he paid the same to the sheriff of Putnam county in satisfaction of the execution held by him, and had it returned fully satisfied; that in pursuance to that agreement, on August 28, 1903, N. B. Pickenpaugh and wife conveyed the land to him by deed of that date; and that he made the note and executed the deed of trust to his grandfather as agreed. Claud's father and grandfather substantially corroborated his testimony regarding those transactions. I have not commented upon the fact that Claud testified that he assumed to pay \$2,250 of the \$4,500 mortgage debts, when all the testimony in the case shows Jacob W. Pickenpaugh assumed \$2,400 of them and paid \$600 in cash for the land he got.

In our judgment, we have shown conclusively in the former paragraphs of this opinion that the respondent, N. B. Pickenpaugh, had fraudulently disposed of his property for the purpose of defeating and preventing his creditors from collecting their debts; and it, therefore, only remains to be ascertained and determined whether or not the respondent, Claud A. Pickenpaugh, knew of that fraud and was a party thereto. The evidence which tends to connect Claud with the fraud of his father is fully as strong and convincing as was that

showing the connection of his grandfather with it. In the first place, his whole story is unreasonable. He resided in the immediate neighborhood with his father, and must have known that his father must have had ample means with which to have paid off the execution mentioned, which was for only \$310, for the reason that he had but recently disposed of some two or three thousand dollars worth of personal property, and that there was no outward indications or evidence that he had disposed of or had expended any of the proceeds received for said property. Beyond that he would have this court believe that he, only 24 years of age, with but \$400 or \$500 worth of property, at the most, devised the scheme, and undertook same at his own instance, by which he was to purchase a farm of 120 acres, worth \$3,000, in order to assist his father, in good faith, to raise the sum of \$310 with which to pay off the bank execution. According to his own statement the land was worth \$3,000, and that he paid that sum for it, while the deed shows he agreed to pay \$3,600 for it. He says that the reason why he purchased the land was to save it from sale and sacrifice under execution; and that he made the arrangements for getting the money, which was necessary to consummate the trade from his grandfather, through the efforts of his father, N. B. Pickenpaugh, and his co-respondent. If that was his only purpose, then why did not Claud suggest and cause his grandfather to furnish the \$310 direct to his son, N. B. Pickenpaugh, and take his note for the money, secured by a deed of trust on the land, instead of having N. B. arrange for getting the money for him from Jacob W. Pickenpaugh, and thereby obviate the necessity of conveying the land to him, Claud, and then he executing a deed of trust back to Jacob W. Pickenpaugh as security for the money, as was done? There was no necessity or reason for Claud's intervention in the matter, if it was only his purpose to assist his father in raising the \$310, for the reason that Jacob W. Pickenpaugh certainly would have assisted his son as willingly and as readily as he would have assisted Claud, his grandson. This is conclusively shown by the fact that Jacob W. Pickenpaugh was ever willing to assist N. B. in this matter whenever called upon to do so. In fact, almost a year later he purchased another 120 acres from him and assumed an indebtedness of \$2,400 standing against it, and paid him in addition thereto the sum of \$600 in cash. So, under those facts, we must presume he would have furnished N. B. the \$310, only one-half the sum he subsequently furnished him on request.

And independent of that, according to the testimony of all three of these parties, Jacob W., N. B., and Claud A. Pickenpaugh, the real estate owned by N. B. Pickenpaugh

at the time his land was being advertised for sale under execution in favor of the bank was worth over and above all incumbrances three or four thousand dollars. One hundred and twenty acres of it was not mortgaged at all and it was worth \$3,000, and the tract conveyed to Jacob W. Pickenpaugh was certainly worth \$600 over and above the sum secured on it by the deed of trust, for he testified that he paid that sum in cash for it over and above the mortgage; and the tract conveyed to Claud was presumably worth the \$750 he says he paid for it over and above the incumbrance on it. But independent of their testimony, all the other evidence in the case shows that all of those lands were worth at least \$25 per acre, which would make N. B.'s interest in the three tracts mentioned at the time they were advertised for sale and at the time he sold to Claud worth \$4,300 over and above the incumbrances; and yet in the face of those facts he would have us believe that his father would have been compelled to have suffered 240 acres of his land to be sold under execution at a sacrifice because he was unable to raise the small sum of \$310 with which to pay off the execution. That story requires a man possessing a greater degree of credulity than I do in order to be believed. Doubtless if N. B. had been acting in good faith, conceding he did not have the means in his pocket, he could have gotten the money from his father or from any other money lender with that amount of good security to offer.

But that is not all of this story. Both Claud and his father testified that his father was in stringent circumstances and was unable to pay his debts, not able to raise even the \$310, before mentioned, with which to satisfy the execution, under which about 240 acres of his land was about to be sold at a sacrifice, yet at the same time N. B. Pickenpaugh was permitting Claud to occupy 120 acres of his land free of rent, and all of the testimony bearing upon that question shows that the land could have been rented anywhere from \$210 to \$240 a year, and Claud said he occupied and used the land free of rent for two years, which aggregates \$420 or \$480 for the two years, and that his father gave him a house in addition, which he moved upon the land.

In law, equity, and good conscience that money and house belonged to the creditors of N. B. Pickenpaugh, and if insolvent, as he claims, he had no legal right to give that money and house to Claud, for the reason that a man must be just before he can legally be generous. If he was not insolvent, as contended by counsel for appellant, then his property had been either concealed or disposed of for the purpose of defrauding his creditors. If the former statement is true, then the gift of the rents and house to Claud was a fraud in law upon the appel-

lant and his other creditors; and if the latter contention is true, then the donation of the rents to Claud was void because it was a fraudulent disposition of his property. *Fehling v. Busch*, 165 Mo. 144, 65 S. W. 542, and cases cited.

But independent of that fact, whichever horn of that dilemma we may take, the same evidence which shows its existence also cuts deeper and proves beyond cavil that the land conveyed by N. B. Pickenpaugh on August 28, 1903, to Claud was also a fraudulent conveyance of his property, and that it should be set aside for the benefit of his creditors. According to the testimony of both Claud and that of his father, the former took the crops and live stock raised on the land, which are the representatives of the rents given to him by his father, and paid for the land in suit with those crops and stock, which, as before shown, did not belong to him, either in law or equity. So by this little scheme of apparent innocent generosity of the father to the son, it was in fact a fraudulent scheme by which Claud has had not only the use of this land free of rent from August 28, 1903, to this time, which is worth not less than \$1,500, but he has also become the owner of the land and the house thereon, if the deed from N. B. Pickenpaugh to him is permitted to stand, which land he testified was worth \$750 over and above the mortgage standing against it. The two items, the rents and the value of the land, aggregate at this time about \$2,250, which is far in excess of the amount of the judgment held by Harber & Knight and Childers Bros. against N. B. Pickenpaugh.

There is another view which must be taken of the deed from N. B. Pickenpaugh to Claud which vitiates it, and that is the confessed alteration of the deed. That act shows that it was made and executed in fraud of creditors, and that Claud knew of and participated in the fraud. The undisputed facts are that a short time after the deed was executed, which was on August 28, 1903, Claud filed it in the recorder's office of Putnam county for record; and that Mr. Underwood, the recorder of deeds, in copying the deed, wrote the description of the land in the record as follows: "Lying, being and situate in the county of Putnam and state of Missouri, to-wit: 40 acres N. W. of the N. W. section eight (8), township sixty five (65), of range twenty (20), and 80 acres W. ½ of N. E. quarter of section seven (7), township sixty five (65), of range twenty (20)." That shortly after the rendition of the judgment in the circuit court of that county against N. B. Pickenpaugh for the sum of \$1,750, which was on April 28, 1904, in favor of Harber & Knight and Childers Bros., they caused an execution to be issued on said judgment and placed in the hands of the sheriff; that the sheriff seized and levied the execution upon the following described

lands, situate in that county, to wit: The north half of the northeast quarter of section 7, township 65, of range 20, and other lands not material to the question now under discussion. On or about August 16, 1903, after the levy of the execution, Claud A. Pickenpaugh, without the knowledge or consent of the makers of the deed, had it altered and changed in the following particulars: The following letters and words, "W. $\frac{1}{2}$ of N. E. quarter of section seven," contained in the deed, when recorded were so erased, altered, and changed as to read as follows, "North $\frac{1}{2}$ of N. E. quarter of section seven," and was on that day recorded in that changed condition. In other words, the letter "W," just before the figures " $\frac{1}{2}$," was erased, and in the place thereof the word "north" was written, thereby purporting to convey a different tract of land than the one which the deed purported to convey when first recorded.

N. B. Pickenpaugh and his son, Claud, testified that it was the intention of the former to convey to the latter the north half, and not the west half, of the northeast quarter of section 7, and that they so informed Mr. Valentine, the scrivener who drew the deed. Mr. Valentine testified that he was instructed to draw the deed so as to convey the north and not the west half, and that in writing the description of that land he wrote the letter "N" and not the letter "W," and that the recorder of deeds mistook the letter "N" for the letter "W," and therefore recorded the deed incorrectly in that regard. He also testified that, after the north half of the northeast quarter of said section had been levied upon, Claud took the deed back to him and informed him as to the manner in which it had been recorded. He also testified that he then examined the deed and found that the letter which the recorder had taken for a "W" was in fact the letter "N," and that at the request of Claud he erased the letter and wrote in its stead the word "north," and thereby made the deed read the "north $\frac{1}{2}$ of the N. E. quarter of section 7," instead of the "W $\frac{1}{2}$ of the N. E. quarter" of said section, as it appears of record. Claud's testimony was substantially the same as Mr. Valentine's was upon that point. Upon the other hand, Mr. Underwood, the recorder of deeds, who recorded the instrument, testified that he examined the deed closely, and that in his judgment the letter was a "W" and not an "N," as claimed by Claud and Valentine, and, consequently, in recording the deed he copied the letter as a "W."

The question now presented for determination is, which of those two stories is true, the one told by Valentine and Claud upon the one hand, or that told by Underwood upon the other. Mr. Underwood was a public officer with no interest whatever in the matter to influence or knowingly induce him to

record the letter "N" contained in a deed as the letter "W." So, if he had not testified at all in the case, the law would presume that the deed was correctly recorded, for the reason the law presumes an officer properly performs his duty. But that is not all of the testimony upon that question. Mr. Underwood was called as a witness in the case, and he testified that in his judgment the letter was a "W," and for that reason he recorded it as such. If the weight of that evidence has not been overcome by the respondents, then we must hold that the deed never conveyed the north half of the northeast quarter of said section 7, whatever may have been the intention of N. B. Pickenpaugh.

The testimony of Claud Pickenpaugh and that of Mr. Valentine is relied upon to overbalance the evidence for appellants upon this point. We will discuss their testimony separately.

In weighing Claud's testimony, we must not overlook the relationship that exists between him and N. B. and Jacob W. Pickenpaugh, his father and grandfather, for the reason that they have greater interests depending upon the result of this litigation than he has. His own personal interest in the case must also be considered, as well as his whole testimony in the case, and his conduct and connections with the fraudulent transactions heretofore pointed out. According to his testimony, his interest involved in this suit is worth about \$1,000, and his fraudulent conduct hereinbefore pointed out is not a very high certificate of commendation to this court. In testifying regarding the change in the deed, Claud said he "presumed the letter erased was an 'N,' and that he thought it was"; and the mere fact he had the deed changed shows that he thought the letter was a "W," and that he thought other people would so consider it, and for that reason he wanted to destroy all ocular evidence of the fact that there had been a mistake made in drafting the deed, and that fact could be best done by erasing the letter, which the recorder says was a "W," and thereby throw doubt in the mind of the court as to what the letter really was, and then rely entirely upon parol testimony to overcome the testimony and the official act of Mr. Underwood, the recorder. His conduct also shows a fraudulent design on the part of himself and father from the time this deed was executed to cover up and conceal the latter's property from his creditors, for the reason that he had the change made without the knowledge or consent of his father. He knew the deed was conceived in sin and delivered in fraud, and when he discovered the mistake and realized that one 40 of his father's land had not been disposed of, and by that mistake it had been left exposed to seizure and sale by his father's creditors, he hastens to

the scrivener who drew the deed, without the knowledge or consent of his father, and had him change it, believing that was the only way the judgment lien could be cut out, and thereby give his deed a preference over the lien; knowing all the while that such act would be in furtherance of that design, and that his father would approve his conduct, without question, just as he did when informed of the change—he had the deed altered in furtherance thereof. When we view Claud's testimony in the light of those facts, and consider his interest in the case and his relations to the other parties to this litigation, we are not loath in saying that it is wholly unworthy of credence.

As to the testimony of Mr. Valentine, we have but little to say. He seems to be a man of some intelligence and judgment. From his title and official connection with this litigation, we judge he is a justice of the peace, and must be somewhat familiar with the ordinary forms of conveyancing and rules of evidence, and should have known the legal effect of a change made in a deed in the absence of the maker, and especially after the validity of the deed had been called in question by legal proceedings, as was the fact in this instance. Good judgment and fair dealing between man and man should have suggested to him the impropriety of his making erasures in the deed, but notwithstanding those facts, when Claud brought the deed to him and told him what the recorder of deeds had done, according to Claud's version, the following occurred: "Q. Is that what you and your father told Valentine to write in the deed? A. Yes, sir; and he told me when I took the deed to him the letter was an 'N.' Q. Did you see and read the deed? A. Yes, sir. Q. What was the letter? A. I presume it was an 'N.' That's what I thought it was; and he said positively it was: said it was as plain as the nose on a man's face."

Now, if the letter erased was as plain as the nose on a man's face, was was the object of Mr. Valentine's erasing it and writing in its place the word "north"? That is a very suspicious fact to be considered in weighing his testimony, especially after the title of 40 acres of land hinged upon the fact whether the letter was an "N" or a "W." If he was honest in this conviction that the letter was an "N" and not a "W," but thought there might be doubt in the minds of other persons as to what the letter really was, then it seems to me common sense and common honesty would have suggested to him a new deed, giving the correct description of the land and reciting therein the fact that it was made for the purpose of making certain that which was doubtful in the deed in question; or if he did not care to go to the trouble of making

a new deed, but wanted to be fair in the premises, why did he not first obtain the consent of the maker of the deed, and then simply draw a red line through the letter, and then write the word "north" above the line and indicate its proper place by a caret. By following either of the plans suggested, the doubt could have been made certain without destroying the existence of the very thing that was in question, and thereby place it beyond the power of the court or any one else to view and determine with ocular certainty what the letter in fact was; but by erasing the letter he compelled the court to depend entirely upon parol testimony in determining that fact. The deed itself, of course, in its present condition is no evidence whatever tending to prove that the letter was in fact an "N" and not a "W," but, upon the contrary, the alteration of the deed should be considered as a badge of fraud; and before any court would be justified in finding that an officer had erroneously recorded a deed which had been changed after its recordation, and especially after litigation had arisen regarding the very matter which is involved in the alleged error, the evidence should be clear, convincing, and overwhelming, leaving no room for a reasonable doubt as to the existence of the error. And we have no hesitancy in saying that the evidence in this case falls far short of that standard and weight.

With great pains we have carefully read this long record, fully weighed the evidence, and, after duly considering all of the legal propositions involved, we are clearly of the opinion that respondent, N. B. Pickenpaugh, disposed of his property for the purpose of defrauding his creditors, and especially Harber & Knight and Childers Bros.; and that his father and son, Jacob W. Pickenpaugh and Claud A. Pickenpaugh, knew of and were parties to his fraudulent purpose, and accepted the deeds mentioned in the record from him to them for the purpose of assisting him in carrying out the fraudulent designs.

We are, therefore, of the opinion that the findings and judgment of the trial court were for the wrong parties, and that the judgment should be reversed, and the cause remanded with directions to the trial court to set aside its findings and judgment in favor of respondents, and enter a judgment for appellant, setting aside and canceling the deed, dated August 28, 1903, signed by N. B. Pickenpaugh and wife, conveying the land involved in this case to Claud A. Pickenpaugh, and to make such other orders, judgment, and decrees as may be just and proper in the premises; and to proceed according to due course of law and try the case upon the second count of the petition. It is so ordered. All concur.

CHILDERS v. PICKENPAUGH et al.

(Supreme Court of Missouri, Division No. 1.
March 31, 1909. Rehearing Denied
April 13, 1909.)

1. FRAUDULENT CONVEYANCES (§ 269*) — PLEADING—NECESSITY—ISSUES.

While as a general rule a homestead right must be pleaded to be available, yet a general denial to the petition seeking to set aside a conveyance as fraudulent against creditors authorizes proof of the fact that the land conveyed was a homestead.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 791, 793; Dec. Dig. § 269.*]

2. HOMESTEAD (§ 200*)—SETTING ASIDE—EFFECT.

A judgment debtor may relieve himself of the preliminary action of appraisers setting out to him a homestead out of his property, by appealing to the court issuing the execution, and on proper showing have the report of the appraisers set aside, and where the report is set aside the judgment debtor is left where he was before the appraisers acted, but where his exceptions are overruled and the report confirmed, the homestead limits become fixed, at least until there is a reassignment by reason of increase in value.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 372-377; Dec. Dig. § 200.*]

3. HOMESTEAD (§ 201*)—SETTING ASIDE—EFFECT.

Where a judgment debtor fails to pay the debt and fails to except to the act of the appraisers setting out to him a homestead out of his property, and the execution with the report of appraisers and report of sale is filed, the assignment of homestead to him is complete and the bounds of the homestead are fixed.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 378; Dec. Dig. § 201.*]

4. HOMESTEAD (§ 201*)—SETTING ASIDE—EFFECT.

Where an execution debtor pays the execution before sale and return, the land is relieved from the levy and from all the incidents thereof, including the act of the appraisers in setting out to him a homestead, and in such case no complete assignment of the homestead results.

[Ed. Note.—For other cases, see *Homestead*, Dec. Dig. § 201.*]

5. HOMESTEAD (§ 103*)—LIABILITIES—JUDGMENT AGAINST—LIEN.

A judgment against one occupying land in excess of his homestead exemption becomes a lien on the surplus from the rendition of the judgment, and such lien is not postponed until assignment of the homestead after a subsequent levy of execution.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 157, 158; Dec. Dig. § 103.*]

6. HOMESTEAD (§ 201*)—SETTING ASIDE—CONCLUSIVENESS.

An execution debtor who takes no steps to set aside the setting off to him of a homestead by the officer holding an execution against him and the appraisers cannot collaterally attack the setting aside of the homestead.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 379; Dec. Dig. § 201.*]

Appeal from Circuit Court, Putnam County; Geo. W. Wanamaker, Judge.

Action by William H. Childers against Napoleon B. Pickenpaugh and another. From

a judgment for defendants, plaintiff appeals. Reversed and remanded.

E. M. Harber, A. G. Knight, and N. A. Franklin, for appellant. Edward Higbee, Lorenzo Jones, and B. L. Robinson, for respondents.

GRAVES, J. This is a companion case of *Childers v. N. B. Pickenpaugh and C. A. Pickenpaugh* (decided at this term of the court) 118 S. W. 453. The two causes were tried together in the court below, and submitted to the court upon the same evidence. The evidence has been set out by **WOODSON, J.**, at length in the other case, and a repetition thereof herein would be superfluous. One additional question in this case requires specific mention of some of the facts. From the evidence it appears that, on the same day a judgment for \$1,750 and costs was rendered against N. B. Pickenpaugh by the circuit court of Putnam county in favor of Harber & Knight and Childers Bros., the said N. B. Pickenpaugh made a deed to the northwest quarter of section 7, in township 65, of range 20, Putnam county, Mo., to his father, J. W. Pickenpaugh. This deed was delivered to the father, in the state of Iowa, at some time between 9 and 12 o'clock at night of April 26, 1904. On April 26th the judgment was rendered, so that there was a judgment prior to the delivery of the deed. The deed was not recorded until later. N. B. Pickenpaugh had originally 480 acres of land. Of this, 380 acres was in township 65 of range 20; thus: The southwest $\frac{1}{4}$ (fractional) of section 6, containing 120 acres or a little more; the northwest $\frac{1}{4}$ (fractional) of section 7, containing 120 acres or a little more; the north $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of section 7, containing 80 acres; and the northwest $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of section 8, containing 40 acres. The other 120 acres was in section 36 of township 66, range 21. The 80 and 40 above described is the land involved in the companion suit, being the land alleged to have been sold to the son, C. A. Pickenpaugh. The south 80 acres of the northwest $\frac{1}{4}$ (fractional) of section 7 is the land involved here.

On April 10, 1903, the National Bank of Unionville procured a judgment in the circuit court of Putnam county against N. B. Pickenpaugh and John H. Bishop for \$261.63, upon which execution was issued, and the sheriff, finding no personal property, proceeded to levy upon lands. The sheriff's return shows that the debtor Pickenpaugh refused, after notice, to select his homestead, and he selected three appraisers, who set out his homestead. The return shows that this was done on May 28, 1903, and that as and for his homestead there was set off the northwest $\frac{1}{4}$ (fractional) of section 7, and other land in the southwest $\frac{1}{4}$ (fractional) of sec-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion 6, and then levied upon the remainder of the lands in said township 65. Under this levy the lands were advertised for sale on August 27, 1903. The return then further says: "I further state that the foregoing property was duly advertised for sale by R. L. Gray, sheriff, to be sold on Thursday, August 27th, 1903, but that the defendant, N. B. Pickenpaugh, on August 26th, 1903, paid to me, successor of the late sheriff R. L. Gray, cash to the amount of \$310.11, which I applied as follows: (Items omitted.) And I return this amount as satisfied. (Signature of sheriff.)" The word "amount" is evidently a misprint in the abstract. It should be "execution," for the sum paid was the full amount of debt and costs called for by the execution. This execution being fully satisfied, no further proceedings were had thereunder. On the day of its satisfaction, August 26, 1903, the deed to C. A. Pickenpaugh to the 80 and 40 above described was made under the circumstances fully described and set out in Judge WOODSON'S opinion.

After Harber & Knight and Childers Bros. got their judgment, an execution was issued, and the sheriff, finding no personal property, proceeded to levy upon the lands. Before doing so he notified Pickenpaugh of his exemption rights, but he refused to point out or select the homestead. The house in which he lived was on the land in section 6. Upon his refusal to designate his homestead the sheriff appointed three appraisers as required by law, who, after taking the required oath, set off to him as his homestead the following, as described in their certificate: "The fractional southwest quarter of section six (6) and the north forty acres of the north west fractional quarter of section seven (7) all in township sixty-five (65) range twenty (20) being in quantity the amount of 160 acres all situated in Putnam county, Missouri, and that we appraise the same as so designated and fixed by us to be of the value of one thousand dollars over and above incumbrances." After this land was set off as a homestead, the sheriff levied upon all of the remaining lands formerly held by N. B. Pickenpaugh, including the 120 acres in section 36, mentioned supra. Sale was had, and the lands levied upon were purchased at said sale by the plaintiff herein, William H. Childers, one of the firm of Childers Bros.

By the first count of the petition herein the plaintiff seeks to set aside the deed to J. W. Pickenpaugh on the ground that it was fraudulently made to hinder, delay, and defraud the creditors of N. B. Pickenpaugh, and especially Harber & Knight and Childers Bros., and that J. W. Pickenpaugh knew of and participated in such fraud. The second count was one in ejectment, laying ouster as of September 8, 1905, alleging the monthly rents to be \$20, and damages \$50, with prayer for judgment for possession as well

as for the damages and monthly rents aforesaid. Upon a trial before the court, judgment went for the defendants and against plaintiff for costs. From this judgment, after unsuccessful motion for new trial and in arrest of judgment, the plaintiff duly appealed to this court.

The evidence pro and con upon the question of fraud is fully set out in the companion case of William H. Childers v. N. B. Pickenpaugh and C. A. Pickenpaugh, to which we make reference, as both cases were tried upon the same facts. This sufficiently states this case.

1. In the companion case, WOODSON, J., has discussed fully all the facts as they bear upon the question of fraud. He discusses the mysterious and unexplained disappearance of a large quantity of live stock owned by N. B. Pickenpaugh just before the \$1,750 judgment. He discusses fully the alleged sale of the 120 acres of land to the son, C. A. Pickenpaugh, and in paragraph 3 of the opinion discusses the transactions involved in this suit. He reaches the conclusions that both of these sales were made to defraud creditors, especially Harber & Knight and Childers Bros. In his conclusions upon the question of fraud, we heartily concur. And in this case the trial court was in error in not setting aside the deed to J. W. Pickenpaugh involved in this case, unless it be for reasons urged, which we discuss next.

2. By counsel for the defendants it is contended that all the land involved in this suit had been set off to N. B. Pickenpaugh as his homestead, in the case of National Bank of Unionville v. N. B. Pickenpaugh and John H. Bishop, and that a conveyance thereof could not be in fraud of creditors. To this the plaintiff replies by saying (1) that no former setting out of this land as a homestead is pleaded; (2) that under the facts in evidence there never was a completed setting out of the homestead in the Bank Case; and (3) that Pickenpaugh having refused to select and point out his homestead when the sheriff notified him of his rights under the execution on the judgment for \$1,750, and thus compelled and induced the sheriff to appoint appraisers to appraise and fix the boundaries of a homestead, he is precluded from now disputing the homestead so set out by the appraisers in this collateral way. It might be well to here state that the answers of the defendants were (1) a general denial, and (2) a plea to the effect that the sale was one made in good faith and not to defraud creditors.

That this former homestead, if in fact and law there was such, should have been specifically pleaded, we think is true in most cases. In Ency. of Plead. & Prac. vol. 10, p. 81, the rule is thus stated: "Wherever in an action property is sought to be recovered out of which a homestead is to be claimed, the right of homestead exemption

should be set up in the pleading." To this, however, the respondents urge that the evidence as to the first assignment of a homestead went in without objection, and therefore plaintiff cannot complain of the action of the trial court, if in fact the trial court found that here was no fraud in the conveyance. In cases of alleged fraud the evidence is permitted to take a broad range, and we are not inclined to think that the general rule above announced has been applied to this character of a case.

The real issue here was, as stated in the petition, that said deed was made "for the purpose of cheating, hindering, and delaying said parties named and others in the collection of their claims and demands, and for the purpose of defrauding, cheating, hindering, and delaying his said creditors, and without any good or valuable consideration therefor." To this specific charge of fraud the defendants interposed the answer above indicated. The general denial put in issue the question of fraud. Now, it occurs to us that even under a general denial the defendants could show any state of facts which would rebut or disprove the charge of fraud, and one way of doing that would be to show that the property was of such character that there could not, either in law or fact, be a fraud perpetrated in the conveyance thereof. In our judgment, whilst as a general rule a homestead right must be pleaded, yet in those cases where the gravamen of the petition is fraud, then a general denial is sufficient to authorize a proof of a previously assigned homestead, as disproving the charge of fraud.

There is more difficulty in the second instance of the plaintiff, i. e., that there never was a completed assignment of this homestead under the bank judgment. Had there been a sale under this bank judgment and the execution returned showing the homestead assignment, there would be no question, but such are not the facts. The amount of the execution was paid and the execution returned satisfied. This payment took all the property levied upon out of the meshes of the law. This payment left the defendant in that suit in status quo as to all of his property. We take it that there are two ways in which a judgment debtor can relieve himself of the preliminary act of the appraisers in meting out to him a homestead out of his property: First, he can go to the court issuing the process and complain, and upon a showing have the report of the appraisers set aside. In *Ency. of Plead. & Prac.* vol. 10, p. 75, it is said: "Exceptions to the report of commissioners assigning homestead should be made to the court from which process issued, and to which the assignment is to be returned; and such report cannot be impeached in a collateral proceeding." The author cites in support thereof, among other cases, the case

of *Lallement v. Detert*, 96 Mo. 182, 9 S. W. 568. If the report is set aside, the judgment debtor is left just where he was before the preliminary act of the appraisers. If, on the other hand, his exceptions were overruled and the report confirmed, the homestead limits become fixed, at least until there is a reassignment by reason of increase in value. Or, if the judgment debtor fails to pay the debt and fails to except to the action of the appraisers and the execution with report of appraisers and report of sale is filed, then such assignment of homestead is complete and the metes of the homestead fixed. It therefore appears that the completion of the homestead assignment depends upon his conduct after the preliminary step is taken by the appraisers. But in the second place, the judgment debtor can obviate the completed assignment of the homestead by his own act, independent of the court, as fully as he could by exceptions filed in the court. He can pay the judgment or execution debt and thus fully relieve his land not only of the levy under the execution, but all other incident steps taken under the execution and levy. When he pays the full amount of the execution, the executor becomes functus officio, and his land is relieved from the levy and all the incidents leading up to and connected with the levy, including the preliminary act of the appraisers. When he has discharged the debt, before sale and before return of the execution, he and his property are left just as if no execution had issued or any steps been taken thereunder. We therefore conclude that there was no complete assignment of a homestead. By a completed assignment of homestead is contemplated the action of the sheriff, the appraisers, and the court. *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649.

The judgment under which plaintiff bought was entered April 26, 1904. No execution was issued until May 7, 1905, and no attempt to levy under the writ was made until August 9, 1905. From this it is argued that no lien attached to any part of the homestead premises, of at least 360 acres, until the assignment of the homestead had been made. In support of this we are cited to *Macke v. Byrd*, supra. The court in banc has just gone over this question in the recent case of *White v. Spencer* (not yet officially reported) 117 S. W. 20, in which case we disapprove of the broad language of the *Macke-Byrd* Case, and hold that a lien attaches to the surplus in quantity from the rendition of judgment. This point will have to be disallowed.

Under the judgment for \$1,750, the defendant had his homestead duly appraised and set off by the officer and the appraisers. He took no steps in court or otherwise to thwart this action in that case, and such act cannot be collaterally attacked in this case.

Lallemont v. Detert, 96 Mo. 182, 9 S. W. 568.

It is not necessary to discuss other questions raised. From what has been said it follows that this case should be reversed and remanded, with directions to the trial court to enter a judgment for plaintiff canceling the deed as to the land involved, made by N. B. Pickenpaugh to J. W. Pickenpaugh, and proceed with the further hearing of this cause under the second count of the petition. It is so ordered. All concur.

McMAHAN et al. v. HUBBARD et al.
(Supreme Court of Missouri, Division No. 2.
March 30, 1909.)

1. WILLS (§ 459*)—CONSTRUCTION—PRESUMPTIONS AGAINST INTESTACY.

The general intention in a will to dispose of all of testator's property is given weight in determining what was intended by a particular devise, that may admit of enlargement or limitation; and the court, in pursuing the general presumption against intestacy, will supply, transform, or change the words in a will, so that the manifest intent will not be defeated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 978; Dec. Dig. § 459.*]

2. WILLS (§ 489*)—CONSTRUCTION—EVIDENCE IN AID OF CONSTRUCTION.

To determine the object of testator's bounty, or the subject of disposition, or the quantity of interest intended to be given, the court may inquire into every material fact relating to the person interested under the will and the property which is the subject of disposition, and to the circumstances of testator and of his family.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 489.*]

3. WILLS (§ 490*)—CONSTRUCTION—EVIDENCE IN AID OF CONSTRUCTION.

Where testator devised land described as part of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, etc., without mentioning any section, and part of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 33, parol evidence was admissible to show what lands testator had at the times of the making of his will and at his death, for the purpose of showing that the lands described without the designation of the section would dispose of lands in section 28, which he owned.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1047-1057; Dec. Dig. § 490.*]

4. WILLS (§ 560*)—CONSTRUCTION—EVIDENCE IN AID OF CONSTRUCTION.

Testator devised lands described as part of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, etc., without giving any designated section, and a part of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 33. He declared that he made the gift to his wife, daughter, and adopted son, to give them ample support. The evidence showed that testator owned lands in section 28, which would be disposed of by the description in the will, provided section 28 was added thereto, and he owned no lands in section 33, except those described in the will. *Held*, that the words "section 33," in the will, would be confined to the land described as the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 33, so that the will disposed of testator's lands in section 28.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1216-1220; Dec. Dig. § 560.*]

5. WILLS (§ 488*)—CONSTRUCTION—EVIDENCE IN AID OF CONSTRUCTION.

Parol evidence is admissible to show a latent ambiguity in a will, which may be removed by extrinsic evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033-1036; Dec. Dig. § 488.*]

6. WILLS (§ 662*)—CONSTRUCTION—CONDITIONS—PERFORMANCE.

Testator devised lands to his wife, daughter, and adopted son, and declared that the gift to the son was conditioned on his remaining with testator's wife until he was 21 years of age and behaving himself toward her as a son. The wife objected to the adopted son marrying when he did, but they were soon reconciled, and he continued to live on the farm and cultivate the land, and he was at the wife's house every day, furnishing her fuel and keeping up the farm. The wife was satisfied with his conduct toward her. *Held*, that the adopted son fulfilled the condition imposed and was entitled to the devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1537; Dec. Dig. § 662.*]

7. ABATEMENT AND REVIVAL (§ 14*)—PENDENCY OF OTHER ACTION.

A suit to determine title to land, claimed by plaintiffs under a will and codicil admitted to probate, was tried without objection or request for a continuance, though the answer alleged the pendency of a suit by defendants to contest the codicil. Service of process in such suit had not been made on plaintiffs. During the trial an order for an alias summons on plaintiffs was obtained, and defendants only raised the pendency of the suit as a defense to the merits. *Held*, that the court properly refused to abate the suit.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 108; Dec. Dig. § 14.*]

8. WILLS (§ 354*)—PROBATE.

Where the original will and codicil were written on the same sheet of paper, to which was attached the certificate of the probate judge, certifying that the judge had examined the instrument, and had heard the evidence of the subscribing witnesses, and adjudged the same to be the will of testator, the court properly ruled that the court had probated both the will and the codicil.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 354.*]

Appeal from Circuit Court, Newton County; F. C. Johnston, Judge.

Action by Dora McMahan and others against Nannie E. Hubbard and others. From a judgment for plaintiffs, defendant Hubbard appeals. *Affirmed*.

R. M. Sheppard and John T. Sturgis, for appellant. Horace Ruark, James H. Pratt, and George Hubbert, for appellees.

GANTT, P. J. This action was commenced in the circuit court of Newton county to determine the title to certain lands in said county. The plaintiffs claimed title to the lands in controversy under and by virtue of items 3 and 11 of the last will and testament of John McMahan, deceased, who is the common source of title, and the first section of the codicil to said will. The said provisions of the will are in these words:

"3. In order that my wife, my daughter

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Leah, and my adopted son William McMahan may have ample support, I give and bequeath unto them, the following described land, viz.: Seven acres, part of S. W. quarter of S. E. quarter, also N. W. quarter of S. E. quarter, also the E. one-half S. W. quarter and that part of the W. half S. W. quarter lying east of the present fence running on the east side of said tract. Also the twenty-three acres, being part of N. E. quarter of N. W. quarter of section 33. All the above land in township 25 of range 31."

"11. All the property herein bequeathed shall descend to the heirs of the bodies of those to whom it is bequeathed, provided said heirs are born in lawful wedlock and should any of my legatees die without heirs of their body as above stated, then all the property bequeathed to them shall descend to my legal heirs."

Codicil: "In explanation of section 3, where the bequeath is to my wife and daughter Leah and adopted son William McMahan, at the death of my wife, the real estate herein mentioned is to descend to my daughter Leah and William McMahan (adopted son)."

The plaintiffs, who are the wife and child of William McMahan, deceased, alleged in their petition that the land intended to be described and conveyed by the third clause of the said will to the testator's wife, daughter Leah, and adopted son William McMahan, is the land in controversy herein, and that by mistake the scrivener, in writing the will, failed to designate that all of said land described in said third item of the will is in section 28, except the last described tract of 23 acres, which is properly described as being in section 33.

The defendants in their answer allege that the said John McMahan made no disposition in his last will of the part of the land in controversy, which is located in section 28; that as to this land he died intestate. The defendants also said in their answer that all the bequests and gifts made to the said William McMahan by the said will were made upon the following terms and conditions, set forth in the seventh item of said will in the following language, viz.:

"7. All the bequests made to him are conditioned that he remain with his adopted mother until he is twenty-one years of age and behaves himself toward her as a dutiful son."

And it is asserted that the said William McMahan failed and refused to comply with the said terms or provisions of said will, and by his conduct and action forfeited any and all bequests under the terms and provisions of said will. The cause was tried in the circuit court of Newton county, and at the trial it was agreed that John McMahan died on the — day of —, 1888, and that he left surviving him his widow, Elizabeth McMahan, who died on the 29th of July, 1904; that he also left surviving him as his only heir at law J. Raphael McMahan, who

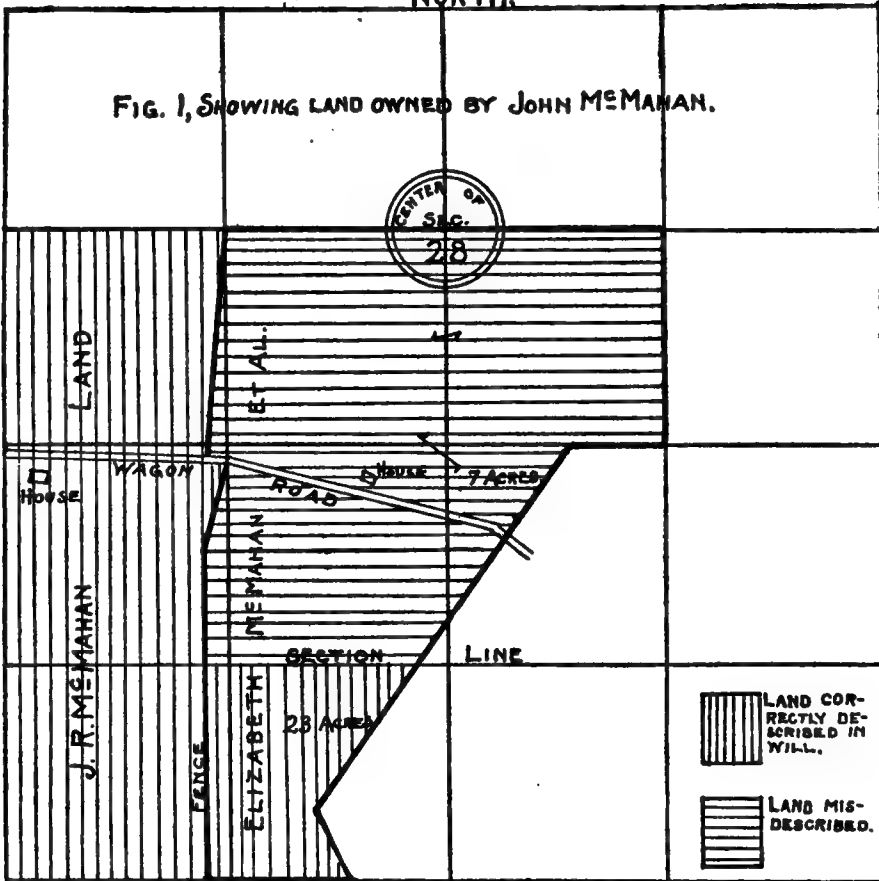
is a son by a former marriage, his daughter Leah McMahan, now Leah Goin, and his daughter Nannie E. Hubbard; that William McMahan, mentioned in the will as his adopted son, died on or about the 25th of December, 1901, leaving as his heirs his widow, Dora McMahan, and his children, Logan, Floyd, Noble, and Duard McMahan, all plaintiffs herein; that the defendant Commodore Thomas is the only child of Leah Goin.

The evidence on the part of the plaintiffs tended to show that the testator, John McMahan, at the time he executed his will, and at the time of his death, and for many years prior thereto, owned the land in suit in section 28, township 25, range 31, and neither at the time of the execution of his will, nor at any other time did he own any land in section 33, except the 23-acre tract described in said will as being a part of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 33 and the 40-acre tract west of said 23 acres, which he devised to his son J. R. McMahan in the ninth item of the will. The evidence also tended to show that, if section 33 should be held to be a part of the description of all the land described in item 3 of the will, then all of it, except the 23-acre tract, was at the time the said will was executed and at the time of the death of the testator owned by T. B. Durham and James Hubbard. A plat of section 33 and of a part of section 28 will accompany this opinion. The plaintiffs are claiming title to that part of the land shown by said plat which is inclosed in the red dotted lines. [Indicated by heavy black lines in plat.]

The evidence clearly demonstrated that the land in which the plaintiffs claim an interest in this suit belonged to John McMahan at the time his will was executed and at the time of his death, and that that part of said land contained in section 28 would have been the identical land described in item 3 of the will, if the scrivener, who drew the will, had inserted the words "section 28" just after the words "and that part of the W. half S. W. quarter." The testimony disclosed that the lands owned by John McMahan as his home farm was a compact body of land, mostly in section 28, and the balance in section 33, immediately south. The house in which he and his family lived was and is on the part of the farm in section 28, and was occupied by his widow until her death in 1904. His wife, daughter Leah, and adopted son were the members of his family, living at home when the will was made. In his will he expressed the intention of providing that his family should have "ample support," and to this end devised 180 acres of land by description. To his daughter Nannie Hubbard he gave land which was not a part of the home farm, to his son J. R. McMahan, who was married and living on the land given him by the will, he gave three 40-acre tracts, extending north and south along, and constituting, the western part of the farm.

NORTH.

FIG. 1, SHOWING LAND OWNED BY JOHN MEMAHAN.



HEAVY BLACK LINE SHOWS LAND IN CONTROYERSY.

DURHAM

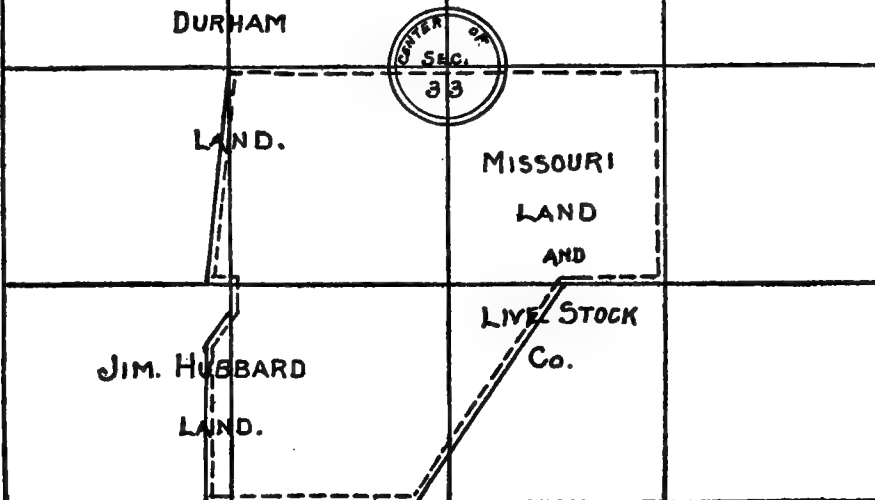


FIG. 2, SHOWING MISDESCRIPTION.

Two of these 40-acre tracts are in section 28, and one in section 33, and are correctly described in the will. After deducting these special devises to his daughter Nannie Hubbard and his son J. R., there was left the 130 acres with the residence on it.

The evidence also showed there was at that time, and yet is, a fence dividing the land occupied by and given to J. R. McMahan from the balance of the home place. This fence was somewhat irregular, and did not follow the subdivision lines, but ran east of the same, cutting off a few acres of land from the J. R. McMahan tracts, to wit, the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 33 and W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 28. This fence was in the mind of the testator when he made his will, as he says he gives to his son J. R. McMahan the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 28, "west of the present fence" and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 33 "lying west of the present cross-fence." In item 3 he devises to the plaintiffs "that part of the W. half S. W. quarter lying east of the present fence running on the east side of said tract," but omits the number of the section. The testator also owned at that time, in section 28, a 7-acre tract, part of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and this he also devised to his wife, daughter, and adopted son, but omitted the section also in that description.

1. Among the cardinal rules often invoked by this court in the construction of wills is the presumption that the testator intended to dispose of his whole estate. This presumption seems to amount to this: Where there is a general intention appearing in the will to thereby make a complete disposition of all of the testator's property, such general intent is allowed weight in determining what was intended by a particular devise that may admit of enlargement or limitation. *Watson v. Watson*, 110 Mo., loc. cit. 171, 19 S. W. 543. Whatever may be the rule in other states, it is well established in this state that in pursuing the general presumption, and to prevent the happening of the incongruous condition of the estate passing partly by will and partly by descent, words may be supplied, transformed, or changed in the will, so "that the instrument may not perish and the manifest intent of the parties be not defeated by the palpable error of the scrivener. *Thomson v. Thomson*, 115 Mo., loc. cit. 67, 21 S. W. 1085, 1128; *Briant v. Garrison*, 150 Mo., loc. cit. 668, 52 S. W. 361; *Rines v. Mansfield*, 96 Mo. 398, 9 S. W. 798; *Presnell v. Headley*, 141 Mo. 184, 43 S. W. 373; *Ro Bards v. Brown*, 167 Mo. 447, 67 S. W. 245." It is also well settled in this state that for the purpose of determining the object of the testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, the court may inquire into every material fact relating to the person who claims to be interested under

the will and the property which is claimed as a subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling it to identify the person or thing intended by the testator or to determine the quantity of interest he has given by his will. *Riggs v. Myers*, 20 Mo. 229. In the last-mentioned case a will described land devised as the S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of section 4 in township 60, range 38, in Holt county, Mo., the devisee to have the privilege of using water of the big spring, with free access to and from it as he might wish; and it was held by this court that parol evidence that the corresponding quarter sections of township 59 in the same range and county were intended to be devised was admissible, it appearing that the big spring was upon the S. E. $\frac{1}{4}$ of section 4, township 59, and that the testator never owned or claimed any land in section 4 of township 60. *Willard v. Darrah*, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468. Under this adjudication we think the court properly admitted parol evidence to show what lands the testator in this case had at the time of making his will and at the time of his death; and when this evidence is considered we think the will, taken as a whole, shows a clearly expressed purpose on the part of John McMahan to dispose of all his property, real and personal; and we think it is also a fair presumption that, as he owned no other real estate, outside of his home place, except that which he devised to his son J. R. and his daughter Nannie Hubbard, there can be little doubt that he intended to give to his wife and his daughter Leah and his adopted son this home place. He was devising his own estate, and he did not intend to give away anything which did not belong to him; and yet, if the contention of the defendants is true, he would have been devising the land which belonged to his neighbors Durham and Hubbard and the Missouri Land & Live Stock Company, which he did not own at the time.

Again, to sustain the defendants, we must reach the conclusion that the testator meant to die intestate as to a very large part of his estate; a conclusion which, we have seen, the law would never presume, especially where the decedent makes a will, as John McMahan did in this case. In the third item of the will the testator says that he makes provision for his wife and daughter Leah and his adopted son, to have "ample support" out of the lands which he devised to them. Certainly he could not have, for one moment, supposed that he provided an "ample support" for them out of the 23 acres of land in section 33, and yet he must have known that this was all the land he owned in section 33 at that time. The bare statement of the proposition shows that it is a most unreasonable and unnatural construction of the language used by the testator. He had de-

scribed 130 acres of land, only 23 acres of which was in section 33. It is readily seen that the real point in controversy in this case is whether it was competent for the circuit court to admit parol evidence to show that the description of the land devised to the wife and daughter Leah and their adopted son, if section 33 was a part of said description, was not owned by the testator, and thereby show that the description was false, if it should be held that all the said lands were in section 33. While there has been great conflict in the authorities as to how far a court can go in receiving testimony to show that the words used in a will are an incorrect description of land devised, we think the rule announced by Judge Scott in *Riggs v. Myers*, 20 Mo. 243, has become the settled law of this state, and such evidence is admissible to show a latent ambiguity, and when this is done the rule is well settled that a latent ambiguity may be removed by extrinsic evidence. In *Willard v. Darrah*, 168 Mo., loc. cit. 670, 68 S. W. 1023, 90 Am. St. Rep. 468, this court approved the rule laid down in 2 Underhill on the Law of Wills, § 910, in these words: "In every case the court is entitled to be placed in possession of all the information which is available of the circumstances of the estate and family of the testator when he made his will, to the end that the court may be in his situation as nearly as may be, and may interpret and understand the will as he would if he were alive. When the evidence of extrinsic circumstances is all in, it may appear that a description in the will which was intended by the testator to apply to one object or thing is applicable, with more or less certainty, to several objects or things. This is a case of latent ambiguity, and parol evidence is then received to ascertain which person or thing was intended by the testator. Where the ambiguity is latent, it is created by evidence of extrinsic facts, and the same evidence is admissible to remove it." In *Page on Wills*, § 819, it is said: "Where the testator describes the property devised by township, range, section, and quarter section, but does not locate it in the correct section or range, or the like, the weight of authority is that extrinsic evidence is admissible to show exactly what real estate the testator owned. Under this view, if he owns any real estate which corresponds in part to the description in the will, the court will reject the incorrect part of the description and will pass the realty conveyed by the correct description."

In the very exhaustive discussion of this question by the Supreme Court of Indiana in *Pate v. Dushong*, 161 Ind. 533, 69 N. E. 291, 63 L. R. A. 593, 100 Am. St. Rep. 287, that court cited with approval the decision of this court in *Riggs v. Myers*, 20 Mo. 239, and numerous other cases which supported the text of *Page* above cited. The court added: "There are some cases which seem to hold that,

when the evidence of the circumstances, situation, surrounding and property owned by the testator at the time he made his will shows that the testator did not own the land as described in his will, but owned other land to which a part of the description might properly apply, no latent ambiguity was disclosed, unless the words 'my land,' or other words stating in effect that the testator owned the land devised, are contained in the will. The rule established by the weight of the authorities and the better reason, however, is that such evidence does disclose a latent ambiguity, whether words stating in effect that the testator owned the lands devised are used or not; and if by rejecting the false description, or the false part thereof, sufficient remains, when considered from the position of the testator, to identify the land intended with reasonable certainty, the same will pass under the will to the devisee. It is true that often rejecting the false description, or the false part thereof, the words 'my real estate,' or words of like import, if used by the testator in making the devise, would be of great force in identifying the land intended, and might alone or in connection with the true part of the description, if any, pass the land to the devisee, in cases where, if the words were not used, the devise would fail for want of a description sufficient to identify the land. The enforcement of this rule does not reform or add any words to a will, for this cannot be done, but enables the court to construe the will after rejecting the false part of the description and thus carry into effect the intention of the testator as expressed therein." A leading case on this subject is *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617, 710, 29 L. Ed. 860. The testator gave to his children a lot described as lot numbered 6 in square 403, together with the improvements thereon erected. The parol evidence disclosed that the testator did not have or own lot 6 in square 403, and that the same had no improvements thereon; but he did own lot 8 in square 406, which had a house thereon, and it was held that this raised a latent ambiguity, and the evidence, taken in connection with the context of the will, was sufficient to show there was an error in the description, and the lot really devised was lot 8 in square 406. Numerous other cases might be cited, but would subserve no good purpose.

Now, applying the foregoing principles to the case in hand, it is not necessary for this court to supply the words "section 28" as applied to the description of the lands preceding the 23-acre tract. All that is necessary is to confine the words "section 33" to the 23-acre tract, in immediate connection with which it is used, and this we do because the evidence abundantly established that the testator did own 7 acres, part of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the east half to which that description would specifically apply, in sec-

tion 28; and so, by rejecting the words "section 33" as to these last described lands, and applying the evidence which shows that these lands constituted the home place of the testator, we find that they are correctly described, except that the section is omitted from their description, and there is sufficient description to identify these lands, and they passed under the will of John McMahan to his wife, daughter Leah and adopted son. This conclusion fully accords with the presumption that the testator intended to devise all of his estate, and not leave this valuable tract of land wholly undisposed of, and because, moreover, it accords with his desire to provide an "ample support" for these devisees, whereas a different construction would render this expressed intention wholly inoperative.

2. But it is insisted by the defendants that the seventh clause in the will created a condition precedent, and that no interest passed to or vested in the said William McMahan by clause 3 of the will, because it did not appear that he had complied with the conditions, set out in clause 7, that "he should remain with his adopted mother until he was twenty-one years of age and behave toward her as a dutiful son." Now, as to this contention the court found as a matter of fact that William McMahan was over 21 years of age at the time of his marriage, and the evidence abundantly established that finding. The only way in which it was claimed that he violated this condition is that he married before he was of that age; but all the testimony shows that he was an exemplary young man, hard worker, sober and industrious, with no bad habits. While there was some evidence tending to show that his foster mother objected to his marrying when he did, the evidence establishes that they were soon reconciled, and that he continued to live on the farm, although in another house, and cultivated the land, and took care of the crops and her stock; that he was at her house every day, and furnished her her fuel and kept up the farm. The evidence tends clearly to show that the foster mother at least was entirely satisfied with his conduct towards her. We do not, under these circumstances, think it is necessary to go at any length into the learning on the subject as to whether this condition was a precedent or a subsequent one, for in either event William McMahan fulfilled it.

3. The answer set up that there was then pending a suit to contest the codicil to this will of John McMahan. The evidence tended to show that, while such a suit had been filed, no service had been had on the defendants in that case, who are the plaintiffs in this case. This plea was in the nature of a plea in abatement to the trial of this cause. But the record of this case shows that when

it was reached it was tried without any objection or a request for continuance; and during the trial of this case the plaintiffs in that case obtained an order for an alias summons on these plaintiffs, and only raised the pendency of that suit as a defense to the merits of this case. The point now made is that it was error for the circuit court in this case to attempt to adjudicate the title while the contest of the codicil to the will was pending. We think the court committed no error in refusing to abate this suit until the trial of the alleged contest over the codicil. No service had been had on the defendants in that case, who are the plaintiffs in this case, and they were not in court. Moreover, the defendants went to trial without objection in this case. It was perfectly competent for the circuit court in this case to find, as it did find, that the original will and codicil had both been probated by the probate court of Newton county in 1888. The original will and the codicil thereto were written upon the same sheet of paper, and it has attached thereto the certificate of the probate judge of Newton county, certifying that the judge of Newton county had examined the said instrument, and had heard the evidence of the subscribing witnesses, and adjudged the same to be the last will and testament of John McMahan. The court very properly, we think, ruled that the probate court probated both the will and the codicil, as they were both written upon one piece of paper and were presented to the probate court at one and the same time for probate. If the court rejected the codicil, it was its duty to grant a certificate of rejection; but, taken together, we think the probate court granted a certificate of probate of the whole will, including the codicil.

We have carefully gone through various other objections as to the admissibility of testimony and the rejection of the same, but in our opinion there was no error in this respect, but, if any at all, of a technical nature, which was not such as would call for a reversal of the judgment.

The judgment of the circuit court is therefore affirmed.

BURGESS and FOX, JJ., concur.

CITY OF CHILLICOTHE *ex rel.* MEEK v. HENRY.

(Kansas City Court of Appeals. Missouri.
March 29, 1909. Rehearing Denied
April 19, 1909.)

1. MUNICIPAL CORPORATIONS (§ 429*) — SPECIAL ASSESSMENTS — STATUTES — CONSTRUCTION — "FRONTAGE."

Rev. St. 1899, §§ 6266-6271 (Ann. St. 1906, pp. 3133, 3134), authorizing a special tax on the lots "on any street" for the improvement of the street, and providing for the apportionment of the cost upon the several lots according to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the "frontage," contemplate that the property shall front on the street improved, and a city paving a street together with the area at the place of intersection with another street cannot levy a special tax on property abutting on the latter street; the word "frontage" being but an expression of the front-foot rule, under which no other property than that abutting on the street improved can be assessed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 429.*

For other definitions, see *Words and Phrases*, vol. 4, p. 2992.]

2. MUNICIPAL CORPORATIONS (§ 57*)—STATUTORY AUTHORITY.

A municipal corporation can exercise only such powers as are granted in express words or are necessarily fairly implied in or incident to such as are expressly granted, and the court in determining whether a certain power has been given to a city must resolve every doubt against the power and in favor of the citizen.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 148; Dec. Dig. § 57.*]

3. MUNICIPAL CORPORATIONS (§ 567*)—SPECIAL TAX LIEN—ACTION—DEFENSES.

The defense to an action to enforce the lien of a special tax bill for a street improvement that the power to impose the tax never existed is available under the general denial.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 567.*]

Appeal from Circuit Court, Livingston County; Francis H. Trimble, Judge.

Action by the City of Chillicothe, on the relation of Jim E. Meek, against G. G. Henry. From a judgment for defendant, plaintiff appeals. Affirmed.

Kitt & Taylor, for appellant. B. B. Gill & Son, for respondent.

ELLISON, J. This action is to enforce the lien of a special tax bill against the property of the defendant fronting on Elm street, in the city of Chillicothe, a city under 10,000 inhabitants and incorporated by special charter. The trial court adjudged the bill to be invalid. The city, by ordinance, directed the paving of 24 feet in width, of that part of Calhoun street lying between Broadway and Locust streets, except where it intersected with other streets, at which intersections the paving, after allowing for parkway and sidewalk space, was to be the full width of Calhoun street. The effect of this was to pave the center of the intersecting street, 24 feet in width, across Calhoun street, or, to state it differently, to pave Calhoun street its full width across the intersecting street; the result being that, if afterwards the city should conclude to pave Elm street, the place of intersection with Calhoun street would be already paved.

The controversy here is over the intersection of Elm and Calhoun streets. The lot sought to be charged is in the block fronting on both streets; but the lot itself is on Elm street alone, 400 feet from Calhoun street. The plaintiff affirms the right to a tax bill for paving the intersection against

the lot, although not abutting on Calhoun, while defendant claims that his lot, not being on that street, cannot be charged. The power to make an assessment against the private property of the citizens must be found in the statute. If it is not, the attempt at taxation must fail. The statute claimed to justify the bill in controversy is sections 6266-6271, Rev. St. 1899 (Ann. St. 1906, pp. 3133, 3134). The first section provides that the council of every city under special charter of less than 10,000 inhabitants (Chillicothe being of that class) shall have power by ordinance to levy a special tax on the "lot or lots on any street, alley, avenue or public highway within such city, town or village, for the purpose of paving, graveling or macadamizing and guttering and curbing all or a part of such streets," etc. Section 6268 provides that, "when such work shall be completed, the improvements committee, city engineer or other officer having the work in charge, shall compute the costs thereof and apportion the part or proportion levied against the owner or occupier as aforesaid among the several lots or parcels of land to be charged therewith and charge each lot or parcel of property with its proper share of such costs according to the frontage of the property." That section further provides that the city council "if it deems it just and proper may levy and collect on the owner or occupier as aforesaid, a special tax sufficient to defray only a part or proportion of the costs of the paving * * * aforesaid, leaving the part or proportion of the costs not levied against said owner or occupier to be paid by such city * * * and in such event special tax bills shall issue as aforesaid for only the part or proportion levied against the owner or occupier." Considering the sections together, as was done by the learned trial judge, it is apparent that the statute contemplates that the property to be charged is the property with its frontage on the street to be paved; that is to say, the abutting property. "Frontage" in the connection used in the statute is but an expression of the "front-foot rule," and under such rule no other property than that abutting on the street improved can be assessed. *Elliott on Streets*, §§ 555, 559. Calhoun street was the street ordered to be paved, while, as already stated, the property here sought to be charged fronts on Elm street, and, instead of any part of it being on Calhoun street, it is 400 feet away. It has not been the understanding in this state that such property could be assessed under the front-foot rule unless provision is made therefor. In *Sedalla v. Coleman*, 82 Mo. App. 560, we sustained tax bills on lots situated in the adjoining block, as the one here is situated. But that was under a statute for cities of the third class, containing just what the present statute lacks; that is to say, special power and provision was made for tax bills

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

against specified property not abutting on the street improved to pay for paving intersections.

Plaintiff insists on a line of argument like this: That the space of intersection of streets is on both streets, and that, therefore, the paving of this intersection is a paving of Elm street as well as Calhoun, and that, therefore, this property is "on" and has a "frontage" on a street which is improved, and thereby fills the requirement of the statute that the property taxed must be on the street improved. But authority to take private property without the consent of the owner ought to be more direct and less "round about" than that. It is said by plaintiff that, unless the property on Elm street is made to pay for the paving of a part of the intersection at Calhoun, when Elm comes to be paved, it will be found that an intersection has been already provided without cost to the property on that street. It has been found to be true that no plan or scheme of taxation can be devised that will work out absolute equality of burden with mathematical exactness under all conditions. It may be the Legislature has considered that, when Elm street comes to be paved, it will be in the condition of Calhoun, and also cross-intersecting streets which have not been paved, when it will have to bear the burden it now escapes, and in this way (all the streets being improved at different times) matters will be equalized, as near as may be, throughout the city. Or it may be that the lawmakers meant to leave it in the power of the city to omit intersections from a charge against the property abutting on the street improved and put the charge for that part of the work against the city at large, as indicated by the last quotation from section 6268, *supra*. These are only suggestions with no pretense of decision thereon; and, however that may be, it is certain that there is absence of power to burden the property in question with a part of the cost for a paving authorized by ordinance for Calhoun street. The argument made by plaintiff in favor of his view of the law is in the face of that fundamental rule of municipal law which is that, in deciding any question whether certain power or authority has been given to a municipality, every doubt must be resolved against the power and in favor of the citizen. *City of St. Louis v. Bell Tel. Co.*, 96 Mo., loc. cit. 628, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370; *City of St. Louis v. Kaime*, 180 Mo. 309, 322, 79 S. W. 140. And such argument is also met by that other rule of interpretation of such statutes, which is that municipal corporations can exercise only such powers as are granted in express words or are necessarily fairly implied in or incident to such as are expressly granted. *City ex rel. v. Eddy*, 123 Mo., loc. cit. 557, 27 S. W. 471. It is claimed by plaintiff that, since the answer of defendant was merely a gen-

eral denial, the defense made was not admissible. The defense was not what is known in pleading as new matter, arising since the cause of action, which must be specially pleaded. The defense goes to show that there has never been a cause of action, and that the asserted power to authorize the taxation of Elm street property never existed. This view of the pleadings in such cases was considered at length in *Cushing v. Powell*, 130 Mo. App. 576, 109 S. W. 1054.

The judgment is affirmed. All concur.

TARR v. CRUMP.

(Kansas City Court of Appeals. Missouri.
March 29, 1909. Rehearing Denied
April 19, 1909.)

1. APPEAL AND ERROR (§ 549*)—EXCEPTIONS—REVIEW.

The bill of exceptions must show that exceptions were taken to the denial of motions for new trial and in arrest, and the fact that the record proper shows that exceptions were saved to the denial is insufficient to require review on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2450; Dec. Dig. § 549.*]

2. APPEAL AND ERROR (§ 501*)—EXCEPTIONS—REVIEW.

To preserve exceptions to rulings on motions for leave to file a reply to the answer setting up new matter and to strike out the reply, exceptions must be preserved in the bill of exceptions to the overruling of the motion for new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2301; Dec. Dig. § 501.*]

3. APPEAL AND ERROR (§ 959*)—DISCRETION OF TRIAL COURT—REVIEW.

Refusal or allowance of a reply to an answer setting up new matter, being discretionary with the trial court, will not be reviewed on appeal, unless abused.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3827; Dec. Dig. § 959.*]

Appeal from Circuit Court, Boone County; E. W. Hinton, Special Judge.

Action by Weldon Y. Tarr against George W. Crump. From a judgment for plaintiff, defendant appeals. Affirmed.

H. S. Booth and E. C. Anderson for appellant. Arthur Bruton, for respondent.

ELLISON, J. The plaintiff and defendant were partners in the coal business. This action was instituted for a settlement and dissolution of the partnership, and resulted in a judgment for the plaintiff for \$104.12.

The record proper, as presented to us in the abstract, shows motions for new trial and in arrest were overruled by the trial court and that exceptions were saved. But that is not the place to show that exceptions were taken. The place for that is in the bill of exceptions itself. The bill presented here does not show any exception in that respect, and we are thus left as if no bill of exceptions had been preserved.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But defendant contends on the record proper—that is, on the face of the pleadings—plaintiff was not entitled to judgment. The basis of the contention is that the answer set up new matter which, if true, entitled him to judgment, and that the plaintiff confessed its truth by failing to file a reply. The question was raised in the trial court during the trial. The bill of exceptions on the subject is hard to understand. Near the beginning of the bill it is shown that objections to certain evidence for the reason that matters alleged in the answer, asserted to be sufficient to defeat plaintiff's claim, were not denied by a reply and should be taken as confessed. Plaintiff then asked leave to file a reply. Defendant objected. The court gave leave to file it, subject to objections, and afterwards such objections were sustained, and then the bill recites: "Said reply is then filed." Defendant then asked and was granted leave to file motion to strike it out. That motion was overruled, and defendant excepted, and the trial proceeded. But there was a failure to preserve such exception by the failure to properly preserve exceptions to overruling the motion for new trial, as already explained.

Then the trial and evidence in full is recited, and at the end of the bill it appears that: "Leave given yesterday to file reply; said leave given subject to objections made by counsel for defendant. Objections to filing reply sustained." It thus appears that a reply was permitted, and not permitted. If there was a reply, the defendant's ground of objection fails. If there was none, the action of the court in refusing to permit one to be filed, as already shown, is not before us. *Roden v. Helm*, 192 Mo. 71, 90 S. W. 798. Besides, either refusal or permission to allow a reply to be filed was discretionary with the trial court, and the record does not disclose anything indicating an abuse of that discretion.

The record before us does not warrant an interference with the judgment, and it is affirmed. All concur.

SNYDER v. CRUTCHER et al.

(St. Louis Court of Appeals. Missouri. Feb. 23, 1909. Rehearing Denied April 20, 1909.)

1. REFERENCE (§ 8*)—COMPULSORY REFERENCE—WHEN AUTHORIZED.

An action for money paid out in violation of the usury law and for attorney's fees awarded by the act of 1905 (Laws 1905, p. 172; Ann. St. 1906, § 3708), as an additional penalty for exacting usury, though involving numerous payments and their application on account of interest, does not involve a long account within the statute relating to reference, and the court cannot direct a compulsory reference.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 13-23; Dec. Dig. § 8*]

2. JUSTICES OF THE PEACE (§ 141*)—JURISDICTION OF COURT ON APPEAL.

A controversy beyond the jurisdiction of a justice of the peace is beyond the jurisdiction of the circuit court on appeal to it from the justice's court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 472-474; Dec. Dig. § 141.*]

3. JUSTICES OF THE PEACE (§ 47*)—JURISDICTION.

Since the cancellation of instruments and an order for their surrender is peculiarly within the jurisdiction of equity, a justice of the peace has no jurisdiction of a suit for the cancellation of notes and for an order for their surrender.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 184; Dec. Dig. § 47.*]

4. USURY (§ 110*)—FORFEITURES—PENALTIES—PERSONS LIABLE.

A person who loaned the money, who received all the interest paid, and who owns the notes given for the loan, is the only necessary or proper party in an action at law to recover usurious interest with the penalty imposed by the act of 1905 (Laws 1905, p. 172; Ann. St. 1906, § 3708), and a third person to whom the notes were made payable is not a proper or necessary party.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 110.*]

5. APPEAL AND ERROR (§ 266*)—QUESTIONS REVIEWABLE.

One who has neither appealed nor saved exceptions to the refusal of the court to disregard exceptions to the report of the referee cannot urge in the appellate court that the trial court erred in failing to disregard the exceptions to the report.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 266.*]

6. APPEAL AND ERROR (§ 1044*)—REVIEW—PREJUDICIAL ERROR—COMPULSORY REFERENCE.

The error of the court in directing a compulsory reference, and thereby depriving a party of his right to trial by jury, is reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4122; Dec. Dig. § 1044.*]

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by C. L. Snyder against L. F. and L. A. Crutcher. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

This action was originally commenced before a justice of the peace in Greene county. The statement filed with the justice set out, in substance: That plaintiff, borrowing from the defendant L. F. Crutcher various sums of money, evidenced by various notes, had been charged and had paid by way of interest various amounts, which he claims were usurious; that plaintiff had given to the other defendant, L. A. Crutcher, a note for substantially the same debt, the exchange or substitution of one note for the other being made, as it is alleged, by L. F. Crutcher, who was the father of L. A. Crutcher, to avoid the statute against usury, adopted in 1905; that the note last referred to was without consideration other than that attached to the note given to L. F. Crutcher; that L. F.

*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

Crutcher was the real owner and holder thereof; and that plaintiff had made all payments on the notes to L. F. Crutcher. Plaintiff demanded judgment against the defendant L. F. Crutcher for the amount paid him over and above lawful interest, which plaintiff avers was \$66.35, and plaintiff demanded that, if L. F. Crutcher has the note, he produce the same in court before the justice for cancellation, or, if the defendant L. A. Crutcher has the note, then that he be ordered to produce it before the justice, and that the justice order that the same be canceled. There is the further demand that \$50 be taxed as costs in this suit as a reasonable attorney's fee in favor of the plaintiff against both defendants. It appears that at the trial before the justice, the defendants answered as follows: "Come now the defendants and say they did not owe the plaintiff any sum whatever. But for counterclaim against the plaintiff says he is indebted to L. F. Crutcher in the sum of \$38.50, with 8 per cent. interest from January 9, 1905, as shown by his promissory note of said date, for which amount he prays judgment."

The justice appears to have rendered a judgment in favor of plaintiff for the sum of \$66.75 as debt and \$50 as attorney's fee and costs of suit. It does not clearly appear whether the judgment for the debt was against one or both of the defendants. An appeal was duly prosecuted by the defendants to the Greene county circuit court, where, on February —, 1907, plaintiff filed an amended petition, in which he took up this matter of the \$38.50 note, set up by L. F. Crutcher as a counterclaim before the justice, and averred that it was given for \$35 actually borrowed, and that it had been surrendered and merged into a note for \$32.50, this latter note representing the \$35 which it was claimed had been borrowed and for which the \$38.50 note had been given and also interest in advance added, as well as for \$40 additional money then borrowed, and that the note for \$38.50 had been canceled and paid by the giving of this note, but that the plaintiff forgot to take up the \$38.50 note. The remainder of this amended statement is practically the same as that filed with the justice; it being claimed, however, that the overpayment was \$63.20, for which he prayed judgment, and the plaintiff again stating that all his transactions were with L. F. Crutcher, although the name of L. A. Crutcher was used. And it is then averred, in effect, as before, that one or other of the defendants have the \$32.50 note, and plaintiff prayed the court to require either or both of them to produce the note for cancellation, and \$50 attorney's fee is demanded under the statute. Acts 1905, p. 172. On February 11th the defendants moved to strike out this amended petition because it changed the cause of action and set up different causes than that before the justice, which motion was overruled, and defendants, on the 21st

of February, 1907, filed an answer to the amended petition, in which answer they deny owing any sum whatever to plaintiff, while L. F. Crutcher sets up, as a counterclaim in his favor, the \$38.50 note above referred to, and the defendant L. A. Crutcher sets up a counterclaim on a note for \$20, which he claims was given to him by plaintiff on the 1st of September, 1905. Plaintiff thereupon, on May 13, 1907, filed a second amended petition, in which he takes up the matter of the \$38.50 note and avers that he had only borrowed \$35 on it, and also takes up the execution of the \$32.50 note substantially as stated before, and then takes up the matter of the \$20 note, which he avers was for money borrowed of L. F. Crutcher, although the note appears to be in the name of L. A. Crutcher. This petition again pleads usury and prays judgment against the defendants for the cancellation and surrender of the notes and for an attorney's fee of \$50, as in each of the other statements or petitions. On the same day, that is, May 13, 1907, defendants filed their answer to this second amended petition, in which they deny that they owe plaintiff anything whatever, while L. F. Crutcher sets up the \$38.50 note as a counterclaim, and L. A. Crutcher sets up the \$20 note as a counterclaim.

On May 14, 1907, plaintiff filed his second amended petition, which is as follows: "Now comes the plaintiff in the above-entitled cause, and for amended petition states: That on January 9, 1905, plaintiff borrowed of defendant L. F. Crutcher the sum of \$35, executing therefor a blank note, specifying no amount, as was required by said defendant, and also executing to said defendant an assignment of future wages with power of attorney to collect the same for a period of three years, from the Frisco Railroad Company, plaintiff's employer. That said assignment was required of plaintiff by said defendant L. F. Crutcher to secure said loan. That said assignment and said note was executed by plaintiff as aforesaid, and mailed to defendant L. F. Crutcher at Springfield, Mo., from Willow Springs, Mo., where plaintiff was at that time employed as yardmaster. That thereafter, without plaintiff's knowledge, defendant filled in said note for the sum of \$38.50, as it now appears. That the plaintiff received the \$35 in the shape of a bank draft, mailed to him by said defendant, together with a letter of transmittal, and notifying plaintiff that 10 per cent. interest would be due on January 21st following. Said letter of transmittal was dated January 10, 1905. That on January 27, 1905, plaintiff borrowed the further sum of \$40 of defendant L. F. Crutcher, and signed and delivered to him a note for \$82.50, which defendant L. F. Crutcher explained as follows: For the \$35 loaned January 9th, and for the \$40 then furnished, and 10 per cent. advance interest \$7.50; a total of \$82.50. Plaintiff signed said note at the demand of defendant L.

F. Crutcher, who produced the first note, declaring it canceled and paid by the giving of the said second note. That although paid in this way, plaintiff forgot to take away said first note, but left it lying on defendant's table. That said note has been fraudulently retained by said plaintiff (defendant?), who, well knowing the same to be fully paid, seeks to make it a counterclaim herein. That plaintiff thereafter returned to Willow Springs to his employment there, and upon demands of plaintiff (defendant?) paid, through his agent, to defendant L. F. Crutcher as follows: On or about February 23, 1905, \$8.25; on or about March 23, 1905, \$8.25; on or about April 23, 1905, \$8.25; or on about May 23, 1905, \$8.25—a total of \$33, which should have gone on said note as credits, and leaving actually due by plaintiff to defendant, of the \$75 actually loaned, the sum only of \$44. That in August, 1905, while plaintiff was in Springfield on a visit, defendant L. F. Crutcher presented to him for his signature a new note for the sum of \$82.50, but made payable to his son L. A. Crutcher. That said L. A. Crutcher was not present, and that no money passed between plaintiff and L. F. Crutcher, but that said L. F. Crutcher explained that this was an exchange of notes made necessary by the new usury law, and that henceforth the payee would be his son L. A. Crutcher, while he (L. F. Crutcher) would merely be security. That plaintiff thereupon, and at the demand of said L. F. Crutcher, signed said new note and delivered the same to him, who returned the other \$82.50 note to him, which is filed herewith. That the said last note was executed for the reasons aforesaid, and that plaintiff received no money whatever from either of the defendants at that time or since as a consideration. That thereupon defendant L. F. Crutcher demanded and collected of plaintiff, as interest monthly, as follows: In August, 1905, \$10. That on or about September 1, 1905, plaintiff borrowed the sum of \$18 from defendant L. F. Crutcher, and delivered to him a note for \$20, due on demand, and bearing interest at the rate of 8 per cent. per annum. That plaintiff believes the note he signed was made payable to L. A. Crutcher as it now appears, but that L. F. Crutcher produced the money, and consummated the loan, and really owns said note, as defendant L. A. Crutcher was not present at the time, and knew nothing of the transaction. That thereafter defendant L. F. Crutcher demanded, exacted, and collected of plaintiff, as interest on his indebtedness, the following sums at the following times: In September, 1905, \$13; in October, 1905, \$10; in November, 1905, \$12; in December, 1905, \$10; in January, 1906, \$10; in February, 1906, \$15; and on April 3, 1906, \$10. That the total amount received of L. F. Crutcher on all notes held by him, made payable either to himself or to L. A. Crutcher, since January 9, 1905, is \$93. That prior

to June 14, 1905, plaintiff paid on said debt the total sum of \$33. That when the Statute 3808, as amended in 1905, went into effect in June, 1905, plaintiff actually owed defendant L. F. Crutcher only the sum of \$44; and since that time, to wit, on September 1, 1905, borrowed \$18 more as aforesaid, making a total indebtedness since said law became effective of \$62. That since said law became effective plaintiff, in compliance with the demands and exactions of defendant L. F. Crutcher, has paid to him, as interest, the sum of \$110, and the same is an excess over and above the total of said debt and legal interest of \$43.36, for which excess plaintiff prays judgment against defendants, and that all notes held by either of the defendants be produced for cancellation. Plaintiff further prays that there be taxed, as costs herein, an attorney's fee of \$50 as authorized by section 3708, Rev. St. 1899 of Missouri, as amended by Act 1905, as appears in said 1905 Session Acts at pages 172 and 173 (Ann. St. 1906, p. 2077)."

On June 12th defendants filed a motion to strike this amended petition from the files and to dismiss the case because the facts stated in this amended petition wholly changed the cause of action from that stated in the original petition and tried by the justice, and because different and new causes of action are stated in the amended petition. This was overruled. Defendants do not appear to have filed an answer to this last petition, but the cause appears to have been tried on the issue tendered by the last petition and the answer filed May 13th to the preceding one. The case coming on for trial, both parties announced ready. Plaintiff demanded a jury. One was called and sworn on voir dire, and while the examination of the jurors was proceeding, the court announced that the cause was one which should be referred. A referee was accordingly appointed "to hear and determine all the issues of law and fact." To this both plaintiff and defendants excepted; the defendants alone, however, preserving their exceptions by term bill duly filed.

The cause was heard before the referee; both parties appearing. The referee found for plaintiff, recommending judgment against L. F. Crutcher alone for \$43.36, but that \$50 as attorney's fee and costs be taxed against both defendants, and that the three notes be canceled. Exceptions and amended exceptions were filed to the report of the referee; the court giving leave from time to time to file them, except as to the last filing of amended exceptions, which latter appear to have been filed beyond the date extended by the court. It is not deemed necessary to set out the facts connected with the filing of these exceptions. It is stated in the abstract that the court overruled the exceptions, save as to the allowance of \$50 attorney's fee, which it disallowed, but in all other respects it is recited in the ab-

stract that the court confirmed the report of the referee. As the referee found only against L. F. Crutcher as liable for the excess interest, \$43.36, finding that he was owner of all the notes and had received all the payments thereon, and found against both defendants for costs and attorney's fee, and also recommended the cancellation of the notes, the judgment, as recited in the transcript on file, hardly sustains this statement. It reads: "Now on this day comes parties plaintiff and defendants in the above cause, and said cause having been submitted to George W. Goad, referee, and the said referee having filed his report, the court having examined and fully heard said report, and being fully advised in the premises, and being satisfied that the said report is just and correct except as to \$50 allowed as attorney fee which is by the court stricken off, it is ordered, considered, and decreed by the court that said report be in all things confirmed and approved except the \$50 attorney fee. It is further ordered, adjudged, and decreed by the court that the referee be allowed the sum of \$75 for his services as such referee, and it is further ordered that the stenographer be allowed the sum of \$99.45 for her services in the above cause, same to be taxed as costs. And the court doth find that the amount due and owing from the defendants to the plaintiff on the notes herein sued on to be the sum of \$43.36 as debt and damages." Then comes the judgment proper: "It is therefore ordered, adjudged, and decreed by the court that the plaintiff C. L. Snyder have and recover of and from the defendants L. F. Crutcher and L. A. Crutcher the sum of \$43.36 as debt and damages aforesaid, assessed by the court, together with all costs in this suit laid out and expended, for which execution may issue." That is to say, apparently confirming the report, when the matter in judgment is reached, it is against both defendants for \$43.36, and for costs, as above taxed, and does not order cancellation of the notes. Motion for new trial being duly filed, overruled, and exceptions saved, defendants appealed.

Hamlin & Seawell, for appellants. E. C. McAfee and Roscoe Patterson, for respondents.

REYNOLDS, P. J. (after stating the facts as above). We have set out the pleadings and various steps in the case perhaps with unnecessary detail; but we have done that to call attention to what we cannot but regard as the unnecessary and costly evils resulting from an ill-advised reference of a very simple case, originating before, and clearly within the jurisdiction of, a justice of the peace and taken by appeal from his court to the circuit court. Here is a case of an action to recover money alleged to have been paid in violation of the laws of the state against usury and for the recovery

of an attorney's fee awarded by the act of 1905 (Ann. St. 1906, § 3708) as an additional penalty for the exaction of usury. It is an action which under the old forms of pleading would be called an action "on the case." The facts to be proved in it, as shown by the petition on which it was before the circuit court, are: From whom did plaintiff borrow the money? Was a note for \$38.50 given for \$35 actually borrowed? Was the excess in that note usurious? Was that note merged in the note for \$82.50? Was the latter note, to the order of L. A. Crutcher, a mere substitute for the former one in favor of L. F. Crutcher? Had the real owner of it, L. A. Crutcher, loaned any money to the plaintiff? How much had he loaned? What amount had plaintiff paid on the several notes? Was this amount in excess of the legal rate of interest? These were the substantive facts in the case to be tried. They presented no feature whatever of a long account within the meaning of the statute, although there may have been payments at several dates. These payments were the ordinary payments on account of interest, and the amount of them and the excess of them was a matter that any ordinary jury could have readily determined. The case, originally tried before a justice of the peace, does not seem, from anything in the record, to have been beyond his comprehension or his ability to solve in a simple and expeditious manner. Yet a case of this kind seems to have been converted into a proceeding in equity, and the very learned and accomplished referee has filed an elaborate report embodying his findings and conclusions of law, in the preparation of which he has evidently devoted much time and great learning. As a matter of course, the demand, contained in the statement filed before the justice and repeated in the circuit court, for a cancellation and delivery of the notes, was something beyond the power of the justice of the peace and beyond the power of the circuit court in an action coming to it on appeal from the justice's court. The cancellation of instruments and an order for their surrender is a matter peculiarly within the jurisdiction of courts of equity. So we entirely eliminate that phase of the case from all consideration. This left nothing before the justice of the peace or the circuit court but the ascertainment of certain disputed facts. With those crucial facts established, there was nothing left but the application of payments, which were never disputed, and the calculation of interest. This did not involve the taking of a long account, within the purview of the statute. *Creve Cœur Lake Ice Co. v. Tamm*, 138 Mo. 385, 39 S. W. 791; *Kenneth Investment Co. v. Bank*, 96 Mo. App. 125, loc. cit. 134, 70 S. W. 173. On the substantive facts in the case defendants were entitled to a jury. They did not

waive it, but insisted on their right to it all through the proceeding. Furthermore, with this matter of the cancellation and return of the notes eliminated, there is no cause whatever stated against the defendant L. A. Crutcher. An examination of the petition, confirmed by the testimony in the case, and a reading of the report of the referee, shows that L. F. Crutcher was the man who loaned the money, who received all the interest, with whom all the transactions were had, and who is now the real owner of the notes, and, in an action at law, as this was, L. A. Crutcher was neither a proper nor necessary party. It was not alleged in any of the statements filed, and there is not a particle of proof to show, that he received a dollar of the money claimed to have been unlawfully exacted, or that he was the one who made the loans. But with this case, and on these facts, a large bill of costs has been run up, and much time of counsel and of officers of the court consumed. Repeating that this is a case properly within the jurisdiction of a justice of the peace, whose courts are established for the speedy determination of controversies—people's courts, as they are sometimes called—courts wherein no formal pleadings are required, cases coming into the circuit court from them should be very few and should be very exceptional to justify a reference. This case is not one of them and is not within the exception.

Many objections and exceptions were taken and saved to the admission and exclusion of testimony before the referee. It is also strenuously insisted by respondent that the exceptions to the report of the referee, having been filed more than four days after filing of report by the referee, and in fact after the time allowed by the court for filing exceptions had expired, should be disregarded. The plaintiff, who now urges this point, neither saved exceptions by term bill to this, nor has he appealed. Hence this point cannot be now considered. *Tinsley v. Kemery*, 170 Mo. 310, loc. cit. 316, 70 S. W. 691. Nor, in the view we take of the case, is it necessary or profitable to consider any of the other questions presented.

As much as we dislike to reverse cases on what appear to be technical rulings or on matters of mere practice, we are forced to do so in this case, for here technicality tends to substantial justice and to the preservation of a right held to be inalienable, a right of trial by jury.

The judgment of the honorable circuit court of Greene county is reversed, and the cause remanded.

NORTONI, J., concurs. GOODE, J., not sitting and not participating in the decision.

BURKE v. GRAND LODGE, A. O. U. W. OF MISSOURI.

(Kansas City Court of Appeals. Missouri.
March 20, 1909. Rehearing Denied
April 19, 1909.)

1. INSURANCE (§ 750*)—MUTUAL BENEFIT—ENFORCEMENT OF BY-LAWS.

A by-law of an insurance order providing for a forfeiture of the benefit certificate held by the member as a penalty for his failure to pay, when payable, the dues and assessments called for by his contract, is reasonable, and will be enforced by the courts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1895; Dec. Dig. § 750.*]

2. INSURANCE (§ 755*)—MUTUAL BENEFIT—WAIVER OF GENERAL RULES BY SUBORDINATE LODGE.

Where the laws of the grand lodge do not permit a subordinate lodge or its officers to alter or waive any of the rules relating to the insurance contract, a custom of the subordinate lodge without the knowledge of the officers of the grand lodge, permitting members to remain delinquent in the payment of dues, and advancing from its treasury the amount of such dues, does not operate as a waiver of a forfeiture for nonpayment of dues.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1911; Dec. Dig. § 755.*]

3. INSURANCE (§ 755*)—MUTUAL BENEFIT—BY-LAWS—WAIVER OF PROVISIONS.

Where a custom of a subordinate lodge of allowing members to remain delinquent in the payment of dues in violation of a general by-law, or in advancing such dues from the lodge funds, is brought to the notice of the officers of the grand lodge and receives approval, either express or implied, the general by-law must be regarded as waived or modified by the recognized custom.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1911; Dec. Dig. § 755.*]

Appeal from Circuit Court, Jackson County; Walter A. Powell, Judge.

Action by Margaret Anne Burke against the Grand Lodge, Ancient Order of United Workmen, of Missouri. From an order granting a new trial after verdict for defendant, defendant appeals. Affirmed.

Henry L. Jost and Frederick H. Bacon, for appellant. W. W. Colvin and W. S. Gabriel, for respondent.

JOHNSON, J. Plaintiff, the widow of William F. Burke, deceased, brought this suit on a benefit certificate issued by defendant, a fraternal beneficiary society incorporated in this state. In 1897 Burke became a member of Summit Lodge No. 272 of said order at Kansas City, and defendant issued to him the benefit certificate in suit, by the terms of which the Grand Lodge promised to pay plaintiff, the beneficiary, \$2,000 on the death of the member, on condition "that said William F. Burke shall in every particular while a member of said order comply with all the rules, laws, and requirements thereof now existing or hereafter enacted." Burke died December 28, 1905. Plaintiff contends that he was a member in good standing at

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the time of his death, while defendant claims, in its answer, that, on account of failure to pay an assessment duly made and payable on November 28, 1905, Burke was suspended and forfeited the benefit certificate. Further, it is claimed by defendant that, after said suspension and forfeiture, Burke voluntarily abandoned his membership in the order. The reply of plaintiff is a general denial. At the close of the evidence introduced by plaintiff, the court gave the jury a peremptory instruction to return a verdict for defendant. Plaintiff took a nonsuit with leave, and in due time filed a motion to set it aside. One of the grounds of the motion was newly discovered evidence. This ground was supported by affidavits. The court sustained the motion on this ground alone, and defendant appealed.

It is argued by counsel for defendant that, with the facts stated in these affidavits added to those adduced at the trial, plaintiff still has failed to show a right to recover on the certificate. In our statement we shall treat the facts appearing for the first time in the affidavits as though they were supported by evidence introduced at the trial. We do this because no point is made, nor does it appear, that the plaintiff was not diligent in the discovery of the new evidence, or that it was merely cumulative. The bill of exceptions recites that plaintiff "made out a prima facie case by the admission of the benefit certificate, the death on December 29, 1905, of William Francis Burke," and that defendant then assumed the burden of proof. After defendant offered evidence in support of the affirmative defenses interposed by its answer, plaintiff introduced her evidence on the issues thus raised, after which the court instructed a verdict for defendant. In the application for membership, dated April 19, 1897, Burke agreed "that compliance on my part with all the laws, regulations, and requirements which are, or may be hereafter, enacted by said order, is the express condition upon which I am entitled to participate in the beneficiary fund, and have and enjoy all the other benefits and privileges of said order."

It is admitted Burke was born November 17, 1857, and therefore was in his fortieth year when he became a member and received his certificate. The laws of the order required him to pay regular monthly assessments which in 1905 were \$3.50 each. Of this sum 50 cents went to the local lodge for its expenses and \$3 to the Grand Lodge on account of the "Guarantee Fund" out of which death benefits were paid. These fixed assessments were as regular as clockwork, and were due and payable by the member on the 28th day of each month. They were payable to the financier of the local lodge who was charged with the duty of forwarding, at stated times, the portions due the Grand Lodge. Law 197 of the order provided: "A failure or neglect of any mem-

ber to pay any assessment on or before the 28th day of the month in which the same is payable to the financier of his subordinate lodge, or to the grand recorder, as provided by law, shall work ipso facto a suspension and forfeiture of all rights under any beneficiary certificate issued to him to whomsoever the same may be payable, and no action on the part of the lodge or any officer thereof shall be required as essential to such suspension and forfeitures. Any member suspended or expelled from the order for any cause whatever, forfeits all claim to the beneficiary fund during suspension or expulsion." It is admitted that Burke failed to pay the assessment due November 28, 1905, a month before his death, and that he was reported as suspended at the meeting of the local lodge on the night of December 7th, but plaintiff endeavors to avoid the forfeiture by showing that the right to claim it under the provisions of Law 197 was waived by defendant by reason of the practice of the local lodge, known to and acquiesced in by the managing officers of the Grand Lodge, of accepting payments of assessments long after they became due. The financier of Summit Lodge testified that Burke's assessments for March and April, 1905, were paid May 28th. Those for July, August, and September of that year were paid September 20th. Burke was not entered suspended for these delinquencies for the reason given by the witness that a member in good standing "stood up for him." In such cases it was the practice of the local lodge to pay the assessments due the Grand Lodge out of its own funds, and the member was not reported to the Grand Lodge as delinquent.

We quote from the financier's testimony: "We made a practice of carrying delinquent members without suspending them if a brother got up and stood good for them. The account of Mr. George Weissinger, page 11, shows that the dues for January, February, and March, 1905, were paid August 28th. I do not know who stood good for him. There should have been somebody. I never carried anybody unless there was. I have no record as to who did it. On page 11 it shows that the dues of Mr. J. M. Wallace for March were paid April 5th. He was not suspended for March because he was carried. Brother Reed was up there, and stood good for him. I was right there. The same party stood good for him for other months. It was not always some one who stood good—sometimes one and sometimes another. I never carried men unless some one stood good for them. They were suspended if no one would volunteer. By standing good, I mean they would pay for him and stood up for him, and not say that he was all right. I do not remember that Mr. Reed paid for these various delinquents. I did not suppose he stood good for all of them. I do not recollect all of them. Sometimes they may have said that they would

pay the account. On page 110 C. D. Updegraff shows the June assessment was paid July 19th. I can tell exactly who stood up for him. It was B. L. Gould who paid for him. I expect he paid for all these delinquents in that list. It was very probable he was delinquent in June, August, November, and December, 1905, because Brother Gould paid for him a great many times. He paid the assessments as they came due. I presume the total amounts to something like \$15. It was a common practice to carry these delinquents if there was anybody who stood good for it. * * * One of our duties is to keep the lodge alive, and we carried delinquents as far as we could. I cannot tell in the particular instances who stood for the delinquents. They did not say they were all right, said they would stand good for them, and we credited them. * * * One man was carried from January to August. It was done a great many times."

It appears from the testimony that the practice of granting these indulgences was very common. Further, it appears that it was not carried on secretly, but, to the contrary, was given some prominence in lodge meetings, partly for the purpose of building up the membership by encouraging the belief that a worthy member in sickness or misfortune would be treated benevolently, and not by the harsh rule provided in law 197. The witness, whose affidavit was given in support of the motion to set aside the nonsuit, states that the practice came under the personal observation of managing officers of the Grand Lodge at times when such officers visited meetings of the local lodge. On one of such occasions the Deputy Grand Master Workman spoke in open lodge, and praised the lodge "for its generosity in carrying its delinquents out of its general fund." The receiver of the lodge was the person to whom Burke generally paid his assessments, and was the member who "stood up for him" when he became delinquent from time to time. He refused to stand up for him when Burke was in his last illness and most needed the favor. He had promised Mrs. Burke, the plaintiff, that he would see that her husband was never suspended. He testified: "During these months [July, August, and September, 1905] I was responsible for the money. Mrs. Burke asked me to see that he was never suspended, and I did so. I told her that I would. I did not give notice to him or her or anybody when he was suspended. I do not give anybody notice. I did not tell her that I would not stand good any further."

Provisions in the laws of a fraternal beneficiary society for the enforcement of prompt payment of assessments levied for the support of the benefit fund are regarded by the courts as necessary to the proper maintenance of the order, and the accomplishment of one of the important and highly beneficent objects of its existence. A law of the

order prescribing a forfeiture of the benefit certificate held by the member as a penalty for his failure to pay, when payable, dues and assessments provided by his contract, is reasonable, and will be reasonably enforced by the courts. *Harvey v. Grand Lodge*, 50 Mo. App. 472; *Curtin v. Grand Lodge*, 65 Mo. App. 297; *Lavin v. Grand Lodge*, 104 Mo. App. 1, 78 S. W. 325. Stipulations to insure the prompt payment of the benefit assessments constitute the substance and essence of an insurance contract of a beneficial association. *Modern Woodmen v. Tevis*, 117 Fed. 369, 54 O. C. A. 293.

Since the laws of defendant order did not permit subordinate lodges or their officers to alter or waive any of the general laws, especially those of the essence of its insurance contracts, we agree with defendant that the custom of the subordinate lodge of which Burke was a member of permitting members to remain delinquent in the payment of their dues and of preventing their suspension and the forfeiture of their insurance by paying their Grand Lodge assessments out of funds in their own treasury could not of itself, and without the knowledge and approbation express or implied of the Grand Lodge, operate as a waiver of the provisions for the forfeiture of the insurance and the suspension of the member appearing in general law 197. But we think if this custom was brought to the notice of managing officers of the Grand Lodge, and, instead of being reprobated, received either express approval or that approval which should be implied from silence, the general law must be regarded as modified by the recognized custom. Such is the view expressed by the Supreme Court in *McMahon v. Maccabees*, 151 Mo. 522, 52 S. W. 384, where it is said: "A fraternal society doing a limited life insurance business as the law permits may waive the provisions of its own law in regard to forfeiture of the insurance on account of failure to pay premiums within the strict requirement. 'The general rules of waiver and forfeiture are the same in association insurance as in ordinary insurance'—[citing cases]. A member of such society is presumed to know its laws, and the contract of insurance is to be construed as having been made under the limitations of those laws. But a member has a right to look to the general conduct of the society itself in respect of the observance of its laws, particularly those relating to his own duties, and, if the society by its conduct has induced him to fall into a habit of nonobservance of some of its requirements, it cannot without warning to him of a change of purpose inflict the penalty of failure of strict observance. A member dealing with a subordinate officer of the society, knowing his duties to be prescribed by law, has no right to rely upon the act of that officer, if he should attempt to waive a requirement which under the law he has no right to waive. But,

when he has dealings of that kind with such officer, and those dealings are of such a nature that they must pass under the observation of those who have in charge the ultimate management of the company's affairs to such an extent as to justly induce the member to believe that the practice is approved by the company itself, the company is estopped to take advantage of the situation. It is essential to the life of these societies that the members pay the assessments promptly, as their laws require. As a general rule, it is cheap insurance, its cost is calculated at the lowest rate at which it can be carried, and, if the society is lax and its officers carry the sentimental feature of its organization too far into its business management, it is liable to fail of its beneficent purpose. But the duty of guarding against such misfortune is primarily on the officers who are intrusted with its management at the head, and, if they permit lax dealing of their subordinate officers to the degree of misleading a member, the responsibility must rest upon the society."

But it is argued by counsel for defendant that "the Grand Lodge had no power or control over the funds of the subordinate lodge belonging to its general fund. If the subordinate lodge had the power to use its own funds as it pleased whether with or without the knowledge or consent of the Grand Lodge, no such knowledge of how it used its funds could affect it in any way. The knowledge of such custom on the part of the Grand Lodge is as immaterial as it would be if it knew that a stranger was paying the assessments for a member. * * * It appears from the evidence that the assessments were always promptly paid to the Grand Lodge, and, so long as the assessments were paid to the Grand Lodge, it was absolutely immaterial who paid them." We do not sanction this proposition. The subordinate lodge, unlike a stranger, was under the supervision and control of the Grand Lodge. The Grand Lodge could interdict the custom and put the local lodge under ban if it disobeyed. It had the power, and exercised it, of regulating and controlling its subdivisions and their members. It would be unjust and inequitable to say that the Grand Lodge might receive the benefits from a custom in derogation of its laws, and then repudiate the obligations necessarily resulting from such custom. The effect of its approval of the custom was to say to Burke: "The Grand Lodge encourages the beneficent practice of your local lodge of preventing suspensions and forfeitures by giving aid from its treasury to its unfortunate but worthy members. You need not fear a forfeiture if you bring yourself within the pale of this custom." We have here all the elements essential to a waiver. The course of dealing of the subordinate lodge became the

course of dealing of the head lodge. Burke had a right to rely on it, and to act on the supposition that he would not be summarily deprived of this important benefit without notice. On the hypothesis of facts presented by the evidence of plaintiff the automatic forfeiture of the insurance provided in law 197 was destroyed by the custom under consideration, and no suspension or forfeiture could be declared without notice to the member.

On the subject of the abandonment of the order by Burke, we find the evidence presents an issue of fact for the jury to solve. The court acted properly in setting aside the nonsuit.

The judgment is affirmed. All concur.

DAHMER v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.
March 29, 1909. Rehearing Denied
April 19, 1909.)

1. TRIAL (§ 156*)—DEMURRER TO EVIDENCE.

The court in passing on a demurrer to plaintiff's evidence must consider the proof in the light most favorable to the maintenance of the cause of action pleaded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 353; Dec. Dig. § 156.*]

2. STREET RAILROADS (§ 93*)—OPERATION OF CARS—CARE REQUIRED OF MOTORMAN.

A motorman, seeing that a traveler intends to cross the track ahead of the car, must make reasonable use of the means at hand to check the speed of the car, so that the traveler may cross in safety, irrespective of the traveler's negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 197; Dec. Dig. § 93.*]

3. STREET RAILROADS (§ 93*)—USE OF STREETS.

A traveler and a motorman in charge of a street car are each rightfully on the public streets, and neither may require the other to make way for him, but each must employ reasonable care to avoid a collision, and, since the street car is the more dangerous vehicle, the humanitarian principle imposes on the motorman the additional duty of being watchful to discover the peril of travelers, and, on becoming aware of its existence, to make every reasonable effort to remove it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 197; Dec. Dig. § 93.*]

4. STREET RAILROADS (§ 117*)—COLLISIONS—NEGLIGENCE—EVIDENCE.

In an action for injuries in a collision with a street car, evidence held to require submission to the jury of the company's negligence for failing to exercise proper care after the discovery of a traveler's peril.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 244; Dec. Dig. § 117.*]

5. APPEAL AND ERROR (§ 882*)—INVITED ERROR—RIGHT TO COMPLAIN.

Under the rule that a party, though not bound by a position he is compelled to take by adverse rulings of the court, is bound by one he voluntarily assumes, a defendant voluntarily treating the issue of contributory negligence as one for the jury cannot complain of the submission of the issue, though plaintiff was guil-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3804; Dec. Dig. § 882.*]

6. DAMAGES (§ 131*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A traveler on a street was injured in a collision with a street car. Three ribs were broken, and he received some cuts and bruises. He paid his doctor \$75, and at the time of the trial, over a year after the injury, he had not fully recovered. *Held*, that a verdict for \$1,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370, 371; Dec. Dig. § 131.*]

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

Action by John E. Dahmer against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

John H. Lucas and F. G. Johnson, for appellant. Elliott & Ehinger and Ulmann & Miller, for respondent.

JOHNSON, J. Plaintiff sued to recover damages for personal injuries caused by the collision of an electric street car operated by defendant with the wagon in which plaintiff was riding. The cause of action is founded on the alleged negligence of defendant in the operation of the car. The trial resulted in a verdict and judgment for plaintiff in the sum of \$1,000.

The injury occurred on the morning of December 15, 1905, at the intersection of Fifteenth and Campbell streets, public thoroughfares in Kansas City. Campbell street runs north and south, and Fifteenth street east and west. There is a break in the continuity of the south line of Fifteenth street at this crossing. East of Campbell street, Fifteenth street is much wider than it is west of Campbell street. Along the middle of Fifteenth street defendant operates a double-track street railroad. The north track is used by west-bound cars, the south track by cars going east. Plaintiff drove north on Campbell street in a one-horse milk wagon, and intended to cross Fifteenth street and continue northward on Campbell. When he reached the south line of Fifteenth street, he looked to the east and saw a car coming west on the north track. He testified that the car at this time was east of Harrison street. If this statement is accurate, the car was from 450 to 500 feet east of the point of collision. Plaintiff drove on in a slow trot, which he described as being no faster than an ordinary walk. When his horse was about 25 feet from the north track, plaintiff looked again, and observed that the approaching car was about 250 feet from the crossing. He did not look again in that direction until his horse was on the north track. Then he discovered that a collision was imminent, and attempted to escape by hurrying

the horse, but his efforts were unavailing. The car struck the wagon at about the front wheels with a force so violent that plaintiff was hurled through the window of the front vestibule, and sustained the injuries of which he complains. After the collision, the car ran about 125 feet before it was brought to a standstill. From the moment plaintiff entered Fifteenth street there was no obstruction to vision between the wagon and the car. Plaintiff knew of the approach of the car, and the motorman states that he observed the wagon. Witnesses for plaintiff stated that the car was going fast, but they did not attempt to give the rate of speed in miles per hour. The motorman testified that in approaching Campbell street the car ran at the rate of 12 to 14 miles per hour. There is substantial evidence introduced by plaintiff to the effect that the motorman made no effort to stop or check the speed of the car until the collision occurred. This is contradicted by the evidence of defendant, which tends to show that the motorman exerted himself to stop as soon as he became aware that plaintiff intended to attempt to cross ahead of the car. It is downgrade from Harrison to Campbell streets. The motorman testified that with a good rail the car might have been stopped in 100 feet, but that at the time in question the rails were frosty, and therefore not in good condition for making a quick stop. Pertinent to the issue of when the motorman should have known that plaintiff was in peril, we quote from the testimony of the motorman as follows: On direct examination: "I first saw the man driving across Fifteenth street, starting that way, and, as he got to the outgoing track—that is, the opposite track going out, we was on the inbound track—as he got there, the horse stopped just for an instant, and then he began whipping his horse across the track, and I applied the air. I did not have much time. The horse got across the track and the car struck the wagon, and it caused the driver to fall inside the front window of the car, and one or two passengers caught him and held him to keep him from falling in front of the car." On cross-examination: "Q. With reference to the north track, how far south of that track was the wagon when you first saw it? A. 20 or 25 feet. Q. 20 or 25 feet south of the north track? A. Yes, sir. Q. What rate of speed about was that horse going at that time? A. Just driving in an ordinary trot. Q. Sort of a dog trot? A. Yes, sir. Q. That was a slow gait? A. Yes, sir; an ordinary gait. Q. When you saw that wagon at that time about 20 or 25 feet south of the north track, how far east of the point of collision was your car at that time? A. I suppose about 50 feet, maybe further than that. I am not sure. Q. You say it was not any further east than that? A. I am not

sure how far east it was. Q. Could it have been 150 feet east at that time? A. It might have been, I don't know." The petition alleges "that said injuries to plaintiff were caused by the negligence and carelessness of the defendant, its agents, servants, and employes in charge of said car in running the said car into and against the wagon of this plaintiff after the said defendant, its agents, servants, and employes in charge of said car, saw, or by the exercise of ordinary care could have seen, that the plaintiff was in a position of peril upon said track in time to have stopped said car, and have avoided said collision with plaintiff's wagon." The answer contains a general denial and the averment "that, if plaintiff received any injuries at the time mentioned in said petition, the same were caused by plaintiff's own fault and negligence."

First, it is insisted by defendant that its demurrer to the evidence should have been sustained. In view of the facts and circumstances in proof most favorable to the maintenance of the cause of action pleaded (which is the view we must entertain in passing on the demurrer to the evidence), we think the negligence of defendant under the principle and rules of the "humanitarian" doctrine is apparent. From the facts that plaintiff ceased to look in the direction of the car when his horse arrived at a point about 25 feet from the track, and that he proceeded in a manner to indicate to an observant person in the situation of the motorman that he intended to cross ahead of the car, the motorman should have realized the existence of such purpose, and should have made reasonable use of the means at hand to check the speed of the car in order that plaintiff might cross in safety. This duty of the motorman was not removed nor affected by the consideration that plaintiff himself might be negligent. Both plaintiff and defendant were rightfully traveling on a public street. Neither had the right to require the other to make way for him. Each was bound to employ reasonable care to avoid a collision. But, since defendant possessed the more powerful and dangerous vehicle, the humanitarian principle imposed on it the additional duty of being watchful to discover the peril of plaintiff, no matter by whose fault that peril arose, and, on becoming aware of its existence, to make every reasonable effort to remove it. *McKenzie v. Railway* (Mo.) 115 S. W. 13; *Cole v. Railway*, 121 Mo. App. 605, 97 S. W. 555; *Grout v. Railway*, 125 Mo. App. 552, 102 S. W. 1026. Since the inference fairly may be drawn that the motorman should have observed that plaintiff was intending to cross ahead of the car when the horse was 25 feet from the track, facts in proof strongly tend to convict the motorman of being remiss in not attempting to reduce speed. He must have been

at least 125 feet from the point of collision, and, had he employed reasonable care, it is fair to assume either that he could have stopped the car in that distance or so materially checked its speed that the collision would have been averted. Instead of doing this, witnesses for plaintiff say (and the fact that the car ran over 100 feet after the impact supports the statement) that the motorman put forth no effort to stop until the car was right at the wagon. We think the evidence most favorable to plaintiff was sufficient to take the case to the jury on the issue of "humanitarian" negligence, and therefore that the demurrer was properly overruled.

The instructions correctly declare the law of the case, and, rightly construed, do not enlarge the cause of action pleaded in the petition. The question of contributory negligence, though not put in issue by the pleadings (*Ramp v. Railway* [Mo. App.] 114 S. W. 59), was treated by both parties as an issue of fact to go to the jury, and, if it might be said that plaintiff was guilty in law of contributory negligence, we would not feel justified in reversing the judgment on account of the submission in plaintiff's instructions of the issue of contributory negligence. A defendant, though not bound by a position he is compelled to take by adverse rulings of the court, is bound by one he voluntarily assumes. We do not feel justified in pronouncing the verdict excessive. Plaintiff had three ribs broken, and received some cuts and bruises. He paid his doctor \$75, and at the time of the trial (over a year after the injury) had not fully recovered. For such injuries a verdict of \$1,000 does not bespeak passion or prejudice on the part of the jury.

The judgment is affirmed. All concur.

CROHN v. CLAY COUNTY STATE BANK.

(Kansas City Court of Appeals. Missouri.

March 29, 1909. On Rehearing,

April 19, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 43*)—ASSETS—PERSONALTY.

The title to personalty at the owner's death vests in the administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 279; Dec. Dig. § 43.*]

2. EXECUTORS AND ADMINISTRATORS (§ 519*)—FOREIGN DOMICILIARY ADMINISTRATOR—TITLE TO PERSONALTY.

A foreign domiciliary administrator is without title to the personalty of intestate in the state.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2310; Dec. Dig. § 519.*]

3. EXECUTORS AND ADMINISTRATORS (§ 519*)—FOREIGN DOMICILIARY ADMINISTRATOR—RIGHT TO COLLECT DEBT.

A debtor paying the debt to the foreign domiciliary administrator of his creditor will not be protected as against the resident admin-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

istrator on the ground that the money has gone where it must in the end go, as such foreign administrator is wholly without authority or title to receive payment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 519.*]

4. EXECUTORS AND ADMINISTRATORS (§ 519*)—FOREIGN DOMICILIARY ADMINISTRATOR—RIGHT TO COLLECT DEBT.

A debtor paying the debt to the foreign domiciliary administrator of his creditor will not be protected as against the resident administrator on the ground that the latter is a trustee for the heirs and the foreign administrator, for the resident creditors have a superior right to heirs.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2310; Dec. Dig. § 519.*]

5. EXECUTORS AND ADMINISTRATORS (§ 519*)—FOREIGN DOMICILIARY ADMINISTRATOR—AUTHORITY TO COLLECT DEBTS.

The payment of a debt to the foreign domiciliary administrator of the creditor is no defense as against the resident administrator, notwithstanding the payment was made before the latter's appointment, for such foreign administrator is wholly without authority or title to receive payment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2310; Dec. Dig. § 519.*]

On Motion for Rehearing.

6. COURTS (§ 92*)—OPINIONS—DICTA.

Inference from remarks of the Court of Appeals outside the point of decision should not be drawn against express decisions of the Supreme Court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 335; Dec. Dig. § 92.*]

Appeal from Circuit Court, Clay County; Francis H. Trimble, Judge.

Action by R. S. Crohn, public administrator, against the Clay County State Bank. Judgment for plaintiff. Defendant appeals. Affirmed.

Craven & Moore, for appellant. Clyde Taylor and W. E. Fowler, for respondent.

ELLISON, J. Plaintiff is the public administrator of Jackson county, in charge of the estate of William H. Lowe, deceased. He brought this action to recover a deposit of \$1,500 left by deceased with the defendant, a banking institution in a county adjoining Jackson. The judgment in the trial court was for the plaintiff. It appears that Lowe resided in the state of Iowa, and that he died in the state of Kansas in November, 1906, leaving also a deposit of \$1,000 in a bank in Jackson county. In that month letters of administration were granted on his estate in his home county in Iowa to C. W. Huff, who duly qualified. In December, 1906, the defendant bank paid to Huff the amount of the deposit, and took his receipt as such administrator. Afterwards, in the same month, plaintiff, as public administrator, was put in charge of the estate by the probate court of Jackson county, Mo., for the purpose of administering thereon. He collected the

deposit in Jackson county and then demanded that left with defendant, but the latter, having already paid it to the home administrator in Iowa, refused payment, and this action followed.

It is thus readily seen that the question involves the title of a foreign domiciliary administrator to personal effects of the deceased in a foreign state, and his right to collect debts owing to the deceased by debtors in such state. It is a familiar rule of law that title to personalty at the death of the owner vests in the administrator. But here the controversy to the property is between two administrators appointed in different jurisdictions and under the authority of different sovereignties. The title and authority of the Iowa administrator in property of a deceased, who resided in that state is governed by the laws of that state, which are without force in Missouri. The property in controversy was in the latter state, and, while it cannot be appropriated from the true or real owners, yet it is under the jurisdiction of the latter state, and can only be withdrawn therefrom in pursuance of Missouri laws. This rule is justified by the duty which a state owes its own citizens who may be creditors, as well as to itself in the way of taxation. Therefore, a creditor of a deceased who was a nonresident is given the right to ask an administration of property which may be found in this state. And it will not do to say there are no creditors, for within the period of limitations that could not well be known. *Becraft v. Lewis*, 41 Mo. App. 546. So it has come to be well-recognized law in this state that the foreign domiciliary administrator is without title to property in this state. *Naylor v. Moffatt*, 29 Mo. 126. "He cannot maintain a suit here for such property for the simple reason that he has no title to the property." *Richardson v. Busch*, 198 Mo. 174, 187, 95 S. W. 894, 115 Am. St. Rep. 472. To the same effect is *In the Matter of Henry Ames & Co.*, 52 Mo. 290; *Turner v. Campbell*, 124 Mo. App. 133, 101 S. W. 119; *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113; *Becraft v. Lewis*, supra.

But it is urged if the debtor pays the debt to the foreign administrator, as in this case, he should be protected, since the money has gone to where it must go in the end. That cannot be allowed to have any weight because of the utter lack of authority and title in such administrator. He cannot even assign a note of the deceased so as to enable the assignee to sue upon it in this state. *McCarty v. Hall*, 13 Mo. 480. And in *Bartlett v. Hyde*, 3 Mo. 490, there was a payment by the debtor to the foreign administrator, yet the court held that the administrator appointed here could force him to pay it again; the court remarking that it was not a question of hardship in a given case, but of ab-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

solute law. In keeping with that holding it will be found to be stated in *McCarty v. Hall*, supra, that the foreign administrator could not "release or control" debts owing by debtors residing in other states. Nor does the fact that an administrator's title is in reality that of a trustee for the heirs and for the foreign domiciliary administrator, as is recognized in *Naylor v. Moffatt*, 29 Mo., loc. cit. 128, and *Richardson v. Busch*, 198 Mo., loc. cit. 188, 95 S. W. 894, 115 Am. St. Rep. 472, affect the question; for, notwithstanding the administrative trusteeship for the benefit of such persons, yet creditors have a superior right to heirs (*Hayes v. Fry*, 110 Mo. App. 25, 83 S. W. 772), and, as resident creditors, they have a primary right to the protection of the laws of their own state in property of their decedent debtor which has been placed in such state, and to have it administered there instead of forcing them to the inconvenience of foreign jurisdictions.

There is a phase of this case which counsel for defendant has not permitted us to overlook, which is said not to appear in any of the other cases which have arisen in the courts of this state, and that is that here the defendant's payment to the Iowa administrator was before the plaintiff had been appointed to take charge of the estate by our probate court. But that that cannot affect the rule in this state is made apparent by looking to the reason upon which the rule is founded. The reason is that the foreign administrator has no title whatever. The fact that the title may be in abeyance pending the appointment of an administrator here does not arm the foreign administrator with any authority or cast upon him any title.

What we have written is in accord with the view of the learned trial judge as expressed by him in writing at the trial, a printed copy of which has been furnished us by counsel. It has been a valuable and serviceable guide to the conclusion we have reached.

The judgment is affirmed. All concur.

On Rehearing.

PER CURIAM. The points passed upon in this case have not been otherwise decided by the St. Louis Court of Appeals in *Sommer v. Bank*, 108 Mo. App. 490, 83 S. W. 1025, as suggested by defendant. Inference from remarks of the court outside the point of decision should not be drawn against express decisions of the Supreme Court. The decision was that no objection could be taken to the foreign administrator's capacity to sue, since it had been waived by a failure to demur. The last cases reannouncing the rule stated in the opinion, the first of which was therein cited, are those of *Richardson v. Busch*, 198 Mo. 174, 184, 185, 187, 95 S. W. 894, 115 Am. St. Rep. 472, and *De La*

Vergne v. Richardson, 198 Mo. 189, 95 S. W. 898. Unless we are to put ourselves in conflict with those cases, as well as the others cited in the opinion, we must deny the motion.

KINGMAN-ST. LOUIS IMPLEMENT CO. v. BANTLEY BROS. HARDWARE CO.

(St. Louis Court of Appeals. Missouri. April 6, 1909. Rehearing Denied April 20, 1909.)

1. APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS—CONCLUSIVENESS.

Ordinarily findings are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. § 1008.*]

2. ABATEMENT AND REVIVAL (§ 3*)—JURISDICTIONAL DEFECTS—METHOD OF ATTACK.

A defect of jurisdiction over the person or subject-matter appearing on the face of the record proper must be raised by demurrer.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 7; Dec. Dig. § 3.*]

3. COURTS (§ 37*)—JURISDICTIONAL DEFECTS—ATTACK—WAIVER.

If a defect of jurisdiction consists of want of jurisdiction over the person and appears on the face of the record by pleading over or by appearing and participating in the further defense of the case, as by appearing at the taking of depositions, taking a continuance, taking leave to plead, the defect is waived, but, if the defect arises in pairs one which is not disclosed by the pleadings, it must be attacked by answer, as in the nature of a plea in abatement, and in that answer pleas in bar, counterclaims, or any other proper defenses may be united, separately stated, without waiving the defense of want of jurisdiction over the person or the subject-matter.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-149; Dec. Dig. § 37;* Abatement and Revival, Cent. Dig. §§ 8-10.]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by the Kingman-St. Louis Implement Company against the Bantley Bros. Hardware Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Plaintiff, a corporation organized under the laws of Illinois, but licensed to do business in this state, having its chief offices and place of business in the city of St. Louis, instituted suit in the circuit court of the city of St. Louis on an account, the principal and interest of which amounted to \$90.48, this being the balance claimed, with interest, due on the purchase price of certain wagons sold by plaintiff to the defendant. In the petition it is stated that the cause of action arose in the city of St. Louis; that the contract out of which the account arose was made in the city of St. Louis; that the contract was accepted in the city of St. Louis; and that the amount payable thereon was payable in that city. It is also alleged that the defendant corporation has its principal office and place of business in the city

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of Lebanon, Laclede county, Mo., that its president and chief officers reside in that city, and that notwithstanding the cause of action arose wholly within the city of St. Louis the defendant, its officers and agents, reside in the city of Lebanon. Wherefore plaintiff prayed summons for the defendant, directed to the sheriff of Laclede county, also praying judgment for \$90.48, with interest and costs. The summons issued to the sheriff of the city of St. Louis was returned not found. Thereupon summons issued to the sheriff of Laclede county, which was returned properly served upon the president of the defendant in Laclede county. The answer set up a plea to the jurisdiction of the St. Louis circuit court over the cause of action, averring the residence of the defendant in Laclede county, its incorporation under the laws of this state; that it had never had an office or agent for the transaction of its business in St. Louis, and that all the transactions complained of and set forth in the petition were carried on at its usual place of business at Lebanon, in Laclede county, and that whatever cause of action, if any plaintiff had, accrued in the city of Lebanon, county of Laclede, state of Missouri, and not in the city of St. Louis; that the contract upon which the balance was claimed to be due was made and entered into in Lebanon; that all of the accounts between plaintiff and defendant were payable in Lebanon; and that all the transactions and dealings between plaintiff and defendant arose and were carried on at Lebanon and not in the City of St. Louis. Further answering, defendant denied each and every allegation in the petition, except as otherwise admitted in the foregoing paragraph of the answer, and denied that it was indebted to plaintiff in the sum claimed or any other sum.

At the trial what is called a "farm wagon contract" was introduced in evidence by plaintiff, which is addressed to Kingman-St. Louis Implement Company, St. Louis, Mo., and dated at Lebanon, Mo., May 20, 1905. By this contract defendant ordered of plaintiff 25 Bain wagons, at a set price, to be shipped by the 'Frisco Railroad to Lebanon, Mo. It is set out in the contract that the buyer "agrees to pay as above in par funds at St. Louis." It is further provided that the title to the goods shipped to the buyer is to remain in plaintiff until it receives the money therefor, and that no agreements, conditions, or stipulations, verbal or otherwise, save those mentioned in the order, will be recognized. The contract concludes in this way: "This order is taken subject to the approval of Kingman-St. Louis Implement Company. If notice to the contrary is not given within 30 days after the receipt of order at its office in St. Louis, Mo., it will be understood that the order is accepted." There was also introduced in evidence a bill of lading, by which it appears that a

car load of wagons was shipped from Kenosha, Wis., to the defendant at Lebanon, Mo., the shipment going from Kenosha via the Chicago & Northwestern to Chicago, thence from Chicago via the Chicago & Eastern Illinois to Thebes, and from Thebes to Lebanon via the 'Frisco. The shipper named in the bill of lading was the Bain Wagon Company, Limited; the bill of lading being dated at Milwaukee, Wis., the defendant being the consignee named.

The only witness introduced was the credit man of the plaintiff, who testified that he had charge of the books of the plaintiff from 1905 on, and at that time—that is, in 1905—had the title of cashier. Shown the sales contract referred to, he identified it as one of the papers found in the office of plaintiff at St. Louis, and he testified that it came to plaintiff through the mail in the regular way, being received by plaintiff at St. Louis, and that he "had answered it." Shown the account, he testified that the balance due on it was \$90.48; that payments had been credited on the account, which was originally for \$1,335, and that they had been received at the office of plaintiff in St. Louis; that they came in the form of checks which were deposited by plaintiff in its bank in St. Louis. He identified the bill of lading as issued to the Bain Wagon Company, and said that, as the goods were charged to plaintiff, the Bain Wagon Company had sent the bill of lading to that company. On cross-examination witness stated that mail received at the office of plaintiff in St. Louis was opened by the manager or assistant manager. At the date of this transaction the manager was a Mr. Burns. This farm wagon contract was found among the papers of the plaintiff, and that that is all he knows about it. It was in the handwriting, he testified, of one Jones, who was a traveling salesman for plaintiff at the date of the contract, traveling in the territory embracing Lebanon. Jones had taken the order at Lebanon and mailed it to the plaintiff; that is, Jones had been in Lebanon, went to see the defendant company or its president to sell them goods, made this contract, and mailed it to the house at St. Louis. The contract is on one of their usual blanks. Payments were made by checks mailed from Lebanon, Mo., by the defendant, were local checks as he remembers; that is, checks drawn on the bank at Lebanon and deposited by plaintiff, in the customary and usual way of business, in its bank at St. Louis, and were transmitted by the St. Louis to the Lebanon bank for payment, as he supposes. On redirect examination this witness said he did not know anything about the farm wagon contract in the case, could not make out the signature on it, could not say whether anything of that kind was ever mailed to the office of plaintiff or received at the office of the plaintiff, and had never seen the contract or anything like

it until shown it at the trial. Referring to his ledger, which he had with him, and asked if there was anything to identify the transaction by the ledger, he said that the only thing he could see was the same amount of wagons that were called for in the contract and the same terms. There were 25 wagons ordered under this contract, and it is for the balance due on them that the suit is brought. It was admitted that the plaintiff was licensed to do business in this state as a foreign corporation. This is all the testimony in the case.

The trial was before the court without a jury. The defendant asked a declaration to the effect that, under the law and evidence, the plaintiff was not entitled to recover and the finding should be for defendant. This was refused, finding for plaintiff and judgment accordingly. Motion for new trial was duly filed, overruled, and exception saved. Defendant appeals.

Morton Jourdan, for appellant. Sturdevant & Sturdevant, for respondent.

REYNOLDS, P. J. (after stating the facts as above). Ordinarily we would be bound by the finding of the court on the facts, and that would compel an affirmance. It is not submitted to us on that theory, however, by either party; the contention being that the trial court erred in law on the question of jurisdiction over the cause of action. It is contended by plaintiff that by appearing and participating in the trial, and by filing an answer which joined with the plea in abatement one in bar, the defendant lost the benefit of the former. It will be observed that it is distinctly averred in the petition that the contract was made in St. Louis, that the cause of action originated in St. Louis, and that, therefore, the venue of the cause was in that city. With this allegation in the petition the defendant could not demur. The only way that it could possibly reach it under our Code was by answer, and it did that, denying the jurisdictional averments. It coupled that plea with a denial of the indebtedness and went to trial, practically not disputing the debt, but resting on that part of its answer which denied jurisdiction. While there has been a great deal of contention over this form of pleading, we are all of the opinion that the decision of our Supreme Court in the case of *Little v. Harrington*, 71 Mo. 390, settles this case. In that decision Judge Sherwood, speaking for the court and referring to the provision of the statute that "the only pleading on the part of the defendant is either a demurrer or an answer" (Rev. St. 1899, § 596 [Ann. St. 1906, p. 622]), and to the subsequent provision in section 605 (Ann. St. 1906, p. 635), that "the defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both," quotes from

Bliss on Code Pleading, § 345, to the effect that matter in abatement is as much a defense to the pending action as matter in bar; and to say that the defendant may reserve the latter until a trial shall have been had upon the issues in regard to the former would interpolate what is not in the statute, and would be inconsistent with its plain and simple requirements. Referring to *Rippstein v. Insurance Co.*, 57 Mo. 88, and *Fordyce v. Hathorn*, 57 Mo. 120, as holding to the contrary, the court overrules them as founded on the common-law rule existing in this state before the adoption of the Code, but abrogated by the Code.

In *Coombs Commission Co. v. Block*, 130 Mo. 668, 32 S. W. 1139, the question again came up, and the doctrine announced in *Little v. Harrington*, supra, was approved and followed; the *Rippstein* and *Fordyce* Cases being referred to as disapproved in that case. In *Johnson v. Detrick*, 152 Mo., loc. cit. 253, 53 S. W. 891, it was laid down that a plea to the jurisdiction, even when coupled with a plea to the merits, is permissible under our Code, and that the latter plea does not as at common law waive the former. In *Meyer v. Insurance Co.*, 184 Mo. 481, loc. cit. 437, 83 S. W. 479, 480, Judge Marshall, speaking for Division No. 1, holds that under the present practice in our state "a defendant can unite in the same pleading a plea to the jurisdiction as to the person as well as to the subject-matter with a plea to the merits, and that he does not thereby waive the question of jurisdiction of the court"; and the cases from *Little v. Harrington*, supra, to *Kenner v. Doe Run Lead Co.*, 141 Mo., loc. cit. 251, 42 S. W. 683, are cited in support of the proposition. In *Little Rock Trust Co. v. S. M. & A. Ry. Co.*, 195 Mo. 669, loc. cit. 682, 93 S. W. 944, the same judge, that question being again before that same Division of the Supreme Court, announces the rule as settled in this state in the same way. The latest decision of our Supreme Court on this question of pleading is that of *Thomasson v. Mer. Town Mut. Ins. Co.* (Mo.) 116 S. W. 1092; an opinion delivered in Division No. 2 by Judge Gantt (not yet officially reported). This case went to the Supreme Court on certification from this court. See 114 Mo. App. 109, 89 S. W. 564, 1135. The Supreme Court adopted the view of the majority of the judges of this court. See, also, *Wicecarver v. Mer. Town Mut. Ins. Co.* (filed by the St. Louis Court of Appeals March 23, 1909, not yet officially reported) 117 S. W. 698.

Counsel for plaintiff quote from Judge Marshall that "consent cannot confer jurisdiction of the subject-matter, and that objection may be made at any time during the progress of the case, or even afterwards if the record discloses such want of jurisdiction. *But consent can confer jurisdiction of the person, and, where a defendant fails to make timely objection to the jurisdiction as to his person,*

he waives that objection." Little Rock Trust Co. v. Railway, 195 Mo. 669, loc. cit. 683, 93 S. W. 944. The last sentence is underscored by counsel, they claiming that these italicized words bring the decision of Meyer v. Insurance Company within the rule of waiver which they invoke. The learned counsel have not told us to which Meyer Case they refer. That case has been before this court twice. We are somewhat at loss to determine which of the two is meant. However, when first before this court, reported in 92 Mo. App. 392, 69 S. W. 638, it was certified to the Supreme Court, as this court held that the appearance of the defendant involved in taking an appeal from the justice's judgment was such an appearance as constituted a waiver of a right to object to the jurisdiction of the justice; it being thought that this was in conflict with the decision of the Kansas City Court of Appeals in Trimble & Fyfe v. Elkin, 88 Mo. App. 229. The Supreme Court, on the case reaching it, held that there was no conflict, and that this court had overlooked the fact that it was the settled law under our Code that "a defendant must make all his defenses in the same answer, whether such defenses as heretofore denominated dilatory, in abatement, or in bar." Meyer v. Insurance Co., 184 Mo. 481, loc. cit. 488, 83 S. W. 479. Judge Marshall then further states in the Meyer Case (loc. cit. 488) that the error consisted in holding that by taking an appeal from the justice of the peace, after the justice had ruled against it on its plea to the jurisdiction, the defendant waived the plea to the jurisdiction, and that the defendant never waived that plea, but has always properly made and preserved the question. This court subsequently in a case of the same title (Meyer v. Insurance Co., 95 Mo. App. 721, 69 S. W. 689) held that a plea to the jurisdiction of the court over defendant's person may be joined in the same answer with the plea to the merits of the action. The distinction drawn by the decisions is this: Where the defect of jurisdiction over the person or subject-matter appears on the face of the record proper, the defense must be raised by demurrer. If the defect is want of jurisdiction over the person, and that appears on the face of the record, by pleading over, or by appearing and participating in the further defense of the case, as by appearing at the taking of depositions, taking a continuance, taking leave to plead, the defect is waived. But, if the defect is one arising in pais, one which is not disclosed by the pleadings, then it must be taken advantage of by answer, as in the nature of a plea in abatement; and in that answer pleas in bar, counterclaims, or any other proper defenses may be united, separately stated, without waiving the defense of want of jurisdiction over the person or the subject-matter. An examination of the testimony in the case

satisfies us that the contract in question was made and was to be performed in Laclede county, and that the proper venue of the action was in that county, and not in St. Louis, and that the learned trial judge was in error in law as well as in his finding on the facts, if his decision is to be taken as founded on the facts. To reverse the case and refuse to remand, it would be depriving plaintiff of all opportunity of recovering what seems to be justly due it. Therefore we reverse and remand the case to give an opportunity to plaintiff, if it sees proper to do so, to take a nonsuit.

The judgment of the St. Louis Circuit Court is reversed, and the cause remanded; all concurring.

DUNWOODY v. MISSOURI, K. & T. RY. CO.

(Kansas City Court of Appeals. Missouri. March 29, 1909. Rehearing Denied April 19, 1909.)

1. RAILROADS (§ 330*)—CROSSINGS—CARE REQUIRED OF TRAVELERS.

A traveler approaching railroad tracks in a switchyard at a public crossing may presume, in the absence of signals, that he may proceed in safety, since an ordinary observer cannot know when a switch engine in a switchyard will begin to move, or, moving, when it will halt, unless the engineer rings the bell before starting, and continues to ring it until the engine stops.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1073; Dec. Dig. § 330.*]

2. RAILROADS (§ 350*)—CROSSINGS—CARE REQUIRED OF TRAVELERS.

Whether a traveler on a public street was negligent in crossing railroad tracks within switchyards, precluding a recovery for injuries in a collision with a switch engine, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1166; Dec. Dig. § 350.*]

3. RAILROADS (§ 347*)—CROSSINGS—CARE REQUIRED OF TRAVELERS.

The fact that a traveler on a public street in the act of crossing railroad tracks within switchyards heard some one shout is immaterial on the issue of his contributory negligence, unless he heard the shouting and understood its purport.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1134; Dec. Dig. § 347.*]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by J. F. Dunwoody against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. P. B. Jackson, for appellant. P. D. Decker and Geo. J. Grayston, for respondent.

BROADBUSH, P. J. This is an action to recover damages on the ground of the alleged negligence of defendant, whereby plaintiff was injured.

The facts are as follows: On May 25,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1907, while plaintiff, who was riding in his automobile, was attempting to cross defendant's tracks on Wall street, in the city of Joplin, the machine was struck by defendant's switch engine, whereby defendant was injured and his automobile damaged. At the place in question Wall street runs north and south, and crosses the switchyards of the defendant and the Missouri Pacific Railroad at Tenth street. Altogether there are about eight of these tracks. The plaintiff was driving on Wall street south, when he came to Tenth street, and stopped to let out a boy who was riding with him, but he failed to pay any particular attention to his surroundings; he being familiar with the location. At that time a Missouri Pacific passenger train was standing on the main track west of the crossing, the engine of which had been uncoupled and moved to the east side of the crossing, heading east, with the rear end of the tank in close proximity to the east line of Wall street, and leaving a space between the cars and the engine of 88 feet. As plaintiff approached the main track, he stopped his automobile about 23 feet distant, near the center of Wall street. About the time he stopped, he heard some one halloo, but, not knowing for what purpose, proceeded across the main track in the space between the Missouri Pacific engine and cars and onto the next track, when his automobile was struck by defendant's engine moving west over the crossing. The evidence tended to show that from his position, when he stopped, his view was intercepted by the Missouri Pacific engine, and that he did not see it in time after he started to avoid the collision. Prior to this time, if he had looked, he could have seen the engine moving west toward the crossing. There was evidence pro and con as to whether the bell of the engine was rung. It seems that the persons on the back of the engine, which was backing at the time, saw plaintiff and hallooted to him as a warning not to start across the tracks, and plaintiff testified that he heard the shouts, but did not know and understand what was said or meant. The judgment was for the plaintiff, and defendant appealed.

The right of plaintiff to recover is the principal question raised by defendant. Its position is stated thus: "It was the duty of the plaintiff in approaching the crossing in question to use every possible precaution necessary for his own protection. The law requires that he should both look and listen for the approach of trains, and, if necessary, that he should have stopped; and, if he was located in any place where his view of the track was obstructed, then it was his duty to have gotten out of his automobile and gone to a place where he could have ascertained with certainty whether or not there was an engine or train approaching. If the plaintiff had exercised the care that the law required, he could not have failed

to have discovered the approaching train in time to have avoided the accident. The necessary conclusion, therefore, is that either he did not use the necessary care to discover the approach of the engine, or that, having discovered it, he attempted to cross in front of it." In *Schmidt v. Railroad*, 191 Mo., loc. cit. 229, 90 S. W. 186, 3 L. R. A. (N. S.) 196, the court states the general rule that "the measure of precaution to be observed by a traveler often depends upon the circumstances and surroundings. The general rule is that in knowingly approaching the track of a railroad, he must use his sense of sight or hearing to ascertain if there be danger. If the view is so obstructed that he cannot see, he should carefully listen. The circumstances may not require that he both look and listen, but common prudence requires that he do either one or the other, and a failure to do so renders his act negligence in law." It is held where the traveler could, when within 25 feet of the crossing, have seen a train approaching at a distance of from 200 to 450 feet, but, without looking, went upon the crossing and was struck, he could not recover. The court quoted from *Elliott on Railroads* in part as follows: "A traveler who knows that a train is due must take care to avoid it, and this knowledge imposes upon him a somewhat higher exercise of care than if he was not in possession of such knowledge. Principle requires that in such a case a person who attempts to cross the track should be held guilty of negligence as a matter of law if there was an obstruction to sight or hearing, since no one can be said to exercise ordinary care who voluntarily encounters a danger that he knows is imminent, unless the situation and conditions are such as to enable him to see that he can proceed with safety." *Sanguinette v. Railroad*, 196 Mo. 466, 95 S. W. 886. The case did not require the application of the rule as quoted, and therefore it may be, strictly speaking, treated as obiter dictum. However, in a similar case on principle, the court holds that the question of plaintiff's contributory negligence is for the jury. *Kenney v. Railroad*, 105 Mo. 270, 15 S. W. 983, 16 S. W. 837. And whether or not the decision referred to is to be treated as obiter dictum it has no particular application to this case, as the circumstances and surroundings are materially different. The plaintiff's automobile was not struck by a train which was due at the time, as in the case quoted, and therefore no danger was to be apprehended from that cause, but he was struck by a switch engine in the switchyards of two railroads in a city, and at a public crossing. It is common experience that an ordinary observer cannot know when he sees a switch engine on the tracks under such conditions when it will begin to move, or, if moving, when it will halt, unless the engineer in charge rings his bell before starting and con-

tinues to ring it until the engine stops. And we believe this is the universal custom governing the movement of switch engines. And, unless such rule is strictly complied with, a street crossing of the switchyards of a railroad in a city would prove a snare of the most dangerous character, and would practically deprive the public of the use of the street. Therefore a traveler approaching such a crossing has the right to presume, in the absence of the sound of a switch engine's bell, that he may proceed in safety. And whether he has exercised proper care is usually a question for the jury. But a traveler on a public street in crossing the tracks of a railroad within its switchyards may be guilty of such contributory negligence as would preclude his right to recover as a matter of law under certain circumstances and surroundings.

With these principles in view, we think there is not much difficulty in arriving at a proper determination of the controlling question in this case. The plaintiff was traveling on a public street, where he had the right to go. His view of the different tracks was fairly unobstructed with the exception of the cars and engine of the Missouri Pacific Railroad. Before he reached the latter track, he stopped and looked, but was unable to see the engine which struck him because it was moving behind the Missouri Pacific engine. It is contended that, had he looked east just before he stopped, he could have seen the latter engine moving west in the direction of the crossing, and should therefore have stopped until it passed. As it turned out, this was what he should have done. But under the circumstances it was a question for the jury to say whether or not, in the absence of the ringing of the bell, he was justified in proceeding on the crossing.

The defendant asked the court to instruct the jury as follows: "If you find from the evidence that the men on the moving engine shouted to the plaintiff when he was far enough away to have avoided the collision, and that the plaintiff heard the shouting and stopped or checked his automobile, then afterwards proceeded towards the crossing and collided with the defendant's engine, and that such collision would not have occurred if he had remained at the place when he heard the shouting, then the plaintiff cannot recover, and your verdict will be for defendant." The court refused so to instruct the jury, and rightfully. The mere fact that plaintiff heard some one shouting, unless he understood it as a warning for him not to proceed, served no useful purpose. The court modified the instruction, and told the jury that, if plaintiff heard the shouting and understood its purport, he could not recover, and gave it to the jury as so modified.

These are the only questions of importance raised on the appeal. For the reasons given, the cause is affirmed. All concur.

COURTER v. TOOTLE, WHEELER & MOTTER MERCANTILE CO.

(Kansas City Court of Appeals. Missouri.
March 29, 1909. Rehearing Denied
April 19, 1909.)

1. MASTER AND SERVANT (§ 85*)—NEGLIGENCE—EVIDENCE.

An employé suing his employer for negligence must show that the employer failed in the performance of some duty owing him as his employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 135; Dec. Dig. § 85.*]

2. MASTER AND SERVANT (§ 137*)—INJURY TO SERVANT—NEGLIGENCE.

An employé was injured while unloading crates of linoleum and storing them in a warehouse, by being struck by a cleat which had become loosened and protruded outward. The cleats frequently became detached while the crates were being handled, and the employés were instructed to nail loose cleats or take them off. Both the employés and the superintendent at times nailed the loose cleats or took them off. Held, as a matter of law, to show that the employer was not guilty of actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 137.*]

3. MASTER AND SERVANT (§ 236*)—INJURY TO SERVANT—CARE REQUIRED OF SERVANT.

A servant must use reasonable care to avoid danger to be apprehended from defects and conditions which are open to observation, and which can, by the use of ordinary care, be avoided by him as well as by his master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 683, 723-742; Dec. Dig. § 236.*]

4. MASTER AND SERVANT (§ 203*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where the manner of doing the work is ordinarily a reasonably safe one, so that the employer may follow such manner, the risks of danger attending the work are assumed by the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by John M. Courter against the Tootle, Wheeler & Motter Mercantile Company. From a judgment for plaintiff, defendant appeals. Reversed.

Sam. I. Motter and Brown & Dolman, for appellant. Rusk & Stringfellow, for respondent.

BROADDUS, P. J. This is a suit against defendant, a corporation engaged in the wholesale dry goods business, for damages alleged to have been the result of defendant's negligence. On or about the 20th day of April, 1906, the plaintiff was engaged with three other employés in unloading from a car crates of linoleum and storing them in de-

fendant's warehouse. These crates were 12 feet long, 14 inches in diameter, and weighed from 550 to 700 pounds. They were constructed by using two pine boards, each 14 inches square, one at each end of a roll of linoleum. The ends of two boards, each 14 inches wide, were nailed to the opposite edges of these boards. The roll of linoleum was then placed between these boards, and to secure them in place short pieces of pine about 6 inches wide, six or eight in number, were nailed at intervals across the open sides. In the language of the description given in the briefs, "the structure looked like a common tree box, closed at the ends, with a roll of linoleum inside instead of a tree." The dimensions of the warehouse were 80 by 100 feet, and, according to the evidence, the warehouse was imperfectly lighted. The crates were stored in piles 4 feet high. On the occasion in question the plaintiff with the other employes was engaged in piling crates of the description named upon a pile that had been made some time previously. The crates were carried to the place desired upon a truck. The manner of depositing them was for two men to place a flat iron bar about 3 feet long under one end of the crate, and by this means to lift that end up to a level with the top of the pile, and put one end of the iron bar on the top of the pile, and then the man at the other end of the bar would hold on to it and support that end of the crate. The man that had raised the inside end of the iron bar to the top of the pile would then go to the other end of the crate, and help the two there to raise it, and then all hands would roll it on the pile. While the plaintiff was lifting the end of the bar next to the pile of crates, he was struck near the hip bone by one of the cleats in the pile, which had become loosened and protruded outward, and was injured. It was shown that these cleats frequently became detached while the crates were being handled, and the employes were instructed by defendant's superintendent that, when they saw one that was loose, to nail it back, and, if that could not be done satisfactorily, to take it off. And it was shown that both the employes and the superintendent at times nailed these cleats when they observed that they were loose, or took them off when they deemed that proper, and that it was a thing which frequently happened, and the matter would be remedied by any one of them when it came under his notice. Such was the usual course pursued in the handling of these crates, and with which plaintiff was familiar. The plaintiff recovered judgment, and defendant appealed. Several questions are raised on the appeal, but we will confine our discussion to the one that we think is decisive of the case.

The defendant by proper instruction raised the question of the right of plaintiff to re-

cover on the pleadings and evidence. The court entertained the opinion that the plaintiff was entitled to recover on the showing he had made, and overruled defendant's demurrer. It is elementary law, in cases of negligence arising between employe and employer, that plaintiff must, as a condition precedent to his right to recover, show that defendant failed in the performance of some duty owing him as his employer. *Glasscock v. Dry Goods Co.*, 106 Mo. App. 657, 80 S. W. 364; *Ryan v. McCully*, 123 Mo. 636, 27 S. W. 533; *Gurley v. Mo. Pac. Ry. Co.*, 104 Mo., loc. cit. 223, 16 S. W. 11. We are of the opinion that plaintiff failed to show that defendant was derelict in the performance of any duty whose nonperformance would authorize a recovery. It appears from the plaintiff's own evidence that it was as much the duty of employes as that of defendant to guard against injury to be anticipated from the cleats that might become detached from the crates. These loosened cleats could not be seriously regarded as a menace to the safety of the defendant's employes. There are many ways in which a person may be injured from causes wholly unexpected, and therefore not to be anticipated, for which the law affords no compensation. If it were otherwise, the undertaking of an employer would be that of an insurer for the safety of his servant. And we have not yet reached that stage in our jurisprudence where the entire care for the safety of the servant devolves on the master, and the safety of the servant is not to be intrusted to his own reasonable and independent action. It is the duty of a servant, which he owes to himself, as well as to his master, to use reasonable care to avoid danger to be apprehended from defects and conditions which are as open to observation to the one as to the other, and which he can, by the use of ordinary care, avoid or remedy, as well as can his master. *Beckman v. Brewing Ass'n*, 98 Mo. App. 555, 72 S. W. 710; *Glasscock v. Dry Goods Co.*, 106 Mo. App. 657, 80 S. W. 364. The manner of doing the work was ordinarily a reasonably safe one, which the defendant had the right to pursue, and the risks of danger attending it were assumed by plaintiff by reason of his employment. It was not shown that the want of sufficient light in the warehouse had any causal connection with the plaintiff's injury.

Reversed. All concur.

BOSCH v. MILLER.

(Kansas City Court of Appeals. Missouri.
March 29, 1900. On Rehearing.
April 19, 1900.)

1. MALICIOUS PROSECUTION (§ 10*)—ACTION—GROUNDS.

An action for damages will lie where one has been compelled to defend himself against a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

civil action of a defamatory nature, maliciously brought and maintained without probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 11, 12; Dec. Dig. § 10.*]

2. MALICIOUS PROSECUTION (§ 32*)—MALICE—INFERENCE FROM WANT OF PROBABLE CAUSE.

Malice in the prosecution of a defamatory suit may be inferred from the existence of want of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 67; Dec. Dig. § 32.*]

3. MALICIOUS PROSECUTION (§ 25*)—"PROBABLE CAUSE"—WHAT CONSTITUTES.

"Probable cause," as the expression is used in connection with malicious prosecution, is any such combination of facts and proofs as may fairly lead the reasonable mind to the belief that, in the absence of hitherto unknown qualifying or rebutting evidence, the prosecution ought to be successful.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 56; Dec. Dig. § 25.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5618-5627; vol. 8, p. 7765.]

4. MALICIOUS PROSECUTION (§ 71*)—QUESTION OF LAW AND FACT—PROBABLE CAUSE.

In an action for malicious prosecution, where the facts are not in dispute, the question of a want of probable cause is one of law for the court; otherwise it is a mixed question of law and fact.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 161, 162; Dec. Dig. § 71.*]

5. TRUSTS (§§ 17, 18*)—EXPRESS TRUSTS IN LAND—DECLARATION—REQUISITES.

The declaration of an express trust in land must be in writing, under Rev. St. 1899, § 3416 (Ann. St. 1906, p. 1949), providing that a declaration of trust in land shall be manifested and proved by a writing signed by the person enabled to declare the trust; section 3417 (Ann. St. 1906, p. 1950), providing that, when a conveyance of land shall be made by which a trust may arise by implication of law, the trust shall be of the same force as if the act had not been made, being applicable only to trusts arising by implication of law.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 18-21; Dec. Dig. §§ 17, 18.*]

6. MALICIOUS PROSECUTION (§ 64*)—EVIDENCE—PROBABLE CAUSE.

Evidence held to show that defendant instituted and prosecuted suits against plaintiff without probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 152; Dec. Dig. § 64.*]

7. MALICIOUS PROSECUTION (§ 68*)—EXEMPLARY DAMAGES—DISCRETION OF JURY.

The awarding of exemplary damages in an action for malicious prosecution lies within the discretion of the jury.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 157; Dec. Dig. § 68.*]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Elizabeth A. Bosch against F. W. Miller. Judgment for plaintiff, and defendant appeals. Affirmed on rehearing, on condition that plaintiff remit an award of punitive damages.

Marley & Swearingen, for appellant. Milton Campbell, for respondent.

JOHNSON, J. Action to recover actual and punitive damages for the malicious prosecution of civil suits brought and prosecuted by defendant against plaintiff without probable cause. The trial resulted in a verdict and judgment for plaintiffs for \$1,620 actual and \$1,630 punitive damages. Defendant appealed.

The first cause of the litigation waged by defendant against plaintiff was a warranty deed executed and delivered to plaintiff by Mari Metz, her grandmother, on the 12th day of March, 1903. The deed recited a consideration of \$2,500, and by its terms conveyed to the grantee the fee-simple title to residence property in Kansas City owned by the grantor of the value of \$2,500. Following the description of the property, this clause appears: "This deed is subject to the charges for the care and subsistence of the grantor, Mari Metz, and such charges and the care of her grandmother, Mari Metz, are assumed by the grantee herein named." The deed was acknowledged March 13, 1903, and was filed for record four days later. The grantor, who was an aged widow, died intestate in Kansas City in October, 1905. For a number of years preceding her death, she resided on the premises described in the deed with her daughter, Mary Bosch, and the latter's family, including the plaintiff, who was engaged in artistic work and teaching, and from her income, which exceeded \$100 per month, contributed to the maintenance of the family, including her grandmother. Defendant, who was a son of Mari Metz and an uncle of plaintiff, was married and lived with his family in Kansas City. He was away from home when his mother died, but returned in time to attend the funeral. A few days later he and his wife called on his sister, Mrs. Bosch, to ascertain the condition of his mother's estate. He was referred to plaintiff, who informed him that the residence property had been deeded to her. She showed him the deed, and a stormy scene ensued. Defendant forcibly expressed his surprise and anger at being thus disinherited by his mother and said the "deed was not worth the paper it was written on." He insisted that the property be divided equally between him and his sister, Mrs. Bosch. There is substantial evidence to the effect that he bombarded his niece with hostile questions and observations, and that his demeanor was so overbearing and truculent that she became afraid of him. He succeeded in extorting from her the admission that the conveyance, though absolute in form, was made to her as trustee, but she would not admit that her uncle was one of the beneficiaries of that trust, and maintained that her grandmother had given her the full right to dispose of the property as she might think best. Defendant then left and went to his lawyer, to whom he stated that plaintiff had

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a deed to the property which was executed and delivered with the understanding that she should hold the property as trustee for the equal benefit of him and his sister. The lawyer advised defendant to procure from plaintiff a declaration of trust in writing and prepared an instrument of that character. Armed with this document, defendant returned to plaintiff and endeavored to obtain its execution by her. She refused on the ground that the instrument did not state the true facts; that her grandmother had not executed the deed with the understanding that plaintiff should be burdened with the execution of an express trust. The interview was stormy, and defendant was abusive, but did not offer physical violence. Finally, to end the scene, and out of fear that worse things might ensue, plaintiff signed the following instrument prepared by defendant: "Kansas City, Mo., October 30, 1905. This is to certify that when Mari A. Metz made a deed to me for the property at 3018 East Twelfth street, Kansas City, Mo., she said this deed was not intended to make me the owner of this property, but was to put it in my name as trustee." Plaintiff was not present when her grandmother executed the deed. A lawyer was called in by Mrs. Metz, and in the presence of witnesses she informed him of her wishes. He drew the deed in strict conformity with her instructions, and she informed herself of the contents of the instrument before she signed it. Nothing was said about a trust, nor was such subject mentioned when, afterward, the deed was delivered to plaintiff. Defendant took the statement signed by plaintiff to his lawyer and was advised, in effect, that it did not improve his position. Defendant testified: "Q. And what did you say to him? A. I said they refused to sign the original yellow slip that he had written (the declaration of trust prepared by the lawyer), and I finally rewrote that, and here it is. And he looked at it and he said 'That is a question as to whether she holds it in trust, or whether she is the real owner according to the deed.' He said: 'The way it is now she can transfer it to anybody, and you will have a fight on your hands. I would advise you to bring a suit merely to prevent her from transferring the property.' Q. He advised you to bring a suit merely to prevent her from getting rid of the property? A. Until we could get a compromise. I was still in hopes of it after suit was brought." Defendant's testimony relative to what plaintiff said when he tried to induce her to sign the declaration drawn by the lawyer is as follows: "She said that she was trustee, and she would decide whether and when I would get any of that property or my heirs, and that she didn't want that inserted until she saw an attorney."

The next step of defendant was to bring suit in the circuit court on December 3, 1905, against plaintiff and her mother to obtain the cancellation of the deed on the ground of

fraud in its procurement. The petition in that suit alleged that Mari Metz was 83 years old, was weak and infirm in body and mind, and that defendants (plaintiff here) unduly influenced her, and by false and fraudulent practices and promises induced her to execute an absolute conveyance of the property under the belief that she was conveying it in trust for the equal benefit of her son (defendant here) and her daughter, Mary Bosch. The characterization in that petition of the conduct of plaintiff and her mother is as vigorous and harsh as one would expect to find in a suit of that nature. No consideration was shown for their good name or feelings. Shortly after bringing that suit, defendant called on plaintiff at her studio. The conversation that ensued thus is stated by plaintiff: "He came up to the studio and asked me what I was going to do about the affair. I told him I didn't intend to do anything—that what he had done, he had put us in court, and it would stay there. He said didn't I have enough of court. I said I didn't know anything about it. He said, 'If you sign over to your mother and me, I will drop the whole thing.' I said: 'Grandma made the deed as she wished to, and to this I will stand. I have no money to fight in court but what I am earning, but if you want to go to court, you can.' He said: 'I have a thousand dollars I will spend for satisfaction.' And he said: 'I won't have one lawyer. I will have two or three. I will do all I can to have satisfaction.'" In due time plaintiff (here) filed an answer, and the case was called for trial May 29, 1906. Defendant was not ready, and, being unable to obtain a witness, dismissed the suit. On the same day his attorney brought another suit by filing a petition in substance the same as the petition in the former case. Plaintiff answered, and the cause came on for trial November 26, 1906. Defendant voluntarily dismissed that suit and immediately brought another of the same character. Again plaintiff answered and prepared for trial. Defendant failed to appear when the case was called March 28, 1907, and it was dismissed for want of prosecution. This ended defendant's attempts to force plaintiff into a compromise. Plaintiff incurred great pecuniary loss in attorney's fees and in the expense incidental to preparing for the trial of the three suits. She lost time from her business and suffered in mind from the unjust accusations. The evidence shows that her grandmother was in good health mentally and physically when she executed the deed, that plaintiff exerted no influence to procure a conveyance of the property, and that the deed, in fact, expressed the true intent of the grantor. No objection was made to the competency of plaintiff as a witness, as defendant had caused her deposition to be taken in one of the suits.

The facts we have stated are those most favorable to plaintiff, and the view of the

case they present is the one we shall adopt in disposing of the contention of defendant that the court should have peremptorily directed a verdict in his favor. The rule has been adopted in this state that an action for damages will lie in cases where the plaintiff has been compelled to defend himself against a civil action of a defamatory nature maliciously brought and maintained without probable cause. This rule has not been universally recognized in other jurisdictions, but it appears to have the approval of some of the best text-writers. In Bishop on Noncontract Law, § 222, the author thus speaks of it: "The element of defamation of character—slander or libel—is sometimes looked upon as justifying an action for malicious prosecution. It is clearly laid down that slander may be propagated by a false suit. And it has been intimated that in such circumstances an aggrieved person may elect the one of the two remedies he prefers. Not a great proportion of the cases practically assume this aspect, but the doctrine is just in principle, and it is occasionally met with in the books." In *Smith v. Burrus*, 106 Mo., loc. cit. 98, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329, the Supreme Court say: "The authorities are in conflict as to whether a petition states a cause of action which merely alleges that a civil action brought and prosecuted maliciously, and without probable cause, has been terminated in favor of the defendant; many of the authorities maintaining that no cause of action exists unless such civil process be accompanied by arrest of the person or seizure of the property, and that the plaintiff in such original action in contemplation of law is sufficiently punished by the payment of costs. This view has received the sanction of Judge Cooley (Law of Torts [2d Ed.] 217 et seq., and cases cited). But there are numerous and able decisions in opposition to this view, and it is difficult to combat the force of the reasoning they employ. It is difficult to see why the right of a plaintiff who, as defendant, has been sued in a civil action maliciously and without probable cause, and who has been put to great expense in consequence thereof, should be altered or at all affected merely by the incident of his property having been attached or his person seized; for in either case the damage, the expense and costs of defending a suit whether instituted by ca. sa. or attachment or by civil summons, would be the same. And it is clear that the recovery of costs would not, under our practice, reimburse him for his attorney's fees, something which and other incidental expenses he does not recover under the English practice. The cases on both sides of this subject have been extensively collated and exhaustively reviewed by John D. Lawson in 21 Am. Law Reg. (N. S.) 281, 353, and the conclusion reached that the better doctrine is that which allows an action to be maintained as well where property, etc., has not been seized

as where it has. The authorities also are well reviewed in 14 Am. & Eng. Encyc. of Law, Tit. 'Malicious Pros.,' p. 82 et seq., and notes. Besides, this court in *Brady v. Ervin*, 48 Mo. 533, adopted the view that an action for malicious prosecution may be maintained where the original action was begun by civil summons alone."

Malice in the prosecution of a defamatory suit may be inferred from the existence of want of probable cause, though it is said that the existence of a want of probable cause cannot be inferred from evidence of malice. A good definition of "probable cause" is that to be found in section 239, Bishop on Noncontract Law: "Probable cause—or, as the expression oftener is, reasonable and probable cause—is any such combination of facts and proofs as may fairly lead the reasonable mind to the belief (and the person relying on it must believe) that, in the absence of hitherto unknown qualifying or rebutting evidence, the prosecution or other suit ought to be successful." Where the facts are not in dispute, the question of a want of probable cause is one of law for the court; otherwise it is a mixed question of law and fact. In the present case, material facts are in controversy, and the first question to confront us is whether the facts most favorable to plaintiff justify a reasonable inference that defendant instituted and prosecuted his suits against plaintiff without probable cause. We think they do. The warranty deed executed by Mrs. Metz by its terms conveyed a fee-simple title to plaintiff. The creation of an express trust for the benefit of defendant in connection with that conveyance could be proved only by writing. It could not be proved by parol. Section 3416, Rev. St. 1899 (Ann. St. 1906, p. 1949); *Lane v. Ewing*, 31 Mo. 75, 77 Am. Dec. 632; *Hell v. Hell*, 184 Mo. 665, 84 S. W. 45. The trust which defendant endeavored to have declared by plaintiff was an express, not a resulting, trust. Therefore it fell under the purview of section 3416, and not of section 3417 (Ann. St. 1906, p. 1950), which relates to trusts arising by implication of law.

Evidently such was the opinion of defendant's lawyer, who advised that a declaration of trust in writing be secured from plaintiff. Defendant knew when he brought the first suit that he could not prove the existence of an express trust by oral evidence, and, further, he knew, for his lawyer so advised him, that the written statement he wrested from plaintiff amounted to nothing so far as proving a trust was concerned. Further, he must have known that he could procure no evidence to support a charge of fraud in the procurement of the deed. His own testimony shows affirmatively that he brought the suit, not from a belief that he had a meritorious cause, but merely in the hope of forcing his adversary to a compromise. His counsel did not advise him that he had a meritorious case, and therefore he is in no position to in-

voke the protection of the advice of counsel. He had no reason to believe that the prosecution of the suits "ought to be successful in the absence of hitherto unknown qualifying or rebutting evidence," and his entire lack of confidence in the justice of his cause is demonstrated by his conduct in making no effort worthy the name to prepare for trial, and in dismissing the suits when brought to bay only to refile them to the further vexation and annoyance of his niece, whose good name he ruthlessly attacked from no better motive than the hope of unjustly gaining some pecuniary advantage to himself. Want of probable cause is abundantly shown by the evidence, and, as we have said, malice may be inferred from it. Plaintiff was entitled to go to the jury, and the demurrer to the evidence was properly overruled.

We find but one error in the record. In the instruction given at the request of plaintiff on the measure of damages, the subject of punitive damages was treated as follows: "And if the jury find that the said F. W. Miller prosecuted his said several actions against plaintiff without probable cause and maliciously, as defined in these instructions read to you, then the jury shall separately determine and award in favor of plaintiff and against defendant such additional sum, if any, as punishment for his malicious suits, if you so find, as to the jury may appear just and proper, not however beyond the sum of \$2,740. The total verdict in plaintiff's favor, if you so find, must not exceed the sum of \$5,000." It will be observed that, on finding that defendant prosecuted the several suits maliciously and without probable cause, the direction to assess punitive damages was mandatory. This was clearly erroneous. The awarding of such damages should always be left to the discretion of the jury. The rule applicable is stated by the Supreme Court in the following extract from the opinion in *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855: "It is insisted by defendant that this instruction is erroneous, in that it tells the jury absolutely that plaintiff is entitled to punitive damages. By it the jury are told that if they find from the evidence that the taking and sale of plaintiff's property, under the attachment against Logan, was malicious, and that the bringing of said attachment was without probable cause, then plaintiff is entitled to punitive damages, which the jury will allow him, in addition to the value of the goods. The rule announced by recent decisions of this court is that it lies within the discretion of the jury as to whether or not punitive damages will be allowed in any case, and is not a question for the court. *Callahan v. Ingram*, 122 Mo. 372, 26 S. W. 1020, 43 Am. St. Rep. 583; *Nicholson v. Rogers*, 129 Mo. 136, 31 S. W. 260. This is in accord with the decided weight of authority.

1 *Sedgwick on Damages* (8th Ed.) § 387; 2 *Thompson on Trials*, § 2065; *Hawk v. Ridgway*, 33 Ill. 473; *Railroad v. Rector*, 104 Ill. 296; *Railroad v. Brooks' Adm'r*, 83 Ky. 129, 4 Am. St. Rep. 135; *Railroad v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Railroad v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Jerome v. Smith*, 48 Vt. 230, 21 Am. Rep. 125; *Boardman v. Goldsmith*, 48 Vt. 403; *Snow v. Carpenter*, 49 Vt. 426; *Bergmann v. Jones*, 94 N. Y. 51. And the rule is the same in all cases of tort, when wantonness, recklessness, oppression, or express malice is shown. Under such circumstances, the jury is allowed to award exemplary damages, not only to compensate the sufferer, but to punish the offender. *Franz v. Hilterbrand*, 45 Mo. 121; *Engle v. Jones*, 51 Mo. 316; *Morgan v. Durfee*, 69 Mo. 409, 33 Am. Rep. 508; *Bruce v. Ulery*, 79 Mo. 322; *Brown v. Plank Road Co.*, 89 Mo. 152, 1 S. W. 129; *Fulkerson v. Murdock*, 53 Mo. App. 151. This instruction is clearly erroneous."

For this error, the judgment is reversed, and the cause remanded. All concur.

On Rehearing.

A re-examination of this case convinces us that the decisive issues were fully and correctly decided in the opinion filed, and the motions for rehearing are overruled.

In view of the expressed desire of plaintiff to enter a remittitur of the punitive damages, we have decided to set aside the order reversing the judgment and remanding the cause. If within 10 days the plaintiff shall file a remittitur in the amount awarded by the jury as punitive damages, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded. All concur.

LEACH v. ST. LOUIS & S. F. R. CO.

(St. Louis Court of Appeals. Missouri. April 6, 1909.)

1. APPEAL AND ERROR (§ 1066*)—PREJUDICIAL ERROR—INSTRUCTIONS.

An instruction submitting a rule for estimating damages, including the element of loss of earnings, is reversible error, where there is no foundation for it in the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

2. WORDS AND PHRASES—"MIXED TRAINS."

A freight train with a passenger coach attached is a "mixed train."

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, p. 7723.]

3. CARRIERS (§ 280*)—PASSENGERS—MIXED TRAINS—DUTY OF CARRIER.

While passengers on a mixed train cannot expect all the conveniences and comforts furnished on regular passenger trains, the carrier is bound to exercise as high care for their safety as is compatible with the management of such trains.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1087, 1098; Dec. Dig. § 280.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. TRIAL (§ 296*) — INSTRUCTIONS — ERROR CURED.

In an action for injury to a railway passenger, any error in an instruction that if the company carelessly and negligently caused other cars to strike a coach, etc., in failing to define "carelessly" and "negligently," was cured by an instruction that a mere sudden jolt of the cars was not negligent, and that unless the trainmen were negligent in making the coupling, or the machinery, etc., was out of order, plaintiff could not recover.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296.*]

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Action by Mary E. Leach against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The plaintiff in this case brought her action for personal injuries received while a passenger on a freight train of the defendant, to which was attached a passenger coach, into which she was escorted by the conductor of the train, and against which coach, while on the track, other cars were backed with such violence, as it is claimed, as to throw her forward across the seat and injure her internally. Charging negligence in the operation of the train, she sues for \$15,000 damages. At a trial before the court and jury she was awarded \$1,000. Various errors are assigned to the giving and refusal of instructions, and it is insisted that there was no evidence whatever in the case to sustain the verdict. Among other instructions, given at the instance of the plaintiff, is this, in part, in instructing on the measure of damages, namely, that the jury should assess plaintiff's damages at such sum, not exceeding \$15,000, as from the evidence they might believe to be a fair compensation for the injuries sustained by her on account of the collision; this instruction closing with these words: "And that in estimating such damages you should take into consideration the physical pain and mental anguish occasioned by her injuries, if the jury find that she was injured, the fact, if you so find from the evidence, that her injuries are permanent, and their future effect upon her health, if from the evidence you believe it will be affected thereby, and, further, any loss of earnings during the remainder of her life." This covers all contained in the instructions as to the rule for estimating the damage. It is objected to this instruction that it submits to the jury the question of loss of earnings by plaintiff during the remainder of her life, and that there was no evidence whatever showing what earnings she had theretofore been receiving, or would lose by reason of her injuries. The testimony on this point, as set out in the brief of plaintiff's counsel is this: "Q. I will ask you if you are able now, or have been since you got this injury, to do your work? A. No, sir; I have not been able to do anything. Q. I will

ask you, if before you received this shock, you was able to do your work, and a healthy woman for your age? A. Yes, sir; I was able to do my work, and make my own living for myself and daughter, and I was sound in body and mind and in good health. Q. Now, I will ask if this injury has totally incapacitated you from making your living? A. Yes, sir. Q. What had you been doing prior to this time? A. Sometimes for several years I have been keeping a rooming house, renting rooms." This is all the evidence touching the matter of earnings claimed by counsel for plaintiff to be in the case.

Jas. Orchard, for appellant. K. C. Spence, for respondent.

REYNOLDS, P. J. (after stating the facts as above). We regret that we are compelled to reverse this case on this point, but it is too important a point, in cases of this kind, to be overlooked. When the plaintiff insists on damages for loss of time and earnings, she must be put to the proof of the value of her time and the amount of her earnings. An instruction submitting to the jury a rule for the estimation of damages, which includes in it the element of loss of earnings when there is no foundation for it, is reversible error. *Wallack v. St. Louis Transit Co.*, 123 Mo. App. 160, loc. cit. 167, 100 S. W. 496. This is the only error we discover in the record.

Complaint is made by the appellant, defendant below, of the refusal by the court of the following instruction: "The court instructs the jury that, if you believe and find from the evidence that it was the custom of defendant to draw the coach down to the depot and let the passengers alight, then switch the coach back on the 'Y,' and do the switching, and, after the switching was completed, to bring the coach back to the depot for passengers to board it, and that this rule was adopted on the date in question, and that the plaintiff boarded defendant's passenger coach before the switching and before being invited, and before said coach was brought back to the depot after the switching, then the company is not liable, and you will return a verdict for the defendant." That instruction was properly refused. In support of it the learned counsel for the appellant advance the proposition that, this being a mixed train, part freight, part passenger, the plaintiff, as a passenger on it, assumed the dangers or perils which are necessarily incident to that mode of conveyance, and they cite several cases which are claimed to be in support of this proposition. We do not think that the contention of counsel is correct, nor that the cases support them. While passengers carried in a mixed train—that is, in a coach attached to a freight train—are not to expect all the conveniences and comforts that are furnished those riding in regularly made up

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

passenger trains, they are entitled to be carried with as high a degree of safety as is compatible with the management of a "mixed" train.

Complaint is made that the court, in its instruction given at the instance of plaintiff, instructed the jury that, if the agents and employes of defendant "carelessly and negligently caused other cars to be run against and violently strike the coach in which plaintiff was seated, and that in consequence of such collision of cars she was injured, your verdict should be for plaintiff." It is complained of this instruction that the terms "carelessly and negligently," were used without defining what carelessness and negligence consisted of, and in support of this contention reference is made to the case of *Magrane v. Railway*, 183 Mo., loc. cit. 132, 81 S. W. 1160. It was said in that case, at that place, that: "The only adverse criticism to be passed on those instructions is that they submit to the jury the question of negligence of the defendant in the matter without instructing the jury as to what constitutes negligence." But the court expressly refused to reverse on account of this, and it was a mere criticism of verbiage, without condemning the body of the instruction itself. Furthermore, in the case at bar, at the instance of the defendant, this instruction was given: "The court instructs the jury that the mere fact, if it is a fact, that there was a sudden jolt or jar of the cars, which threw the plaintiff from her seat, is not sufficient to constitute negligence; and, unless you find from all the evidence in this case that the men in charge of the train were guilty of negligence in making the coupling, or that the machinery or appliances were out of order, which produced the jolt or jar, your verdict must be for the defendant." Whatever criticism may be indulged in as to the failure of the court to define the terms "carelessly and negligently," as used in the instruction given at the instance of plaintiff, was cured by this.

For error in the instruction as to the measure of damages, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered, all concurring.

STATE v. CARIOT et al.

(St. Louis Court of Appeals. Missouri.
April 6, 1909.)

CRIMINAL LAW (§ 101*)—JURISDICTION—TRANSFER OF CAUSE.

Rev. St. 1899, art. 18, § 13 (Ann. St. 1906, p. 4908), vests exclusive original jurisdiction of misdemeanors committed in the city of St. Louis in the St. Louis court of criminal correction. Section 19 (page 4911) provides that no indictment shall be found for any misdemeanor committed in St. Louis, but that the same shall be presented to the court of criminal correction by information. *Held*, that the St.

Louis court of criminal correction obtained no jurisdiction to try a misdemeanor committed in St. Louis by the transfer of an information filed in the circuit court of the city.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 101.*]

Appeal from St. Louis Court of Criminal Correction; Hiram N. Moore, Judge.

Minion Carlot having been duly called in the St. Louis court of criminal correction to answer an offense, and not appearing, the recognizance given for his appearance was declared forfeited, and a writ of scire facias ordered against him as principal and against Joseph A. Duffy, as his surety. Duffy moved to quash the scire facias, and, his motion having been overruled, he appeals. Reversed.

In this case, on the 26th of October, 1904, an information was filed in the circuit court of the city of St. Louis, criminal division, by W. Scott Hancock, assistant circuit attorney of that city, in which information it is set out that one Carlot stood charged with violating an ordinance of the city in a certain cause and proceeding pending before a police justice of that city and against one Minion Carlot; that one Nellie Keating was a competent and material witness against said Carlot, who had been duly notified to appear before the police justice to testify to her knowledge of the facts relating to the violation of the ordinance, and that Carlot, well knowing the premises, and that Nellie Keating was then and there a competent and material witness, did willfully and corruptly attempt to give her a certain sum of money as a bribe for the purpose and with the intent to induce her to withhold her testimony in the cause and to depart from the city of St. Louis, and not to appear as a witness for and on behalf of the city of St. Louis. Upon the filing of this information, Carlot was arrested, and entered into a bond, approved by a judge of the circuit court, for his appearance before either of the divisions of the circuit court (Divisions 8 or 9), having jurisdiction of criminal causes, to answer the information. On the 20th of December this information was certified from the division of the circuit court having jurisdiction of criminal causes at the time into the St. Louis court of criminal correction. The defendant appeared in the latter court to answer and entered into recognizance in that court for his appearance until discharged; appellant being his surety. The case was continued from time to time, and, when called for trial, Carlot not appearing and being duly called, the recognizance was declared forfeited and a writ of scire facias ordered against Carlot as principal and against Duffy as his surety. In due time Duffy appeared and moved to quash the scire facias, alleging many

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

grounds, among others lack of jurisdiction. This motion being overruled, Duffy, duly saving exceptions, has appealed to this court.

F. A. C. McManus, for appellant. J. D. Dalton, for the State.

REYNOLDS, P. J. (after stating the facts as above). There is only one error assigned necessary to be noted. The offense charged is averred to have been committed in the city of St. Louis, and it is a misdemeanor. The circuit courts of the city of St. Louis when sitting as courts for the disposal of criminal causes have no jurisdiction over misdemeanors. Section 13 of the article relating to the St. Louis court of criminal correction (see Rev. St. 1899, p. 2544, art. 18, § 43 [Ann. St. 1906, p. 4900]) vests "exclusive original jurisdiction of all misdemeanors under the laws of the state, committed in St. Louis city, the punishment whereof is by fine or imprisonment in the county jail, or both," etc., in the court of criminal correction. In section 19 (page 4911) of the same act it is provided that "no indictment shall hereafter be found for any misdemeanor under the laws of this state, committed in the city of St. Louis, the punishment whereof is by fine or imprisonment in the county jail or both, or by any forfeiture, but the same shall be presented to the court of criminal correction by information." Section 18 (page 4910) provides "that the prosecuting attorney of that court shall attend to and prosecute all suits brought therein." For a rather full discussion and exposition of the powers of the St. Louis court of criminal correction, see *State ex rel. v. Foster*, 187 Mo. 590, 86 S. W. 245.

In certifying the information to the court of criminal correction, the clerk of the circuit court for criminal causes certifies to it as an "indictment." He and the court were evidently proceeding upon the assumption that it was an indictment, and, acting upon that assumption and under the provisions of section 2494, Rev. St. 1899 (Ann. St. 1906, p. 1495), certified and transmitted the case to the court of criminal correction. As we have seen, this was not an indictment. The offense being a misdemeanor proceeded upon by information, and as proceedings by information for misdemeanors of this class occurring in the city of St. Louis can only be instituted and prosecuted in the court of criminal correction, that court could obtain no jurisdiction of this case by transfer from the circuit court. The recognizance was therefore entered into in a cause not in court. It follows that it was void, and the *scire facias* issued and judgment entered thereon are nullities.

The judgment of the court of criminal correction is reversed. All concur.

STATE v. CARIOT et al.

(St. Louis Court of Appeals. Missouri.
April 6, 1909.)

Appeal from St. Louis Court of Criminal Correction; H. N. Moore, Judge.

Minion Cariot having been duly called in the St. Louis court of criminal correction to answer an offense, and not appearing, the recognizance given for his appearance was declared forfeited, and a writ of *scire facias* ordered against him as principal and against Joseph A. Duffy as his surety. Duffy moved to quash the *scire facias*, and, his motion having been overruled, he appeals. Reversed.

F. A. C. McManus, for appellant. J. D. Dalton, for the State.

REYNOLDS, P. J. This case is practically identical in all respects with that under the same title (No. 10,689, 118 S. W. 512); the only difference between the two cases being that in this case the person alleged to have been bribed is one Katie Bordsenick.

For the reasons set out in the opinion in No. 10,689, the judgment of the court of criminal correction is reversed. All concur.

GILLESPIE v. BEEDY et al.

(Kansas City Court of Appeals. Missouri.
April 19, 1909.)

PARTNERSHIP (§ 56*)—EVIDENCE.

Evidence held not to show that a defendant was a partner of codefendants, or that he held himself out to plaintiff to be such.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 80; Dec. Dig. § 56.*]

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

Action by Sarah F. Gillespie against J. C. Beedy and others. Judgment for plaintiff, and the mentioned defendant appeals. Reversed.

W. W. Calvin and J. B. Hamner, for appellant. Frank Yeoman, for respondent.

BROADBUSH, P. J. This suit was instituted in a justice's court, where it was tried and judgment had, from which an appeal was taken to the circuit court, where it was tried anew, and plaintiff obtained judgment and defendant Beedy appealed to this court.

The plaintiff sues defendants as copartners. The plaintiff claims that on or about the 15th day of March, 1904, the defendants as such partners employed plaintiff as a mail carrier on the star route mail service from Myersville to South Pass City, Wyo.; that they owe plaintiff for service performed for the last 15 days of March, 1904, in the sum of \$116.86, and 6 per cent. interest on the same for 2½ years; and that they are indebted to her in the further sum of \$79.71, with interest, amounting to \$11.85, for the full amount of the quarter's pay due one M. M. Gillespie for said mail service, an order for which had been duly assigned to

her. The defendant Beedy, before the trial of the cause in the justice's court, filed an affidavit denying the existence of the alleged partnership.

It appears from the testimony that during the year 1903 Hansberger and Crenshaw, defendants, through their agent, E. C. McKinney, secured a contract with the government for the carrying of the mail from South Pass City to Myersville, Wyo. McKinney made a contract with M. M. Gillespie in their behalf, whereby the latter agreed to carry the mail over said route for the consideration of \$700, quarterly payments, for his services. The said mail contract with the government was made in the name of McKinney, and the quarterly vouchers issued by the government were issued to McKinney, which were turned over by him to defendants Hansberger and Crenshaw, who cashed them under a power of attorney from McKinney.

Before assuming his duties under his contract, M. M. Gillespie was introduced by Beedy's codefendants to Beedy, who as agent for his daughter, Nellie A. Beedy, had money to lend. He borrowed from defendant Beedy \$900, to secure the payment of which he executed a chattel mortgage upon certain personal property, which he used in connection with the business of carrying the mail, and a mortgage upon some real estate situate in Kansas City. In March, 1904, on account of domestic troubles, M. M. Gillespie ceased to carry the mails, and his wife, the plaintiff herein, undertook the service under a contract similar to that of her husband. When he left the service he assigned to her a portion of one quarter's pay then due, but which Hansberger and Crenshaw refused to pay on the ground that they had been compelled to pay it to her husband. Plaintiff complied with her contract in carrying mail, but, not having been paid therefor, she instituted this action against all three of the defendants as partners. The only question raised on the appeal is whether the defendant Beedy is a partner with Hansberger and Crenshaw.

Hansberger, Crenshaw, and Beedy all testified that the latter was not a partner, and it must be admitted there is no positive evidence that he was such. The contract between McKinney and M. M. Gillespie contained a proviso that the former was to deposit with Barber & Barber of Kansas City a check for the sum of \$600 as security for payment to Gillespie of each quarterly payment when the money should be received from the government. The contract contains also the following: "There are certain notes given to N. A. Beedy of different amounts, in the total amount \$900, which are secured on real estate owned by the party of the second part. Said notes are payable at dif-

ferent intervals and whenever the note due on any quarter during this agreement it shall be deducted with the interest thereon from the amount of pay due the party of the second part for the quarter," etc. It was shown that Beedy and Gillespie, after the contract had been entered into, talked together in reference to it, and then went into the office of Barber & Barber and deposited it with them for safe-keeping. Beedy testified that he had no knowledge of the contents of said contract. This may be true; but it does not seem reasonable that McKinney would have made such provision in his favor without his knowledge and consent.

In addition to said recitations, plaintiff relies upon certain letters she received from Beedy in answer to letters she wrote to him about the business. One, dated March 3, 1904, if it be construed by detaching certain expressions from the context, might be considered as evidence tending to show that he was holding himself out as a partner in the business; but, if construed as a whole, it does not indicate such an intention. He tells plaintiff plainly that he has no right to say what shall be done with the route, "and that the loan on the property and the advance on your mail pay was a private matter of mine, which I suppose you are aware of." Other letters introduced, read in connection with the fact that he had lent the money of his daughter to M. M. Gillespie to enable him to purchase an outfit to carry the mail, account for the interest defendant manifested in plaintiff's undertaking to carry out the original contract made by her husband. The evidence as a whole is to the effect that plaintiff merely stepped into the shoes of the husband to complete his contract for carrying the mail, and that she had no contract with Beedy to that effect; and the only reasonable inference to be drawn from the evidence is that whatever defendant Beedy did or said was of an advisory character, so far as the plaintiff was concerned, and with a view to his own individual interest, or that of his daughter.

Beedy, apparently, belonged merely to that class of persons with abundant means who may be found connected more or less with the business affairs of persons who are in need of money and are willing to pay a good rate of interest to secure it. This view of the case accounts for his action in the premises. We are satisfied that there was no evidence whatever that he was a partner of his codefendants, and that there was no substantial evidence that he held himself out to the plaintiff as such, but that, on the contrary, he notified plaintiff in plain terms that he had no authority to act for his codefendants.

Reversed. All concur.

**LOHOEFENER v. MERCANTILE TOWN
MUT. INS. CO.**

(Kansas City Court of Appeals. Missouri.
April 19, 1909.)

**1. INSURANCE (§ 626*)—ACTION ON POLICY—
SERVICE OF PROCESS—"PRINCIPAL OFFICE."**

Under Rev. St. 1899, § 8092 (Ann. St. 1906, p. 3843), requiring service of process on town mutual fire insurance companies to be made on some corporate officer at defendant's "principal office," service at defendant's "usual business office" is insufficient.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 626.*]

For other definitions, see Words and Phrases, vol. 6, p. 5539.]

2. APPEARANCE (§ 24*)—WAIVER OF DEFECTIVE SERVICE OF PROCESS.

Though the service on defendant corporation was defective on its face, defendant appeared specially to demur on the grounds that the petition and record disclosed no jurisdiction, and that no cause of action was stated. The demurrer being overruled, defendant filed an answer in two counts, one stating that the appearance was specially for the purpose of challenging the jurisdiction of the court, and one a general denial of the petition. An amended answer disclaimed a general appearance, and asked an abatement of the action for defective service of process, and this was repeated in a general denial of the allegations of the petition. *Held*, that defendant thus waived the defective service.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. § 24.*]

Appeal from Circuit Court, Boone County; A. H. Waller, Judge.

Action by H. H. Lohoefer against the Mercantile Town Mutual Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

C. B. Sebastian and Barclay, Shields & Fauntleroy, for appellant. N. T. Gentry, for respondent.

ELLISON, J. This is an action on a fire insurance policy; the defendant being a town mutual insurance company organized under article 11, c. 119, §§ 8084-8103, Rev. St. 1899 (Ann. St. 1906, pp. 3840-3847). The judgment in the trial court was for the plaintiff.

The matter presented for our consideration relates to a question of jurisdiction of the defendant. A consideration of the question involves a construction of the statute and the sheriff's return of service of the summons, and also whether there was a waiver of proper service by appearance of the defendant. The action was brought in Boone county and the service of the summons was in city of St. Louis. The following is the return indorsed thereon: "Served this writ in the city of St. Louis, Missouri, on the within named defendant the Mercantile Town Mutual Insurance Company (a corporation), this 10th day of November, 1904, by delivering a copy of the writ and petition as furnished by the clerk to J. W. Daugherty, secretary of the

said defendant corporation, he being in said defendant's usual business office and in charge thereof. The president or other chief officer of said defendant could not be found in the city of St. Louis at the time of service. Joseph F. Dickmann, Sheriff, by R. Cahill, Deputy. Fee \$1.15."

The statute (section 8092, Rev. St. 1899 [Ann. St. 1906, p. 3843]), governing service on town mutual fire insurance companies, provides that "suits may be instituted in the circuit court of any county in this state where the cause of action originated against any company operating under the provisions of this article or where such company has its principal office, and whenever any suit shall be so instituted against any such company, a certified copy of the original petition and summons shall be served on the president or secretary, or other chief officer in charge of the principal office of such company, by the acting sheriff of the county in which such company may have its principal office. If such company have its principal office in the city of St. Louis, then the acting sheriff of the city of St. Louis shall serve the process herein mentioned. And service when so made and proven by the return thereof, shall be deemed service on any such company proceeded against." It will be noticed that the return shows the summons was served on the secretary in charge of "defendant's usual business office," instead of the "principal office," as required by the statute. We are satisfied that the service at the "usual business office" was not a service at the "principal office" of the defendant, and for that reason no jurisdiction of the defendant was obtained by such service. *Thomasson v. Insurance Co.*, 114 Mo. App. 109, 89 S. W. 564, 1135. Service on the "nearest agent" of a railroad company will not meet the requirement of a statute that it shall be had on "the nearest station agent." *Haley v. Railway Co.*, 80 Mo. 112; *Blanton v. Jamison*, 8 Mo. 52. It was held in *Gamasche v. Smythe*, 60 Mo. App. 161, in an opinion by Judge Rombauer, that the condition of service of the character here considered must be strictly complied with, and that no inferences will be made in its favor, but rather will be taken against it to the full extent "which its departure from the description of the statute will warrant." Several instances furnished by decisions of the Supreme Court are cited in that case by way of illustration of the correctness of the view taken as to the particularity required in such service.

The question is presented whether jurisdiction of the body corporate has been waived. The defendant came into court and filed a demurrer, claiming therein to appear for no other purpose. The grounds of demurrer were that the petition and record disclosed that the court had no juris-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexed

diction of the defendant, and on the ground that the petition did not state a cause of action. The demurrer was overruled. The defendant then filed an answer in two counts. The first stated an appearance for the special purpose of challenging the jurisdiction of the court. The second was a general denial of the plaintiff's petition. Afterwards the defendant filed an amended answer disclaiming a general appearance, and alleging that the court had no jurisdiction over the defendant, for the reason that the service of process was insufficient, and therefore asked that the action be abated. And then again made a general denial of the allegations of the petition, but repeated its statement that thus answering was not a waiver of its matter in abatement. Under the view stated by Judge Valliant in *Newcomb v. Railway Co.*, 182 Mo. 687, 81 S. W. 1069, followed by the St. Louis Court of Appeals in *Thomasson v. Insurance Co.*, 114 Mo. App. 109, 89 S. W. 564, 1135, we must hold that the defendant waived the insufficient service.

We do not regard the other points made by defendant in regard to defects in the petition and as to the action of the trial court in the matter of setting the cause for hearing after sustaining motion for new trial as of substantial merit.

The foregoing was written just after the cause was submitted in March, 1906, when it was suggested that as the case of *Thomasson v. Insurance Co.*, supra, with similar question, was pending in the Supreme Court on a certificate from the St. Louis Court of Appeals, we should withhold it to await the action of the Supreme Court. We have now been furnished with a copy of the opinion of the latter court by Judge Gantt in which the views expressed by Judge Norton of the St. Louis Court of Appeals and by us herein are approved.

We therefore promulgate this opinion, and direct the affirmance of the judgment. All concur.

HARDY v. ATKINSON et al.

(Kansas City Court of Appeals. Missouri.
April 19, 1909. Rehearing Denied May
3, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 3*)—FORECLOSURE OF MORTGAGE—NECESSITY OF ADMINISTRATION.

Where a husband and wife mortgage their homestead, and the husband dies, and there is no estate for administration, it is unnecessary to have an administrator appointed and made a party to an action to foreclose the mortgage, as any surplus at the foreclosure sale would go to the widow, though *Rev. St. 1899, c. 52, § 4346* (Ann. St. 1906, p. 2392), requires that in case of the death of the mortgagor his personal representative shall be made defendant.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 3, 7-9; Dec. Dig. § 3.*]

2. MORTGAGES (§ 427*)—FORECLOSURE—NECESSARY PARTIES.

The widow of a mortgagor should be made a party to an action to foreclose, though during the lifetime of the mortgagor it would be unnecessary to join the wife in the foreclosure suit.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1269, 1281, 1282; Dec. Dig. § 427.*]

3. HOMESTEAD (§ 146*)—INTEREST OF SURVIVING WIFE—CONVEYANCE—ESTATE CONVEYED.

Where a widow's right of dower is extinguished by reason of the preponderance in value of her homestead right, and she conveys her homestead right to her children, who are the only heirs of the owner and entitled to the land after the expiration of the widow's rights, the entire fee to the land merges in them.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 257; Dec. Dig. § 146.*]

4. MORTGAGES (§ 534*)—FORECLOSURE—TITLE OF PURCHASER.

A foreclosure sale under a mortgage covering the entire fee, including dower, homestead, and the remainder which would descend to the heirs of the mortgagor, passes the fee to the purchaser.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1555; Dec. Dig. § 534.*]

5. HOMESTEAD (§ 121*)—FORECLOSURE OF MORTGAGE—RIGHT OF WIDOW TO SURPLUS.

Where mortgaged property is of greater value than the homestead right of the widow and the mortgage combined, the widow is entitled to the surplus on the foreclosure sale of the property after the death of her husband.

[Ed. Note.—For other cases, see *Homestead*, Dec. Dig. § 121.*]

Appeal from Circuit Court, Moniteau County; Wm. H. Martin, Judge.

Action by H. B. Hardy, administrator of James T. Atkinson, deceased, against Sarah C. Atkinson and others. A demurrer to the petition was overruled, and defendants appeal. Affirmed.

Edmund Burke, for appellants. Moore & Williams, for respondent.

BROADBUSH, P. J. The appeal in this case is from the action of the court in overruling defendant's demurrer to plaintiff's petition.

The recitations of the petition in substance are that in September, 1898, one W. J. Atkinson executed his promissory note payable to James T. Atkinson or order for the sum of \$500 due one day after date, bearing 7 per cent. interest per annum; that the said W. J. Atkinson with his wife, the defendant Sarah C., for the purpose of securing the payment of the note, executed a deed of trust in the nature of a mortgage with J. El. Lander as trustee, conveying to the latter for the use of the said James Atkinson as beneficiary certain real estate, described, upon the usual conditions in such instruments; and that, when the debt and interest was paid, the instrument was to be void otherwise to remain in full force and effect. It is alleged that the said W. J. Atkinson failed to pay

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

any part of said note and interest; that, after its execution, the said W. J. Atkinson died on the 25th day of December, 1898, intestate; that he left no property subject to administration and no administration was had on his estate; that on the 14th day of January, 1899, defendant Sarah C., his widow, filed a motion in the probate court of Moniteau county, stating that the personal property of the said W. J. did not exceed \$94 in value, and praying that an order be made refusing letters of administration; that the court upon hearing the motion made an order that no letters of administration should be granted on said estate, and all the property of deceased was turned over to the said Sarah C. as widow; that the said W. J. at the time of his death occupied the dwelling on the land described with his family, and that said real estate constituted his homestead and that of his widow and his minor children during their minority; that, after the death of the said W. J., the defendant Sarah C. continued to occupy the said real estate up to the present time with the defendants Elva A. Howard and Sarah E. Atkinson, children of W. J. and Sarah C., who have obtained their majority; that said homestead was at all times and now is of less value than \$1,500; that the said Sarah C. and daughters, Elva A. Howard and Sarah E. Atkinson, were and are the only heirs at law of the said W. J.; that the said Sarah C. as widow was entitled to life estate in the realty as her homestead, and that the other defendants are entitled to the remainder subject to said mortgage debt; and that plaintiff is informed that Sarah C. has made a quitclaim conveyance of her said homestead rights to her two daughters Sarah E. and Elva A. It is further alleged that the said James T. Atkinson died intestate, in Moniteau county, on the 12th day of December, 1905; that on the 19th day of December, 1905, the plaintiff as public administrator was appointed administrator of the said James T. Atkinson's estate and as such brings this suit, and that the trustee has moved from the state; that as no action as a strict action of law for foreclosure of said mortgage will lie under the facts of the case, and there can be no administrator appointed, the chancery powers of the court are invoked for a judgment of foreclosure in equity and for a sale of the property, which must be sold as a whole, and after the payment of the note and interest the balance of the proceeds be paid out under the orders of the court. To the petition defendants filed a demurrer, the purport of which is that the estate of the said W. J. in the land cannot be foreclosed unless it be represented by an administrator; and because the defendants are not necessary parties to the suit.

Section 4346, c. 52, Rev. St. 1899 (Ann. St. 1906, p. 2392), concerning mortgage and deeds of trust, provides that: "In case of the death

of the mortgagee or his assignee or of the mortgagor, whether before or after action brought, the personal representative of the deceased party shall be made plaintiff or defendant, as the case may require." *McDonald v. Frost*, 99 Mo. 44, 12 S. W. 363; *Tierney v. Spiva*, 97 Mo. 98, 10 S. W. 433. And it is held in such cases that the only necessary party to the suit is the administrator of the deceased. *Hall v. Klepzig*, 99 Mo. 83, 12 S. W. 372; *Blevins v. Smith*, 104 Mo., loc. cit. 615, 16 S. W. 213, 13 L. R. A. 441. And in *Thornton v. Pigg*, 24 Mo. 249, it is held that, although a wife should join with her husband in the execution of a mortgage, she is not a necessary party under the statute to foreclose a mortgage. See, also, *Riddick v. Walsh*, 15 Mo. 519. But this rule does not apply after the death of the husband as the wife's inchoate right to dower has by his death vested an estate as tenant for life. And it is said there is nothing inconsistent with the widow's rights to both dower and homestead in the same estate. *Gragg v. Gragg*, 65 Mo. 343. But she is entitled to her homestead first, and from the residue of the real estate she is entitled to dower, diminished by the amount of her interest in the homestead. Section 3621, Rev. St. 1899 (Ann. St. 1906, p. 2042). It appears from the recitations of the petition that the widow's right of dower is extinguished by reason of the preponderance in value of her homestead right. The widow having conveyed her homestead right to her two children, the entire fee to the land merged in them; they being the remaindermen. 5 Words & Phrases, 4402; *Bassett v. O'Brien*, 149 Mo. 381, 51 S. W. 107.

The mortgage covered the entire fee, including dower, homestead, and the remainder, and a foreclosure would pass to the purchaser such fee. If there should be a surplus, it would go to the widow. It is held that, if the property be of greater value than the homestead and the mortgage combined, the widow is entitled to the surplus after a deduction of the amount of the mortgage. *Hufschmidt v. Gross*, 112 Mo. 649, 20 S. W. 679; *Burroughs v. Howell County*, 180 Mo. 642, 79 S. W. 682; *Elstroth v. Young*, 83 Mo. App. 253. Such being the law, notwithstanding the merger, the general creditors would have no interest in the estate. Consequently there was no necessity for an administrator.

Affirmed. All concur.

MITCHELL et al. v. CHICK et al.

(Kansas City Court of Appeals. Missouri.
April 18, 1906.)

1. PRINCIPAL AND AGENT (§ 23*)—AGENCY—EVIDENCE.

Evidence held to show that a person to whom plaintiffs had delivered an account against third persons, and who had promised to pay it,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was acting in his individual capacity, and not as agent of defendants.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 23.*]

2. PRINCIPAL AND AGENT (§ 136*)—CONTRACT BY AGENT—FAILURE OF PRINCIPAL TO RATIFY—DUTY TO RETURN PAYMENT TO PURCHASER.

Where agents contracted for the sale of property agreeing to accept as a first payment an assignment of an account against a third person, as so much cash, the contract to be subject to approval of their principal, and the principal refused to ratify it, the agents were not obliged to pay the purchaser the cash amount, but only to return the account itself.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 136.*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by L. O. Mitchell and another, copartners, against J. S. Chick and another, copartners. A verdict for defendants was directed. Plaintiffs took a nonsuit with leave, and, their motion to set it aside being overruled, appealed. Affirmed.

W. W. Calvin, for appellants. H. S. Conrad, for respondents.

JOHNSON, J. This suit was brought before a justice of the peace of Jackson county. The statement filed is in two counts. In the first it is alleged: That plaintiffs sold, assigned, and delivered to defendants an account of \$242.85 they held against one J. G. Staley and, at the same time, executed and delivered to defendants their bank check for \$7.15; that, in consideration of the sale of said account and the delivery of said check, defendants promised and agreed to pay plaintiffs \$250 in money; and that defendants have failed and refused to pay said sum or any part thereof. In the second count plaintiffs allege that defendants received from them \$250, and agreed to hold it as agents and stakeholders of plaintiffs on the following conditions: "That should one T. H. Pratt, Ex., not ratify a certain agreement of sale, entered into with plaintiffs, and in which agreement defendants were made and were the agents and stakeholders of plaintiffs, within ten days from the date thereof, August 6, 1906, then it was agreed and understood by and between the parties to said contract of sale, and was also agreed and understood by and between plaintiffs and defendants, that the money so left and deposited in hands of defendants was to be turned over and refunded to plaintiffs." Further, it is alleged that said Pratt failed and refused to ratify said contract of sale, and that defendants have failed and refused to return the deposit to plaintiffs. At the trial in the circuit court, where the cause was taken by appeal, the court peremptorily instructed the jury, at the conclusion of the evidence introduced by plaintiffs, to return a verdict for defendants. Plaintiffs took a nonsuit with

leave, and, after their motion to set aside was overruled, appealed to this court.

Material facts disclosed by the evidence are as follows: In the summer of 1906, plaintiffs, who were partners engaged in the plumbing business in Kansas City, did the plumbing work for a building owned by Staley at No. 616 Olive street. The charge for all the work was \$307.85. \$125 was paid on the account by Staley, leaving due and unpaid the remainder of \$242.85. The account was approved and marked "O. K." by Staley, the debtor, and plaintiffs were directed by him to present it at defendants' office in Kansas City for payment. Defendants were partners engaged in the business of real estate and loan agents. They employed one Colvin as an assistant in their loan business and one Calhoun as a salesman of real estate. Staley had applied to them for a loan on the property we have mentioned, but defendants could not make the loan and referred him to Colvin, who, it appears, was permitted by arrangement with defendants to transact loan business on his own account as well as for defendants. Colvin secured a loan on the property from a life insurance company, and we think the evidence shows conclusively that defendants had no connection with the transaction, though it was conducted by Colvin in their office. It appears that the proceeds of the loan were not sufficient to pay the entire cost of the improvements made by Staley on the property, and Colvin began, and conducted to an unsuccessful end, negotiations with the insurance company for another loan. During the progress of these negotiations, plaintiffs, at the direction of Staley, presented their account to Colvin for payment. From what they were told, plaintiffs inferred that defendants were the agents in charge of the loan; but, as we have said, defendants had nothing to do with it, and plaintiffs were referred to Colvin, who, apparently, was satisfied with the correctness of the account and assured plaintiffs that it would be paid in a few days. Plaintiffs called on Colvin several times about the payment of the account, and, becoming impatient, threatened to employ a lawyer. Finally, plaintiff Mitchell went to defendants' office on the 5th or 6th of August, 1906, to collect the account if possible. While there he was approached by Calhoun, who wished to interest him in the purchase of some real property owned by T. H. Pratt, as executor of an estate. Plaintiff said he would not purchase the property unless he could apply his account against Staley on the purchase price. Calhoun agreed that this might be done, and the parties reached an understanding. A written contract of sale was prepared, by the terms of which Mitchell bought the property for \$3,630. It recites: "Of the purchase price, two hundred and fifty dollars has been paid and is deposit-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed with J. S. Chick & Son, agents for the seller, and the balance is payable as follows," etc. It contains the stipulation: "All money is to be returned to Mr. Mitchell if the sale is not ratified by Mr. Pratt within ten days from this date." The contract was signed by Calhoun as agent for Pratt, executor, and by Mitchell as agent for his firm. The sale was not consummated for the reason that Pratt refused to ratify it. It is conceded that the sum of \$250 mentioned in the contract as paid by plaintiffs was made up of the following items, viz.: First, a transfer in writing of the Staley account amounting, as we have said, to \$242.85; and, second, a check of \$7.15, drawn by plaintiffs on a bank in Kansas City and made payable to the order of defendants. The evidence tends to show that defendants were the agents of Pratt, the executor, and that Calhoun was acting as their salesman in entering into the contract of sale with Mitchell. Plaintiffs contend that these facts entitle them to recover \$250 in money from defendants, while defendants, among their defenses, say that at best plaintiffs, on the refusal of Pratt to ratify the contract of sale, were entitled only to a return of their account against Staley and their check of \$7.15. It is conceded that a return of the account and check was tendered plaintiffs before this suit was begun. Other facts appear in the record, but those stated suffice for a proper understanding of the case.

Counsel in their briefs discuss with much earnestness the questions of whether the cause of action pleaded in the first count of the statement falls within the operation of the statute of frauds and of whether Colvin and Calhoun were acting in the transactions of the loan to Staley and the sale of the real estate as the respective agents of defendants. We think the evidence shows that Colvin was not the agent of defendant in the matter of the loan, and that Calhoun was their agent in selling real estate.

We do not find it necessary to discuss the subject of the effect of the statute of frauds on the cause stated in the first count, for the reason that the evidence does not support the inference that defendants, acting through their agent, Calhoun, did anything more than to make a conditional purchase of the Staley account. Clearly it was the intention of the parties that defendants should accept the assignment of the account as so much cash paid on the purchase price of the real estate provided their principal, the executor, would ratify the contract of sale. They did not intend to make an absolute purchase of the account and took an assignment of it only as a part of the transaction of selling the real estate and as an inducement to plaintiffs to become purchasers thereof. When their principal rejected the contract of sale, the extent of their obligation was to return

to plaintiffs the property they had received on account of the purchase price, viz., the Staley account and the check of \$7.15. Since defendants tendered this property to plaintiffs before the commencement of this action and have kept the tender good, it follows that plaintiffs can have no right to recover under either count of the statement.

The judgment is affirmed. All concur.

BARBER ASPHALT PAVING CO. et al. v. KIHLEBERG KARLSBAD BATH CO. et al.

(Kansas City Court of Appeals. Missouri.
April 19, 1909.)

MUNICIPAL CORPORATIONS (§ 567*)—STREET IMPROVEMENTS—ASSESSMENT LIEN—SPECIAL TAX BILL—ACTION—PLEADING.

Rev. St. 1890, § 5986 (Ann. St. 1906, p. 3022), regulating cities of the fourth class, provides that special tax bills, and any action thereon, shall be prima facie evidence of the regularities of the proceedings for such special assessments, of the validity of the bill, of the doing of the work, and the liability of the property. *Held*, that under such section, construed in conjunction with the presumption that municipal authorities have proceeded according to law, a petition on a special tax bill, alleging that the duly authorized officers of the city had issued the bill to plaintiff, setting out its provisions, and that defendants are the owners of the land sought to be charged, was sufficient, without facts showing that the city had authority to pass the ordinance for the improvement in question.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 567.*]

Appeal from Circuit Court, Clay County; Francis H. Trimble, Judge.

Action by the Barber Asphalt Paving Company and another against Kihleberg Karlsbad Bath Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Craven & Moore, for appellants. Scarritt, Scarritt & Jones, for respondents.

JOHNSON, J. This suit is for the enforcement of the lien of special tax bills issued by Excelsior Springs, a city of the fourth class, in payment of the cost of paving a public street. Defendants, the owners of the property against which the tax bills were issued, demurred to the petition on the grounds: First, that the petition fails to state a cause of action; and, second, that it does not show that the city "had any authority by law to pass its ordinance to pave the street therein mentioned, for the reason that said ordinance could only be passed after the proper publication of a resolution." The demurrer was overruled. Defendants declined to plead further, and, standing on the demurrer, brought the case here by appeal from the judgment rendered against them.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The petition is in three counts, but present purposes will be satisfied by a statement of the substance of one of them. It is alleged that an ordinance providing for the improvement was enacted and approved by the city; that pursuant thereto a contract was made by the city with plaintiff; that the work was completed in accordance with the terms of the ordinance and contract, and was accepted by the city; and that the assessment was levied, and the tax bill issued. There is an averment that "each and all of the requirements of the statutes and ordinance, in regard to the work and improvements and the tax bill herein referred to, were duly complied with." The tax bill is set out in *hæc verba*. It is conceded that the facts pleaded are sufficiently stated, but the objection urged against the petition is that it fails to state all of the facts constitutive of the cause of action. Defendants argue that it is just as essential that compliance with other statutory requirements relating to the levy of the assessment be shown in the petition as it is that the ordinance authorizing the improvement or the tax bill itself be pleaded; that each statutory step leading to the issuance of the tax bill is jurisdictional, and therefore is constitutive of a cause of action for the enforcement of the lien. Specific attention is directed to the omission from the petition of an allegation that a resolution was passed by the board of aldermen declaring the work necessary to be done, a step required by the provisions of the statute relating to cities of the fourth class. Section 5989, Rev. St. 1899 (Ann. St. 1906, p. 3024). The courts of this state have held in a number of cases that, in actions on special tax bills, the plaintiff is not required to plead compliance with the preliminary steps leading to the issuance of the tax bill. "It is sufficient for the plaintiff to allege in the first instance that the officers of the municipality duly authorized so to do have issued to him the special tax bill on which he sues, setting out its provisions, and stating that the defendants named therein are the owners of the lot sought to be charged. *Vleths v. Planet, etc., Co.*, 64 Mo. App. 207; *Eyerma v. Payne*, 28 Mo. App. 72; *Lucas v. McCann*, 50 Mo. App. 638; *Seaboard Nat. Bank v. Wright's Trustees*, 68 Mo. App. 144; *Excelsior Springs Co. v. Ettenson*, 120 Mo. App. 222, 96 S. W. 701; *Hunt v. Hopkins*, 66 Mo. 98; *Duncan v. Kirtley*, 54 Mo. App. 655.

But defendant contends that this rule of pleading had its origin in statutes which, as in the case of *Hunt v. Hopkins*, supra, specifically provided that "it shall be sufficient for plaintiff to plead the making and the issue of the tax bill sued on, giving the

dates and contents thereof and assignment thereof in case of assignment," and that, in the absence of such statutory provision, the rule cannot obtain, but instead the general rule of pleading that the petition must contain a plain and concise statement of all of the constitutive facts must apply. The statutes relating to cities of the fourth class do not contain a provision similar to that quoted, but they do provide that "such special tax bills shall in any action thereon, be prima facie evidence of the regularity of the proceedings for such special assessments, of the validity of the bill, of the doing of the work, and of the furnishing of the materials charged for and of the liability of the property to the charge stated in the bill." Section 5986, Rev. St. 1899 (Ann. St. 1906, p. 3022). It is true this statute goes no further than to establish the character of a special tax bill as evidence, and does not deal with the question of pleading. *Cushing v. Powell*, 130 Mo. App. 576, 109 S. W. 1054. But, taken in conjunction with the initial presumption, indulged in cases of this nature, that the municipal authorities have proceeded in accordance with the law, and not in violation thereof (*Paving Co. v. Ullman*, 137 Mo., loc. cit. 568, 38 S. W. 458; *Excelsior Springs Co. v. Ettenson*, supra), we think the statutory rule of pleading considered in some of the cases we have cited (e. g., *Hunt v. Hopkins*) should be regarded as but a legislative enactment of a general rule. "The suit is one upon the tax bill, and not for work and labor done." *Vleths v. Planet Co.*, supra. If on its face the tax bill appears to be regular, presumptively it is valid. It proclaims the fact that it was issued in conformity with the law, and the burden always is on the defendant to overcome the presumption of validity by proof to the contrary. The petition is to be measured by the rule applied in the cases where the statutes deal specifically with the subject of pleading, and, thus measured, is found sufficient. The decision of this court in the recent case of *Cushing v. Powell*, supra, is not in conflict with the views expressed. Indeed, we said there, in effect, what we have said here: "The holder of the bill by legal intentment alleges the several steps necessary to a tax bill and its regularity, by alleging the issuance of the bill, and he proves that by introducing the bill." We do not consider that the case of *City of Carthage v. Badgley*, 73 Mo. App. 123, much relied on by defendants, sustains their contention. There the petition alleged facts which affirmatively disclosed the invalidity of the tax bill. Here all the allegations assert its validity.

The judgment is affirmed. All concur.

SCOTT et al. v. BOSWELL et al.

(Kansas City Court of Appeals. Missouri.
April 19, 1909. Rehearing Denied May
8, 1909.)

LIMITATION OF ACTIONS (§ 100*)—FRAUD—CONCEALMENT.

A statute provided that actions for fraud must be commenced within 5 years, but that the cause of action should not be deemed to have accrued until the discovery of the fraud by the aggrieved party at any time within 10 years. *Held* that, where plaintiff could have discovered the fraud at any time after its perpetration by examining the public record of an option under which defendant purchased the land in question, the fraud was an open one, so that defendant's mere silence was no excuse for plaintiff's failure to discover the fraud within the 5-year limitation, and that an action therefor, not brought within that time, was barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 490; Dec. Dig. § 100.*]

Appeal from Circuit Court, Jasper County; A. E. Spencer, Special Judge.

Action by L. L. Scott and others against A. V. Boswell and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Perkins & Blair and A. L. Thomas, for appellants. Gardner & Cameron, for respondents.

BROADDUS, P. J. This is an action for fraud and deceit. The controversy grew out of a transaction in which plaintiffs and defendants became the purchasers of 83 acres of land situate in Jasper county, Mo. The land belonged to Mrs. Theresa Wink, who resided in Oklahoma. On the 12th day of October, 1899, she executed and delivered to the defendant Boswell what is known as an option contract, giving him the exclusive right to purchase said land at the price of \$50 an acre, which option was to expire on the 6th day of January, 1900. This writing was filed for record in the recorder of deeds' office of Jasper county on the 4th day of December, 1899, and was duly recorded. On the 27th day of December, 1899, defendant Boswell exercised his said option right, purchased the land from Mrs. Wink for the sum of \$4,150, and received from her a deed to the land for that consideration, which consideration was recited in the deed. The deed was filed for record on the 3d of January, 1900. On the 20th day of December, 1899, two days after he had received the deed from Mrs. Wink, Boswell with his wife conveyed an undivided three-twentieths of the land to plaintiff R. S. Doling; an undivided one-twentieth to plaintiff James S. Doling; an undivided three-twentieths to plaintiff W. W. Whaley; an undivided one-twentieth to plaintiff John F. Bryan; an undivided one-tenth to plaintiffs Scott & Bowker; and an undivided one-tenth to defendant John Patten. The matter remained in this condition until the year 1906, when the plaintiffs herein brought a

partition suit in the circuit court of Jasper county against the defendants herein for a partition of the land, after which, by mutual agreement, it was divided between plaintiffs and defendants by exchange of deeds, by which division plaintiffs received 43 acres and defendants 40 acres thereof. After Boswell had received the option from Mrs. Wink and recorded the same, he met plaintiff Scott, and the two had a conversation, in which Boswell undertook to induce Scott to buy an interest in the land. Scott informed his partner, plaintiff Bowker, of said conversation, and the latter went to Joplin, and out to the land and examined it. On the 6th day of November, 1899, plaintiffs Scott & Bowker entered into a written contract, whereby they agreed to purchase from Boswell an undivided one-tenth of the land for \$650. Some time after Boswell had obtained said option, he was in Springfield, Mo., when he met plaintiffs R. S. Doling and W. W. Whaley, and had a talk with them about the land. Afterwards they went to Joplin, and went out in company with plaintiff Bowker and Boswell, and examined the land; and afterwards they agreed to purchase the several undivided interests in the land, which were afterwards conveyed to them by Boswell, as stated. It does not appear that Boswell had any talk with the plaintiffs James M. Doling and John F. Bryan in person about the land, but it does appear that James S. Doling represented them in the transaction. It was not shown that defendant Patten had any connection with the plaintiffs in the transaction, and the court dismissed him from the proceedings. The plaintiff Bowker testified that he met Boswell in company with plaintiffs Doling and Whaley in Joplin, and had a talk about the land, in which Boswell said that there was an opportunity to buy the land from a widow woman who resided in the territory; that the land could be bought for \$6,500, and that he regarded it as very cheap; that he was unable financially at the time to buy the entire tract himself, or put that much money in it; and that, "If we would go in with him and buy this land, we would divide it up into tenths. He would take a certain part of the tenths, three or four tenths, and if the rest of us would take the balance, we would go in and buy it." He testified that the other parties present agreed to take certain interests in the land, and that Boswell said that it would take some little time to get the deed and abstract made and see the title was all right, and as soon as that was done, that "he would notify us, and we could send our money to the bank" in Joplin, and that "we would have to bear our proper part" of the expenses, whatever they would be. Plaintiff Scott's evidence corresponded with that of witness Bowker in regard to Boswell's representations. James M. Doling testified that he represented R. S. Dol-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

ing and Bryan in the transaction. Other evidence was introduced which showed conclusively that plaintiffs understood from defendant Boswell that he would buy the land at \$6,500 for the mutual benefit of all parties, and that they entered into the arrangement with the understanding that they were to get it at what it cost. The defendant tendered evidence to prove that the land was of greater value than the price the plaintiffs paid for it. The court refused the tender. The plaintiffs did not learn that Boswell had the option on the land for the sum of \$4,150 until more than 5 years after they purchased their respective interests, but less than 10 years thereafter. The plaintiffs recovered judgment, and defendant appealed.

The defendant raises several questions on his appeal, but we shall only consider the one that we believe is decisive of the case, to wit, the right of plaintiff to recover on the pleadings and testimony. The action was commenced more than 5 years after the date of the alleged fraud, but within 5 years from the alleged date of its discovery. The statute provides that actions for fraud shall be commenced within 5 years; "the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years of the facts constituting the fraud." The petition alleges that the fraud was not discovered until 7 years after the purchase by plaintiffs of their respective interests. The suit was begun immediately thereafter. The contention of defendant is that, as there is no allegation and proof thereof that plaintiff used any diligence to discover the alleged fraud, and no allegation and proof thereof that defendant said or did anything to prevent the discovery of the alleged fraud, the plaintiff is not entitled to recover. It is held that, where plaintiff was in possession of the means of discovering the fraud from the time of its perpetration, and did not use them, the concealment of the facts by defendant by mere silence was not enough to bar the recovery of the statute, and that the petition in such case must charge, and the evidence show, that it was by reason of something defendant did or said that the discovery of the fraud was not discovered sooner. *Callan v. Callan*, 175 Mo. 346, 74 S. W. 965. "A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it; and, if he had the means of discovery in his power, he will be held to have known it." *Shelby County v. Bragg*, 135 Mo. 291, loc. cit. 300, 86 S. W. 602. Many other authorities might be cited to the same effect.

The plaintiff relies upon *Bent v. Priest*, 86 Mo. 475. But that was a case where the fraud practiced by an agent was accomplished in secret, and the court held that under such circumstances the cause of action did

not accrue until the fraud was discovered. And the court used the following language in drawing the distinction between open and secret frauds, to wit: "If the substantial facts constituting the fraud, in cases like the one under consideration, were open, it is believed, under the equity rules, the statute of limitations would have applied at once, but if the facts were in their nature secret and unknown, it is believed the statute would not begin to run until they were discovered; there being no want of diligence on the part of the complainant." In this case, the alleged fraud was not of a secret nature, but an open one. It was a matter open to discovery to the plaintiffs at all times. At any time, by an inspection of the record, they could have learned from defendant's option deed the price he was to pay for the land, and, further, by inquiry of the owner of the land they could have learned that fact. And there is no evidence tending to show that defendant did or said anything to prevent a discovery of the fraud; besides, there are no allegations of diligence, or that defendant said or did anything to prevent discovery. It follows, therefore, that the court committed error in refusing to sustain defendant's demurrer to the evidence.

The cause is reversed. All concur.

JONES v. PAUL.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908. Rehearing Granted. Dec. 7, 1908. On Rehearing, April 19, 1909.)

MUNICIPAL CORPORATIONS (§ 362*)—CONTRACTS FOR PUBLIC IMPROVEMENTS—DELAY IN PERFORMANCE.

Under a general ordinance defining the manner in which street improvements should be made, and providing that the acceptance of a bid shall be taken as an award of the contract for the work, and that the street committee shall contract for the completion of the work "within the time agreed upon," the time specified is of the essence of the contract, where it contains no provision for forfeiture if the work is not completed in time; but the city council may extend the time, and such extension will not invalidate special tax bills issued in payment of such improvements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 895; Dec. Dig. § 362.*]

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by J. J. Jones against Julia S. Paul. Judgment for plaintiff, and defendant appeals. Affirmed.

Gardner & Cameron, for appellant. Grayson & Graham, for respondent.

JOHNSON, J. Action to enforce the lien of a special tax bill issued by the city of Joplin, a city of the third class, in part payment of the cost of grading and macadamizing First street in said city from Amander

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

avenue to Meridian street. The validity of the tax bill is attacked by defendant on the ground that the time for the completion of the improvement was made of the essence of the contract between the city and the contractor, and the improvement was not completed until after the expiration of the time specified.

The ordinance authorizing the work was passed by the city council December 19, 1900, and is as follows:

"Section 1. That First street be improved by bringing to subgrade and macadamizing the same from Meridian street to Amander avenue, as provided by general ordinance No. 38, entitled 'An ordinance defining the manner in which the paving, macadamizing, curbing and guttering of streets, avenues, squares, alleys, or other highways or part thereof, shall be done, and the manner in which improvements shall be paid for.' Approved June 13, 1893.

"Sec. 2. The city engineer is hereby authorized and directed to advertise for bids in the Joplin Daily Globe for the bringing to subgrade and macadamizing First street from Meridian street to Amander avenue, according to the plans and specifications now on file in the office of the city clerk, and said work to be done under the supervision of the street committee and city engineer, as provided by general ordinance No. 38, and paid for in special tax bills, there being no money in the city treasury to pay for the same. Also that the bids will be opened by him, in the presence of the council, on the eighth day of January, 1901.

"Sec. 3. This ordinance shall take effect and be in force from and after its approval and publication."

The general ordinance to which reference is made provided: "The acceptance of a bid shall be taken as an award of the contract for the proposed work to the party making the same, and the street committee shall, without delay, enter into contract with such bidder, for the completion of such work according to the specifications for the same and within the time agreed upon." Pursuant to these ordinances, bids were advertised for, and the contract was awarded to W. H. Mahoney as the lowest and best bidder. A written contract between the city and Mahoney went into effect on the 14th day of January, 1900. It required the contractor to complete the improvement "within 75 days from the time this contract goes into effect," but provided no penalty or forfeit for a failure to complete the work in the time stated. The work was not finished in that time, but before its expiration the city council passed an ordinance extending the time 80 days. The cause was tried without a jury, judgment was entered for plaintiff, and defendant appealed. From the declarations of law given, it appears the court found as facts that the work was completed within the period fixed

by the last-mentioned ordinance, and that the failure to complete it in the time stated in the contract was unavoidable, owing to unfavorable weather. The facts thus found, being supported by substantial evidence, are accepted by us as proved and bring us to the consideration of the vital questions of whether: First, the time of completion was of the essence of the contract; and, second, if it was, had the council the authority to extend the time by ordinance passed before the contract time expired?

Counsel for defendant present in their brief two propositions, viz.:

"(1) The contract provided that the work should be completed within 75 days from the time the contract went into effect, which was January 14, 1901. The contract contained no provision for a forfeiture in case the work was not completed in time. Therefore the general ordinance, together with the contract, made time of the essence of the contract, the same as though it was written in the contract. This is settled law in this state. *City of Springfield, to Use, v. Davis*, 80 Mo. App. 574. This case is cited approvingly in *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163; *Paving Co. v. Munn*, 185 Mo. 552, 83 S. W. 1062; *City of Springfield v. Schmook*, 120 Mo. App. 41, 96 S. W. 257.

"(2) When time is of the essence of the contract, the city council has no authority to extend the time for completing the contract, and, if the work is not completed within the time mentioned in the contract, the tax bills issued in payment of the work are void. The provision that the work must be completed within the time is mandatory. *Smith v. City of Westport*, 105 Mo. App. 221, 79 S. W. 725; *Spalding v. Forsee*, 109 Mo. App. 675, 83 S. W. 540; *Rose v. Trest-rail*, 62 Mo. App. 352. The charter of cities of the third class provides that contracts for improving streets shall be let by competition bidding. Section 5860, Rev. St. 1899."

The soundness of the first of these propositions is conceded for argument, but the second must be disapproved on the ground that the Supreme Court ruled this precise point against the contention of defendant in *Hund v. Rackliffe*, 192 Mo. 312, 91 S. W. 500. It was said in the opinion: "No good reason has been given or is conceivable why the municipal assembly should not have power to extend the time for the completion of a contract beyond the period specified therefor in the original ordinance, if the extending ordinance is passed prior to the expiration of the time limited in the original ordinance." The writer is of the opinion that very good reasons supporting the opposite view are to be found in the cases cited by defendant; but, since we are bound to follow the last decision of the Supreme Court, we cannot do otherwise than to adopt and apply the rule just quoted. It is true that in the case before the Supreme

Court the ordinance authorizing the improvement did not specify the time for its completion, nor was time made the subject of any general ordinance; but we do not feel justified in treating the quotation from the opinion as a mere dictum. "It will not do to denounce everything as unauthoritative dicta which might possibly have been omitted from an opinion." *Williams v. Railroad*, 106 Mo. App., loc. cit. 64, 79 S. W. 1167. Evidently the court intended to deliver an authoritative utterance, and we must so accept it. The point made by defendant against the action of the trial court in modifying the judgment has been considered and found to be without merit.

The judgment is affirmed. All concur.

On Rehearing.

PER CURIAM. We have given this case further consideration on a rehearing which was granted at last term, and have concluded that the judgment should be affirmed on the opinion heretofore rendered.

BALL et al. v. REYBURN.

(Kansas City Court of Appeals. Missouri.
April 19, 1909.)

1. ATTORNEY AND CLIENT (§ 143*)—"UNCONSCIONABLE CONTRACT."

An "unconscionable contract" for attorneys' fees is a fraud, and may be made so to appear by showing that it is such as no man in his senses, and not under a delusion, would make on the one hand, and as no honest and fair man would accept on the other.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 328-331; Dec. Dig. § 143.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 7155.]

2. ATTORNEY AND CLIENT (§ 143*)—CONTRACT FOR FEES—UNCONSCIONABLE CONTRACT.

Defendant, having resided on land abutting a street for a number of years, sued to enjoin the city from lowering the street grade, having expressed himself as determined to prevent it if it cost him "a thousand dollars." Held, that a contract employing an attorney to represent defendant in such action, and agreeing to pay \$500 for his services, was not unconscionable, nor was the charge disproportionate to the service.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 329; Dec. Dig. § 143.*]

3. APPEAL AND ERROR (§ 1009*)—REVIEW—EQUITY—FINDINGS.

The Court of Appeals, while not bound by the finding of the trial court in an equity case, will nevertheless defer largely on disputed matters, to the conclusions of the trial judge based on oral testimony heard by him.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Ray County; Francis H. Trimble, Judge.

Action by Lizzie S. Ball and another as executors of the will of James Ball, against

Adam K. Reyburn. Judgment for plaintiffs, and defendant appeals. Affirmed.

James L. Farris, Jr., and Jenkins & Black, for appellant. Lavelock & Kirkpatrick, for respondents.

ELLISON, J. Plaintiffs are the executors of the will of James Ball, and brought this action for fees alleged to have been earned by Ball as a practicing lawyer in Ray county. They recovered judgment in the trial court. The petition was in two counts, but the second one was abandoned, and the case left to stand on the first, which states the items of indebtedness, and that these had been stated and agreed upon in writing signed by the parties. The contract recites that defendant was indebted to Ball for certain service theretofore rendered, in a case with a coal mining company, in the sum of \$200, of which he had paid \$50; that he owed him \$30 for indebtedness, not stated on what account. It further recites that defendant had employed Ball in a certain injunction case, brought to restrain the city of Richmond from changing and lowering the grade of a street in such city upon which defendant's property abutted, for which services he was to pay \$500. There appears a credit of \$40 on the contract, which leaves a balance appearing to be due of \$640, the amount for which judgment is asked and rendered. We are asked to review the evidence in the record as though the case had been converted by defendant's answer into one in equity, and since in our opinion, considered as a case either at law or in equity, the judgment should be affirmed, we have examined it from the latter standpoint. The evidence shows beyond doubt that the written agreement was executed by defendant. It is conceded that the signature is his, but it is shown that the agreement was written by typewriter on two pages of paper, defendant signing at the close, on the last page, and it is claimed that the first page has been attached to it by ordinary "fasteners" after signing. The evidence does not sustain the claim.

The principal contention between the parties is over the charge of \$500 for the injunction case against the city of Richmond. The charge is claimed to be so disproportionate to the importance of the case and the service rendered as to be unconscionable; and that the agreement for its payment should be set aside. An unconscionable bargain is a fraud, and it may be made to appear by showing that it is "such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other." *Chesterfield v. Janssen*, 2 Ves. Sen. 125, 155. We have examined the evidence bearing upon this point, and have concluded, with the learned trial judge, that it does not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

justify us in refusing validity to the agreement. Defendant was a man able to care for himself, and to determine what effect the proposed action of the city he wished to enjoin would have on his property, and his feelings; he having resided at the place for a long number of years. It was shown that he expressed himself as determined to prevent it if it cost him "a thousand dollars." To permit an avoidance of the writing, on the evidence disclosed in the record, would make written contracts of too slight consequence for the proper security of business transactions.

As stated at the outset, the agreement acknowledged an indebtedness of \$30, and a further indebtedness of \$200 as a fee in a coal mining case, credited by a payment of \$50, and we do not think the record shows that this was not owing. The integrity of the writing has not been successfully impeached, and we, therefore, give effect to its acknowledgments. We say this, whether it be considered in either of the three ways which have found expression in defendant's brief and argument, viz., a mere written acknowledgment, a composition and settlement, or a contract.

It is rightly said that we are not bound by the finding of the trial court in an equity case. But while that is true, the constant practice has been that, where the case is heard on oral testimony, the witnesses thereby facing the trial judge, we defer largely, on disputed matters, to his conclusions. *Wilson v. Craig*, 175 Mo., loc. cit. 403, 75 S. W. 419; *Bank v. Murray*, 88 Mo., loc. cit. 196; *Mathias v. O'Neill*, 94 Mo., loc. cit. 530, 6 S. W. 253; *Benne v. Schnecko*, 100 Mo., loc. cit. 257, 13 S. W. 82.

We have carefully considered the points and suggestions made in defendant's behalf, but we find ourselves without right to interfere with the judgment, and it is accordingly affirmed. All concur.

REICKERT v. HAMMOND PACKING CO.

(Kansas City Court of Appeals. Missouri.
April 19, 1909.)

1. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—NEGLIGENCE—PREMISES—DIS-REPAIR.

Defendant packing company operated a steamroom for washing iron trees by a caustic soda bath. Plaintiff had been in charge of the room for two days before he was injured, but did not know that caustic was used, supposing the bath consisted only of steam and water. The floor of the washroom at the entrance to the steamroom had become worn and eaten by the solution, which escaped so as to form depressions which became filled with solution during the cleaning process; the sill and bottom of the door being likewise worn and eaten away, forming apertures through which the solution escaped to the floor of the washroom. Plaintiff wore no stockings, and his shoes had holes in the soles, so that, when he accidentally stepped

into one of the pools of solution, his foot was severely burned, forming an ulcer which did not heal. *Held*, that defendant was negligent in allowing the place to fall into such disrepair.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 179, 200; Dec. Dig. § 107.*]

2. MASTER AND SERVANT (§ 153*)—INJURIES TO SERVANT—FAILURE TO WARN.

Defendant was also negligent in failing to warn plaintiff of the danger he incurred from the caustic solution under such circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

3. MASTER AND SERVANT (§ 101*)—INJURIES TO SERVANT—CARE REQUIRED BY MASTER.

A master is not an insurer of the servant's safety, but is only required to exercise reasonable or ordinary care to guard the servant against the risk of injury; the master not being liable for the risks that ordinarily and naturally belong to the service, though he must not increase such risks by his failure to observe ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 172; Dec. Dig. § 101.*]

4. MASTER AND SERVANT (§ 295*)—INJURIES—INSTRUCTIONS—DANGERS "NECESSARILY" INCIDENT TO EMPLOYMENT.

In an action for injuries to a servant, the court charged that, if plaintiff was employed by defendant, plaintiff assumed all the dangers "necessarily" incident to such employment, but plaintiff did not assume any dangers arising from or caused by defendant's carelessness and negligence. *Held*, that "necessarily," as so used, meant inevitably, not to be avoided even by the exercise of the highest degree of care, and that the instruction was therefore erroneous as imposing on the master too high a degree of care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

For other definitions, see Words and Phrases, vol. 5, p. 4703.]

Error to Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Action by Ralph Reickert against the Hammond Packing Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Vinton Pike, for plaintiff in error. Neville & Grier and Eli Holland, for defendant in error.

JOHNSON, J. Plaintiff sued to recover damages for personal injuries alleged to have been caused by the negligence of defendant, his employer. The answer is a general denial. The cause was tried to a jury and is here on writ of error from a judgment in favor of plaintiff.

Defendant is extensively engaged in the business of meat packing at St. Joseph. For two months or more prior to his injury plaintiff had been employed in the washroom of the oleomargarine department of defendant's packing establishment. Within this room was a smaller boxlike room, called the "steamroom," in which the iron trees used in hanging meat were cleaned. The trees

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were run into the steamroom from the washroom on a track. The door of the steamroom then was closed, and steam was turned into the room and onto the trees through perforated pipes. Caustic soda was mixed with the steam in a way to subject the trees to a bath of hot water strongly impregnated with caustic. The floor of the room was slightly concave to permit the drainage of the solution into a sewer inlet in the center of the floor. After the trees were treated to the bath 15 or 20 minutes, the workman in charge opened the door and by means of a hook pulled them out into the washroom. Squeegees were used to dry the floor. Plaintiff had been in charge of the steamroom for two days before his injury. He did not know that caustic was used in cleaning the trees, but supposed that the bath consisted only of steam and water. He wore no stockings, and his shoes were old and had holes in their soles. From the evidence introduced by plaintiff, it appears that the floor of the washroom at the entrance to the steamroom had become worn and eaten by the solution which escaped from the steamroom to an extent to form depressions which became filled with the solution during the cleaning process. The sill and bottom of the door likewise had become worn and eaten away, forming apertures through which the solution escaped to the floor of the washroom. Plaintiff had just opened the door for the purpose of removing the trees he had cleaned, when he accidentally stepped into one of the pools described. His foot was partly immersed in the solution and was severely burned by the caustic. A chronic sore resulted. The physician who began to treat plaintiff some four months after the injury testified that he found on the foot "an ancient ulcer caused by a caustic burn." He stated that a burn of this character produces "inflammation; low grade of inflammation, heals badly and slowly, sometimes don't heal at all." Plaintiff expended \$75 for medical treatment, and at the time of the trial, which was more than a year after the injury, had not recovered. There is evidence that defendant did not inform plaintiff that caustic soda was being used in the steamroom nor advise him of its dangerous properties. Defendant had actual knowledge of the defective condition of the place a long time before the injury.

We have stated the case in its aspect most favorable to the cause of action asserted. There is much evidence in the record to impugn the credibility of plaintiff and his witnesses, but we find ourselves compelled to hold that the evidence adduced by him was substantial. This being the case, the credibility of the witnesses and the weight to be given their testimony were issues for the jury to solve. That the evidence of plaintiff tends to accuse defendant of negligence is indisputable. Considering the highly dangerous nature of the caustic used so lavish-

ly, the dictates of care and humanity would impel an ordinarily careful and prudent master in the position of defendant to exercise reasonable care to maintain the door of the steamroom and the adjacent flooring of the washroom in a state of repair that would prevent the escape of the solution to places where it likely would come into contact with the bare skin of the operator. We are dealing here with a concealed, not a patent, danger. Plaintiff did not know the hidden risk he was required to encounter, and we think the evidence supports the inference that defendant was negligent in two respects: First, in allowing the place to fall into such ill repair that it became nothing short of a man-trap; and, second, in not informing plaintiff of the lurking danger. The demurrer to the evidence which defendant argues should have been given was properly overruled.

With one exception, all the assignments of error are found to be without merit. The exception relates to the second instruction given at the request of plaintiff which is as follows: "The court instructs the jury that, if plaintiff was employed by defendant, plaintiff assumed as a part of his employment all the dangers necessarily incident to such employment, but that plaintiff did not assume any dangers arising from or caused by the carelessness and negligence of defendant." The version of the injury given in the evidence of plaintiff is contradicted in all essential particulars by the evidence of defendant, which tends strongly to show that, if plaintiff were injured by coming into contact with the caustic, it was in a way to bespeak either his own negligence or one of the natural risks of the employment, as the proximate cause. If the definition in the instruction of the risks assumed by plaintiff enlarged the scope of defendant's duty to plaintiff, its servant, the error must be deemed prejudicial, in view of the fact that the solution of the question of whether the injury was caused by defendant's negligence or by one of the risks incidental to the employment depended on the solution of sharply contested issues of fact. The master is not the insurer of the servant, nor is he required to exercise extraordinary care to guard his servant against risk of injury. His duty is to exercise reasonable or ordinary care. For risks that ordinarily and naturally belong to the service, the master is not liable. He must not increase those risks by his failure to observe the degree of care and solicitude for the protection of his servant that would characterize the conduct of an ordinarily prudent person in his situation, and, should his failure to perform this duty result in injury to his servant, the latter may recover the damages sustained, provided the servant himself be free from negligence contributing to the injury; but, if the injury to the servant result from one of the natural and ordi-

nary hazards of the business, he has no cause of action against his master. Such hazards the servant assumes as incidents of his employment. *Henry v. Railway*, 109 Mo. 488, 19 S. W. 239; *Musick v. Dold*, 58 Mo. App. 322; *Lucey v. Oil Co.*, 129 Mo. 32, 31 S. W. 340; *Thompson v. Railway*, 86 Mo. App. 141; *Minnier v. Railway*, 167 Mo. 99, 66 S. W. 1072.

The declaration in the instruction to the effect that plaintiff assumed only those dangers that were necessarily incident to the employment, and did not assume those caused by defendant's negligence, was equivalent to the assertion that dangers which might ordinarily and naturally but not necessarily belong to the service were dangers not assumed by the servant and, consequently, were among those which the care of the master should take into account and obviate. "Necessary" means inevitable, not to be avoided even by the exercise of the highest degree of care, and the corollary of the proposition of the instruction that only unavoidable risks are assumed by the servant is that the master must exercise the highest degree of care to furnish his servant a safe place in which to work. This is opposed to the well-settled rule of the substantive law.

For the error in giving this instruction, the judgment is reversed, and the cause remanded. All concur.

SMITH v. J. H. CARTER & CO.

(Kansas City Court of Appeals. Missouri.
April 19, 1909.)

1. CONTRACTS (§ 322*)—BREACH—ACTIONS.

Where, in an action for breach of a contract for the sale of a teaming outfit, including defendants' agreement to employ plaintiff to do their hauling for a year, no damages relating to the sale of the property were submitted, but only those applicable to the alleged breach of the employment contract, whether the teams belonged to defendants, prior to the sale, or to a third person for whom defendants acted, was not material.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 322.*]

2. CONTRACTS (§ 280*) — CONSTRUCTION — BREACH.

Where defendants, as part of a contract for the sale of a teaming outfit, agreed to employ plaintiff to do all defendants' hauling at a guaranteed gross annual income of from \$900 to \$1,300, defendants were bound to furnish plaintiff the hauling for the stores for a year, and, having sold the stores to another within three months after the contract was made, did not perform by furnishing plaintiff such employment as they might have for him.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 280.*]

3. DAMAGES (§ 62*) — CONTRACT — BREACH — WAIVER—DUTY TO DIMINISH LOSS.

Defendants, the owners of certain country stores, having contracted with plaintiff to do all their hauling for a year, sold the stores to another, after which, for a short period, plaintiff did hauling for the buyer. *Held*, that plain-

tiff did not thereby waive his right to recover damages from defendant for breach of contract, being bound to do all he could to minimize his damages.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 62.*]

Appeal from Circuit Court, Harrison County; Geo. W. Wanamaker, Judge.

Action by C. J. Smith against J. H. Carter & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

A. S. Cumming and J. M. Sallee, for appellants. J. C. Wilson and Garland Wilson, for respondent.

JOHNSON, J. This suit was begun before a justice of the peace to recover damages, laid at \$250, sustained from the breach by defendants of a contract between them and plaintiff. A trial to a jury in the circuit court, where the cause was appealed, resulted in a verdict and judgment for plaintiff in the sum of \$115. After ineffectually moving for a new trial and in arrest of judgment, defendants brought the case here by appeal.

Defendants were partners doing business as general merchants at Hatfield and Pawnee, small inland towns in Harrison county. Blythedale was the nearest railroad station to both towns, and defendant had freight for transportation by wagon between their stores and the railroad station, in the hauling of which four horses and two wagons were employed. This hauling cost them from \$900 to \$1,300 per year, at the rates paid. In April, 1906, defendants entered into an oral contract with plaintiff to sell him the property used in doing the hauling for \$300. This property consisted of four horses, two wagons, two sets of harness, and a bobsled. Plaintiff executed and delivered to defendants his promissory notes for the purchase price, and afterwards paid the notes, with the exception of \$15. Plaintiff asserts in his pleadings and proof that, as a part of the contract of sale, defendants employed him to do all their hauling at a stated rate for one year and guaranteed that his gross income therefrom would be from \$900 to \$1,300. Plaintiff did the hauling for three months and received therefor about \$280. Defendants then sold their stores, and their successors in business gave their hauling to plaintiff a brief period and then made other arrangements.

The solution of the questions arising from the insistence of defendants that their demurrer to the evidence should have been sustained will sufficiently dispose of the case. Defendants contend that the property sold actually belonged, not to them, but to the man who had been doing their hauling. In the negotiations with plaintiff, they treated the property as their own, sold and transferred it to him, and accepted his notes

made payable to their order in payment of the purchase price. In the instructions no damages relating to the sale of the property were submitted, and the only damages to which the attention of the jury was directed were those relating to the breach of the alleged contract of employment. With the issues thus restricted, the question of who owned the property is unimportant. It appears beyond dispute that defendants had an interest in the sale of the property, enough to constitute its purchase by plaintiff a sufficient consideration for their promise to employ him to do their hauling. We find substantial evidence to the effect that defendants, as a part of the transaction, promised to give plaintiff their hauling for one year, and, finding further that the promise was supported by a consideration, we pass to the question of whether the sale of their business by defendants and the almost immediate refusal of their vendee to continue the employment of plaintiff constituted a breach by them of the contract of employment.

Our construction of the contract, as stated by plaintiff, is that defendants' obligated themselves to give plaintiff all of their hauling for one year and guaranteed that his gross income therefrom would be not less than \$900. Defendants argue that they did not bind themselves not to discontinue the business, and consequently that all they were required to do after they sold out was to continue to give plaintiff such employment as they might have for him. We do not adopt this narrow construction of the agreement. The true intent of the parties was that plaintiff should do the hauling for the stores during the period specified. That was the real inducement offered to him to purchase the teaming outfit, and, while defendants had the right to sell their business, they were bound, if they did sell it, to provide for the performance of their contract with plaintiff, and their omission to perform this obligation, whatever the cause, constituted a breach of the contract for which plaintiff would have a right of action for the damages sustained. The facts before us differ in essential particulars from those considered by the Supreme Court in *Ferry Co. v. Railway*, 128 Mo. 224, 27 S. W. 568, 30 S. W. 430, much relied on by defendants. We find nothing in that case at variance with the conclusion expressed.

We do not agree with defendants that plaintiff released them from the performance of the contract by accepting employment from their vendee. The evidence shows conclusively that plaintiff was not informed of the sale of the stores until after the sale was consummated, and that he continued to do the hauling for the stores at the request of defendants. He did not agree, and was not asked, to release de-

fendants from the contract. After the breach it was his duty to do all he could to minimize his damages, but, as we have said, there was no breach until he was deprived of the hauling, and before the breach occurred his reliance on the assurance of defendants that the contract would be performed by their vendee should not be regarded as the expression on his part of an intention to waive his right to hold them to the performance of the contract.

We find no merit in the contention that the suit was prematurely brought. The demurrer to the evidence was properly overruled. The instructions to the jury are in harmony with the views expressed and declare the correct rule for measuring the damages, and the amount assessed as damages is warranted by the evidence.

There is no error in the record, and, accordingly, the judgment is affirmed. All concur.

BOWEN v. EPPERSON et al.

(Kansas City Court of Appeals. Missouri.
April 19, 1909.)

1. TRIAL (§ 243*)—INSTRUCTIONS—APPLICABILITY TO CASE.

Where the court had properly instructed that defendant could not be held liable as a partner unless his conduct led plaintiff to believe he was a partner, a subsequent instruction, submitting the theory of an actual partnership by virtue of a contract, was erroneous and confusing.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 243.*]

2. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Error in submitting the case upon the theory of an actual partnership, after properly instructing that defendant could only be held liable as a partner if his conduct had led plaintiff to believe he was such, was not cured by the fact that the first instruction given was proper.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 295.*]

3. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTIONS BY JUDGE AS TO FACTS.

In an action against defendants as partners for work done, where the court instructed that the relationship between defendants made them prima facie partners, but there was evidence tending to explain their relation and show that one of them was not a partner in fact, an instruction to find for plaintiff if either of defendants ordered the work done was erroneous, as directing a verdict for plaintiff on the ground that an actual partnership existed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

4. TRIAL (§ 234*)—INSTRUCTIONS—ADMISSIBILITY OF EVIDENCE.

Where a contract between appellant and the other defendants was admissible to show that he was not a partner of the others, it was error to instruct, in an action against defendants for work claimed to have been done for them as partners, that if plaintiff did not know of the existence of the written contract when

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he made the goods, it should not be considered by the jury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 234.*]

5. PARTNERSHIP (§ 48*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action against defendants for work claimed to have been done for them as partners, a contract between defendants, by which title to partnership property of the others was conveyed to one of them to secure advances he might make to enable them to perform a partnership contract, and to secure to him a certain sum out of the profits of such contract, was admissible to explain such defendant's connection with the others, and to show that he was not a partner.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 48.*]

6. PARTNERSHIP (§ 34*)—RELATION—PARTNERSHIP BY ESTOPPEL.

Liability as a partner by a holding out as such to third persons, where no partnership in fact exists, is imposed on the theory that by his conduct persons dealing with the apparent partner were led to believe that a partnership existed.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 49; Dec. Dig. § 34.*]

7. PARTNERSHIP (§ 34*)—EVIDENCE—PROOF OF HOLDING OUT—ADMISSIBILITY.

Matters leading one to believe that a partnership existed must have occurred before such belief was formed and acted upon, in order to create a partnership liability by estoppel.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 49; Dec. Dig. § 34.*]

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by C. K. Bowen against U. S. Epperson and others. From a judgment for plaintiff, the defendant named appeals. Reversed and remanded.

Ashley, Gilbert & Dunn, for appellant. L. E. Durham, for respondent.

ELLISON, J. Plaintiff instituted this action against the three defendants as partners. His claim is based on an account for photographs alleged to have been taken by him and furnished to defendants at their request. He obtained judgment in the circuit court for \$489, and defendant Epperson alone appealed.

Each of the defendants filed an answer denying the partnership under oath. Defendant Epperson admitted getting photographs of the value of \$7, which sum he tendered, and for which he offered to permit judgment. The principal controversy here relates to the attempt to make out defendant Epperson's liability by reason of a partnership. It appears that defendants Winning and Rudd were associated together as partners, and that among other matters of partnership, was a contract which Rudd had made with the Missouri, Kansas & Texas Terminal Company, whereby they were to do a large amount of grading of certain lands in Rose-dale, Kan.; that they needed financial assistance to carry out their contract, and call-

ed upon Epperson to furnish it. The result was a written contract between them, of some length and detail, which was intended to secure Epperson in the advances he should make, by putting the title of the Winning & Rudd partnership property in him as a trustee, and further securing to him for such advances a bonus of \$3,000 and a certain part of the profit which Winning & Rudd should make out of the contract. We need not set out the contract in full; suffice it to say the trial court rightly held that it did not constitute Epperson a partner, and the case was thus left, and could properly only be considered from the standpoint of a partnership as to third persons by estoppel.

Thus considered, it is apparent that it was not correctly submitted to the jury by the instructions. In the first place we have the court declaring to the jury, by defendant's instruction No. 4, that there was no partnership in fact with Epperson, thus, as just written, properly holding that the contract did not constitute him a partner, and that he could only be held liable by conduct such as to lead plaintiff to believe he was a partner. Yet plaintiff obtained an instruction (No. 1) submitting the case upon the ground of an actual partnership, thus in that way affirming that the contract itself was one of partnership. The instructions were confusing, and the fact that the one for defendant was right does not cure the error of plaintiff's. *Wojtylak v. Coal Co.*, 188 Mo. 280, 87 S. W. 506; *Baer v. Lisman*, 85 Mo. App. 317. The latter instruction was furthermore erroneous in informing the jury that, under certain arrangements between defendants, "they were *prima facie* partners," and then on that basis proceeding to direct them, in absolute terms, to find for plaintiff if either of defendants ordered the photographs. To say that defendants were only *prima facie* partners is nothing more than to say they were partners, unless their relationship was explained; that is to say, they were partners if nothing more was shown. But the case was filled with explanatory evidence, and it was therefore highly prejudicial to base an absolute direction on a mere showing of one side of the controversy. The effect of the instruction could not have been less than to direct a verdict for plaintiff on the written contract.

There was also error in giving plaintiff's instruction No. 4, wherein the jury were told that, if plaintiff had no knowledge of the existence of the written contract when he did the work sued for, then it should not be considered by them in making a verdict. As explained by the trial court when it was introduced, the contract was made proper evidence for defendant by the course of the evidence as drawn out by plaintiff. It was proper evidence as tending to explain the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
118 S.W.—34

connection which Epperson had with the other defendants, and as tending to show that his connection and association with them was for other purposes than partnership. *Scholtz v. Freund*, 128 Mich. 72, 87 N. W. 130.

Defendant asked, and was refused, an instruction (No. 7) in which it was declared that any holding out by defendant Epperson as a partner must have been known to plaintiff, and relied upon by him before contracting the pictures sued for, and that knowledge obtained after that could not affect the case. The theory of holding one's self out as a partner when in point of fact he is not as between himself and those charged to be his copartners is that he has, by conduct, led persons dealing with the supposed partners into the belief that a partnership existed. Matters leading to this belief must, of course, have transpired before the belief became fixed in the creditor's mind. The instruction should have been given. *Rimel v. Hays*, 83 Mo. 200; *Gamble v. Grether*, 108 Mo. App. loc. cit. 343, 83 S. W. 306. We have been cited by plaintiff to the cases of *Dale & Bennett v. Mining Co.*, 110 Mo. App. 317, 85 S. W. 929, and *Tamblyn v. Scott*, 111 Mo. App. 49, 85 S. W. 918, but we do not see where they apply to the case at bar. Defendant has suggested that there was no evidence whatever of a partnership. This excludes any reasonable inference to be drawn from the evidence. After consideration we feel we would not be justified in so ruling. The case, if tried again, should be on the question whether defendant, by a course of conduct before the contract, led plaintiff to believe he was a partner.

The judgment is reversed, and cause remanded. All concur.

JOHNSON v. DAILY.

(Kansas City Court of Appeals. Missouri.
April 19, 1909.)

1. ASSAULT AND BATTERY (§ 43*)—CIVIL ACTION—CONFLICTING INSTRUCTIONS.

There is not such conflict between instructions as to mislead the jury; one given for plaintiff declaring that if defendant willfully beat him he can recover unless he first attacked defendant, and such attack was resisted with no more force than necessary, and the other given for defendant being in keeping with his defense that, though he may have assaulted plaintiff, he had a right to make such assault if the appearances justified him in judging from plaintiff's actions that plaintiff was about to inflict great bodily harm on him.

[Ed. Note.—For other cases, see *Assault and Battery*, Dec. Dig. § 43.*]

2. ASSAULT AND BATTERY (§ 26*)—JUSTIFICATION—BURDEN OF PROOF.

Plaintiff having shown an assault on him, it is presumed to have been unlawful, and defendant has the burden of justifying it.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 36; Dec. Dig. § 26.*]

3. ASSAULT AND BATTERY (§ 38*)—DAMAGES.

As part of the damages for assault and battery plaintiff may recover for any humiliation and disgrace shown by the evidence to have been suffered by him because thereof.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 53; Dec. Dig. § 38.*]

4. ASSAULT AND BATTERY (§ 13*)—INSTRUCTIONS—SELF-DEFENSE—PROVOKING DIFFICULTY.

Reasonable inferences to be drawn from the evidence justifying it, an instruction submitting the hypothesis of defendant having brought on and provoked the difficulty, in which case defendant could not rely on self-defense, is properly given in an action for assault and battery.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 11; Dec. Dig. § 13.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REPETITION.

One may not complain of refusal of an instruction substantially embodied in another given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Circuit Court, Harrison County; G. W. Wanamaker, Judge.

Action by John R. Daily against William Johnson. Judgment for plaintiff. Defendant appeals. Affirmed.

J. M. Sallee and S. P. Davisson, for appellant. Barlow & Barlow, J. C. Wilson, and W. H. Leazenby, for respondent.

ELLISON, J. This is an action for assault and battery in which plaintiff obtained judgment in the trial court. The evidence showed much ill feeling between the parties had existed for a considerable period. They were relatives and neighbors residing in the country in Harrison county. Finally they met in the public road. Defendant in his buggy passed plaintiff who was walking in the road. The buggy wheel brushed against plaintiff and thus started a fight between them, resulting in defendant committing the assault with a hammer. Who was the aggressor was a matter of dispute between the parties. As to whether there was any occasion for self-defense on defendant's part was likewise a matter of dispute. Indeed, such was the state of contradictory evidence in the cause, we need not go into any detailed statement of it, since it was all submitted to the jury, who found in plaintiff's favor, and since we must abide by that finding it is only cumbering the record to set forth what the evidence was upon which the jury acted.

We will therefore address ourselves to the criticism made of the instructions. One was given for plaintiff wherein it was declared that, if defendant violently and willfully beat and wounded the plaintiff, then the verdict should be for him unless plaintiff first made an attack on defendant and that he resisted such attack by using no more force to repel it than was necessary. Defendant claims that instruction to be in conflict with No. 2

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

given at his request, wherein the jury were told that if they believed the defendant apprehended that plaintiff was about to do him some great bodily harm, and that there was reasonable cause for believing the danger was imminent, and that such danger was about to fall upon him, then he had a right to act on appearances and to use such force as seemed necessary to avoid the danger, and he was not required to nicely gauge the amount of force necessary to repel the assault. The first of these directs in plaintiff's behalf that, if defendant assaulted and beat plaintiff, then the finding should be for him, unless it appeared from the evidence that plaintiff first attacked him and he resisted with no more force than was necessary. Speaking in general terms, the second directs in defendant's behalf, and in keeping with his defense, that though he may have assaulted plaintiff, yet he had a right to make such assault if the appearances justified him in judging from plaintiff's actions that plaintiff was about to inflict great bodily harm upon him. We do not see any such conflict between them, when read together, as would justify us in saying that they would mislead or confuse the jury.

Instruction No. 2, given for plaintiff, is said to be erroneous in that it states that defendant admits striking the plaintiff. In our opinion the evidence justified the instruction. In view of defendant's statements in his testimony in his own behalf it would be idle to deny that he conceded or admitted striking the plaintiff.

It is insisted that the instruction put the burden of proof on the defendant. The rule is that, while the plaintiff has the burden of making out his case of assault upon himself, yet, when he shows the assault, it is presumed to be unlawful, and he is not required to go further and prove that it was not made in defense of the person of his assailant. That is an excuse or justification for the assault which must be proved by the party who offers it. In *Orscheln v. Scott*, 90 Mo. App. 352, we reviewed the decisions of the Supreme Court, as well as other authorities on this question, and need do no more than refer to that case.

Objection is urged against the propriety of instructions Nos. 3 and 5, given for the plaintiff. The latter permitted as a part of the measure of damages humiliation and disgrace if suffered by plaintiff by reason of the assault. The evidence justified the instruction, and the objection is not well taken. The former submitted the hypothesis of defendant bringing on and provoking the difficulty, in which case he could not invoke the right of self-defense to shield himself from the consequence of his own wrong. The entire evidence considered, and reasonable inferences to be drawn from much of it, abundantly justified the instruction. It

is true, as said in *State v. Walker*, 196 Mo. 78, 93 S. W. 384, "it is error for the trial court to frit away the right of self-defense by inviting the jury to enter the field of conjecture"; but the record here does not present such a case.

There is no just ground to complain of the refusal of defendant's instruction No. 7. It was substantially embodied in No. 2, given for him.

Finally, there is a statement in a very general way that "the court erred in admitting incompetent, irrelevant, immaterial, and illegal evidence on the part of the plaintiff over the objection of defendant, and in rejecting material, competent, and legal evidence offered on the part of the defendant." There is then set out near five pages of evidence. Much of this related to some difficulty between the parties several years prior to this. Some of it tended to inquire into the merits of ill feeling between one or more witnesses and one of the parties. Some of the objections were extremely technical. It may, however, be safely said that no ruling in the particulars objected to materially affected defendant's rights; nor do we see that they were in any way prejudicial to the merits of the controversy. Especially is this true in view of the reasons given by the court accompanying several of the rulings made.

We do not feel that we would be justified in condemning the verdict as being excessive. The jury believing the case to exist as presented by the evidence in plaintiff's behalf, we cannot say that the amount of the verdict will allow its being declared to be the result of passion and prejudice.

A careful examination of the entire record has failed to disclose any substantial error materially affecting the merits of the case, and the judgment must therefore be affirmed. All concur.

PAYTON v. PEOPLE'S CREDIT CLOTHING CO.

(Kansas City Court of Appeals. Missouri.
April 19, 1909.)

CORPORATIONS (§ 432*)—LIABILITY OF CORPORATION—SCOPE OF AGENT'S EMPLOYMENT.

That the slander of plaintiff, uttered by the agent of defendant, a foreign corporation, was an act within the general scope of the agent's employment, making defendant liable therefor, and not merely the result of his own malice, may be inferred from the facts that the agent was the general manager of plaintiff's business in the state, and that the words were spoken while plaintiff was before him, on the question of his having paid a bill which he had owed defendant.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1717, 1718, 1724, 1726-1737; Dec. Dig. § 432.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Charles A. Payton against the People's Credit Clothing Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Johnson & Lucas, for appellant. Cliff Langsdale and John M. Cleary, for respondent.

JOHNSON, J. Action against a corporation for slander. Actual and punitive damages were asked in the petition, but the verdict and judgment recovered by plaintiff were for actual damages only. Defendant appealed.

Defendant is an Ohio corporation engaged in the business of selling ready made clothing on the installment plan in various cities of the United States. One of its stores is in Kansas City. Plaintiff, a grocery clerk in Kansas City, bought some clothing of defendant on credit, and afterwards paid for it in full. Some time after the last payment was made, a collector of defendant presented a bill for the clothing to plaintiff, and demanded payment. Plaintiff stated he had paid the bill to another collector and held a receipt in full, whereupon the collector requested him to call at the store, and exhibit his receipt to the manager. Accompanied by a friend, plaintiff went to the store, asked for the manager, and was referred to the witness McCoy, who was the manager in charge of defendant's business in Kansas City. Plaintiff testified: "I told him my name was Payton, and that his collector had been up for the bill which I had paid. He asked if I had a receipt, and I told him 'Yes.' He said, 'Let's see it.' I took the receipt out of my pocket, and held it in my hand like this [witness holds up his hand as high as his shoulder]. He said, 'Give it to me.' I said, 'I don't care to give it, but you can see it,' and he stepped up to me and tore the receipt out of my hands. He grabbed it and said: 'Give me that receipt. Just because you are a dirty thief and crook you needn't think we are.' I said, 'You call me a dirty thief and crook, do you?' and he said, 'Yes, I do, and I can prove it in more ways than one.' I asked him to give my receipt back, and he said, 'No,' and would not give it back. Went out for an officer, but could not find one, so when I returned McCoy was gone, and there was a gentleman in the cage there that handed me a duplicate receipt. I took it. There was nothing else to do." Persons who were present and in position to hear the slanderous words were plaintiff's friend, a woman clerk of defendant, and the manager of defendant's store at Louisville, Ky., who was also a traveling auditor for defendant, and was in the office checking up McCoy's accounts. It appears from the evidence of plaintiff that the outburst of Mc-

Coy was unprovoked, and that plaintiff throughout the affair conducted himself with extreme moderation. This version of the occurrence is contradicted by the witnesses for defendant, who say that plaintiff was abusive from the start, and, in effect, charged McCoy with having embezzled the money paid by him on the account. The traveling auditor, introduced as a witness by defendant, testified that McCoy, provoked by the abuse of plaintiff, did snatch the receipt out of plaintiff's hand, and say, "Because you are a dirty thief, you needn't think we are." On the issue of the scope of McCoy's duties as local manager a former employé of defendant, called as a witness by plaintiff, testified: "He was manager of the business. * * * He had full charge and control of the concern. I took no orders from any one except Mr. McCoy. * * * Mr. McCoy had charge of the collections. He had full charge of everything. The collectors reported to him, and turned over what money they had collected to him." The witness described the traveling auditor as "a sort of overseer to examine McCoy's books, but he never gave any orders."

Counsel for defendant argue that "defendant's demurrer at the close of plaintiff's case should have been sustained because it clearly appeared from the evidence that defendant's agent, in uttering the words alleged to have been uttered, was acting wholly outside the scope of his employment, and the malice, if any, was his"—citing *Milton v. Railway*, 193 Mo. 46, 91 S. W. 949, 4 L. R. A. (N. S.) 282; *Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543; *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 43 South. 210, 9 L. R. A. (N. S.) 929, 124 Am. St. Rep. 90. Reliance is placed by defendant on the remark, by way of illustration, in *Milton v. Railway*, supra, that: "The employment of an agent to present a claim and demand payment thereof from the debtor to his principal does not include within its scope the right to arrest or assault the debtor if he refuses to pay. Such an employment contemplates only lawful and peaceable acts; and, when an agent so clothed with authority commits a trespass upon the debtor, he acts wholly outside the scope of his employment." We give willing assent to the doctrine thus expressed; and, were this a case where the slanderous words had been uttered by the collector sent out by McCoy to collect the account, we would say that an action against defendant could not be sustained by mere proof of the facts that the collector was an agent and uttered the slander. The inference that the wrongful act was authorized by the defendant could not be drawn from these facts alone. But if the plaintiff in the supposititious case under consideration proved, in addition to the facts we have stated, that the collector had been directed by Mc-

Coy, the manager, to call plaintiff a thief if he did not pay the account, we think no one would have the hardihood to argue that authority from the corporation to utter the slander could not be inferred from such fact, and that the court should hold, as a matter of law, the act of the agent to be without the scope of his authority.

That a corporation may be held responsible for a slander uttered by an officer or agent within the scope of his employment is no longer a debatable question. It has been said that to hold the corporation liable, the tortious act of the agent, not only must have a direct relation to the performance of some duty pertaining to his employment, but also must have the express or implied sanction of the corporation, or afterwards be ratified by the corporation. But where, as in the case in hand, no express authority is shown, the issue of whether authority to commit the wrong should be implied becomes one of fact for the jury, where the facts and circumstances in proof would induce a reasonable person to infer that the act was within the general powers conferred on the agent. The rule thus is pertinently stated in *Gaslight Co. v. Lansden*, supra: "If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference should be drawn

from the evidence, and that is a want of authority, then the question is a legal one for the court to decide. We do not mean that in order to render the company liable there must be some evidence of authority, express or implied, given to the manager to publish, or to authorize the publishing of, a libel, but there must be some evidence from which an authority might be implied on the part of the manager to represent the company, as within the general scope of his employment, in regard to the subject-matter of the correspondence between Brown and himself." McCoy's duties, being those of general manager of the business conducted in this state by a foreign corporation, embraced the widest scope. He was the corporation here, its alter ego, and was acting within the performance of one of the duties of his position—that of the collection and adjustment of accounts—when he spoke the slanderous words. Clearly, we think, a reasonable man might, and would, infer that what he did was in line with the policy and practice of the corporation he was employed to represent; in other words, that his act was within the general scope of his employment as manager, and was not merely the result of his own malice. The court committed no error in overruling the demurrer to the evidence.

The judgment is affirmed. All concur.

MILLER v. STATE.

(Court of Criminal Appeals of Texas. April 14, 1909.)

CRIMINAL LAW (§ 1094*)—APPEAL—REVIEW—RECORD.

Where the record contains neither statement of facts nor bill of exceptions, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3204; Dec. Dig. § 1094.*]

Appeal from District Court, Bell County; John M. Furman, Judge.

Frank Miller was convicted of robbery, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of robbery, and his punishment assessed at five years' confinement in the penitentiary.

The record contains neither statement of facts nor bill of exceptions. This leaves the record before us without anything for consideration.

The judgment is therefore affirmed.

GAY v. STATE.

(Court of Criminal Appeals of Texas. April 14, 1909.)

WEAPONS (§ 17*)—CARRYING WEAPONS.

Evidence held not sufficient to sustain a conviction of unlawfully carrying a pistol.

[Ed. Note.—For other cases, see Weapons, Dec. Dig. § 17.*]

Appeal from McLennan County Court; J. W. Baker, Judge.

Babe Gay was convicted of unlawfully carrying a pistol, and appeals. Reversed and remanded.

Geo. N. Denton, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This is an appeal from a conviction had in the county court of McLennan county, Tex., on a charge of unlawfully carrying a pistol.

The testimony of the state consists in the evidence of one witness, to wit, Rivers Torrence, who testified as follows: "I live in McLennan county, Tex., near the town of Elk; have lived there more than 20 years. I know the defendant, Babe Gay; knew him about 2 years before this offense is alleged to have occurred. I knew him in the fall or winter of 1906. Some time in November of that year I was at Axtel. It was Sunday night, about 9 or 10 o'clock, after church. There was quite a crowd, and some were horseback. I was horseback, and the defendant was horseback. The night was very dark. It was misting rain and pretty cold. You could not see your hand before you. Just as I was getting on my horse, or had gotten on my horse, I heard

some one say, 'Look out! I am going to shoot.' I said, 'Don't do it,' and about that time a pistol fired, and I could hear the sound of horses' feet running. A second shot was fired about the time they crossed the railroad. There were several on horses that night, at the time I heard the shot fired, besides the defendant. I only knew two of them, besides the defendant. Their names are Johnie Moore and F. A. Morrow. These men were on horseback, and there were several others on horseback I did not know in the dark. They were all in the road at the time the shot was fired, and were running their horses. I was just getting on my horse. The defendant was just to my right when I was getting on my horse. It was so dark I could not recognize any one. I did not see a pistol in the hands of the defendant, or any one else. It was too dark. I could not tell which of the men on horses fired the shot. I know Babe Gay's voice. I think it was the voice of Babe Gay who said, 'Look out! I am going to shoot.'"

On cross-examination the witness said: "It was a very dark night, and was misting rain. You could not recognize any one, it was so dark. There were a number of men in the road at or near where the defendant was, and near where I heard the voice. They began running their horses about the time I heard the shot, and ran across the railroad, and about the time they crossed the railroad I heard another shot fired. I knew the names of two of the parties in the crowd on horseback. They were Johnie Moore and F. A. Morrow. I cannot be certain that the voice I heard was the voice of Babe Gay. It could have been the voice of either of the two men I knew in the crowd, or the voice of some of the others in the crowd, who I did not know. I never saw a pistol in the hands of the defendant that night, and did not see the handle, barrel, or cylinder of the pistol. I will not swear that the defendant fired that shot, and I will not swear that the voice I heard was the voice of the defendant. I rode with the defendant that night after the shots were fired. I did not see a pistol on him, and he did not tell me that he was the one who fired the shot. I rode with him about a mile after we left Axtel. We discussed the matter of the firing of the shot. The defendant never admitted that he was guilty of having the pistol. I did not say that Gabe Pillot, the deputy sheriff, would about accuse me of having that pistol; but I did not have a pistol that night, and I did not do the shooting. Afterwards I was accused of having the pistol; but I have never been arrested for it. We did ride fast that night after we left Axtel. It was cold and rainy, and I did not have my overcoat. I had known Babe Gay only a short time before this occurrence. This all occurred in McLennan county, Tex.,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

some time in November, 1906. I do not know the exact date."

Appellant in his own behalf took the stand and denied that he had a pistol on the occasion named or had fired it off. Appellant's counsel insist that the evidence is insufficient to sustain a conviction, and we believe, in the light of the entire record, that this contention must be sustained. It is possible, of course, that the appellant in this case is guilty; but we do not believe, on full reflection, that we would be justified in sustaining this conviction and establishing the precedent of sustaining a conviction on such inconclusive and vague testimony.

For the reason that the evidence is, in our judgment, insufficient, the judgment of conviction is reversed, and the cause remanded.

POTTS v. STATE.

(Court of Criminal Appeals of Texas. March 10, 1909. Rehearing Denied April 14, 1909.)

1. CRIMINAL LAW (§ 784*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—DUTY TO CHARGE.

Where, in a homicide case, accused admitted doing the shooting and decedent stated positively in a dying declaration that accused shot him, it was unnecessary to charge on circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1883; Dec. Dig. § 784.*]

2. CRIMINAL LAW (§ 1090*)—APPEAL—RECORD—BILL OF EXCEPTION—EFFECT OF FAILURE TO EXCEPT.

Error assigned in the motion for a new trial in refusing to grant a continuance cannot be considered on a criminal appeal, where the record contains no bill of exceptions preserving the point.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2812; Dec. Dig. § 1090.*]

3. HOMICIDE (§ 308*)—MURDER—INSTRUCTIONS.

In a murder prosecution, evidence held not to raise the issue of murder in the first degree so as to require a charge thereon.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 308.*]

4. HOMICIDE (§ 340*)—HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT.

Where accused was acquitted of murder in the first degree, he cannot complain of error in submitting that issue or of errors committed in connection with its submission.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 720; Dec. Dig. § 340.*]

5. HOMICIDE (§ 23*)—MURDER—SECOND DEGREE.

If accused did not shoot decedent in self-defense, and there was no provocation to reduce the killing to manslaughter, and the evidence did not make out murder in the first degree, the killing was murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 85, 89, 40; Dec. Dig. § 23.*]

6. HOMICIDE (§ 13*)—MALICE—IMPLIED MALICE.

The law implies malice from the unlawful killing, where there is nothing to reduce the

homicide to manslaughter or to some lesser degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 18; Dec. Dig. § 13.*]

7. HOMICIDE (§ 43*)—MANSLAUGHTER—PROVOCATION—NECESSITY.

Every killing upon a rash and inconsiderate impulse is not manslaughter; an adequate cause rendering the mind incapable of cool reflection being essential to reduce an unlawful killing to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 67; Dec. Dig. § 43.*]

8. HOMICIDE (§ 309*)—INSTRUCTIONS—MANSLAUGHTER—NECESSITY OF INSTRUCTION.

The court was not required to instruct upon manslaughter where that issue was not raised by the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 652; Dec. Dig. § 309.*]

9. HOMICIDE (§ 301*)—INSTRUCTIONS—DEFENSE OF ANOTHER—NECESSITY.

Where, in a murder prosecution, a witness testified that accused told him shortly after the killing that he fired two of the four or five shots, one of which killed decedent, because he thought another was assaulting the witness, an instruction upon the issue of homicide in another's defense was necessary.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 633; Dec. Dig. § 301.*]

10. HOMICIDE (§ 301*)—INSTRUCTIONS—DEFENSE OF ANOTHER—SUFFICIENCY.

In a murder prosecution, a witness testified that accused told him shortly after the killing that he fired two of the four or five shots, one of which killed decedent, because he thought another was assaulting the witness, and the court charged that homicide is justifiable when done to protect another from death or serious bodily injury if it reasonably appeared to be necessary, and the jury should determine whether such other was in present danger of death or great bodily harm and the killing was necessary to protect him, and, if a third person was accidentally killed in an effort to protect the person threatened, the killing would be justifiable, so that if another made a violent assault upon a third person from which it reasonably appeared to accused that such third person was in danger of death or a serious bodily injury, and he shot at the assailant but killed decedent, the killing was justifiable. *Held*, that the charge correctly and sufficiently submitted the issue of homicide in another's defense.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 301.*]

11. CRIMINAL LAW (§ 864*)—EVIDENCE—DEMONSTRATIVE EVIDENCE—FATAL IMPLEMENTS.

The evidence tended to show that the fatal bullets would not have fitted the gun of another whom the other evidence also tended to implicate, but did fit accused's gun and could be used in it, and the bullets had been admitted in evidence at the trial, but, inadvertently, had not been inspected by the jury, and, upon the jury's request after they had retired that the bullets be sent to them for inspection, the trial court recalled the jury and permitted them to examine the bullets in the presence of accused and his counsel. *Held*, that the trial court's action was proper.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 864.*]

12. CRIMINAL LAW (§ 361*)—EVIDENCE—EXPLANATORY MATTERS.

Under Code Cr. Proc. 1895, art. 791, providing that, when a part of an act, declaration, or conversation is given in evidence by one

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

party, the whole of the subject may be inquired into by the other, and, when a detailed act, declaration, conversation, etc., is given in evidence, any other act or declaration necessary to explain it is admissible, while the explanatory act, etc., and that to be explained, need not have occurred at the same time, yet where the explanatory matter is not a part of the conversation, etc., already inquired into, it must be a statement, etc., which is necessary to explain the acts or statements introduced by the other party in order to be admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 802-808; Dec. Dig. § 861.*]

13. CRIMINAL LAW (§ 956*)—NEW TRIAL—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

On motion for new trial in a homicide case, on the ground that a juror had stated in the jury room that accused was guilty, and the jury would know so if they knew him as well as the speaker, affidavits *held* to sustain a finding that the juror did not make the alleged improper statements.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 956.*]

14. CRIMINAL LAW (§ 1158*)—APPEALS—FINDINGS—CONCLUSIVENESS.

The appellate court will not disturb the trial court's findings upon evidence relative to the misconduct of a juror in the jury room, unless his decision is clearly wrong.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3071; Dec. Dig. § 1158.*]

15. HOMICIDE (§ 254*)—MURDER—SUFFICIENCY OF EVIDENCE—SECOND DEGREE MURDER.

Evidence in a murder case, in view of the trial court's refusal to grant a new trial, *held* to sustain a verdict of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 254.*]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

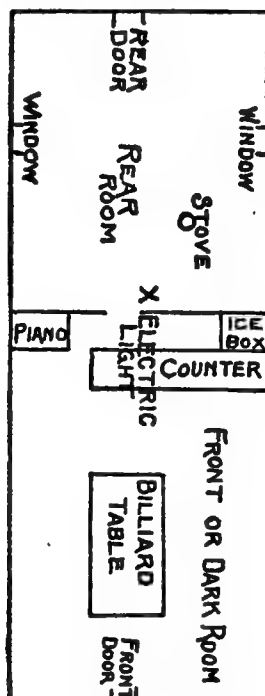
Fred Potts was convicted of murder in the second degree, and he appeals. Affirmed.

Jos. L. Cobb, Cecil H. Smith, and Jno. C. Wall, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Grayson county on a charge of murder. On May 14, 1908, he was found guilty by the jury of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 10 years. He promptly filed a motion for a new trial, which contains many grounds, and has duly prosecuted his appeal to this court.

The facts of the case are involved in much doubt and obscurity; and, while we cannot say that the evidence is so inconclusive as would justify us in reversing the case for lack of testimony to support the verdict, it must be confessed that it is more or less fragmentary and far from satisfactory. The testimony in brief shows that on the night of January 13, 1908, in a house occupied by appellant and one Mose Williams, which was used as a poolroom, about 11 o'clock at night a young negro named Bertram Dudley was killed. Soon thereafter both

appellant and one Ed Pitts were indicted. The house where this killing occurred was situated not far from the depot of the Missouri, Kansas & Texas Railroad Company, and fronting east. In the front room of this house there was a pool table, and in the rear room soda water and other drinks were sold, and in this rear room was also situated a stove. The following is a fairly correct diagram of the house:



BRANCH STREET

There was a door in the front of the house, one in the west or rear end, and a partition door in the center between the two rooms. On the night of the killing, deceased, who was a young fellow some 18 or 19 years of age, with a number of other negroes, were in the back room. The evidence shows that Ed Pitts had come to the place early in the evening, and was generally troublesome, and apparently seeking a difficulty with some one, and apparently not caring with whom. At first appellant interfered as a peacemaker, and sought to control him. After some noisy and quarrelsome talk, Pitts left the place and came back soon thereafter with a Winchester

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rifle and pistol. Some time after his return, he came into the back room of the building in question, where deceased was near the stove. There was a stick leaning up against the wall near the stove and near where deceased was. Pitts asked him who put that stick there, to which Dudley replied that Fred Potts had put it there. In the meantime, or about this time, the deceased put his hand on the counter standing near by, when Pitts made a stab at his hand with a knife, and some remark was made about his being liable to cut deceased, when Pitts without provocation grabbed up the stick and struck Dudley a violent blow, whereupon Dudley ran to the partition door into the front room, known as the "poolroom." The evidence showed that some few minutes before this defendant had gone into this room and had put out the light there. Just how long he had been out of the west room before the difficulty between deceased and Pitts occurred the evidence does not disclose, nor does the testimony disclose just what he had been doing in the meantime. That he was in the room, if the testimony is to be believed, is certain from the fact, soon after the shooting, which occurred almost immediately after deceased rushed into the front room, he opened the front door. There were probably some four or five shots fired. The evidence makes it pretty certain that the second shot which was fired was the shot that killed Dudley. The evidence tends to show that appellant could not have fired more than two of these shots. Williams, the principal witness against him, testified that there were four cartridges in the pistol when Potts got it, and that two of these yet remained in the pistol after the difficulty. There was no ill will or misunderstanding of any kind shown between deceased and appellant, nor does the evidence suggest any motive for the killing on appellant's part. Deceased was shot in front. He made a dying declaration to his mother, to the direct effect that Fred Potts had shot him, though soon after the shooting he made a statement to other persons that Ed Pitts had shot him. But, however, in respect to one of these statements, when Pitts protested he had not shot him, he said: "Well, you know Fred Potts shot me." Mose Williams testified that, soon after the shooting, Potts stated to him that he had fired two of the shots, though he qualified this statement by the explanation that, when he fired, he thought that Pitts was about to do some injury to him,—Williams. The evidence shows as stated above that, when Pitts and deceased ran out of the rear room, Pitts was behind and deceased in front. It is difficult to understand how, since deceased was shot in front, such wound could have been made from the pistol of Ed Pitts. His explanation that, when he fired the shot, he thought Pitts was about to do Williams some injury, seems im-

probable, since Williams had turned Pitts loose some time before any shot was fired. This is probably as strong a statement of the incriminating facts as the proof from any point of view would justify, and is made so that the subsequent discussion of the legal questions may be more readily apprehended. There are a number of questions raised in the record, some of which we will not undertake to discuss. They have all been carefully investigated, and neither the novelty, difficulty, nor importance of them are such as we think require discussion.

1. It is urgently insisted that the court erred in not charging the law of circumstantial evidence. On this question appellant tendered a proper charge, if such instruction was demanded by the facts. Appellant relies largely on the case of Trejo v. State, 45 Tex. Cr. R. 127, 74 S. W. 548. That case is in some respects not unlike the case at bar, but there is this difference: There was in the Trejo case, supra, no unequivocal admission by appellant that he had shot the deceased. The remark testified to in the case was: "Hist, Celestina, be careful not to say that I did it." The court, as will be apparent from an inspection of the opinion, held that this was not of necessity an unequivocal admission that Trejo had fired the fatal shot, but was consistent perhaps with an appeal or exhortation of Trejo not to go beyond the truth or from enmity or ill will ascribe the killing to him. The court says, in order to justify the trial court in not charging upon this phase of the law, it must be taken as certain, first, that the witness Aguilar testified truthfully; and growing out of that, secondly, that appellant was at the window as testified by her; and, thirdly, that his remark to her was a confession of the killing. We think it is the rule beyond doubt that where, as in this case, there was unequivocal admission of the shooting, that a charge on circumstantial evidence is not required. In addition to this confession, the dying declaration of deceased, as testified to by his mother, was, among other things, as follows: "In that conversation he said he knew he could not live. I asked him who killed him, and he said Ed Pitts hit him across the head with a stick and Fred Potts shot him." This statement assumes positive knowledge, and is only to be understood as a direct and positive assertion of fact within the knowledge of the deceased. We think, in view of the above testimony, the court was not required to give a charge on circumstantial evidence.

2. That ground of the motion for a new trial complaining that the court erred in refusing to grant a continuance cannot, of course, be considered, because there is no bill of exceptions in the record saving the point.

3. Serious complaint is made that the

court erred in charging on the law and submitting the issue of murder in the first degree. We do not believe that murder in the first degree was raised by the evidence. Appellant, however, was acquitted of this grade of homicide. It is well settled by such an unbroken line of authorities as require no citation that, where on a charge for murder appellant was acquitted of murder in the first degree, he cannot complain either of the fact that such degree of murder was submitted or of errors in respect thereto. This is the settled law of this state.

4. Again, appellant makes vigorous complaint of the action of the court in charging on murder in the second degree on the ground that this grade of homicide was not raised in the evidence. To this conclusion we cannot agree. If, in fact, Fred Potts shot young Dudley, and the killing was not in self-defense, we cannot see how under the evidence in this case it could be anything less than murder in the second degree. The law implies malice from the fact of an unlawful killing in the absence of proof of express malice, and where there is nothing in the evidence to reduce the grade of homicide to manslaughter or some lesser degree. It is not the law, as we have frequently held, that every killing done from a rash and inconsiderate impulse is manslaughter, but, to reduce an unlawful killing to the grade of manslaughter, adequate cause must always exist which renders the mind incapable of cool reflection. There is no suggestion in this case of adequate cause.

5. If we are correct in the conclusion announced in the preceding paragraph, it would follow that manslaughter was not in the case, and that the court was not required under the facts of the case to charge on manslaughter at all. If, however, it should be conceded that manslaughter was in the case, then an examination of the charge on this issue convinces us that it is practically beyond just criticism.

6. Some complaint is made of the charge of the court in submitting the issue of the right of defendant to kill in defense of another. We think this issue was distinctly raised in the evidence. There was no pretense in the testimony that appellant shot in his own self-defense. The substance of the testimony of Williams is that Potts told him that he had fired two shots, but that he thought that Ed Pitts was assaulting him—Williams. On this question the court charged the jury as follows: "Homicide is justifiable when done by one person to protect another person from death or serious bodily injury, but such killing must reasonably appear, viewed from the standpoint of the person doing the killing, to have been necessary in order to resist an assault apparently violent and imminent towards the person about to be injured. Upon this issue the questions for the jury to determine from the facts and circumstances in evidence are: Was the one in whose behalf

the slayer acted in present danger of great bodily harm at the time of the killing? Was the homicide committed in a bona fide effort to preserve the person thus threatened from impending danger? One person may act in defense of another person to the extent of taking life, not only when such person's life may be seriously threatened, but he may so do when the infliction of a serious bodily injury is threatened and the danger is imminent and pressing. If a person under such necessity shoots to protect one in such danger, and by accident kills still another person who was not making the assault against the party whom he interferes to protect, a killing under such circumstances would be justifiable. If, therefore, you believe from the evidence beyond a reasonable doubt that the defendant did shoot and thereby kill deceased, but you further believe from the evidence that at the time of the killing it reasonably appeared to defendant, viewed from his standpoint alone, one Ed Pitts was making a violent assault upon Mose Williams, from which assault, if any, it reasonably appeared to this defendant that the said Mose Williams was in danger of death or of suffering serious bodily injury at the hands of the said Ed Pitts, and you further believe from the evidence that under such conditions this defendant shot at Ed Pitts and thereby killed deceased, Bertram Dudley, then such killing would be justifiable, and, if you so believe, or have a reasonable doubt thereof, you will acquit the defendant and say by your verdict not guilty." This was a correct and sufficient submission of this issue, and failure of the court to submit this issue would, as we believe, under the testimony, have been reversible error.

7. After the jury had retired and while deliberating in respect to their verdict, through their foreman they made of the court in writing the following request: "Please send us the bullet that was taken from the body of Bertram Dudley; also the one cut from the 32-caliber cartridge." On receipt of this communication, the bill recites, the court refused to send the bullet into the jury room, but had the jury brought into the courtroom and permitted those of the jury who wished to examine said two bullets. Before this was done, the defendant objected both to the bullets being sent into the jury room, and also to the jury examining the bullets in the presence of the court, on the ground that the same was immaterial, irrelevant, prejudicial to the defendant's rights, and that the jurors thereby might form conclusions of their own not warranted by any evidence in the case; but the court overruled said objections, and permitted the jurors to examine the bullets in the manner above stated. In this connection it should be remarked that much importance was attached by the state to the kind of bullet and size of the bullet found in and taken from the body of the deceased. The evidence tended to show that the kind

of bullet which killed deceased would not have fitted and could not have been fired from the arms which Pitts had, but would have fitted and was the same character of bullet found in and which could be fired from appellant's pistol. Indeed, this was one of the strong inculpatory facts. In approving this bill the court further states that the two bullets in question had been admitted in evidence during the trial, but through inadvertence of the county attorney had not been handed the jury for inspection, and, when the above written request from the jury came to the court, the court had the jury seated in the box, and in the presence of defendant and his counsel permitted the jury to inspect the bullets as detailed above. Then the jury was sent back to their room, but were not permitted to take the bullets with them. We not only feel and find that there is no error in these proceedings, but think the court should be commended for the careful safeguarding of the rights of the accused. The course pursued by him in having the jury examine these bullets in his presence was a more certain safeguard to the rights of appellant than if they had been sent to them in their room. By this course every possibility of mistake or any exchange of the bullets was safely guarded.

8. Objection was made on the trial to the action of the court in permitting the witness Williams to testify over appellant's objection as to the character of the building in which deceased was shot; that is, the purpose for which it was used. The question propounded to him was as follows: "What kind of a business did you and the defendant run?" The answer was: "It was a pool hall." The objection to the question and answer was that the same was immaterial, irrelevant, did not tend to prove any issue in the case, but tended only to prejudice the rights of the defendant. As stated by the court in his explanation of the bill, the full answer of the witness was: "It was a pool hall. I mean by that we had pool tables." While perhaps it was unnecessary to produce this evidence, we can readily understand how natural it was to do so by way of accounting for the presence of the deceased there as well as for the purpose of showing the relation and connection between the witness and appellant. It seems they were partners in the business, and had been for some time.

9. A more serious question is presented by appellant in respect to his effort to put in evidence some conversation between Williams and himself. The bill evidencing this matter recites substantially that after the witness Mose Williams had been recalled by the state, and on cross-examination had testified that he saw Fred Potts immediately after the shooting occurred, and went with him to the Dupree house, where the deceased had been carried, the following question was propounded to him by appellant's counsel: "I will ask you if Fred [meaning

the defendant] did not tell you then and there that, when the shooting began, he was talking to Beatrice Peavy at the front door?" To this question the state objected on the ground that same was irrelevant, immaterial, hearsay, and self-serving. If the witness had been permitted to answer, he would have said in response to said question, "Yes." The testimony, if permitted, would have been favorable to the appellant. In allowing this bill the court makes the following explanation: "This witness Mose Williams in examination by the state had testified that immediately after the shooting in the room where the deceased was killed he saw Fred Potts and the deceased together, and that witness asked Fred Potts, the defendant, for the pistol; that the defendant then told witness he had fired some shots; that defendant gave witness the pistol, and that the defendant then left the place of the shooting; that witness then took deceased to a neighbor's house, and came back to the place of the shooting, and examined the pistol and found that it had been fired two times. After this he met defendant on Mulberry street, when the conversation occurred that was asked about in this bill of exception; that it was five or ten minutes after the shooting, and was not a part of any conversation asked about by the state. The state objected to it because it was immaterial and irrelevant, self-serving, no part of the *res gestae*, and no part of any conversation introduced by the state, which objections were sustained." We had occasion to discuss at some length a question quite like this in the recent case of *Pratt v. State*, 53 Tex. Cr. R. 281, 109 S. W. 138. Article 791 of our Code of Criminal Procedure of 1895 is as follows: "When part of an act, declaration or conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, as when a letter is read, all other letters on the same subject between the same parties may be given. And when a detailed act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood or to explain the same may also be given in evidence." In the case of *Greene v. State*, 17 Tex. App. 395, it is stated that this article expands the common-law rule with reference to such evidence; that at common law, when a confession or admission is introduced in evidence against a party, such party is entitled to prove the whole of what is said on the subject at the time of making such confession or admission. The article above referred to, however, does not restrict the explanatory act, declaration, conversation, or writing to the time when the act, declaration, conversation, or writing sought to be explained occurred; but extends the rule so as to render such acts or statements admissible, if necessary to a full understand-

ing or to explain the acts or statements introduced in evidence by the adverse party, although the same may have transpired at a different time, and at a time so remote even as not to be admissible as *res gestæ*. We think the test in all cases where the matter sought to be proved is not a part of the conversation already inquired about is that it must be some statement which is necessary to a full understanding of or to explain the acts or statements introduced in evidence by the adverse party. We think that the matter here sought to be proved cannot in any sense be brought within this rule. The bill before us does not disclose how or in what particular the matter was relevant to the issue before the court, or how or in what manner it could explain the declaration and statement theretofore admitted in evidence.

Finally, appellant most vigorously assails the verdict of conviction on the ground of the misconduct of the jury, in that, as averred, the foreman of the jury, Mr. S. E. Wright, stated in the presence and hearing of the jury, and particularly to one Polk Slaughter and J. H. Wilson, members of said jury, that: "There is no doubt that this negro is guilty. I know him, and he is a mean negro. If you knew what I know, you would know he is guilty." In support of the motion, Mr. Slaughter filed an affidavit in writing, in which he ascribed this language to Mr. Wright. His affidavit further discloses that originally he was for acquittal, and finally agreed to come to a penalty of not more than two years. Mr. Wright, the affidavit recites, used the above argument to him and others two or three times, and the jury could not agree; and Mr. Wright's argument above stated influenced him to come from his decision of an acquittal, of verdict of guilty of manslaughter with a penalty of two years, to a verdict of murder in the second degree with a penalty of ten years. The affidavit of Mr. Wilson was not so strong. It is, in substance, as follows: "That after the jury retired to consider of their verdict, and after one S. E. Wright had been selected as foreman of the jury, the said S. E. Wright, immediately after being selected foreman, said to the jury: 'There is no doubt but that the negro [meaning Fred Potts] is guilty of murder.' This statement was challenged by one or two others, and then the jury began to discuss the case. During the discussion of the case in the jury room the said S. E. Wright on two different times made this remark: 'If you all knew as much about this matter as I do, you would know the defendant was guilty.' He used this argument on two different occasions that I remember. Each time when I would ask him if he knew anything the testimony did not disclose, he would say 'No.'" It will thus be seen there is an irreconcilable conflict in the affidavits of the two jurors in respect to the statement of Mr. Wright. According to the affidavit of Wilson, there was an express disclaimer of

Wright that he knew any fact in respect to the case not disclosed by the evidence.

The matter was investigated by the court, and among other persons Mr. Slaughter was sworn, who, in substance, confirmed the facts set out in his affidavit, though there is not only some confusion and contradiction in his testimony in respect to what Wright said about the matter, but also considerable contradiction as to when and how the conversation occurred. The following quotation will show the contradictory statement: "The thing that influenced me was this: Mr. Wright first stated as foreman that the defendant, Fred Potts, was a mean negro, and that, if we knew him like he did, we would give him 99 years. He just spoke as if he knew him personally. Well, yes; he said that the evidence showed, went on to talk about that place down there, the occurrence, discussing the evidence, and stated that the evidence showed that he was a bad negro—mean negro. He just spoke as if he knew him personally. I believe he said that the evidence showed that he was a mean negro, and ought to be hung, or sent to the penitentiary for 99 years. I believe that was about what he said."

The juror Wright was sworn, and on hearing before the court stated that he believed defendant was guilty of murder in the first degree and was in favor of the death penalty; that, when the jury first went out, two of them were for hanging, some of them for five years, and some for fifteen years. He further states: "I did not make any statement in the jury room as to my personal knowledge of the defendant. I might have known the defendant in a general way. I have known a good many of those Potts negroes, but I have no recollection of him at the time. I did not make any statement in the jury room to any juror, or to all the jurors, that, if they knew the defendant as well as I did, they would want to hang him or give him 99 years, or something of that sort. Nothing of that sort occurred."

R. L. Thompson, another one of the jurors, was sworn, and testified, in substance, that he heard some one say that he knew Fred Potts; that Fred had worked for him some time; that he did not hear this man say that Fred was a bad negro or mean negro, and nothing was said about Fred's character that he heard.

J. H. Johnson, another of the jurors, testified that, while they were considering their verdict, he did not at any time hear Mr. Wright state that he knew the defendant, and that the defendant was a mean negro, and was guilty of murder and ought to be hanged or anything of that kind.

J. B. Curry, another juror, testified to the same effect, as well as one Meyers. In fact, Slaughter's statement found no support in the testimony of the other jurors, but was distinctly denied by practically all of them. The juror Wilson, whose affidavit was at-

tached to the motion for a new trial, was not sworn, and we note a number of the other jurors were not accounted for. We think the rule with reference to granting new trials on account of discussions and statements by jurors in the jury room has already been carried too far. In this case the matters were investigated and the evidence heard by the court. The statement and testimony of Slaughter in respect to the matter was contradictory and confusing. There was an unqualified denial by all the other jurors. The court hearing these jurors, with better opportunity than we can have for determining their credibility, intelligence, and weight of their testimony, has held this issue adversely to appellant. We believe that his decision was correct under the facts. In any event, it is obvious under the well-settled rule controlling us that we should not interfere with his decision unless it was clearly wrong.

There are other questions in the case, but they are not of such importance as to demand a discussion. It may be an injustice has been done this defendant, but there are some circumstances in the case from which an inference and conclusion of his guilt might in fairness have been drawn by the jury, and, in view of the learned court permitting the verdict to stand, we do not feel that we should interfere; and it is therefore ordered that the judgment of the court below be, and the same is hereby, in all things affirmed.

MORRISON v. STATE.

(Court of Criminal Appeals of Texas. April 14, 1909.)

BLASPHEMY (§ 1*) — SWEARING IN "PUBLIC PLACE"—NATURE OF OFFENSE.

A reply by accused to the district attorney, while testifying before a grand jury, "It is none of your damn business," etc., did not constitute swearing and cursing in a "public place."

[Ed. Note.—For other cases, see *Blasphemy*, Dec. Dig. § 1.*

For other definitions, see *Words and Phrases*, vol. 6, p. 5810; vol. 8, p. 7773.]

Appeal from Mitchell County Court; A. J. Coe, Judge.

Tom Morrison was convicted of unlawfully swearing in a public place, and he appeals. Reversed.

Thurmond & Robinson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged in the county court of Mitchell county with the offense of unlawfully and willfully swearing and cursing in a public place, to wit, the grand jury room in the courthouse of Mitchell county, Tex., in a manner calculated to disturb the inhabitants thereof, and his punishment assessed at a fine of \$10.

The facts show, in brief, that he was summoned before the grand jury of Mitchell county and interrogated at some length in reference to offenses thought to have been committed in his community, and with special reference to certain persons named by him in his testimony. Among other things, after stating that he knew one Jim Brown, the district attorney asked him how many cattle Jim Brown had, and appellant replied, "About 100 head," and he was thereupon asked by the district attorney if Jim Brown owed anything on his cattle, to which question appellant replied, suddenly and angrily, and facing said district attorney, "It is none of your damn business; it looks like you are trying to inquire into mine and my boy's private business." The use of the language attributed to appellant is admitted by him, with the statement that he thought at the time that the district attorney was trying to pry into his and his son's business, and at the time he was talking in an ordinary tone of voice, like he was when delivering his testimony. He had nothing against any member of the grand jury, but that the district attorney was trying to pry into his son's business, and this was the reason he stated to him that it was none of his damn business.

1. A number of interesting questions are raised in the motion for a new trial—among others, the contention that, the truth or falsity of the testimony of a witness before the grand jury not being an issue, the grand jurors could not, under the law, testify to what was said or done in the grand jury room while they were in session. In view, however, of the entire record, we believe a conviction under the evidence cannot be sustained, and it becomes unnecessary to decide this question. In the case of *Lumbkin v. State*, 12 Tex. App. 341, appellant was prosecuted on an indictment which, among other things, charged that he did swear and curse in a manner calculated to disturb the inhabitants of a private residence. It seems that appellant in that case denounced the prosecuting witness as the "meanest damndest man on the mountain side" and as a "damn rascal." Judge Hurt, in passing on this case, says, after discussing other questions: "We are also of opinion that the evidence is not sufficient to support the verdict." See, also, *Carr v. City of Conyer*, 84 Ga. 287, 10 S. E. 630, 20 Am. St. Rep. 357. That the conduct of appellant was contumacious and probably a contempt, for which, on presentation, he could and should have been rebuked and punished by the district court, is doubtless true; but we scarcely think that the language used comes, under the decisions, within the purview of the statute.

For this reason, it is ordered that the judgment of conviction be, and the same is, hereby reversed, and the cause remanded.

BAKER v. STATE.

(Court of Criminal Appeals of Texas. April 14, 1909.)

1. INCEST (§ 14*)—SUFFICIENCY OF EVIDENCE.
Evidence in a prosecution for incest held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Incest, Dec. Dig. § 14.*]

2. CRIMINAL LAW (§ 1177*)—VERDICT—HARMLESS ERROR.

The error in assessing punishment at "seven years in the penitentiary," instead of "seven years' confinement in the penitentiary," is harmless.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1177.*]

3. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where the evidence in a prosecution for incest shows that accused had carnal intercourse with the complaining witness, resulting in conception, whether the court correctly defined carnal knowledge is immaterial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

4. CRIMINAL LAW (§ 429*)—EVIDENCE—DOCUMENTS—MARRIAGE LICENSE.

A marriage license and return which comply with the law are admissible in evidence, although there is no evidence that the person performing the marriage ceremony was a justice of the peace, except his own statement following his signature.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 429.*]

Appeal from District Court, Bell County; John M. Furman, Judge.

A. F. Baker was convicted of incest, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Bell county on a charge of incest with one Eula Faublon, the daughter by former marriage of his then wife.

1. That he had had carnal intercourse with this young girl, then about 15 years of age, is established by her testimony and the fact that they were found together in bed at Temple by numerous witnesses under circumstances that left no sort of doubt that they had recently had carnal intercourse. While there is by appellant's wife some contradiction of the alleged incestuous intercourse resulting in a miscarriage, yet the facts in the record leave it in our minds beyond doubt, whatever may have been her relation with other men, that appellant had not infrequently had carnal intercourse with the prosecutrix is too clear for discussion. We cannot, therefore, sustain the first ground of appellant's motion, which is to the effect that the verdict of the jury is contrary to the law and the evidence, and is against the weight and preponderance of the evidence, and without legal or competent evidence to support it.

2. Complaint is also made of the verdict

of the jury, which is claimed to be fatally defective and insufficient, and so insufficient that no valid or legal judgment or sentence can be rendered upon it. The verdict is as follows: "We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment at seven years in the penitentiary." While the motion does not point out the particular defect claimed in the verdict, it is assumed it was thought to be insufficient by reason of the omission of the word "confinement" between the words "years" and "in." While this would have been better expressed if such word had been used, the meaning and intent of the verdict is so obvious that its omission cannot be held fatal.

3. The third ground of the motion is that the court erred in the fifth paragraph of his charge, wherein he defines the term "carnal knowledge." This portion of the court's charge is as follows: "By the term 'carnal knowledge' of a female by a male person is meant that some part of the male organ of generation must have entered some part of the female organ of generation; but the depth or degree of such entry or penetration is immaterial." In view of the fact that the evidence shows that the parties had had carnal intercourse, resulting in conception, it is evident, whether erroneous or not, that in any event the question becomes utterly immaterial and inconsequential.

4. On the trial objection was made to the introduction of a certain marriage license, issued by the county clerk of Lampasas county, and the return thereon, for the reason that the marriage license failed to show that one J. W. Trussell, who purports by the terms of said instrument to be the justice of the peace of precinct No. 4, Lampasas county, Tex., was really such justice of the peace; there being no evidence introduced to show that, at the time the marriage ceremony was performed, he was such officer and had authority under the law to perform marriage ceremonies, save and except his signature thereto, reciting that he was such justice of the peace. The marriage license and return thereon, introduced in evidence, in all respects complied with the law. These licenses, when return is made, are required to be preserved and the return recorded. The return was in proper form, and made by a person purported to be an officer authorized to solemnize the rites of matrimony between the parties. In the absence of a showing to the contrary, the law would presume that the clerk, in accepting the return, had satisfied himself of the official character of the person performing the marriage rites, and in the absence of anything challenging such authority, or the official character of such person, no burden rests on the state to show that he was in deed and in truth such officer. Again, all

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the evidence showed, without doubt or controversy, among others, by the wife of appellant, the marriage in question.

There is no merit, as we believe, in any of the questions raised and we would be utterly without excuse to reverse the case.

It is therefore ordered that the judgment of conviction be, and the same is hereby, in all things affirmed.

ELLIS v. STATE.

(Court of Criminal Appeals of Texas. April 14, 1909.)

CRIMINAL LAW (§ 913*)—NEW TRIAL—STATEMENT OF FACTS—DEATH OF JUDGE.

Where there was an agreed statement of facts filed in a case, the death of the presiding judge, subsequent to the trial and before the statement of facts was made up, was no ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 913.*]

Appeal from Johnson County Court; F. E. Adams, Judge.

Coley Ellis was convicted of violating the local option law, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the county court of Johnson county on a charge of unlawfully selling intoxicating liquors therein in violation of the local option law. On conviction he was fined \$100 and imprisoned in the county jail for 60 days.

That appellant sold intoxicating liquors to the person named in the indictment is placed beyond dispute by the testimony; nor was there any evidence raising the issue, as claimed by appellant, of mere agency. Nor is there any merit in the contention that, because Judge Adams, who was presiding at the trial of the case, had died subsequent thereto and before the statement of facts was made up, this necessarily entitled appellant to a new trial. In this case there was an agreed statement of facts filed. So that it is inconceivable that in this regard any injury or injustice was done appellant by reason of the death of Judge Adams. There is no bill of exceptions in the record, nor is there any claim that appellant was deprived of bills of exception by reason of the death of the judge presiding.

There is no merit in any of the contentions of appellant, and it is clear that the case should be affirmed, which is now done.

WALTERS v. STATE.

(Court of Criminal Appeals of Texas. April 14, 1909.)

ROBBERY (§ 24*)—"ASSAULT WITH INTENT TO ROB"—EVIDENCE.

Evidence held not to show an "assault with intent to rob," within Pen. Code 1895, art.

611, providing that an assault with intent to commit any other offense is constituted by the existence of facts which bring the offense within the definition of an assault, coupled with an intent to commit such other offense.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32-36; Dec. Dig. § 24.*]

For other definitions, see Words and Phrases, vol. 1, p. 544.]

Appeal from Criminal District Court, Harris County; E. R. Campbell, Judge.

George Walters was convicted of assault with intent to rob, and he appeals. Reversed and remanded.

Brockman & Kahn and E. T. Branch, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of assault with intent to rob, and his punishment assessed at two years' confinement in the penitentiary.

The evidence in the case, being the testimony of A. R. Anderson, the only witness, is as follows: "That he, in company with Constable Smith, intended to get on the Ft. Worth sleeper of the Houston & Texas Central Railroad; that about five minutes before the train left he went upon the platform or vestibule of said sleeper; that after he got upon the platform of said sleeper, which sleeper was attached to the rear end of the Dallas sleeper, he encountered appellant and his codefendant Johnson at the doorway leading into said Ft. Worth sleeper, and, to use the language of said Anderson, 'As I went to squeeze through them to get into the sleeper, this man over there that calls himself Walters, he had an overcoat on his arm, he got right in my way, and as I got between him and this other fellow (Johnson) Walters kind of put his coat up this way (indicating by raising his left arm up about level with breast of witness), and ran his hand around and got hold of my stud, and I said, "You damned son of a bitch, what do you mean?" and grabbed hold of him;' and further testified that, as he grabbed hold of Walters, he struck Walters with a small grip he had in his hand and Walters immediately desisted from any further attempt to take the witness' diamond stud, which was screwed into his shirt; and further testified that the diamond stud was not removed from its place in his shirt, and that his shirt was not torn. The first thing that attracted the attention of Anderson was that he felt the attempt to get his stud, and then noticed, in connection therewith, the fact that appellant had his hand up, with his overcoat over it as a shield, and that it was not necessary for the witness to be crowded in getting into the coach, and witness then realized that they were pickpockets, and that an attempt was being made to get his diamond stud; that he was 'jammed' by appellant and said Johnson; that by 'jammed' he meant that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said parties were standing at the doorway of said Ft. Worth sleeper, and that he tried to 'squeeze between them' and get into the sleeper, and that they did not give way and make room for him to pass, as he expected they would do, and that neither of the co-defendants or appellant put their hands on or about him, except that appellant put his hand on witness' diamond stud, and that he felt the hand on the stud, which was the first thing that attracted his attention; that neither of the three men arrested for the attempt to get his stud, Johnson, Garrard, and appellant, said a word before or after the attempt to take the stud; that witness was not put in fear; that no one struck him, or used any violence upon him, or demanded any property from him, and that no weapon other than ordinary pocketknives were found on either of the three men, and no weapon was exhibited; that the three men were jointly indicted, but (appellant having been tried separately) were searched immediately after the arrest by witness and the constable, and that the above circumstances constituted what had occurred; that he so testified on the examining trial, and did so now, and that his testimony as given then and now is true; further, that no evidence of any right to ride on said train was found on either of the three men, and that to get access to said train it was necessary to go through a gate at the depot and exhibit tickets; that appellant was caught and held by witness after he detected his hand on the stud and had struck appellant with the grip; that the whole transaction was quicker than it could be told and was over in a minute."

Appellant insists that the evidence is insufficient to show an assault with intent to rob. Article 611 of the Penal Code of 1895 provides: "An assault with intent to commit any other offense is constituted by the existence of the facts which bring the offense within the definition of an assault, coupled with an intention to commit such other offense, as of robbery." Under the provisions of this article and a long line of authorities of this court we hold that appellant's contention is correct. The case of *Long v. State* (Tex. Cr. App.) 114 S. W. 632, is, in all of its salient features, exactly like the facts disclosed by this record. In that case appellant was prosecuted for theft from the person, and convicted. However, the facts further show in the *Long Case* that a theft was consummated. If the facts in this case had shown that appellant secured the diamond stud, it would have constituted theft from the person. Failing to so show, it does not constitute an assault to rob. For a discussion of the question, see the following authorities: *Johnson v. State*, 35 Tex. Cr. R. 140, 32 S. W. 537; *Rodriguez v. State* (Tex. Cr. App.) 71 S. W. 596; *Tarrango v. State*, 44 Tex. Cr. R. 385, 71 S. W. 597; *Herr*

v. State, 52 Tex. Cr. R. 53, 105 S. W. 190; *Boyd v. State* (Tex. Cr. App.) 29 S. W. 157; *Long v. State*, supra. It follows, therefore, that the evidence is wholly insufficient to support the conviction.

The judgment is reversed, and the cause is remanded.

HARE v. STATE.

(Court of Criminal Appeals of Texas. April 14, 1909.)

1. WITNESSES (§ 301*)—PRIVILEGE OF ACCUSED—EXAMINATION.

Under Code Cr. Proc. 1895, art. 770, providing that accused's failure to testify in his own behalf shall not be taken as a circumstance against him, it was reversible error to permit accused to be asked whether he testified on his former trial for the same offense, which accused answered in the negative.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 301.*]

2. CRIMINAL LAW (§ 721*)—CONDUCT OF COUNSEL—ARGUMENT.

Under Code Cr. Proc. 1895, art. 770, providing that accused's failure to testify for himself shall not be alluded to in argument, it was reversible error for the state's attorney to state in argument that accused's failure to testify on his former trial showed that his testimony in the present trial was false.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1672; Dec. Dig. § 721.*]

3. CRIMINAL LAW (§ 1097*)—APPEALS—CONTENTS OF RECORD—STATEMENT OF FACTS.

Error in requiring accused to testify as to whether he testified on his former trial for the same offense, and in permitting the prosecuting attorney to comment in argument on his failure to testify on the former trial, in violation of Code Cr. Proc. 1895, art. 770, was available to accused, though the record on appeal contained no statement of facts, where the bill of exceptions stated the proof in general terms sufficiently to show the contentions.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1097.*]

4. CRIMINAL LAW (§ 1097*)—APPEAL—RECORD—STATEMENT OF FACTS.

If the bill of exceptions on accused's appeal did not fully state the matters necessary to review errors in admitting evidence or permitting improper argument, so that a statement of facts was essential to review the case, it became the prosecuting attorney's duty to bring up the statement of facts.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1097.*]

Appeal from Criminal District Court, Harris County; E. R. Campbell, Judge.

Will Hare was convicted of burglary, and he appeals. Reversed.

E. T. Branch and A. C. Van Velzer, for appellant. F. J. McCord, Asst. Atty. Gen., and W. G. Love, Dist. Atty., for the State.

RAMSEY, J. Appellant was convicted in the criminal district court of Harris county on the 15th day of March, 1909, on a charge of burglary, and his punishment assessed at confinement in the penitentiary for a period of three years.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. There is no statement of facts in the record, but it appears by proper bill of exceptions that the evidence was sufficient to show: That W. D. Allison was the special owner of the car alleged to have been burglarized, and that same had been burglarized in Harris county, Tex., and certain cigars of the Optimo brand taken therefrom; each box bearing the brand, "Rotan Grocery Company, Cigar Department, Waco, Texas, Distributors." That no eyewitness testified to the burglary, but the evidence as to the breaking was wholly circumstantial. That on the next day appellant was shown to be in possession of such cigars, of the market value of 6½ cents each, and to be selling them for 1 cent each, and that he had signed a fictitious name to a receipt to a party to whom he had sold some of the cigars, and that he had sold and offered for sale said cigars to several parties; the state's evidence being prima facie sufficient to show him guilty by circumstances. The bill also recites that at a former term of this court in December, 1908, the appellant had been tried for the same offense, and at said trial had been convicted, and a new trial thereafter granted, and had not on such trial become a witness in his own behalf, and that on the trial from which this appeal results he was placed on the stand as a witness in his own behalf and testified in substance that he had been employed to sell said cigars by one Buck Moore, Jr., and that he did not break into said railway car, but was in bed at the time same was broken into and was not present at such breaking. There was no additional testimony adduced by him, or further questions asked him by his counsel. Thereupon the district attorney asked appellant the following question: "You did not take the stand on the former trial of this case at the December term, did you?" To which question and answer sought to be elicited thereby his counsel objected, on the ground that it was a reference to his failure to testify on said former trial, and could not be taken as a circumstance against him. The court overruled the objection, and the witness answered in the presence of the jury, "No;" such evidence and answer being offered by the state to show that appellant's testimony was false and a recent fabrication. A somewhat similar bill appears in the record and complains of the argument of the district attorney in discussing the fact of the failure of appellant to take the stand in his own behalf on the former trial. This argument was to the effect, in substance, that the failure of appellant to take the stand on the former trial showed that his claim was a fabrication.

We think the action of the court in permitting the question to be asked and requiring appellant to answer thereto was erroneous, and that the discussion of this testimony and answer of appellant by the district attorney was also erroneous, for which

the case must be reversed. Article 770 of our Code of Criminal Procedure of 1896 provides that "any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause." It has been uniformly held by this court that this statute is broad enough to cover and does cover the proceedings on a former trial. From this ruling there has been no exception in the cases, and we have no doubt that this is a correct construction of the statute. See *Richardson v. State*, 33 Tex. Cr. R. 519, 27 S. W. 139; *Dorrs v. State* (Tex. Cr. App.) 40 S. W. 811; *Bradburn v. State*, 43 Tex. Cr. R. 309, 65 S. W. 519; *Pryse v. State* (Tex. Cr. App.) 113 S. W. 938; *Wilkins v. State*, 33 Tex. Cr. R. 320, 26 S. W. 409; *Templeton v. People*, 27 Mich. 501; *Miller v. State*, 45 Tex. Cr. R. 517, 78 S. W. 511. It is urgently contended by the state that this statute should have no application in any case where on any trial the defendant takes the stand in his own behalf, and the proposition submitted by our Assistant Attorney General is as follows: "When a defendant at any trial during the progress of any criminal action takes the stand as a witness in his own behalf, he takes himself out of the protection of the statute which forbids reference to the failure of the defendant to testify in a criminal action, and occupies the position of any other witness, and may be cross-examined and subjected to the same tests and rules affecting his credibility and the weight of his evidence as would apply to any other witness." We have, indeed, in many cases stated and held that when a defendant takes the stand he is subject to the same rules on cross-examination that all other witnesses are subjected to. *Mirando v. State* (Tex. Cr. App.) 50 S. W. 714. This language, however, is always subordinate and to be read in harmony with the other decisions which prevent and condemn a violation of a statutory right. There is no conflict between the ordinary rule and the rule to be applied in a case like the one at bar. We think the contention of appellant, stated in his brief, is manifestly correct, and that to construe the statutory inhibition as applying only to the present trial would render it dangerous to any citizen's case if his counsel decided not to put him on the stand, when, if a subsequent trial was had, the state's case might be stronger and require defendant's testimony, and his previous silence (when he had a right to be silent) be used as an indication of fabrication. Such a construction would destroy the presumption of innocence. The matter has been so frequently discussed by this court, and is so firmly fixed as the unbroken rule of the decisions of this tribunal, that it requires no further discussion.

2. Nor can we accede to the suggestion

In general terms, the proof on the part of the state and the nature and character of appellant's defense, and is sufficient to illustrate the contention of the respective parties, and is, as we believe, rather to be commended than condemned. It is the rule of this court, settled beyond dispute, that the statute above quoted is mandatory. Such, also, is the rule in other tribunals. It is thus stated in 12 Cyc. p. 576: "A statute which provides that the neglect or refusal of the accused to testify shall not be commented upon by the prosecuting attorney is usually mandatory." Again, if it was thought that a statement of facts was essential to a proper review of a case, and that the matter was not fairly or fully stated in the bill of exceptions, and could not be so stated, it would become the duty of the prosecuting officers to bring up the statement of facts on appeal.

For the reasons stated, we think that the judgment of conviction must be reversed; and it is so ordered.

CASSENS v. STATE

(Court of Criminal Appeals of Texas. April 14, 1909.)

CRIMINAL LAW (§ 1020*) — APPEAL — JUDGMENTS APPEALABLE.

A judgment of the county court in a criminal case appealed from a justice court is final and not appealable when the fine is under \$100.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2578-2580; Dec. Dig. § 1020.*]

Appeal from Williamson County Court; Chas. A. Wilcox, Judge.

G. Cassens was convicted of crime, and he appeals. Dismissed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This case was tried originally in the justice court, from a conviction in which an appeal was taken to the county court. The trial in the latter court resulted in a conviction, with a fine of \$25; the charge being the sale of intoxicants to a minor.

Motion is made to dismiss the appeal because of the fact that the fine was under \$100. This being true, the case was a finality in the county court. Under the law this motion is well taken. See *Nelson v. State*, 33 Tex. Cr. R. 379, 26 S. W. 623; *Tison v. State*, 35 Tex. Cr. R. 360, 33 S. W. 872; *Mahanay v. State* (Tex. Cr. App.) 60 S. W. 756.

The motion to dismiss is granted, and the appeal is dismissed.

CRIMINAL LAW (§ 1020*) — APPEAL — JUDGMENTS APPEALABLE.

A judgment of the county court in a criminal case appealed from a justice court is final and not appealable when the fine is under \$100.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2578-2580; Dec. Dig. § 1020.*]

Appeal from Williamson County Court; Chas. A. Wilcox, Judge.

Enno Cassens was convicted of crime, and he appeals. Dismissed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This case originated in the justice court. From a conviction, appeal was taken to the county court. In the latter court a fine of \$25 was the result of the trial, and notice of appeal given to this court.

The fine being under \$100 in the county court, it became final, and the appeal is not authorized to this court. See *Nelson v. State*, 33 Tex. Cr. R. 379, 26 S. W. 623; *Tison v. State*, 35 Tex. Cr. R. 360, 33 S. W. 872, and *Mahanay v. State* (Tex. Cr. App.) 60 S. W. 756.

The motion to dismiss the appeal is sustained.

McKALLIP v. COLLINS BROS.

(Court of Civil Appeals of Texas. March 19, 1909.)

1. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS—PROPOSITION AND STATEMENT.

An assignment of error, not followed by proposition or statement, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence, supported by corroborating circumstances, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

Appeal from Harris County Court; A. E. Amerman, Judge.

Action between J. C. McKallip and Collins Bros. From a judgment for the latter, the former appeals. Affirmed.

S. Talliaferro and G. L. Teat, for appellant. W. J. Howard, for appellees.

REESE, J. The findings of fact of the trial court are substantially supported by the evidence, and the assignments presenting objection thereto are overruled.

The second assignment of error is not followed by proposition nor statement, and will

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not be considered. It relates, moreover, to a ruling of the court in the admission of evidence, to which no bill of exception appears to have been taken.

None of the assignments of error presents sufficient grounds for reversal of the judgment. The case simply involves a question of fact as to the terms of the contract under which the furnace was repaired, upon which the evidence was conflicting. The court accepted appellees' testimony, with the corroborating circumstances, as to this fact, instead of that of appellant and his wife. In such case it is not the province of the appellate court to substitute its judgment for that of the court or jury trying the case.

Finding no error, the judgment is affirmed. Affirmed.

WAGGONER v. SNEED.†

(Court of Civil Appeals of Texas. Jan. 16, 1909. Rehearing Denied Feb. 27, 1909.)

1. JURY (§ 149*)—DISCHARGE PENDING TRIAL—SICKNESS—FILLING JURY.

Completing a jury by summoning talesmen, where pending a trial a juror is incapacitated by sickness for sitting, is error, not being expressly authorized by Rev. St. 1895, arts. 3221, 3224, the only express authority for summoning talesmen, and being impliedly forbidden by article 3225, providing that in case of a juror being so incapacitated the remainder of the jury can render the verdict, which, however, shall be signed by every remaining member.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 635-637; Dec. Dig. § 149.*]

2. TRIAL (§ 266*)—INSTRUCTIONS—REQUESTS.

On a party requesting a number of special charges based on any given group of facts, the court need not select the one most favorable to the party; but, either being given, he may not complain of the refusal of the others, though the one given be less favorable than he would be entitled to on the issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 663-667; Dec. Dig. § 266.*]

3. MASTER AND SERVANT (§ 157*)—[INJURY TO SERVANT—TIMELY WARNING OF DANGER.

If defendant's foreman warned plaintiff in time for him to have removed his hand from the place of danger, and plaintiff heard the warning, this would be a defense, as the jury should be instructed, whatever be the proper denomination of such defense.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 157.*]

4. TRIAL (§ 244*)—INSTRUCTIONS—UNDUE PROMINENCE OF PARTICULAR FACTS.

The same matter of defense should not be submitted by separate charges as assumed risk and contributory negligence, as that would be unnecessarily to give prominence to that group of facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTING FURTHER INSTRUCTIONS.

A charge, though not as favorable to defendant as he would be entitled to have, is not for that reason alone erroneous.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 256.*]

6. MASTER AND SERVANT (§ 235*)—DEFECTIVE APPLIANCES—DISCOVERY BY SERVANT.

An employé is not required to exercise diligence to discover defects in appliances furnished by the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 713, 714; Dec. Dig. § 235.*]

7. MASTER AND SERVANT (§ 295*)—INSTRUCTIONS—ASSUMPTION OF RISK—DEFECTIVE APPLIANCES.

The defense of a master against his negligence in using a defective rope, by the breaking of which plaintiff, his employé, was injured, that plaintiff knew or should have known of its condition, cannot be more fairly presented than by the ordinary charge of assumed risk; that is, if plaintiff knew of its defective condition, or in the exercise of ordinary care for his own safety in the prosecution of his work would necessarily have known of it, he could not recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Action by A. H. Sneed against W. T. Waggoner. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

M. Spoonts, Stephens & Miller, and R. W. Hall, for appellant. McLean & Carlock, for appellee.

SPEER, J. This is a personal injury suit instituted by appellee against appellant, in which there was judgment for the plaintiff in the sum of \$10,000, and the defendant has appealed.

The question of first importance in the case is one of practice, arising on the court's ruling in causing talesmen to be summoned to fill the panel, which had been broken by the sickness of one of the jurors regularly selected. The matter is so clearly presented by appellant's bill of exceptions that we venture to quote at length from the bill itself:

"The above styled and numbered cause was regularly reached and called for trial on, to wit, Monday, October 28, A. D. 1907, and thereupon both parties announced ready for trial, and there was at the time of said announcement of ready for trial in attendance upon said court 12 jurors who had been regularly selected in accordance with law for jury service in said court for week beginning Monday October 28, 1907, whose names are as follows, to wit: Leo Pittman, B. R. Owens, W. G. Ballinger, W. N. Shofit, T. M. Mallory, M. A. Jernigan, F. O. Freeman, D. C. Curtis, J. R. Brothers, S. J. Lotsputch, and J. H. Walker. And thereupon the court directed the deputy sheriff waiting upon said court to summon a sufficient number of persons qualified for jury service as talesmen and complete said panel, and, in obedience to said direction and order of the court, said deputy sheriff summoned nine persons possessing the qualifications of jurors as talesmen, whose names are as follows:

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error dismissed by Supreme Court March 31, 1909.

J. W. Burton, John Behrens, Bert Betschel, J. W. Sherley, O. L. Bandy, Ben Waggoman, J. G. Bewley, J. S. McDonough, and J. C. Pliant. None of the 21 persons whose names are above mentioned disqualified, and thereupon the defendant requested the court to require the panel to be filled with 24 qualified jurors, before he was required to exercise peremptory challenges; but the court refused said request and compelled the parties to exercise such peremptory challenges as they desired to make without the panel of jurors being filled and completed, to which action of the court the defendant then and there in open court excepted, and in obedience to the direction of the court the defendant exercised his right of peremptory challenge and challenged 6 of said persons who were objectionable to him as jurors and whose names are as follows, to wit: M. A. Jernigan, S. J. Lotsputch, J. M. Trammill, J. H. Walker, C. L. Bandy, and J. C. Pliant. And thereby defendant exhausted all of his peremptory challenges, the plaintiff used only 3 of his peremptory challenges in striking said panel of 21 jurors, and from said panel a full jury of 12 persons possessing the qualifications of jurors were selected to try the above styled and numbered cause, whose names are as follows, to wit: B. B. Owens, W. G. Ballinger, W. N. Shoffit, T. N. Mallory, D. C. Curtis, J. R. Brothers, J. W. Burton, John Behrens, Bert Betschel, J. N. Sherley, J. G. Bewley, and J. S. McDonough and the above 12 named persons were regularly sworn as required by law to try the said cause, and were regularly, duly, and properly impaneled as jurors in said cause. Thereupon the plaintiff read to the jury his pleadings, consisting of his first-amended petition and his trial amendment, and the defendant read to the jury his first-amended answer, to which said pleadings the parties announced ready for trial, and on which they went to trial, and on which this cause was tried. At the time when the pleadings of the parties were presented to the jury as above set out, the regular time for the adjournment of this court for that day, to wit, October 28, 1907, had arrived, and thereupon the court after properly instructing said jurors permitted them to disperse for the night, with directions to them to return to said court at 9 o'clock a. m. on the succeeding day, to wit, October 29, 1907. At 9 o'clock a. m., Tuesday, October 29, 1907, all of said jurors appeared in said court to serve upon the trial of this case, but the Honorable M. E. Smith, judge of this court, being unavoidably detained by private business, was unable to appear, and by reason thereof said jurors were excused from further attendance until 9 o'clock a. m. on Wednesday, October 30, 1907, at which time they were directed by the sheriff to appear so that the trial of this cause might proceed before them.

"On Wednesday, October 30, 1907, all of

said jurors who had been so selected to try the issues of fact appeared except J. R. Brothers, who failed to appear, and the deputy sheriff, waiting on the district court of the Seventeenth judicial district of Texas, informed the court that said juror, J. R. Brothers, had told him on the day before that he was suffering from rheumatism and wanted to be excused from the jury, as set out in Exhibit A hereto attached; but the defendant refused to agree that said juror might be excused from jury service in this cause. Thereupon the court asked counsel for the defendant if they were willing to proceed with the trial of the case with the 11 jurors who appeared at said time, and the defendant and his counsel declined and refused to proceed to trial with said 11 jurors, and demanded a trial before the said jurors who had been theretofore selected by the parties for the trial of this cause, and refused to consent or agree to excuse the said absent juror, J. R. Brothers, or to try this cause with a less number than 12 jurors, or to try said cause before any other jurors than the said 12 who had been so selected. Thereupon the court directed the deputy sheriff waiting upon said court to summon 3 other talesmen, and the said deputy sheriff, in obedience to said direction and order of said court, summoned three persons possessing qualifications of jurors as talesmen, whose names are as follows, to wit, G. P. James, T. D. James, and C. B. Law, and the said three persons last hereinabove mentioned appeared as jurors and qualified as possessing the qualifications for jurors under the law, and thereupon by directions of the court their names were added to the said lists which had theretofore been furnished to the parties, and the parties hereto were required to select from said three names the twelfth juror for the trial of this cause to serve in the place of J. R. Brothers, who failed to appear on said day. The defendant had exhausted his peremptory challenges. The juror C. B. Law was objectionable to the defendant because the defendant believed that said juror would be inclined to find a verdict for the plaintiff, and that he would be in favor of assessing damages for the plaintiff at a very high amount; but the defendant, having exhausted his six peremptory challenges on the persons hereinabove named, who were particularly objectionable to him, was not allowed to challenge the said C. B. Law, and the plaintiff, having left two peremptory challenges, exercised them in peremptorily challenging G. P. James and T. D. James, leaving said Law as the twelfth juror to serve in the place of J. R. Brothers. The objections to the man Law were personal objections of counsel of defendant and not made known to the court because said Law properly qualified as a juror on his voir dire. At the time the court directed the said deputy sheriff to summon said last-named three persons as talesmen,

the defendant objected thereto upon the ground that it had not been shown to the court that the juror J. R. Brothers was dead or disabled, and upon the ground that under the circumstances hereinabove shown the court had no authority to cause other jurors to be summoned or to fill the panel. When said jurors were tendered to the defendant, the defendant then and there in open court objected to them, because it had not been shown that the juror J. R. Brothers was dead or disabled, that under the circumstances hereinabove set out there was no authority vested in the court to require the defendant to accept as a juror either of the said three last-named persons; but the court overruled said objection and required the defendant to proceed as has been hereinabove shown, to which action of the court the defendant then and there in open court excepted."

The jury, as thus completed, returned a verdict against appellant in the sum of \$12,500, but which sum was subsequently reduced by a remittitur filed at the instance of the trial court to the amount above named. Article 3221 of the Revised Statutes of 1895, regulating the formation of the jury for the trial of civil causes, provides: "If the number of jurors be reduced by challenge for cause to less than twelve in the district court or six in the county court, the court shall order other jurors to be drawn or summoned, as the case may be, and entered upon the slips in place of those who have been set aside for cause." And further, article 3224 reads: "When by peremptory challenges the jury is left incomplete, the court shall direct such number of other jurors to be drawn or summoned, as the case may be, as the court may consider sufficient to complete the jury, and the same proceedings shall be had in selecting and empanneling such jurors as are had in the first instance." This we believe constitutes the only express authority for summoning talesmen. Article 3229 seems to contemplate just such a contingency as is shown to have arisen in this case, and reads: "Where pending the trial of any case in the district court one or more of the jurors, not exceeding three, may die or be disabled from sitting, the remainder of the jury shall have power to render the verdict; but in such case the verdict shall be signed by every remaining member of the jury." Now there can be no question but that the court would have had the power, and it became his duty upon the juror J. R. Brothers becoming disabled from sitting, to require the parties to proceed to trial before the 11 jurors. The statute does not expressly authorize the summoning of talesmen under such circumstances, and we think the effect of the article of the statutes last quoted is by implication to forbid it. It is quite apparent from the language of the bill that appellant not only objected to the summoning of talesmen because it had not been shown that the juror

Brothers was really disabled from sitting, but also, generally, that the court under the circumstances had no authority to cause another juror to be summoned to fill the panel.

We have carefully noted appellee's reply, to the effect that appellant waived his right to a trial before the 11, or invited the court to fill the panel, rather than that he should be forced to proceed with 11 jurors, and in this connection have carefully examined the stenographer's notes of what occurred at the time; but we are of opinion that the bill, even when construed in the light of this explanation, does not show that appellant in any way waived his right to object to the juror Law in any and all events. To be sure the matter is altogether technical, but, indeed, the right itself to a trial before the 12 jurors is technical, but none the less a substantial right. For the errors thus committed, the judgment of the district court will be reversed, and the cause remanded for another trial.

We perhaps would not be authorized to reverse the judgment upon the ruling of the court in refusing special instructions in view of the charges given, some of which were requested by appellant. Upon a party's requesting a number of special charges based upon any given group of facts, we do not think it is incumbent upon the trial judge to select from amongst them the one most favorable to the party requesting such charges, and would hold that, if either charge was given, such party would have no just cause of complaint for refusing the others, even though the charge actually given may be less favorable than he would be entitled to on such issue. On the present appeal the complaint of appellant, at least as to some of his refused charges, might be answered in this way, but we cannot know that the same will be true on another trial, and we therefore suggest in a general way that, if appellant's foreman warned appellee in time for him to have removed his hand from the place of danger, and appellee heard such warning, it would be a complete defense to this suit, and the court should so instruct the jury. This is true whether such defense should be denominated assumed risk, contributory negligence, or what not. *F. W. & R. G. Ry. Co. v. Robinson*, 37 Tex. Civ. App. 465, 84 S. W. 410. But the court should not submit such defense both as assumed risk and contributory negligence—that is, in separate charges—for that would be unnecessarily to give prominence to that group of facts. The court actually submitted this issue as follows: "If you find from the evidence that the said Slaughter just previous to the accident discovered that the rope was breaking, or about to break, and warned plaintiff of this, if it be a fact, in time to have avoided the injury by the exercise of ordinary care, and further find that plaintiff thereafter

failed to exercise ordinary care to remove his hand and avoid the injury, and that such want of care, if any, on his part contributed to his injury, or if you find that by the exercise of ordinary care for his own safety plaintiff would have known that the rope was defective, if it was defective, and under the circumstances was guilty of a want of ordinary care for his own safety in going into and remaining in said place, and that such want of ordinary care, if any, contributed to his injury, then he cannot recover." While this charge is not as favorable to appellant as he would be entitled to have, yet it is not for that reason alone erroneous (C., R. I. & G. Ry. Co. v. Johnson [Tex. Civ. App.] 111 S. W. 758); and, besides, it appears to be in substantial keeping with one requested by him.

Quite a group of assignments form the basis for the following proposition: "If a person of ordinary prudence, situated as plaintiff was, would have discovered the defective condition of the rope by which the compress cylinder was suspended, and plaintiff failed to do so, and such failure directly and proximately contributed to his injury, then plaintiff was guilty of such contributory negligence as will preclude his recovery for the injury complained of." There is a measure of law in the proposition, yet the charges requested upon this issue were subject to the criticism that they imposed upon appellee the exercise of diligence to discover defects in the appliances furnished by appellant, and this of course is not the law. We apprehend that appellant's defense against his negligence in using the defective rope which injured appellee cannot be more fairly presented than by the ordinary charge of assumed risk; that is, if appellee either knew of the defective condition of the rope, or in the exercise of ordinary care for his own safety in the prosecution of the work in which he was engaged would necessarily have known of the same, then he cannot recover.

In view of the reversal, the questions of the misconduct of the jury, argument of counsel, and excessiveness of the verdict will not be considered.

Reversed and remanded.

BOARDMAN v. WOODWARD.

(Court of Civil Appeals of Texas. March 17, 1909. Rehearing Denied April 14, 1909.)

1. APPEAL AND ERROR (§ 907*) — PRESUMPTIONS—FACTS NOT SHOWN BY RECORD—WAIVER OF OBJECTIONS.

Where the record does not show that any action was taken by the trial court on defendant's exceptions to the petition, error therein, if any, is presumed to have been waived.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 907.*]

2. TROVER AND CONVERSION (§ 36*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action for the conversion of cattle, the defense being that defendant sold the cattle to plaintiff under an agreement that title should not pass until plaintiff should execute a note therefor secured by mortgage, which he failed to do, and was about to remove the cattle, plaintiff could show that defendant owed him a certain sum as his reason for refusing to execute the note and mortgage.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 36.*]

3. EVIDENCE (§ 121*)—RES GESTÆ—ACTION FOR CONVERSION.

In an action for the conversion of cattle, in which plaintiff claimed exemplary damages, testimony by plaintiff as to a difficulty which occurred at the time the cattle were taken was admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 121.*]

4. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.

In an action for the conversion of plaintiff's cattle, any error in admitting evidence of a difficulty which occurred when the cattle were taken was harmless, where the court did not submit the issue of exemplary damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4183; Dec. Dig. § 1053.*]

5. TRIAL (§ 139*)—DIRECTION OF VERDICT.

Where the evidence raised issues which the court was required to submit, a peremptory charge for defendant was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

6. APPEAL AND ERROR (§ 742*)—ASSIGNMENT OF ERRORS—PROPOSITIONS—NECESSITY.

Where an assignment of error is not followed by a proposition or statement, as required by Court of Civil Appeals rules, it need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

7. TRIAL (§ 261*)—INSTRUCTIONS—APPLICABILITY TO CASE.

A charge which contained an improper statement of law was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 660, 671, 675; Dec. Dig. § 261.*]

8. TRIAL (§ 191*) — INSTRUCTIONS — ASSUMPTION OF FACTS.

A requested instruction, which was upon the weight of the evidence in that it assumed one of the principal facts in issue, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

Appeal from District Court, Concho County; John W. Goodwin, Judge.

Action by J. L. Woodward against Eno Boardman. From a judgment for plaintiff, defendant appeals. Affirmed.

J. Curtys Simmons, for appellant. B. B. Stone and J. B. Wade, for appellee.

RICE, J. This suit was brought by appellee against appellant for the recovery of actual, as well as exemplary, damages, occasioned by reason of the alleged conversion, on the part of appellant, of two horses and two mules, the alleged property of appellee. Aff-

er a general demurrer, special exceptions, and a general denial appellant undertook to justify the taking of said property upon the ground that the same never at any time belonged to appellee, but, on the contrary, were the property of appellant, who, prior to said alleged conversion, had hold the same to appellee upon the distinct understanding and agreement that title thereto should not pass to appellee until he had executed his note to appellant for the sum of \$550, covering the purchase price thereof, as well as \$75 for certain other property, together with a mortgage on said stock to secure the payment of said note, and that appellee had failed to execute and deliver said note and mortgage, and was about to remove said property out of the county. There was a jury trial, and verdict and judgment in behalf of appellee in the sum of \$400, from which this appeal is prosecuted.

Upon the trial the court clearly submitted the issues involved in his charge to the jury, telling them that, if from the evidence they believed that appellant had sold the horses and mules in question on credit until the succeeding fall, and that appellee was to thereafter give a note for the purchase money, secured by mortgage on said stock, then in that event, the title to same passed to appellee; and, if they believed that appellant thereafter converted the same, to find for the appellee. On the other hand, said charge directly told the jury that, if they believed from the evidence that appellant sold the horses and mules in question to appellee, together with certain other articles, with the understanding that the title to said horses and mules was to remain in appellant until appellee executed his note therefor secured by a mortgage upon said stock, and thereafter appellee failed or refused to execute and deliver said note and mortgage in accordance with the terms of said contract, then and in that event they were instructed that no title to the horses and mules passed to appellee, and that appellant had the right to repossess himself of said stock; and, if they so believed, to find for appellant. No other issue was submitted, and the verdict was for the value of the stock alone.

Appellant contends that the court erred in overruling his general and special exceptions to the petition; but, since the judgment fails to show that any action was taken by the court on said general and special exceptions of appellant, the error, if any was committed, is presumed to have been waived. *S. A. & A. P. Ry. Co. v. Barnett*, 12 Tex. Civ. App. 321, 34 S. W. 139; *Denison, S. R. & S. Ry. Co. v. Powell*, 35 Tex. Civ. App. 454, 80 S. W. 1054. Besides this, an inspection of the charge shows that the only question submitted for the consideration of the jury, if they found for appellee, was as to the reasonable market value of the stock at the date of the alleged

conversion, and the verdict was in accordance therewith.

There was no error, in our judgment, in permitting plaintiff while on the stand to state that defendant owed him \$300. The same we think was admissible for the purpose of showing why appellee refused to execute the note and mortgage when demanded of him by appellant.

Nor was there any error in permitting appellee to testify relative to the difficulty which occurred at the time of the taking of said horses and mules by appellant, since what occurred at that time was *res gestae* of the transaction, and was therefore admissible. *Paraffine Oil Co. v. Berry* (Tex. Civ. App.) 93 S. W. 1089. Besides, if we are in error as to this, said testimony was harmless, for the reason that the court failed to submit to the jury the issue of exemplary damages. *St. Louis & S. F. Ry. Co. v. Smith*, 34 Tex. Civ. App. 612, 79 S. W. 340.

It would, in our judgment, have been improper for the court to have peremptorily charged the jury in favor of appellant, as requested by him, as complained of in his sixth assignment, because the evidence raised issues which made it incumbent upon the court to charge thereon.

Appellant's seventh assignment of error is not briefed in accordance with the rules. It is followed by no proposition nor statement, and for this reason we might decline to consider same; but, notwithstanding this, we believe that the special charge, refusal of which is assigned as error, contains an improper statement of the law, and therefore was properly refused.

The court did not err in refusing to give appellant's special charge No. 3, because the same was directly upon the weight of evidence in that it assumed as true the existence of one of the principal facts in issue.

The remaining assignments complain of the insufficiency of the evidence to support the verdict and judgment. Without detailing the evidence, we think it is sufficient to say that, in our judgment, it is ample to support the verdict.

Finding no error in the record, the judgment of the court below is in all things affirmed.

Affirmed.

LOWRANCE et al. v. WOODS.

(Court of Civil Appeals of Texas. Feb. 27, 1909.)

1. COVENANTS (§ 20*)—IMPLIED COVENANTS.

Where a town-site company, as part of a general scheme of platting, laying out, and selling lots, designated a certain block as residence property exclusively, there was, in effect, a covenant with a purchaser of lots that the company would limit the use of all other lots in that block to residence purposes and the covenant bound defendant, who purchased adjoining lots with

knowledge of such dedication, so as to preclude him from maintaining a wagon and feed yard on his lots.

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 20.*]

2. APPEAL AND ERROR (§ 742*)—BRIEFS—SUFFICIENCY.

Assignments of error cannot be considered, where they are grouped in appellants' brief, and propositions are made under two or more of them raising distinct questions of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

3. APPEAL AND ERROR (§ 931*) — REVIEW — PRESUMPTIONS.

Under Sayles' Ann. Civ. St. 1897, art. 1831, if a finding by the court, favorable to appellee on a particular issue not submitted, is necessary to sustain the judgment rendered, it will be presumed that the court so found, where appellants do not appear to have requested a submission of that issue.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 931.*]

4. COVENANTS (§ 20*)—RESTRICTIVE BUILDING COVENANTS—NOTICE.

The date when defendant received a deed to lots should be considered the date of his purchase, and not a prior date, when he made a partial payment for the lots, taking a receipt therefor, as affecting notice to him that the block had been designated by the town-site company as residence property exclusively, where the receipt merely recited, "Received of [defendant] \$216 in further consideration of the execution of two notes for \$216 each due in one and two years at 8 per cent., and upon the delivery of said notes the R. town-site company will execute a warranty deed"; the receipt being insufficient to support suit by defendant for specific performance.

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 20.*]

5. EVIDENCE (§ 129*) — BUILDING RESTRICTIONS—EVIDENCE.

In a suit to enjoin the use of lots as a feed and wagon yard, deeds containing restrictions against such use of neighboring lots in another block were admissible, as tending to show dedication of the block involved for residence purposes exclusively.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 129.*]

6. APPEAL AND ERROR (§ 934*) — REVIEW — PRESUMPTIONS.

Where findings are sufficient to support the judgment, it will be presumed to have been based thereon, in the absence of a showing to the contrary in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. § 934.*]

Appeal from District Court, Fisher County; Cullen C. Higgins, Judge.

Action by John W. Woods against W. J. Lowrance and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Beall Bros. & McDugald and W. C. Halbert, for appellants. Leggett & Kirby, Harry Tom King, and McCreas & Kirk, for appellee.

DUNKLIN, J. The decision of this court on a former appeal of this case is reported in 109 S. W. 418, John W. Woods being the appellant, and W. J. Lowrance et al., appellees. The suit was instituted in the district

court of Fisher County by John W. Woods against W. J. Lowrance and M. Hardin, to enjoin them from using their lots 8, 9, and 10 in block 53, and buildings thereon, in the town of Rotan, as a feed and wagon yard. Plaintiff is the owner of lots 6 and 7 in the same block, and adjoining defendants' property, and occupies his property as a place of residence for himself and family, having improved it for that purpose. Upon plaintiff's application therefor the judge of the district court granted a temporary writ of injunction, restraining the defendants from using their property for feed and wagon yard purposes pending the litigation, which was made perpetual by final judgment rendered upon the merits of the case, and from this judgment the defendants have appealed.

The town site for the town of Rotan was laid out and platted by the Rotan Town-Site Company. Plaintiff purchased lots 6 and 7, block 53, from that company February 25, 1907, defendant Lowrance purchased lots 9 and 10 of the same block from the same company April 17, 1907, and lot 8 in that block was purchased from that company by H. B. Lewis February 25, 1907, who sold it to Lowrance November 2, 1907. The deed to Woods contained a stipulation that the property therein conveyed should not be used as a feed or wagon yard, but the deeds to Lowrance and Lewis were warranty deeds, without restrictions upon use of the property conveyed. The case was tried before a jury, who, upon special issues submitted, returned the following findings of fact, to wit: "The Rotan Town-Site Company, as a part of the general scheme of platting and laying out and sale of the property belonging to it, designated and set apart block 53, in which the property of plaintiff and defendant is situated, as residence property exclusively, and W. J. Lowrance and John W. Woods each purchased their respective properties with knowledge of that fact, and when Lowrance purchased lots 9 and 10, he agreed with the town-site company not to erect a wagon or feed yard thereon. Woods has erected his dwelling on the property so purchased by him, and Lowrance and Hardin own a wagon yard establishment on the adjoining property, which was erected after Woods erected his dwelling, and which defendants are threatening to operate as a wagon yard and feed-yard." These findings we think authorized and required the rendition of the judgment perpetuating the injunction. The effect of such a dedication of block 53 by the town-site company, as was found by the jury, was equivalent to a covenant with Woods in the purchase of his property that the company would limit the use of all other lots owned by it in that block to residence purposes, and this covenant was binding upon Lowrance, who had knowledge of such dedication when he purchased the property now proposed to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Sikana v. White, 57 Tex. 385; *State v. Travis Co.*, 85 Tex. 441, 21 S. W. 1029; *Wolf v. Bass*, 72 Tex. 136, 12 S. W. 159; *Lewis v. Gollner*, 129 N. Y. 227, 29 N. E. 81, 28 Am. St. Rep. 516, 22 Cyc. 862; *Anderson v. Rowland*, 18 Tex. Civ. App. 460, 44 S. W. 911, and other authorities there cited; also *Temple v. Sanborn*, 41 Tex. Civ. App. 65, 91 S. W. 1095, and *Tallmadge v. Bank*, 26 N. Y. 105.

In the case of *Anderson v. Rowland*, supra, the court quoted with approval the following language from the case of *Kirkpatrick v. Peshine*, 24 N. J. Eq. 216, which is also quoted in 2 High., Inj. 115-118: "The mere fact that a breach of the covenant is intended is a sufficient ground for the interference of the court by injunction. A covenantee has the right to have the actual enjoyment of the property *modo et forma* as stipulated for by him. It is no answer to say that the act complained of will inflict no injury on him, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be kept as far as he is concerned, or whether he will permit it to be violated. It is not necessary that he should show that any damage has been done. It being established that the acts of the defendant are a violation of the contract, the court will protect the complainant in the enjoyment of the right he has purchased." In the case of *Tallmadge v. Bank*, supra, a person owning several lots fronting on a street sold one under a parol agreement that the buildings on the other lots would be set back eight feet from the street, and it was held that an injunction would lie to restrain a subsequent vendee of one of the other lots, with notice of the agreement, from building contrary to this restriction, although his deed was absolute, and without any such restriction.

In appellants' brief their first, second, third, fourth, and fifth assignments of error are all grouped and propositions made under two or more of them raising different and distinct questions of law. This is in violation of the rules for briefing cases on appeal, and the assignments cannot therefore be considered. *Evans v. Jackson*, 41 Tex. Civ. App. 277, 92 S. W. 48, 49. The same holding applies to appellants' eighteenth, nineteenth, and twenty-second assignments.

Previous to receipt by Lowrance from the town-site company of deed to the property purchased by him, he had made a partial payment, taking a receipt therefor, and appellants contend that the jury should have been directed to find whether or not Lowrance at that time, instead of at the date he received his deed, had notice that block 53 had been designated a residence property exclusively. It does not appear that appellants requested the submission of that issue; and, if a finding by the court favorable to appellee on that issue is necessary to sus-

tains have copied in their brief the receipt taken by Lowrance at the time the first payment was made, which is as follows: "Received of W. J. Lowrance \$216.00 in further consideration of the execution of two notes for \$216.00 each due in one and two years at 8 per cent. and upon the delivery of said notes the Rotan Town-Site Company will execute a warranty deed." This instrument was not sufficient to support an action by Lowrance for specific performance, and we are of the opinion that the date Lowrance received his deed should be considered the date of his purchase.

Several deeds from the town-site company to persons other than those who were parties to the suit were introduced in evidence over defendants' objections. These deeds contained restrictions against the use of the property conveyed for wagon and feed yards just as were contained in the deed to Woods. The property conveyed in these deeds was in the vicinity of block 53, and the deeds were admissible, as tending to show dedication of that block for residence purposes exclusively.

In addition to the special findings by the jury above noted there were further findings that Lowrance promised Woods that he would not erect a wagon or feed yard on his property before Woods began the erection of his dwelling; that Woods erected his dwelling relying on that promise, and that the use of defendants' property as a wagon and feed yard, in the manner that wagon and feed yards are ordinarily conducted, would create a nuisance to Woods and his family.

Appellants present numerous assignments of error to the submission of some of these issues, to the admission of testimony in support of some, and to the exclusion of testimony offered by defendants upon others, but none of the testimony bears upon the issues passed on by the jury and first-above noted.

As above said, we think the findings by the jury that block 53 had been designated as residence property exclusively, and that the purchase by Woods and Lowrance with notice of that fact, that Woods now occupies his property as a residence, and that defendants are threatening to use their property as a wagon and feed yard, are sufficient to support the judgment rendered by the court; and, as there is nothing in the record to show that the judgment was not rendered upon those findings, the presumption will be indulged that such was the decision of the trial court. *Walker v. Cole*, 89 Tex. 327, 34 S. W. 713; *Moore v. Brown*, 27 Tex. Civ. App. 208, 64 S. W. 946; *Hardin v. Jones*, 29 Tex. Civ. App. 350, 68 S. W. 837.

It is therefore unnecessary to discuss the assignments relating to the other issues, and the judgment of the trial court is affirmed.

WALKER v. EL PASO ELECTRIC RY. CO.

(Court of Civil Appeals of Texas. Jan. 13, 1909. On Rehearings, March 17, 1909, and April 14, 1909.)

1. MASTER AND SERVANT (§ 1*)—EXISTENCE OF RELATION—FELLOW SERVANTS.

Where a master gives the labor of his servant to a third person, without losing the supervision of the servant, the latter does not become a servant of the third person, and a fellow servant with his servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. MASTER AND SERVANT (§ 257*)—RELATION—NEGLECT OF SERVANT—LIABILITY OF MASTER—PETITION.

A petition in an action for personal injuries received by the negligence of an employé of defendant, while plaintiff and the employé were at work on a machine in defendant's plant, which alleges that plaintiff was placed at work on a machine at the request of an employé of A. and employés of defendant, and that plaintiff acted under the direction of the employé of A. and employés of defendant, and the superintendent of plaintiff's employer, does not show that plaintiff, at the time of the accident, had become an employé of defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 813; Dec. Dig. § 257.*]

3. MASTER AND SERVANT (§ 1*)—EXISTENCE OF RELATION.

An agreement between two employers that employés of either will assist the other where necessary, the cost of such labor being charged against the employer employing it, does not make an employé of one of the employers an employé of the other.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1; Dec. Dig. § 1.*]

On Rehearing.

4. MASTER AND SERVANT (§ 277*)—EXISTENCE OF RELATION—EVIDENCE.

Plaintiff, in the employment of a third person, was engaged in placing electrical machines in the power plant of defendant. He had been engaged for about two weeks, when he was requested by the superintendent of the third person to help the employés of defendant to repair a generator. Plaintiff assisted in repairing the machine, and as the machine was being put into place, a servant of defendant negligently injured plaintiff. Plaintiff's work on the machine was only temporary, and occupied only an hour. Plaintiff, while doing the work, did what he thought was best, and no one was directing him. Held, to warrant a finding for defendant on the theory that plaintiff was defendant's servant, and a fellow servant of the one guilty of the negligence resulting in the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 953; Dec. Dig. § 277.*]

James, C. J., and Fly, J., dissenting in part.

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by I. B. Walker against the El Paso Electric Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Patterson, Buckler & Woodson, for appellant. Beall & Kemp, Leigh Clark, and Nagle & Scott, for appellee.

FLY, J. Appellant sued appellee for damages arising from the negligence of one of

its employés, whereby he lost the first joint of the first finger, and two joints of the second finger, of his left hand. A trial by jury resulted in a verdict and judgment in favor of appellee.

The uncontroverted facts show that appellant was in the employment of the Stone-Webster Engineering Corporation, and was engaged in placing new electrical machines and generators of electricity in the power plant of appellee. He had been so engaged for about two weeks, when he was requested by the superintendent of the Stone-Webster Corporation to help the employés of appellee to repair an old generator that had become so out of repair that it could not be used, and it was needed at once to generate electricity for appellee. He assisted in repairing the machine, and after the repairs had been made, and as the generator was being put into place, he was struck on the hand by one of the employés of appellee, and his fingers injured, as alleged in the petition. Appellant's work on the old generator was merely temporary, and occupied only an hour. There was no one in the employ of appellee exercising control over appellant while at work on the old generator, but we understand from the testimony that the superintendent of his employer was in the same room while he was at work on the generator. Charles Bailey, a witness for appellee, swore that appellant was doing what he thought best, and no one was directing him. Appellant was employed by the Stone-Webster Engineering Corporation, and was paid by it, and was acting under the direction of its superintendent when he was hurt.

The first assignment of error assails the last paragraph of the following charge given by the court at the request of appellee: "If you believe that at the time of the plaintiff's injury he was an employé of the Stone-Webster Engineering Corporation, but that he was requested by Mr. W. S. Gould and other employés of defendant, and directed [by] Mr. Ralph, superintendent of the Stone-Webster Engineering Corporation to make, or assist in making, repairs on the dynamo, or electric machine of the defendant company on which he was working at the time he was injured, and that in compliance with said request he was making, or assisting in making, said repairs with one Robert Jasmer, an employé of the defendant, the El Paso Electric Railway Company, and that at the time of his injury he was doing the work with said Jasmer for the defendant company, and not for the purpose of expediting the business of the said Stone-Webster Engineering Corporation, then you are instructed that in that event the plaintiff, Walker, and the said Jasmer were fellow servants, and the plaintiff could not recover for any injury received under such circumstances by reason of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

negligence of the said Jasmer. Therefore, if you believe that at the time of the plaintiff's injury he was an employé of the Stone-Webster Engineering Corporation, but that he was doing the work that he was doing with the said Jasmer for the defendant company, and not for the purpose of expediting the business of the Stone-Webster Engineering Corporation, your verdict will be for the defendant." The test as to Jasmer, the offending employé of appellee, being a fellow servant of appellant is: Whose business was being expedited by the work—that of appellant's employer or that of appellee? That is a novel method, when made the sole test, of ascertaining whether or not the relation of fellow servants exists, and we think was erroneous in this case at least. The same rule might have been applied with as much appropriateness if appellant had been working on any other job that his employer had undertaken for appellee, for any work being done by the employer was expediting the business of appellee, and must have been expediting the business of his employer, as it was paid for the labor of appellant. There is no foundation in law for any such test as to who are fellow servants. There was no lending of the servant to appellee, as is assumed by it, but the servant was merely directed to perform certain work for appellee by his employer, and the latter was paid for it. The authorities cited by appellee do not sustain its contention. If appellant was doing the work of his master under its supervision and control, it did not matter at whose request he had been put to work, or whose business his labor was expediting. If his employer chose to give the labor of his servant to appellee, but did not lose the supervision and control of him, he did not thereby become the servant of appellee and a fellow servant with its servants.

It seems to be the well-supported rule that, where a third person is sued for the negligence caused by his servants, the fact of their having been, at the time of the accident, engaged in the same general operation as the injured servant is not sufficient to place him on a different footing from any other stranger suing for damages inflicted by the servants of the same defendant. The doctrine of common employment "applies only where the action is brought for an injury to a servant or agent against the principal by whom such servant was himself employed." *Smith v. Railway*, 19 N. Y. 127, 75 Am. Dec. 305; *Svenson v. Steamship Co.*, 57 N. Y. 108; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58; *Parker v. Railway*, 109 Mo. 362, 19 S. W. 1119, 18 L. R. A. 802; *Railway v. Billeter*, 28 Neb. 422, 44 N. W. 483; *Kastl v. Wabash Railway Co.*, 114 Mich. 56, 72 N. W. 28. The rationale of the doctrine of fellow servants is based on the hypothesis, or assumption, that the servant on entering the service of the master assumes

the risk of being injured by the negligence of his employés; and the rule cannot be invoked where no contractual relations have arisen between the injured party and the employer of the servant through whose negligence the injury has been inflicted. The relation of fellow servants cannot be established unless the servants are all under the control and direction of a common master. *Shear. & Red. on Neg.* 116. The mere fact that servants are working together, and to a common purpose, will not of itself constitute them fellow servants.

In the case of *Morgan v. Smith*, herein cited, the plaintiff, an employé of Flannagan, was working together with McCarthy, a servant of defendant, in putting a ventilator in a roof belonging to Sears, and the theory of the trial court was that, as the servants were on extra work, not covered by the contract with the employers of both, they were servants of the owner of the house, and fellow servant to each other. The Supreme Judicial Court of Massachusetts held: "There is no doubt that the general servant of one person may become the servant of another by submitting himself to the control and direction of the other. In such a case the servant becomes the fellow servant of the servants of the person under whose control he comes; and neither his general master nor his special master is liable, if he is injured by the negligence of one of the other servants. * * * Although the servants of different contractors, while engaged in working together on a building, are in a common employment, they are not fellow servants, unless they have a common master. * * * The rule that one fellow servant cannot maintain an action against a common master for an injury occasioned by a fellow servant rests upon the ground that he takes upon himself the natural and ordinary risks incident to the performance of his service." The following language from *Shearman & Redfield*, § 225, we think forcibly states the rule: "Mere co-operation, or community of labor and ultimate purpose, is not enough to make men fellow servants. They are not fellow servants unless they are all under the control and direction of a common master. Therefore, where a servant works side by side with one employed by his master as an independent contractor, or with a servant of such contractor, or the servant of a contractor works with the servants of a subcontractor, or with the servants of another independent contractor, they are not fellow servants, even though they help to do the same work, for the benefit of the same ultimate employer; and the master of either servant is therefore responsible for an injury caused by such servant's negligence in such work to the other servant."

The Stone-Webster Engineering Corporation did not surrender control of its servant at any time, and could have ordered him away from the old generator at any time.

He may have received orders, in the prosecution of the work, from Gould, who, by the way, was not an employé or appellee, and from employés of appellee, as was alleged in the petition, but that did not operate to change his relations to his master. *Johnson v. Netherlands Nav. Co.*, 132 N. Y. 576, 30 N. E. 505. The control, management, and power to discharge appellant never passed from his employer to appellee even for a moment. The allegations in the petition that he was placed at work on the old generator at the request of Gould, who was an employé of the General Electric Company, and employés of appellee, was not an admission that appellant had become an employé of appellee, nor did the allegation that appellant acted under the direction of Gould, and employés of appellee and the superintendent of his employer, amount to an allegation of a change of service. The allegations showed that appellant never at any time passed from the direction and control of his master. This is a very different case from one in which a servant is loaned by his master to a third party, the latter to have sole control of him. That kind of case would bring it within the rule of a quotation in the case of *Kilroy v. Canal Co.*, 121 N. Y. 22, 24 N. E. 192, from the case of *Murray v. Currie*, L. R. 6 C. P. 24: "If I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed." The New York Court of Appeals, however, drew the distinction between the case from which the quotation was taken and the one it was considering as follows: "To make that case fit the one before us we must first determine that the stevedore in unloading the coal was entirely independent of the captain, who had no right in any manner to interfere with the process of unloading; and then we must further find that he was employed by the stevedore as his servant to do the work." To apply the quotation to this case we must, in order to make appellant a fellow servant with the employés of appellee, find that, while working on the old generator, he was under the sole control of appellee, and his employer had no right, in any manner, to interfere with him in the work, and that he had been employed by appellee to do the work. No such case arises from the allegations or testimony.

The agreement between the employer of appellant and appellee "that laborers or workmen or employés of either company would assist the other when necessary, the cost of such labor being billed against the company that employed it" did not make appellant an employé of appellee, and did not bring him within the scope of the decisions in *Railway v. Taylor* (Tex. Civ. App.) 35 S.

were cases where the servant was working in yards owned by several railway companies, and was in fact working for all of them. The servants in those cases were employed to serve the several companies in their yards, and the courts held that each of them was liable, as the master, for any negligence towards the servants. It would, we think, be an absurdity to hold that appellant was an employé of appellee, under the circumstances of this case, no matter what secret agreement the employer and appellee may have had with each other. Appellant worked for the Stone-Webster Corporation, and only on this one occasion was ordered by his master to help in a piece of work for appellee. It follows that the special charge complained of in the second assignment of error was erroneous, and should not have been given. That charge made appellant's relation to the servants of appellee rest on the secret agreement between appellee and the employer of appellant. Under that charge the parties by a secret agreement, in no manner outwardly manifested to appellant, could place him in the position of a servant of a corporation who was unknown to him in his contract of employment, and with whom he could not possibly have had any privity of contract. *Railway v. Ferch*, 18 Tex. Civ. App. 46, 44 S. W. 317; *Railway v. Martin*, 113 Tenn. 266, 87 S. W. 423; *Zelgler v. Railway*, 52 Conn. 543, 2 Atl. 465; *Brennan v. Iron Co.*, 74 Conn. 382, 50 Atl. 1030.

In the cited case of *Zelgler v. Railway* the plaintiff was in the employ of the defendant, but the latter claimed immunity from liability for injuries to its employé on the ground that there was an agreement between it and another railway, over whose line its trains were run for parts of the distance, by which the employés of the defendant became the employés of the other road when the train passed onto the track of the latter. The claim was that the employé of the latter road, through whose negligence the injury was inflicted, was the fellow servant of the plaintiff. The Supreme Court of Connecticut said: "No consideration of public policy will sustain this defense, because the public are not at all interested in the question, as they are in questions concerning innkeepers and common carriers. They are only interested to have the law justly and fairly administered. No considerations of justice will sustain it, because the plaintiff had no relation whatever to the negligent conductor. It was not his duty to observe his conduct. He had no opportunity to do so, and no opportunity to guard against the consequences of his negligence. We have shown that the defense can have no foundation in any contract to which plaintiff was a party, or which can justly affect him. If, therefore, the plaintiff may in any sense be regarded as in

the service of the defendant, he is clearly without the reason of the rule, and therefore not within the rule itself. But he cannot in any proper sense be regarded as the servant of the defendant." It would, as stated in that opinion, be an absurdity to hold that appellant's employer, could be changed in an instant, without his knowledge or consent, by the order of the only employer he knew, under some secret arrangement between that employer and another corporation. If appellant was the employé of the Stone-Webster Engineering Corporation, and was working on the old generator subject to the control of his master, it would not matter whose business was being furthered by his work; he would still be in the employment of his master, and the court erred in making his relation to the employes turn on the question of whose interests were being advanced by his work. We do not think the evidence tended to show that appellant was lent by his employer to appellee, and was under the sole control and management of appellee, when he was injured, and that issue should not have been submitted.

The fifth assignment is not well taken. The relation of appellant to appellee's employes was not determined by the question of whether the work inured to the benefit of his master, but on the question of whether he had passed from the control of his employer to that of appellee. Appellant was not a volunteer, but was either in the employ of one master or another. If, with the knowledge and consent of an employé, he is placed in charge of another to perform his work, he would thereby, at least temporarily, pass from the control of one master to that of another, as was held in the case of *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267, by the Supreme Judicial Court of Massachusetts. In that case a servant of Noyes & Co. was sent to repair an elevator for the defendant. He was told by that firm that he would be under the superintendence of the defendant, and he was instructed what to do by the defendant. He was not under the control of his general employer, and he knew it, and had accepted the situation. He was hurt by the negligence of another employé of the defendant, and the court said: "It is obvious that C. A. Noyes & Co. were not contractors. The transaction between them and the defendant was the loan by them to the defendant of their servant, the plaintiff, who was to be under the control of the defendant, by his superintendent, while engaged in the work. This made the plaintiff *pro hac vice* a servant of the defendant. * * * The plaintiff was not acting under the immediate orders of his general masters, C. A. Noyes & Co., but was acting under the orders of the defendant's superintendent, and thus became the defendant's servant, notwithstanding that he remained the general servant of Noyes & Co., and was paid by them."

The judgment is reversed, and the cause remanded.

On Rehearing.

NEILL, J. The main questions in this case are: Was plaintiff, as an employé of the Stone-Webster Company, directed by its manager to assist the employes of the Electric Railway Company in removing or adjusting its dynamo, and was he doing such work in furtherance of his master's business when he was injured? The affirmative of these questions must appear to entitle him to recover. *Labatt's Master & Servant*, § 632. For in that event he cannot be regarded as a volunteer in the defendant's service, or a fellow servant of Jasmer, either of which would defeat his action. *Labatt's Master & Servant*, §§ 630, 631. If he was not injured while doing the work under the direction of Ralph, the Stone-Webster Company's manager, in furtherance of his master's business, he must, for the time, be regarded either as Jasmer's fellow servant or a mere volunteer. Hence, the court having correctly instructed the jury that plaintiff was entitled to recover if he was directed by the manager of the Stone-Webster Company to assist the defendant's servants to do work which was being done in furtherance of the company's business, and was injured by the negligence of Jasmer while engaged in such work, it can make no difference whether the special charge, copied in our original opinion, and complained of by the first assignment of error, presenting the question of whether plaintiff and Jasmer were fellow servants, was correct or not; especially as the special charge itself required the jury to believe that plaintiff was doing the work with Jasmer for defendant, and not for the purpose of expediting the business of the Stone-Webster Company, before they could find for defendant upon the theory that plaintiff and Jasmer were fellow servants. While the charge is justly subject to the criticism contained in the main opinion, we believe the error it contains is, under the peculiar facts of this case, harmless.

We regard special charge No. 4, complained of by the second assignment of error, in the same light. While an agreement between the Stone-Webster Company and defendant company that either should, at the request of the other, furnish it the services of its employes, could not, without the knowledge or assent of the servant of one, make him the servant of the other (*Labatt's Master & Servant*, § 630), yet, as the charge simply presents a state of facts which would make the plaintiff a volunteer in defendant's service, the plaintiff was in no way prejudiced by it.

The law pertinent to the issues of fact was properly presented to the jury by the court's main charge, the errors in the special charges given were harmless, and the verdict

FLY, J. I adhere to the original opinion delivered herein, and do not concur with the foregoing opinion.

On Appellant's Motion for Rehearing.

JAMES, C. J. It is proper that I should give my reasons for agreeing to an affirmance of this judgment.

No question existed as to Walker having been a volunteer. That question is not in the case.

The court, by the sixth clause of the charge, directed the jury to find for the plaintiff if they found that Walker's employer, the Stone-Webster Engineering & Construction Company, directed him to assist in the removal and adjustment of defendant's dynamo, and he did so for and in behalf of the Stone-Webster Company, and for the purpose of facilitating or expediting the work of said company, and he was not under the supervision or direction of the defendant at the time, but was doing the work for said Stone & Webster Company, and was negligently injured by Jasmer, without negligence on his part. Appellant states in this motion: "The contention of the plaintiff (appellant) has been and is that plaintiff was not the fellow servant of Jasmer if he was doing the work in furtherance of his own master's business, even though he had not been directed to do so by his own master, and that he was not such fellow servant, even though he was not acting in furtherance of his own master's business, provided the jury should believe from the evidence that he was acting under the direction and control of his own master, and was not under the control, direction, or supervision of the defendant." It seems to me that the sixth clause of the charge, above quoted, submitted the case in accordance with appellant's theory.

By the seventh clause of the charge the jury were allowed to find for defendant if plaintiff was under the control, supervision, and direction of the defendant, and was not loaned for the purpose of facilitating the work of the Stone-Webster Company. This was the only theory upon which the jury were authorized to find for the defendant, and thus the verdict in favor of defendant settles two facts, viz.: That plaintiff was under the supervision and direction of the defendant, and that the work being done was not that of the Stone & Webster Company. The view taken by the district judge of the test of the relation of fellow servants in this case was, I think, the correct one, in addition to its being the one which appellant's counsel admit was their own contention.

ble to the direction and control of his master, or becomes subject to the party to whom he is loaned or hired. *Munsie v. Springfield Breweries Company*, and cases there cited, 200 Mass. 79, 85 N. E. 840. Also, see, long list of cases cited in *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 255, 53 L. Ed. —. The jury, under the charges, could not have found for defendant without having found the facts above stated. The verdict establishes for the purposes of this appeal that the work that was being done was not to facilitate or expedite the business of the Stone-Webster Company; and, if there was any issue in the evidence as to plaintiff's being subject to the direction of the defendant while engaged in the particular work, that issue was settled also by the verdict, but it appears to me that all the evidence indicates that, while so engaged, he was not acting under the supervision or direction of the Stone-Webster Company.

The evidence discloses, however, that the Stone-Webster Company was under an agreement with defendant to furnish this kind of assistance when called on, and the argument founded upon this seems to be that it establishes that plaintiff was working for and in the interest of that company, while engaged in performing its contract. My opinion is that this fact is immaterial, when its control did not follow the servant, for the interest of said company extended no further than the loan of the servant; and, when it sent its servant, it had performed its contract, and had no further interest in the matter. It had no interest in the work, or in the manner in which it was being performed.

The motion is overruled.

INTERNATIONAL & G. N. R. CO. v. McCULLOUGH.

(Court of Civil Appeals of Texas. March 17, 1909. Rehearing Denied April 14, 1909.)

1. CARRIERS (§ 215*)—INFECTIOUS DISEASES—LIABILITY.

Where cattle were not injured by being unloaded from cars, but by being put in infected pens after unloading and after the carrier's agent had assured the shipper, ignorant of the danger of infection, that there was no danger, the fact that they were unloaded in violation of the regulations of the United States Department of Agriculture did not defeat a recovery.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 215.*]

2. CARRIERS (§ 210*) — CARRIAGE OF LIVE STOCK—DUTY TO FURNISH PENS.

A carrier must furnish reasonably safe pens for cattle unloaded en route, especially where a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

delay is caused by its failure to connect with a connecting carrier.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 210.*]

3. CARRIERS (§ 215*)—INFECTIOUS DISEASES—REGULATIONS OF DEPARTMENT OF AGRICULTURE.

The quarantine regulations of the United States Department of Agriculture as to where cattle may be unloaded in Texas refer only to cattle shipped from one state to another, and are for the protection of other cattle at the point of destination, and a violation of such regulations by a carrier of cattle from a northern state through Texas to Mexico does not defeat a recovery in the absence of evidence that cattle in Mexico could be infected, or that Mexico was a territory in whose favor the quarantine was established.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 215.*]

4. EVIDENCE (§ 529*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.

An expert may testify that cattle suffering from splenetic fever were infected by having been placed in infected pens and there kept over night, on it appearing that the fever developed a few days later.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2338; Dec. Dig. § 529.*]

5. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

A party cannot complain of the admission of testimony in support of a fact established by other evidence received without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

6. CARRIERS (§ 228*)—INFECTIOUS DISEASES—CARRIAGE OF LIVE STOCK—CUSTOM AS TO DISINFECTION OF CARS—EVIDENCE.

In an action for injuries to a shipment of cattle from a northern state through Texas to Mexico, resulting from their becoming infected with a disease, proof of a custom as to the disinfection of cars from the South was admissible.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

7. EVIDENCE (§ 474*)—OPINION EVIDENCE—DISINFECTION OF CARS.

A shipper of cattle from the North through Texas to Mexico, knowing what the condition of the cars furnished by the carrier indicated, was competent to testify that the cars had the appearance of having been disinfected before the cattle were placed in them.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 474.*]

8. CARRIERS (§ 228*)—INFECTIOUS DISEASES—CARRIAGE OF LIVE STOCK—ACTIONS—EVIDENCE.

In an action for injuries to a shipment of live stock from a northern state through Texas to Mexico, resulting from their being infected with a disease, the exclusion of a rule of the Bureau of Animal Industry referring to interstate shipments, and enacted for the protection of cattle at the point to which a shipment is destined, was proper.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

9. CARRIERS (§ 217*)—INFECTIOUS DISEASES—INJURY TO LIVE STOCK—CONTRIBUTORY NEGLIGENCE.

Where, in an action against a carrier for injuries to a shipment of live stock from the North to Mexico through Texas in consequence of their being infected with a disease, it ap-

peared that the carrier knew that pens into which the cattle were placed were infected, and that the agent in charge of the shipment did not, but acted on the assurance of the carrier, the shipper was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 217.*]

Appeal from Bexar County Court; P. H. Shook, Judge.

Action by C. H. McCullough against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

King & Morris and Hicks & Hicks, for appellant. H. E. Vernor and Joseph Ryan, for appellee.

FLY, J. Appellee alleged in his petition: That on July 28, 1905, he shipped from Batavia, Ill., to the city of Mexico, 88 head of Holstein milk cows; that en route the cattle were delivered to appellant, by its connecting carriers, at Taylor, Tex., on July 31st, and were transported to Laredo, Tex., by appellant, which point they reached on August 1st too late to be crossed into Mexico, until next morning, and on account of the great heat and the length of time the cattle had been on the train it became necessary to unload them and place them in pens provided by appellant; that the pens were infested with insects, which gave the cattle a fever known as "Texas" or "splenetic" fever, from which four of the cows died, and great expense was incurred in connection with the disease of the other cattle, to appellee's damage in the sum of \$600. Appellant answered by general and special exceptions, and that appellant was forced to unload the cattle at Laredo by the agent of appellee in charge of them, and that they were unloaded contrary to the laws and rules of the Department of Agriculture of the United States. The court sustained a demurrer to the latter portion of the answer, and, on the cause being tried by jury, a verdict and judgment for appellee were rendered in the sum of \$350.

The plea of contributory negligence as to the unloading of the cattle was properly stricken out. If such an improbable proposition could be entertained of one man forcing a railroad company to unload cattle, still it was no defense to the action to allege that the cattle were unloaded in defiance of a regulation of a governmental department. The cattle were not injured by being unloaded, but by being put in infected pens. In view of the testimony, had the plea been a proper one, it would not form a ground of reversal, because it appeared that the unloading of the cattle was not forced, as alleged, by the agent of appellee, but were only unloaded after appellant's agent had

given the assurance that there was not "a particle of danger in putting the cattle there." The agent of appellee was not a cattleman, and knew nothing of the danger of infection, and acted on the advice of an employé of appellant. Appellant was the active agent in unloading the cattle, and cannot screen itself from responding in damages because it may have been a violation of law to unload the cattle. It was not the unloading, but the confinement in infected pens, that the evidence showed was the proximate cause of the damages sustained by appellee. The employé of appellant did not swear that any force was used to have the cattle unloaded, but merely that a request was made that they be unloaded. He did not warn the agent of appellee of the danger of placing the cattle in the pens. It was the duty of appellants to furnish reasonably safe pens for the cattle after they had been unloaded, especially as the delay was caused by its failure to connect with the Mexico train. The evidence showed that the fever that seized the cattle and caused the damage was occasioned by the use of the pens that had previously been used by Texas cattle. The regulations of the Department of Agriculture, as to where cattle could be unloaded in Texas, have reference only to cattle being shipped from one state to another, and are for the protection of other cattle at the point of destination, and not for the safety of the cattle being shipped. There was no evidence tending to show that cattle in Mexico could be infected by cattle with splenic fever, or that Mexico was in a territory in whose favor the quarantine was established. On the other hand, it would naturally be supposed that, if ticks would create splenic fever on one side of the Rio Grande, they would on the other.

Sam O. Bell and J. M. Vance, witnesses for appellant, were asked on cross-examination if the cattle raised in Illinois were in good health and condition when they left Illinois in latter part of July, destined to Mexico City, and were not unloaded except at Laredo, south of the quarantine line, and were unloaded there and placed in pens which were used for native cattle, and were kept there over night, and a few days after had ticks on them and developed Texas fever, what in their opinion caused the fever, and they answered that their opinion was that it originated by infection in the pens at Laredo. The only objection to the evidence was that it was an "invasion of the province of the jury." In what way it invaded the jury's domain is not made to appear in the two bills of exceptions. There is nothing to indicate that the objection was made because the witness had not qualified as an expert, and the only proposition under the two assignments of error complaining of the admission of the evidence is that:

"An expert witness will be allowed to testify of matters of which he has peculiar knowledge by reason of his experience; but he must testify to facts, and allow the jury to draw its conclusions therefrom, and will not be allowed to invade the province of the jury and decide the very question." If the witnesses had qualified as experts, which is not denied by appellant, they could answer the hypothetical question, although it may have been decisive of the very matter in issue. *Scalf v. Collin County*, 80 Tex. 514, 16 S. W. 314; *Railway v. Bohan* (Tex. Civ. App.) 47 S. W. 1050; *Railway v. Rogers* (Tex. Civ. App.) 113 S. W. 583. The question and answer related to a question purely of fact, and not a mixed one of law and fact. The authorities cited by appellant are not in point.

There was no evidence tending to show that the agent of appellee caused the cattle to be placed in the pens of appellant, and a charge based on that hypothesis was properly refused. The charge is objectionable also because not conditioned on a knowledge by the agent of appellee of the danger of placing the cattle in the pens tendered by appellant. There was no evidence tending to show that appellee's agent knew of any danger attending the use of the pens.

The sixth assignment of error assails the testimony of appellee, admitted by the court, that the danger in the acclimatization of cattle consisted, not in becoming accustomed to the heat, but to the ticks. The same facts were proved by Vance and Bell, without objection on the part of appellant. Vance swore: "There is slight danger that such stock will become infected with any fatal malady or distemper merely from the weather or heat, while passing through the country below the quarantine line and before they reach the high altitudes of Mexico." Bell testified: "Holstein cows, when shipped from Illinois into Southwest Texas, through Bexar and Webb counties, have great trouble in getting acclimated on account of the infection of the ticks. They do not suffer any more from the heat and temperature after being acclimated than the native cattle. It is not the heat that kills them. * * * I do not think the heat would cause the fever." It was testified by appellee that all cattle cars coming from the South are disinfected by the railroad companies, and that the cars in question had been ordered from Chicago, being cars specially adapted to the purpose, and he also testified that when the cars reached the city of Mexico they had the appearance of having been disinfected before the cattle were placed in them. All that testimony was objected to because it was irrelevant and immaterial and was hearsay and a conclusion of the witness. Proof of a custom as to the disinfection of cars from the South was admissible. *Railway v. Henning* (Tex.

could obtain such knowledge from the appearance of the cars as to testify as to their inspection, it should, by cross-examination, have tested the knowledge of the witness. He was a shipper, by occupation, of cattle from the North to Mexico, through Texas, and placed himself in a position to testify as to what the condition of the cars indicated.

The court did not err in excluding the rule of the Bureau of Animal Industry. That rule has reference to interstate shipments, and is for the protection of the cattle at the point to which the shipment is destined. If it had been shown that the cattle, under that rule, should not have been unloaded at Laredo, it would not have exonerated appellant from its negligence in furnishing infected pens for the cattle. If it would, it would have been a defense to the wanton shooting of the cattle when they were unloaded, just as well.

The proposition of appellant under the eleventh assignment of error is based on the assumption that the cattle were "unloaded at the request of plaintiff or his agent over the objection" of appellant, while the evidence does not support any such theory. Sloan swore that the agent of appellant told him that there was not "a particle of danger in putting the cattle" in the pens. It is true that he told Sloan that the pens were kept for native cattle, but, instead of warning Sloan of the danger of using the pens, assured him of their perfect safety. The court did not err in refusing to instruct a verdict for appellant. Appellant seems to labor under the impression that it was the duty of the shipper to know all about the quarantine rules and about splenic fever, and his duty to see the pens disinfected, and if he, under stress of circumstances brought about by appellant, unloaded his cattle and placed them in pens which appellant assured him were not dangerous, he cannot recover. Appellant knew about the quarantine; there is nothing to show that Sloan, appellee's agent, did. Appellant knew the pens were infected; Sloan did not, but acted on the assurance of appellant that they were not infected. The agent of appellee was deceived by the agent of appellant, and there could be no contributory negligence on his part.

The evidence was sufficient to show that the cattle were infected in the pens at Laredo. Two of appellant's expert witnesses swore that, under all the facts, they concluded that the fever was contracted from ticks which got on the cattle in appellant's pens in Laredo.

The judgment is affirmed.

1. CONTRACTS (§ 333*)—CONFORMITY TO EVIDENCE.

—INSTRUCTIONS—CONFORMITY TO EVIDENCE. In an action to recover for architect's plans, plaintiff alleged a contract to prepare the plans for \$1,000, and testified that defendant "fully understood and I had told" him that the charges "would be on the basis of 3½ per cent." of the estimated value of the building, and that defendant agreed to the charges, that the estimated value was from \$30,000 to \$34,000 "and my charge was finally placed at \$1,000," that it was understood between the parties that plaintiff was to furnish the plans "at the standard compensation," and that plaintiff "explained the system of charges we have and which I always follow." *Held*, that an instruction to find for plaintiff if the jury believed that plaintiff furnished the plans, and that defendant agreed to pay \$1,000 for them, was erroneous as not supported by the evidence.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 353.*]

2. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action to recover for architect's plans under an alleged contract to pay \$1,000 for the plans, there was testimony that the charge was to be 3½ per cent. on the estimated value of the building, which was from \$30,000 to \$34,000, and that plaintiff finally placed his charge at \$1,000. Defendant introduced testimony to show that the building was to cost not more than \$18,000. *Held*, that an instruction to find for plaintiff if the jury believed that plaintiff furnished the plans, and that defendant agreed to pay \$1,000 for them, was not harmless error, as it ignores defendant's testimony, which would make the amount to be charged for the plans less than \$1,000.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1066.*]

3. CONTRACTS (§ 346*)—ACTIONS FOR BREACH—ISSUES AND PROOF.

In an action to recover for architect's plans, the only questions made by the pleadings were whether defendant became bound to pay plaintiff any sum of money on account of the plans, and, if he did, what sum? *Held*, that evidence as to defendant's financial condition was inadmissible.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 346.*]

4. CONTRACTS (§ 338*)—ACTIONS FOR BREACH—PLEADINGS—IMMATERIAL ALLEGATIONS.

In an action to recover for architect's plans furnished under a contract to pay a specific price therefor, defendant alleged that, by the terms of the agreement between himself and plaintiff, defendant was to buy a building site, plaintiff was to prepare plans for a building and negotiate a loan to pay for the construction of the building, and that it was understood between them that if a loan was not secured plaintiff was not to be entitled to anything on account of the plans, and that he was not, and plaintiff knew he was not, able to purchase the site and construct the building unless a loan was secured. *Held*, that the last allegation was an immaterial one, and should have been stricken from the answer on exceptions thereto.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 338.*]

5. PLEADING (§ 400*)—DEFECTS—WAIVER BY FAILURE TO OBJECT.

In an action on a contract to furnish defendant plans for a building, an immaterial al-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

legation in the answer as to defendant's financial condition was not rendered material by failure to object thereto or by the admission of testimony tending to establish its truth.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 409.*]

6. TRIAL (§ 75*)—RECEPTION OF EVIDENCE—ADMISSIBILITY BY REASON OF ADMISSION OF SIMILAR EVIDENCE.

In an action on a contract to furnish architect's plans, testimony as to defendant's financial condition is not rendered admissible by the admission of other irrelevant testimony without objection.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 75.*]

7. CONTRACTS (§ 353*)—ACTIONS FOR BREACH—INSTRUCTIONS.

In an action on a contract to furnish architect's plans, where there was evidence that the plans were to be supplied for a certain percentage of the estimated value of the building, and defendant's evidence showed that the building was not to exceed \$18,000, while the evidence of plaintiff was that it was to cost \$30,000 or more, an instruction that if the jury believed from the evidence that defendant employed plaintiff to draw plans for a building to cost not more than \$18,000, and they believed that plaintiff furnished the plans for a building which would cost \$30,000 or more, plaintiff cannot recover, was not rendered erroneous by adding, "unless defendant accepted the plans drawn, and this with knowledge of the excess in cost to erect the building," as submitting an estoppel of defendant to deny liability if he had accepted the plans with knowledge that they were of a building to cost in excess of the sum contemplated when the contract was entered into.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 353.*]

8. ATTACHMENT (§ 232*) — GROUNDS FOR QUASHING—CONFLICT BETWEEN PLEADING AND AFFIDAVIT.

Under Sayles' Ann. Civ. St. 1897, art. 186, subd. 2, authorizing the issuance of an attachment when plaintiff makes affidavit that defendant "is not a resident of the state," it is not a ground for quashing an attachment in which the affidavit stated that defendant is not a resident of the state, that there are averments in the complaint that defendant is temporarily within the state, as a person may be a nonresident of the state and at the same time be within its boundaries.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 232.*]

9. ATTACHMENT (§ 228*) — GROUNDS FOR QUASHING—UNCERTAINTY AS TO AMOUNT.

An attachment should not be quashed because of uncertainty in the amount sued for, where the petition alleges an undertaking on defendant's part to pay plaintiff the reasonable value of certain plans to be prepared by plaintiff, and in the affidavit to the petition plaintiff swore that defendant was indebted to him in the sum of \$1,050, and in the prayer for the attachment plaintiff alleges that the debt, interest, and costs "will amount to the sum of \$1,000."

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 228.*]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by R. H. Parry against J. T. Hall. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Gross & Allen, for appellant. Stevenson & Ritchie and F. C. Highsmith, for appellee.

WILLSON, C. J. The action was by appellee. In his amended petition he alleged that appellant had employed him as an architect to prepare plans and specifications for a stone and concrete building to be erected by appellant, and had agreed to pay him \$1,000 for same. He then alleged performance on his part of the contract, and a refusal on the part of appellant to pay the \$1,000. In another count in his said petition, appellee alleged that he prepared the plans, etc., at appellant's special instance and request, that they were reasonably worth \$1,000, and that appellant had refused to pay for them. On the ground that appellant was a nonresident of the state, appellee had a writ of attachment issued. The writ was levied upon a tract of land belonging to appellant. The appeal is prosecuted from a judgment in appellee's favor for said sum of \$1,000, and foreclosing the lien of the attachment on the land.

The court instructed the jury to find for appellee and to assess his damages at \$1,000, if they believed from the evidence that he had made and furnished the plans, etc., and further believed that appellant had agreed and promised to pay him \$1,000 for them. Appellant insists that there was no evidence of an undertaking on his part to pay \$1,000 for the plans, etc., and that the instruction therefore was erroneous. On the trial appellee testified as follows: "From the first time that Mr. Hall came into my office until the delivery of the plans, etc., at Shreveport, it was fully understood, and I had told Mr. Hall that my charges for the work of making the plans complete would be on the basis of 3½ per cent. of the estimated valuation of the building to be erected, and an additional 1½ per cent. on the value, if I superintended the work of construction, and Hall agreed to these charges. * * * My charge for the services rendered was based on an estimated cost for the building of \$30,000. In the frequent talks and conferences with Mr. Hall, we had an estimated value of the building construction of from \$30,000 to \$34,000, and my charge was finally placed at \$1,000." Appellee insists that the testimony just recited raised the issue submitted by the instruction complained of, but we do not think it sufficient to support a finding that appellant had agreed to pay \$1,000 for the plans, etc. It may be inferred that appellee meant that at the conclusion, and as a result of the frequent talks and conferences he referred to, his "charge" was finally placed at \$1,000; but we do not think it should be further inferred that he meant when it was so placed appellant agreed and undertook to pay it. That such was his meaning was not consistent with other portions of his testimony following that we have quoted. "In the case

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of Mr. Hall," he testified, "as in all other cases, the charge of $3\frac{1}{2}$ per cent. on the estimated value was payable unconditionally. * * * It was understood between Mr. Hall and myself that I was to furnish him the plans as heretofore mentioned, at the standard compensation for the work. * * * There was very little said between myself and Mr. Hall as to what I would charge him for the work. He asked me what I would charge him, and I told him, and explained the system of charges we have, and which I always follow." The "standard compensation" and "system of charges" appellee referred to was stated by him to be $3\frac{1}{2}$ per cent. of the estimated value of the building for preparing the plans and specifications therefor, and $1\frac{1}{2}$ per cent. for superintending the construction thereof. Considered together, we think the issue made by appellee's testimony was not whether appellant had contracted to pay him \$1,000 for the plans, etc., but whether he had contracted to pay him therefor $3\frac{1}{2}$ per cent. on the estimated cost of the building or not. Therefore we think the instruction complained of was erroneous.

Appellee insists, however, that, if the instruction was erroneous, it was so in favor of appellant, and that he should not be heard to complain of it. The contention is based on appellee's testimony to the effect that the building was to cost not less than \$30,000, $3\frac{1}{2}$ per cent. of which would be \$1,050; but to sustain the contention on such a ground would be to ignore the testimony of appellant that the building was to cost not exceeding \$18,000, $3\frac{1}{2}$ per cent. of which sum would be \$630, or \$370 less than the amount found by the jury. The finding of the jury reasonably cannot be referred to the evidence tending to establish a contract to pay for the plans, etc., on a percentage basis, because an issue as to such a contract was not submitted to them by the court's charge. Fairly it cannot be referred to an undertaking implied on the part of appellant to pay the reasonable value of the plans, etc., because, while there may have been testimony in the case from which the jury might have concluded that the reasonable value of the plans, etc., was a sum either greater or less than \$1,000, there was no testimony from which they could have concluded that it was no greater and no less than \$1,000 as found by them. It is clear, we think, that the verdict of the jury must be referred to the issue erroneously submitted to them, and therefore that it should not be held that the instruction complained of was harmless. *Stanford v. Wright*, 41 Tex. Civ. App. 346, 92 S. W. 269; *H. & T. C. Ry. Co. v. Gilmore*, 62 Tex. 301; *Altgelt v. Brister*, 57 Tex. 436; *Adamson v. Shiel* (Tex. App.) 18 S. W. 464; *Moore v. Boothe*, 39 Tex. Civ. App. 339, 87 S. W. 882; *Wood v. Texas Produce Co.* (Tex. Civ. App.) 88 S. W. 499.

Over appellant's objection on the grounds that it was irrelevant, immaterial, and cal-

culated to prejudice the minds of the jury against him, the court permitted the witness Moseley to testify that appellant represented to him that he was worth about \$100,000, owned lumber enough to build a city like Mineral Wells, and was there for the purpose of purchasing a site upon which to construct "a \$30,000 or \$40,000 hotel." And over appellant's objection on like grounds, the court permitted appellee on his cross-examination of appellant, testifying as a witness, to prove by him that he might have told Moseley that he "had timber enough in Louisiana to build a town like Mineral Wells, if it was cut up." In his pleadings appellant had alleged that, by the terms of the agreement between appellee and himself, he was to buy a building site from Highsmith, when appellee was to prepare the plans, etc., and negotiate a loan for him (appellant) of money sufficient to pay for the construction of an hotel upon the site. He further alleged that it was understood between them that, in the event a loan for the purpose of building the hotel was not secured, appellee was not to be entitled to demand or receive anything on account of the plans, etc., to be prepared by him. Appellant further alleged that he had so stated to appellee, and that appellee knew he could not purchase the site and construct the hotel unless such a loan was secured. On his direct examination he had testified that he did not at the time of the transactions between himself and appellee have money enough to buy the lot and build the hotel, and that appellee knew it. The testimony objected to should not have been admitted as evidence. Appellant's financial condition was not an issue in the case. The questions made by the pleadings were: (1) Did appellant become bound to pay appellee any sum of money on account of the plans, etc.? (2) If he did, what sum? In determining these questions, whether he was worth \$1 or \$100,000 was of no importance. He might have entered into the contract as claimed by appellee, notwithstanding he was worth only \$1. He might have declined to enter into it had he been worth \$100,000.

Appellee insists, however, that, if the evidence was inadmissible, appellant should not be heard to complain of it in the face of the allegation in his pleadings to which we have referred, to wit, that appellee knew he could not buy the lot and construct the hotel unless the loan was secured, and on account of his testimony on his direct examination as a witness, to which we have also referred, to wit, that he did not have enough money with which to buy the lot and build the hotel. The allegation in the answer referred to, to the effect that appellant was not, and that appellee knew he was not, able to construct the proposed hotel unless the loan was secured, was an immaterial one. It did not present a reason why appellee should not recover against him as prayed for. It doubtless would have been stricken from the an-

evidence. Nor, on the other hand, was the testimony of appellant referred to rendered material by reason of the fact that appellee had failed to except to and have stricken out the allegation in the answer which it tended to support. In so far therefore as the testimony of the witness Moseley was admitted for the purpose of impeaching appellant, relating as it did to an immaterial matter, it was error to admit it as evidence. *T. & P. Ry. Co. v. Phillips*, 91 Tex. 278, 42 S. W. 852. In so far as the testimony objected to was for any other purpose, it clearly was irrelevant, and we do not think it was rendered admissible because other irrelevant testimony without objection thereto had been admitted.

The court instructed the jury: "If you believe from the evidence in the case that the defendant employed the plaintiff to draw plans and specifications for a hotel to cost not exceeding \$18,000, and you further believe from the evidence that plaintiff furnished the plans and specifications of a hotel building which would cost more than \$18,000, and would cost \$30,000, or more, then you are charged that the plaintiff cannot recover in this case, unless defendant accepted the plans drawn, and this with knowledge of the excess in cost to erect the building." The objection urged to the instruction is that it was upon an issue not made by the pleadings and the evidence. As we understand appellant, his contention is that the instruction should not have been qualified by the language, "unless defendant accepted the plans as drawn, and this with knowledge of the excess in cost to erect said building," because it bound him by matter in estoppel which had not been pleaded. We do not think the qualification objected to should be regarded as submitting an estoppel as against appellant to deny liability if he had accepted the plans with knowledge that they were of a building to cost in excess of the sum contemplated when the contract was entered into. If the contract as originally made was for plans of a building to cost not exceeding \$18,000, as claimed by appellant, the effect of appellant's accepting plans tendered to him by appellee, knowing they were of a building to cost in excess of \$18,000, it seems to us; would be to change the terms of the contract in that particular, and render him liable on the contract as so changed. We cannot say that the contract as so changed is not the one declared upon in the petition. If it was, then the court did not err in instructing the jury as complained of, and did not err in refusing to instruct them as requested by appellant in special charges asked.

Appellant complains of the action of the court in overruling his motion to quash the attachment. The grounds stated in the mo-

tion, and the affidavit and petition state inconsistent facts as to the residence of defendant;" and (2) that the amount sued for was "uncertain and incapable of being arrived at except by conjecture on part of jury."

With reference to the ground first mentioned, it may be stated that in his petition appellee alleged that appellant "is a nonresident of the state of Texas, but is a transient person, now temporarily staying in Palo Pinto county, Tex.," and that in his affidavit for the attachment appellee averred that appellant was "not a resident of the state of Texas." The allegation in the petition showing that the court to which the suit was brought might by service of a citation in the ordinary way have acquired jurisdiction to render a personal judgment against appellant, he contends that the fact that he may have been a nonresident of the state did not authorize the suing out of the attachment. We think the contention should be overruled. The question presented is not as to the effect of a showing by proper pleading and proof that the affidavit was false, because appellant was not in fact a nonresident of the state within the meaning of the statute, but is as to the effect of supposed contradictory averments in the affidavit and petition. The statute in terms authorizes the issuance of an attachment when the plaintiff makes an affidavit that the defendant "is not a resident of the state." *Sayles' Ann. Civ. St.* 1897, art. 186, subd. 2. When such an affidavit is made, we do not think the fact that it appears from other averments in the pleadings that the defendant is temporarily in the state is a sufficient reason for quashing the proceedings. The averment in the affidavit that appellant was a nonresident of the state was not inconsistent with the allegation in the petition that he was temporarily staying in the state. A person may be a nonresident of the state within the meaning of the statute, and at the same time be within its boundaries. 3 *Amer. & Eng. Ency. Law* (2d Ed.) 199; *Greene v. Beckwith*, 38 Mo. 384; *Hickson v. Brown*, 92 Ga. 225, 17 S. E. 1035; *Wallace & Sons v. Castle*, 68 N. Y. 370.

With reference to the other ground urged as a reason why the attachment should be quashed, it may be stated that, while appellee in his original petition did not allege an undertaking on appellant's part to pay him a specific sum for the plans, etc., but only their reasonable value, in his affidavit to said petition he swore that appellant was indebted to him in a specific sum, to wit, \$1,050. Even if the allegations of the petition alone should be looked to in determining the contention made, we think it should be overruled. *Stiff v. Fisher*, 2 Tex. Civ. App. 346, 21 S. W. 202; *Waples-Platter Grocery*

Co. v. Basham, 9 Tex. Civ. App. 638, 29 S. W. 1118; *Evans v. Breneman* (Tex. Civ. App.) 46 S. W. 80; *McKay v. Elder* (Tex. Civ. App.) 92 S. W. 288; *Hockstadler v. Sam*, 73 Tex. 315, 11 S. W. 408; 3 A. & E. Enc. Law (2d Ed.) p. 189. The authorities cited establish in effect that where the recovery is sought on a contract either express or implied, and the "damages claimed are actual and capable of estimation by the usual means of evidence, and not resting wholly or in part in the discretion of the jury," an attachment may be sued out. *Hockstadler v. Sam*, 73 Tex. 315, 11 S. W. 409. Appellant's demand, as set out in his original petition, was for a sum alleged to be due on a contract, and the damages claimed were "actual and capable of estimation by the usual means of evidence," and did not rest "wholly or in part in the discretion of the jury." In *Stiff v. Fisher*, supra, the action was to recover a sum of money paid on a contract for the purchase of certain cattle, and also to recover, as damages on account of the defendant's failure to deliver the cattle as agreed upon, the difference between the market value and the contract price thereof. The defendant's motion to quash the attachment issued against his property to enforce the plaintiff's demand, on the ground that it was unliquidated, was overruled. On appeal the refusal to quash the attachment proceedings was held not to be error. After quoting from the opinion in *Fisher v. Consequa*, 2 Wash. C. C. 384, Fed. Cas. No. 4,816, the statement of Mr. Justice Washington "that the uncertainty of the sum due does not, in the common understanding of mankind," render a sum due by an express contract any less a debt, the court in the *Stiff-Fisher* Case said: "It is true in that case," referring to *Fisher v. Consequa*, supra, "there was an express promise to pay this difference; while, in the case here submitted, there was but an implied promise to pay the difference between the contract price and the market value at the time and place of delivery. In some of the cases, however, cited by Mr. Drake (*Drake*, Attachm. §§ 12-23), there was no express promise. We are of the opinion that the words 'debt' and 'demand,' as used in our attachment statute, should not be so restricted in their meaning and scope as appellants contend, and that no error was committed in overruling the motion to quash the attachment. While a strict compliance on the part of the attaching creditor with the statute has been steadily enforced in this state, it seems to us that, in construing the meaning of the law itself, to adopt an illiberal rule is to disregard the expressed will of the Legislature. Rev. St. 1895, final title, section 8." We do not think the allegation in the original petition, in connection with the prayer for the attachment, that appellee's debt, in-

terest and costs "will amount to the sum of \$1,000," furnished a reason why the attachment should be quashed. It appeared from specific allegations in other portions of the original petition, and from the affidavit attached to same, that appellee was claiming a right to recover \$1,000 as the value of the plans, etc. From the whole petition, notwithstanding the element of uncertainty introduced by the confusing, if not contradictory, averment in connection with the prayer, referred to, we think it reasonably appears that the intention of the pleader was not to abandon the claim asserted for \$1,000 as the value of the plans, etc.

The judgment is reversed, and the cause is remanded for a new trial.

TURNER v. PATTERSON et al.

(Court of Civil Appeals of Texas. March 25, 1909. Rehearing Denied April 15, 1909.)

1. INJUNCTION (§ 111*)—VENUE.

Under Rev. St. art. 1194, subd. 17, fixing the venue of actions to stay proceedings in any suit in the county where the suit is pending, an action to stay proceedings in a suit in another county is properly dismissed, where the petition fails to state any cause of action against the defendants who do not reside in such other county.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 195; Dec. Dig. § 111.*]

2. INJUNCTION (§ 7*)—NATURE AND PURPOSE OF REMEDY—APPEAL.

An injunction against maintaining an action cannot be made to serve the purpose of an appeal.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 6; Dec. Dig. § 7.*]

3. INJUNCTION (§ 26*)—RESTRAINING ENFORCEMENT OF CONTRACT—FRAUD.

That a note executed by plaintiff was obtained through the fraudulent representations of defendant is available as a defense in an action on the note, and therefore is not ground for the issuance of a writ of injunction restraining the enforcement of the note.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 24; Dec. Dig. § 26.*]

4. INJUNCTION (§ 26*)—ENFORCEMENT OF CONTRACT—FRAUD—FAILURE TO URGE DEFENSE.

Where the grounds on which an injunction is sought to restrain the enforcement of a note given by plaintiff are available as defenses in an action on the note, the failure of plaintiff to interpose those defenses at the proper time on account of his own negligence is no reason for enjoining the suit.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 24; Dec. Dig. § 26.*]

Appeal from District Court, Borden County; James L. Shepherd, Judge.

Suit by W. H. Turner against W. H. Patterson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. H. Peebles, Turney & Lewis, and Morrison & Morrison, for appellant. Curtis & Hancock, for appellees.

HODGES, J. This appeal is from a judgment dissolving a temporary restraining order theretofore issued, and refusing a writ of injunction.

On December 9, 1907, the appellant filed in the district court of Borden county his petition for an injunction, alleging, in substance, the following facts: That W. H. Patterson, one of the appellees, resides in Dallas county, and is the manager of the Hartford Life Insurance Company, a foreign corporation engaged in the business of writing life insurance in Texas. That the other defendants, W. L. Evans and M. J. Thornton, are also agents of said company, and reside in Borden county, Tex. That on or about the 9th day of October, 1907, the said Patterson induced plaintiff to buy a policy of insurance for an annual premium of \$174.50, representing that, in consideration of said premium, the insurance company would issue to him a policy on his life for \$5,000, which would insure his life for that sum for 20 years, and, at the expiration of that time, said sum would be paid to plaintiff in cash if he were then living. That this representation was made by the defendants to plaintiff at the time and place aforesaid to induce him, and did induce him, to contract and agree with the defendants, as agents of the corporation aforesaid, to buy such \$5,000 insurance policy. Relying upon the promise that he would obtain a policy payable to him at the end of 20 years, in consideration thereof he executed his note, dated February 12, 1907, for \$174.50, payable to the order of W. H. Patterson at Dallas, Tex., on the 1st day of July thereafter, without grace, said note to bear interest after maturity at 10 per cent per annum, and also providing for the payment of attorney's fees if it should be placed in the hands of an attorney for collection. Plaintiff further alleges that after he signed said note, and before its delivery to Patterson, Evans and Thornton, two of the defendants in the suit, signed the same as sureties, writing their names on the back thereof, and then delivered the note to Patterson. That, when the insurance policy which he understood he was to receive from the agents of the insurance company was tendered to him in fulfillment of his said contract and agreement, he found that it was not such as he had contracted for, but that it was merely one which would become nonpremium bearing after 20 years, and payable only upon his death. That he thereupon returned the tendered policy and demanded the surrender of his note, but that the appellees refused to surrender the note, though the consideration had wholly failed. He further avers that Patterson, with full knowledge of all the facts alleged, wrongfully and fraudulently withheld said note from him, and on or about June 19, 1907, deposited the same with the American Exchange National Bank

of Dallas, Tex., for collection, which bank thereupon forwarded the same to a bank at Gall, in Borden county, for collection. That, after appellant had learned that the note was at the Gall bank, his attorney at once proceeded to prepare and file suit against the necessary parties to cancel the note. That when Thornton, one of the appellees, learned that said suit was in course of preparation, and in order to prevent the fraud from being exposed in Borden county and injuring his business, he did on June 26th, as a mere volunteer, pay off and extinguish the note, and that Patterson received the proceeds thereof before action could be taken in the said suit. Plaintiff alleges that he is informed and believes and charges the fact to be that the note was by the Gall bank stamped, "Paid, June 26, 1907," the day Thornton paid the same with his personal check. He further charges as a fact that several days after said note was paid and canceled as aforesaid Thornton had said Gall bank make on said note the following entry: "Paid by M. J. Thornton. J. D. Brown, Cashier." Appellant alleges that, if he is in error in stating that Patterson deposited said note with the American Exchange National Bank at Dallas, Tex., for collection, he then avers that Patterson negotiated said note in due course of trade to the American Exchange National Bank of Dallas, Tex., to which said Thornton as surety or volunteer, or as both, paid said note as aforesaid, extinguishing same.

The appellant further avers that if Thornton as surety, and not as a volunteer, paid said note without the frauds complained of, then in that event only the cause of action arose in his favor against plaintiff upon an implied promise to pay him the money paid by Thornton upon the note. He denies that he ever promised in writing to pay said Thornton, or any one else in Dallas county, Tex., the money by him paid on said note, and denies that any of the statutory exceptions exist authorizing any suit beyond Borden county and in Dallas county against plaintiff by any of defendants in reference to said note or on said implied promise, and claims the statutory right to be sued in the justice precinct and county of his residence. He further avers that, after the satisfaction of said note by Thornton, the defendants entered into some kind of a false and fraudulent arrangement wherein said Thornton returned said extinguished note to Patterson, and the latter thereupon fraudulently pretending that the note was valid and unextinguished, after having sold it to the American Exchange National Bank of Dallas, or received payment thereof, instituted a suit in the justice court of precinct No. 1 in Dallas county on July 10, 1907, against the appellant on said note. That the case was postponed from time to time at the instance of said Patterson or his attorney,

and was not called for trial until October 29, 1907, on which day Patterson recovered a judgment in said justice court against the appellant in said suit. That on or about October 9, 1907, appellant presented to Hon. James L. Shepherd, judge of the district court of Borden county, his original petition, praying for a writ of injunction against the said Patterson to restrain him from prosecuting to judgment the aforesaid suit while pending in the justice court, and restraining said defendant M. J. Thornton from instituting suit against plaintiff on said implied promise, said original petition containing the same allegations hereinabove made, as well as other allegations hereinafter set forth. That Hon. James L. Shepherd, being constantly engaged with his official work in other counties in his district, could not for lack of time consider the petition, and did not do so until the 7th of November, 1907, at which time he did affix his fiat directing the issuance of the writs in said petition prayed for upon plaintiff's entering into a bond of \$500. That, as the result of the delay by the district judge above mentioned, judgment was obtained by said Patterson against appellant in the justice court on the 29th of October, 1907; the restraining order referred to being too late to prevent the prosecution of the suit in said cause.

He further alleges that, as a result of the delay in the matter of the issuing of the restraining order, he was forced to prosecute an appeal to the county court of Dallas county, Tex., from a judgment rendered against him in the justice court, in order to avoid the issuance and levy of a writ of execution upon his property, and the cause is now pending in said county court on appeal. He further avers that the case was tried by the justice of the peace, and a judgment arbitrarily rendered against him on said note in October, 1907, although the justice of the peace saw that said note was paid and had been extinguished, and for which reason the same could not legally, and ought not to, have served as a basis for a suit. He alleges that he did not read the application for a policy of life insurance before signing the same, for the reason that he was deterred from so doing by the false and fraudulent representations made by Evans, who stated to him at the time that it was all right and there was no use in reading it; that he has never read any application for such policy, nor for any policy offered to him by the Hartford Life Insurance Company or any of its agents. He further alleges fraud and deceit practiced upon him by Patterson, Evans, and Thornton, for the purpose of procuring the execution of the aforesaid note and his promise to pay 19 other annual premiums upon said policy of insurance, and claims that, unless restrained by a writ of injunction, Patterson will further prosecute his suit against appellant in the county court of Dallas county, where the case is pending on appeal, he having filed an

appeal bond for the purpose of preventing an execution being issued against him; and that Thornton will institute suit against him on said implied promise, and prosecute the same to judgment. He alleges that the suit against him in the justice court of Dallas county was fraudulently instituted upon the ground that said note contained a promise to pay in Dallas, and he alleges the fact to be that Thornton paid the note in Borden county, and it was thereafter transmitted to Dallas. He also alleges that the Hartford Life Insurance Company will institute suit against him upon his refusal to pay any or all of the remaining premiums stipulated in the policy of insurance. He claims collusion and confederation among all of the appellees for the purpose of collecting from him the money stipulated to be paid in the note and the annual premiums provided for in the policy of insurance. He asks that all of the appellees, including the Hartford Life Insurance Company, be enjoined; that Patterson be enjoined from prosecuting his suit against him in the county court of Dallas county upon the note; that Thornton be enjoined from suing him on the pretended implied promise by him to repay the money paid by Thornton on the note; that the Hartford Life Insurance Company be enjoined from suing for said nineteen premiums or any of them; and that the defendants be required to bring into court the note and policy of life insurance for cancellation. The record shows that a temporary writ of injunction had been issued by the Hon. James L. Shepherd during vacation, before the regular term of court.

All of the parties defendant in the suit answered, all disclaiming any interest in the subject-matter in controversy, the note sued on, except Patterson. The latter claimed the privilege of being sued in the county of his residence, which is Dallas county, Tex., and specially pleaded the pendency of the proceeding sought to be stayed in Dallas county and objecting to the venue. He also filed general and special exceptions to the petition, and further answered by general and special denial. The Hartford Life Insurance Company disclaims any right, title, or interest to the matter in controversy, and says, with reference to the policy referred to, that under the contract between the plaintiff and the defendant, by virtue of which the policy of insurance was issued, it was at all times and is optional with the plaintiff as to whether or not he desires to pay the nineteen annual premiums called for in the same; that he is under no obligation to pay the same unless he elects to do so for the purpose of keeping his policy in force; that it never asserted, and does not now assert, and does not intend in the future to assert, that there is any obligation on the part of plaintiff to pay any of those premiums. W. L. Evans answered, disclaiming any right, title, claim, or interest in the matter in controversy, says that he makes no claim against the plaintiff on the

note described in the plaintiff's pleadings, and did not claim any interest therein at the date of the institution of this suit or at any other time. In addition to the disclaimer, he pleads general denial as to the charges of fraud. Thornton also disclaims any right, title, claim, or interest to any of the matter in controversy, and says that he makes no claim against the plaintiff on the note described in the pleadings, and did not claim any interest therein at the date of the institution of this suit. He further denies the charges of fraud and conspiracy alleged in the petition.

From a judgment sustaining the general and special exceptions and dismissing the petition, this appeal is prosecuted.

The principal purpose of this suit being to stay proceedings in a suit pending in Dallas county, and having failed to state any cause of action against the parties defendant who did not reside in that county, the court properly sustained the objections to the venue. Article 1194, subd. 17, Rev. St. 1895, fixes the venue of actions to stay proceedings in any suit in the county where the suit is pending. It also appears from this petition that it seeks to have the application for injunction serve the purposes of an appeal. That this is not permissible is well settled in this state. *G., H. & S. A. Ry. Co. v. Ware*, 74 Tex. 47, 11 S. W. 918; *Tex. Mex. Ry. Co. v. Wright*, 88 Tex. 350, 31 S. W. 614, 81 L. R. A. 200; *Beer v. Landman*, 88 Tex. 457, 31 S. W. 808. The grounds alleged as a basis for the issuance of a writ of injunction were available as defenses in the suit then pending, or any of the suits thereafter expected. If by reason of his failure to interpose those defenses at the proper time a situation has arisen in which the appellant is deprived of any of them, he fails to state facts indicating that anything other than his own negligence was the cause.

We think the court properly refused the writ, and the judgment is therefore affirmed.

LINDALE BRICK CO. v. SMITH.†

(Court of Civil Appeals of Texas. March 4, 1909. Rehearing Denied April 15, 1909.)

1. MASTER AND SERVANT (§ 82*)—SERVICES AND COMPENSATION—LIENS.

Under *Sayles' Ann. Civ. St. 1897*, art. 8339a, giving a lien to secure the payment of wages of "any clerk, accountant, bookkeeper, artisan, craftsman, factory operative, mill operative, servant, mechanic, quarryman, or common laborer, farm hand, male or female," for labor performed, one who is employed as the superintendent of a brick company is not entitled to a lien for services although he at times performed the labor of an ordinary hand, as the lien does not attach in favor of persons not enumerated although they may occasionally perform the duties of one of the enumerated classes, and one of the classes enumerated has a lien for all his services although some of his work is

not within the duties usually assigned to his class.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 129; Dec. Dig. § 82.*]

2. PLEADING (§ 8*)—CONCLUSIONS.

The petition of one, claiming a lien on the property of a brick company, for damages for conversion by the purchasers of the property, does not sufficiently establish a lien by alleging that plaintiff was entitled to a lien, as that is but a conclusion of the pleader.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 12; Dec. Dig. § 8.*]

3. TROVER AND CONVERSION (§ 32*) — COMPLAINT—ALLEGATION OF INTEREST.

An allegation, in a complaint for conversion of a brickmaking plant on which plaintiff claimed a lien for wages, that plaintiff "performed labor," etc., is insufficient to bring plaintiff within any one of the classes of employees particularly specified in the statute as entitled to a lien for their wages.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 191; Dec. Dig. § 32.*]

4. COURTS (§ 121*)—DISTRICT COURT—JURISDICTION—AMOUNT INVOLVED.

The district court has no jurisdiction of an action for conversion of property belonging to a brick company, brought by an employee of the company claiming a lien for his services, and also claiming as the assignee of the wages of two other laborers, where the amount of the claims assigned is less than \$500 and the plaintiff has no lien for his own wages, and therefore no cause of action for the conversion of his employer's property.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 413; Dec. Dig. § 121.*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by S. R. Smith against the Lindale Brick Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Fitzgerald & Butler, for appellant. Jesse F. Odom and Gentry & Castle, for appellee.

HODGES, J. The appellee, S. R. Smith, filed this suit against the appellant in May, 1907, seeking to recover the sum of \$1,963.02 as damages for the conversion of a certain brick plant, its machinery and appurtenances, upon which he claimed to have liens for labor performed by himself and others. The petition alleges, substantially, that the Smith County Brick Company was a private corporation formed under the laws of Texas, with its place of business in Smith county; that during the years 1905, 1906, and a portion of 1907 the company owned and operated a brick plant at Lindale, Tex.; that the appellee, Smith, by virtue of a certain contract made by him with the Smith County Brick Company, performed labor to the amount of \$1,534.06, as per his itemized account attached. It is further alleged that M. A. Wilds and Henry Henson also performed labor for said brick company, aggregating in value sums stated, and acquired liens under the statute which were assigned to and held by appellee at the institution of this suit. The petition then alleges that in April, 1907, the defendant, Lindale Brick Company,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 19, 1909.

with full knowledge of appellee's rights and liens, purchased all of the property of the Smith County Brick Company as above mentioned, and converted the same to its own use, to appellee's damage in the sum sued for, and prays judgment for that amount. Upon a trial, judgment was rendered in favor of the appellee, Smith, for the sum of \$905.65. The jury specified the claims upon which their verdict rested, and this shows that they ignored the claim for services performed by Wilds, restricted the allowance for the services performed by Smith to \$800, but allowed the full amount of the claim by Henson.

Findings of Fact.

The testimony adduced upon the trial shows the following facts: The Smith County Brick Company was a private corporation organized sometime during the year 1904, for the purpose of manufacturing and selling brick, and the appellee, S. R. Smith, was one of the stockholders and directors. If he was not such at the date of organization, he became one shortly thereafter. The company owned about 70 acres of land near Lindale, upon which it established a plant with the necessary machinery for making brick. The business of brickmaking was commenced and continued during the years 1905, 1906, and a small portion of 1907, during which time a large number of brick were made and sold. The company became indebted to the Jester National Bank of Tyler in the sum of \$3,000, to secure which it gave a mortgage on its plant and property. It was also indebted to Robert Clark in the further sum of \$5,000, to secure which a second mortgage was given on its property and brick plant. The brick company continued its business till on or about the 7th day of January, 1907, when a suit was instituted by Clark on his note and mortgage, a writ of sequestration issued, and the property was taken in charge by the sheriff, who held it till sold under order from the court. Clark prosecuted his suit to judgment, procured an order of sale, and in March following the property was sold and bought in by him for a sum less than the amount of his debt. Clark afterward acquired the claim held by the bank. In April, 1907, the Lindale Brick Company, the appellant in this suit, was organized, and thereafter purchased from Clark the brick plant and the tract of land on which it was situated, and again began operating it. After this last-named purchase this suit was filed for conversion. All of the stock of the Smith County Brick Company, during the time it operated the plant, was owned by five persons—Nowlin, Kennedy, M. A. Wilds, the appellee, S. R. Smith, and his brother, W. T. Smith. These were also the directors of the corporation, and continued as such during the time it did business. During the years of 1905, 1906, and that portion of 1907 when the Smith County Brick Company operated the plant, the appellee was the superintendent, having been employed for

that purpose by the board of directors. We think the evidence is ample to justify the conclusion that he was given the entire supervision of the plant, with full authority to employ and discharge hands, direct the details of the work, fix the compensation of subordinate employes, determine when and for what length of time they should be engaged, and was responsible to the directors for his management of the business. The testimony also shows that appellee did considerable manual labor about the plant at different times, but whether or not this was required of him by the terms of his contract does not appear. He testifies that he would frequently fill the place of an absent hand, or would assist in laying brick, or help to keep up the fires, repair breaks, and do many miscellaneous jobs about the business. There is nothing, however, to negative the inference that those services were performed from choice rather than in compliance with the exactions of a contract. For aught that appears to the contrary, he was empowered to employ others to do all the manual labor which he performed about the plant. He testifies that his contract with the directors was that he was to get \$75 per month if they employed Wilds to assist him; that he told them that if they did not employ Wilds he would charge them \$100 per month for his services. They failed to employ Wilds, and he made out his claim for \$100 per month. When the Smith County Brick Company ceased to do business, and at the time the plant was sequestered by Clark, it was indebted to appellee, according to his estimate, for more than 15 months' services, none of which was ever paid.

Henson was employed as a night watchman by the appellee while superintending the plant. Henson was also required to and did perform some other services, such as making fires in the furnaces and assisting in handling the brick. His employment began about the first of the year 1906, and he was to receive a monthly compensation of \$40. There is some dispute as to whether his wages were payable monthly or at the end of the year. The evidence shows without contradiction that he drew his wages monthly till about the 1st of June, 1906, after which time he drew none. At the time the property was sequestered by Clark there was due him the sum of \$305.66, the amount sued for. Henson testifies that he had the right to demand his wages at the end of each month if he needed them, but his contract was that he was to draw only so much monthly as he needed to live on, and the rest was to be paid at the end of the year. It is shown that the claims of both Wilds and Henson were merely transferred to the appellee to enable him to sue on them in the same action with his; that he had not paid or contracted to pay them any consideration for their claims. On the 22d day of January, 1907, the appellee filed with the county clerk of Smith county,

in form as required by law for fixing a laborer's lien, an account against the Smith County Brick Company, claiming an indebtedness of \$307.50 as a balance due for labor done and performed for that company at \$75 per month, payable January 1, 1906; also an additional claim for similar services to January 8, 1907, at \$100 per month—making a total of \$1,534.06. In his affidavit attached to the account the appellee swears that he was employed by the board of directors of the aforesaid company "to do labor, manage, and supervise the business of manufacturing brick for said company at its said plant."

On the 26th day of January, 1907, Henson filed with the county clerk of Smith county his claim against the Smith County Brick Company for the sum of \$305.66 for services as night watchman, alleging that the indebtedness accrued on the 1st day of January, 1907. There was a claim filed by Wilds also; but the jury having failed to find anything in favor of the appellee by reason of that claim, it is not necessary to notice it further.

Conclusions of Law.

The liens claimed in this suit, if they exist, are by virtue of article 3339a of Sayles' Annotated Civil Statutes of 1897, giving liens in favor of certain classes of employes who perform labor and other services, for security for the payment of their wages. The article referred to provides that: "Whenever any clerk, accountant, bookkeeper, artisan, craftsman, factory operative, mill operative, servant, mechanic, quarryman, or common laborer, farm hand, male or female, may labor or perform any service in any office, store, saloon, hotel, shop, mine, quarry, manufactory or mill of any character, or on any farm, under or by virtue of any contract or agreement, etc., * * * in order to secure payment of the amount due by such contract or agreement, written or verbal, the hereinbefore mentioned employes shall have a first lien upon all the products, machinery, tools," etc. Article 3339b provides for the method of fixing and securing the lien. Article 3339c provides that "under the operations of this chapter all wages, if the service is by agreement performed by the day or week, shall be due and payable weekly; or if by the month, shall be due and payable monthly."

The question which logically presents itself as one that should be first considered is, does this statute give a lien to that class of employes to which the appellee, Smith, belongs? That the statute did not intend to create a lien in favor of all employes is very evident; for, had this intention existed, the end could have been accomplished with more ease and precision by the use of less verbiage. Another fact is, we think, apparent upon the face of this statute, and that is the purpose of protecting with a lien the classes of employed individuals mentioned, rather than to attach the lien to any particular class or

grade of service that might be performed. For instance, the lien is given to the clerk, bookkeeper, and accountant, not to any person who might in the course of a dual or miscellaneous employment perform, at times, some of the duties appertaining to those usually falling within the line of work of the clerk, bookkeeper, or accountant. It is true we must look to the grade and character of service contracted for and performed by an employe to ascertain the class to which he properly belongs, and from that determine whether he falls within the list of the protected classes. But this presents no difficulty except in those instances where the duties are of a dual or mixed character, some belonging to the protected classes and others not. In such cases the only safe method is to ascertain from the contract of employment what are the principal duties of the employe, and this will determine the class to which he belongs, notwithstanding he may at times perform some services not generally belonging to that grade or class of employment.

It follows from what we have said that an employe who belongs to any one of the classes mentioned in the statute has a lien for all of his wages, even though some of the labor or service he performs does not fall within the line of duties usually assigned to that class. On the other hand, an employe who does not belong to any one of the groups or classes mentioned in the statute is without the lien, notwithstanding he may at times perform some labor or service properly within the list of duties usually belonging to the protected employes. Where the contract of employment imposes miscellaneous duties, some of which belong normally to a protected occupation and some do not, but fails to segregate the duties and apportion the wages to be paid, but provides a fixed sum for the entire compensation, the employe has a lien for all of his wages or none. It is just as obnoxious to the statute to extend its provisions so as to permit liens where none were given, as to deny liens, by a too restricted construction, where it was intended they should be given. Looking to the principal line of employment provided for by the terms of the appellee's contract with the Smith County Brick Company, we think it clear that he should be classed as a superintendent or manager. Managers and superintendents have no statutory lien for their wages, even though they may at times perform labor or services belonging to those employes who have. *Raynes v. Kokomo, etc., Co.*, 153 Ind. 315, 54 N. E. 1061; *Freeman on Executions*, § 234. Counsel for appellee insist that Smith performed manual labor in accordance with the terms of his contract; that such labor was a part of the duties which he assumed in becoming the superintendent of the plant. It is true that the evidence shows that Smith did perform some manual labor about the brick plant; but this, we think, may be regarded as a mere incident to his principal

term "common laborer" in our statute is not without special significance. The language was probably adopted to avoid the confusion experienced in other states in construing similar provisions giving liens or preferences to laborers, and to designate as accurately as practicable the grade of employes meant. Unless we adopt the rule that an employe should be graded according to the lowest instead of the highest service he may have contracted to perform, and this without regard to the principal undertaking, there is no foundation whatever for the conclusion that Smith was a "common laborer," within the meaning of the statute. If, then, he is properly classed as a manager or superintendent, why should he be allowed a lien for all or any part of the compensation for his services? Under the evidence we must hold that he was entitled to a lien for all or for no part of his salary, assuming that no bar has intervened by reason of the lapse of time. If the statute does not include a superintendent or manager among the protected classes, it certainly did not intend to incumber the property upon which such liens were to operate for compensation to be paid for services earned as superintendents and managers. When Smith was selected and employed to superintend and manage the brick plant, it is safe to assume that the compensation he was to receive was based principally upon the value of his services in that line; and, even admitting that he was also to perform some manual labor in connection with his other duties, such labor would form the basis of a much smaller proportion of his salary or wages. The capacity to manage and superintend a business enterprise always commands higher wages than is allowed for labor of a low grade. There being no way by which the court or jury could segregate the value of the services rendered by Smith as a superintendent from the value of the wages he might have earned as a laborer, assuming that such a construction of the statute were permissible, there is no basis for the judgment here rendered in his favor. Necessarily he was accorded a lien by the jury for some services, at least, never contemplated by the statute. We can see no good reason for holding that a superintendent should have a lien for the labor of loading brick on a wagon, and be denied one for supervising the labor of others while performing the same service, unless it be held that the statute was enacted for the sole purpose of encouraging people to engage in that class of labor.

It will be observed that the statute has confined the lien given to classes of employes who occupy subordinate positions in the service, and whose duties do not involve the management and control of the business with which they may be connected. In

look to the reward of a day's labor or services for immediate and present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence." The testimony here shows that Smith was a member of the board of directors, a part of the corporation itself. The success of the undertaking must have depended to a great extent upon his business sagacity and ability to manage the affairs of the company. Its financial embarrassment may have been due to his mistakes. Under such circumstances we see no reason why courts should be called upon to adopt a liberal rule in construing this statute in order to extend its provisions to those under whose management the enterprise has proved a failure.

In an able argument counsel for appellant has urged the proposition that Smith should not be permitted to recover for his wages upon the ground that he had a lien, for the reason that he is shown to have been a stockholder and a director in the Smith County Brick Company at the time he performed the services for which he now claims the lien, asserting that to do so would be opposed to public policy. There is much force in the suggestion; but inasmuch as we think there are other and sufficient reasons for reversing this judgment, we do not pass upon the question. If Smith had no lien on the property of the Smith County Brick Company for his wages at the time it was purchased by the appellant, then it follows that he is not entitled to recover in this suit any damages on that account for the alleged conversion of the property. *England v. Beaty*, 41 N. J. Eq. 470, 4 Atl. 307; *Cole v. McNelli*, 99 Ga. 250, 25 S. E. 402; *In re Clark*, 92 Mich. 351, 52 N. W. 637; *Raynes v. Kokomo, etc., Co.*, 153 Ind. 315, 54 N. E. 1061; *McPherson v. Stroup*, 100 Ga. 228, 28 S. E. 157; *Penn, etc., Co. v. Leuffer*, 84 Pa. 108, 24 Am. Rep. 189; *State v. Land*, 108 La. 512, 32 South. 433, 58 L. R. A. 407, 92 Am. St. Rep. 392; *Wakefield v. Fargo*, 90 N. Y. 215; *Moore v. Am. Industrial Co.*, 138 N. C. 304, 50 S. E. 687. The right of the appellee to recover in this action must depend solely upon his ability to plead and prove the existence of a lien upon the property formerly owned by the Smith County Brick Company at the time it was purchased by the appellant. The allegations of the petition are no stronger than the evidence, and if this is insufficient to sustain a recovery it follows that the petition is also insufficient. In that portion of the petition in which it is undertaken to set out the facts which gave rise to the lien, the allegations are as follows: "That during the years 1905, 1906, and 1907 S. R. Smith, plaintiff herein, by virtue of a certain contract made by him

with the Smith County Brick Company, performed labor for it to the amount of \$1,534.06, an itemized account of which is hereto attached and marked 'Exhibit C' for identification, and made a part of this petition." The account filed with the county clerk and referred to as "Exhibit C" is thus stated:

Tyler, Texas, January 22, 1907.

Smith County Brick Company to S. R. Smith, Dr.

To amount due S. R. Smith for labor done and performed for said Smith County Brick Company during the year 1905 and due on January 1st, 1906, at \$75.00 per month, balance due on said contract.....	\$ 307 40
To amount due S. R. Smith for labor done and performed for said Smith County Brick Company from January 1st, 1906, to January 8th, 1907, at \$100.00 per month.....	1,226 66
Total amount due.....	\$1,534 06

In the affidavit attached to the account in which Smith sets forth the terms of his contract as definitely as this can be said to have been done in any part of his pleadings, he says: "And said Smith County Brick Company, acting through its said board of directors at a meeting held for that purpose on or about the 1st day of January, 1906, employed the said S. R. Smith to do labor, manage, and supervise the business of manufacturing brick for its said company at its said plant, and said company agreed to pay the said S. R. Smith for his said services during and for the year 1906 the sum of \$100 per month, said wages to be due on January 1, 1907." We do not think these allegations are sufficient to show that the appellee was entitled to a lien upon the property. His averment that he was entitled to a lien is but the conclusion of the pleader, and not the statement of a fact. He should either have alleged a contract of employment within one of the classes mentioned in the statute, or he should have so stated the class of labor or service he rendered as to enable the court to designate his principal occupation in the service. The mere statement that one "has performed labor" for another is far from being equivalent to an averment that he belongs to a class of employes to whom the statute has given a lien. Because one labors it does not necessarily follow that he is a "common laborer," or that he belongs to any one of the groups mentioned in the statute whose occupation may involve labor. In a sense all employes labor in some form, but all employes are not protected by the lien.

We deem it unnecessary to notice the assignments which challenge the correctness of the judgment as to the claim of Henson. Both his and Wilds' claims together would not make a sum sufficient to give the district court jurisdiction, being less than \$500.

The petition not having stated facts which would justify a recovery on the claim of Smith, the court was without jurisdiction to render judgment on the claims of Henson and Wilds. *Peterson v. Thomas* (Tex. Civ. App.) 24 S. W. 1124.

There are other assignments in the record attacking the charge of the court, and other rulings, some of which we think should be sustained. But in view of the disposition we make of the case, it is unnecessary to consider them.

The judgment of the district court will be reversed, and the cause dismissed.

EDWARDS et al. v. TRINITY & B. V. RY. CO.†

(Court of Civil Appeals of Texas. March 8, 1909. On Rehearing, April 1, 1909.)

1. EVIDENCE (§ 433*) — PAROL EVIDENCE — VARYING WRITTEN CONTRACT.

Parol evidence to establish facts which, in equity, relieve a party from the obligations of a written contract, on the ground that it was entered into under a mistake as to the facts, is not objectionable as varying the terms of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1909; Dec. Dig. § 433.*]

2. CONTRACTS (§ 93*)—VALIDITY OF ASSENT—MISTAKE.

Where, when a contract whereby plaintiffs sold to defendant railroad so much of the gravel, clay, and sand on a certain tract as it should remove within five years, and defendant agreed to remove not less than a certain amount per month during the term and to pay a stipulated price per cubic yard therefor, was executed, the parties contemplated that the gravel, etc., was to be used by defendant in ballasting its roadbed, and supposed that there was a sufficient quantity of a quality suitable for the purpose so situated that it could be worked by steam shovel at a reasonable expense, not in excess of its value for such purpose, but such conditions did not in fact exist, defendant was entitled to a cancellation of the contract on the ground of mistake.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 415-419; Dec. Dig. § 93.*]

Appeal from District Court, Grimes County; Gordon Boone, Judge.

Action by W. O. Edwards and others against the Trinity & Brazos Valley Railway Company. From the judgment, plaintiffs appeal. Affirmed.

Buffington, Buffington & Bowen, for appellants. Andrews, Ball & Streetman and McDonald Meachum, for appellee.

REESE, J. On April 17, 1906, appellants (styled contractors in the contract) and appellee entered into a written contract, which is, omitting immaterial portions, as follows: "Whereas, the contractors own a tract of land in the A. Zuber survey, located in Grimes county, Texas, upon which is located a deposit of gravel overlaid by deposits of sand and clay, and they hereby grant, bar-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 26, 1909.

gain, sell and convey to said Trinity & Brazos Valley Railway Company, its successors and assigns, all of said gravel, sand and clay, or so much thereof as said railway company may remove therefrom during the existence of this contract, and upon the terms hereinafter stated. Said railway company to pay the contractors' grantors herein, one cent (1c) per cubic yard for each yard of gravel, sand and clay removed from said land during the period of this contract, and to be paid as hereinafter provided for. The contractors hereby agree and contract to permit the said railway company to do such grading and to lay such tracks as will be necessary for said railway company to have, to operate trains and steam shovel plant, for the purpose of removing said gravel, sand and clay. Said railway company to have the right of way through land of contractors, with right to grade said tracks as may be found necessary, and right to remove all such tracks, on termination of said contract. Said railway company to have the right to work the aforesaid gravel deposit at any time during the five years, ending April 1, 1911. That said railway company will begin operation, and take possession of the aforementioned gravel pit, and begin removing material therefrom within one year from the signing of this contract. Said railway company hereby agrees to remove not less than five thousand (5,000) cubic yards of gravel and sand per month, and further agrees that the price to be paid contractors is to be at rate of one (1c) per cubic yard, but it is to be counted in car loads—none to be less than ten (10) cubic yards. Said railway company further agrees to make payments monthly, on or before the 20th day of each month, for gravel hauled during the previous month. To further identify this property, upon which the gravel pit is located, there is hereto attached, as 'Exhibit A,' a blue print of the property owned by contractors, upon which is outlined the gravel deposit to be worked by the aforementioned railway company."

Under this contract appellee began operations in December, 1906, and took out gravel, sand, and clay of the value, under the contract, of \$150, and then ceased and abandoned the work. Whereupon, on September 21, 1907, appellant brought suit to recover on the contract claiming as damages \$2,600 as the value, at the contract price, of the amount of gravel, sand, and clay which, it is alleged, appellee was required to remove and pay for, from December, 1906, when it began work, to April 1, 1911, the termination of the five years named in the contract. Appellants also prayed for general relief. It was alleged that appellee had, in fact, removed and appropriated sand, gravel, and clay of the value of \$150 before abandoning the work, and that there was on the land a sufficient quantity of gravel, sand, and clay to enable appellee to comply with its contract. To this petition appellee pleaded a general denial and

specially answered, in substance: That it entered into said contract believing that there existed upon appellants' lands a gravel bed containing gravel, sand, and clay in such quantity and suitable for use in filling and ballasting its roadbed as to be gotten out by building a spur track thereto, by the operation of a steam shovel and trains of cars. That appellants, as well as appellee, so believed, and that it was in contemplation of this fact that this contract was made, and it was well understood that the gravel was to be so removed in such a way as that, after payment of all expenses so incurred and paying the price for the gravel, appellee could profitably use the same for the purposes aforesaid. That at the time the contract was made no gravel pit, mine, or bed had ever been open on the land, and the amount of the gravel, its location, quality, and situation were wholly undetermined; but it was supposed that it existed in such quantity and of such quality that it could be profitably worked and could be gotten out and removed by means of a steam shovel. It is averred that appellee, pursuant to the terms of said contract, at large expense, built its railroad bed for some distance into or near said supposed gravel pit, and unloaded its iron rails and ties preparatory to building its track, and had endeavored in good faith to carry out its contract, but found that there was but small quantity of gravel on the land, and that not suitable quality, and so located, being scattered about in pockets containing small quantities, that it was impossible to remove the same in the manner contemplated, or in any other manner, except at an expense greatly in excess of its value after such removal. It was further alleged that, in fact the gravel, sand, and clay did not exist on the land in such quantity, or of such quality, or so located, that it was possible for appellee to remove as provided in the contract, and that both parties were mistaken as to the existence of the subject-matter of the contract. Appellee alleged specially its own ignorance as to the matter, which it is alleged constituted the essence of the contract, and prayed that the contract be rescinded, and appellee be relieved of its obligation, tendering back to the appellants a release of all said clay and gravel specified in the contract. We have set out sufficient of the answer to disclose the general nature of the defense urged to the suit. Upon trial, without a jury, there was judgment for appellants for \$150, the price of the gravel actually removed, from which they appeal.

Conclusions of fact and law were filed by the trial court. The trial court found the following facts, which are here adopted by us: "(1) The plaintiffs, W. O. Edwards, E. A. Edwards, M. E. Gooch, O. M. Gooch, C. E. Gooch, and R. B. Gooch, on and prior to the 17th day of April, 1906, owned a tract of land described in the plaintiff's petition and in the agreement hereinafter set out, on

which was located certain deposits of gravel, sand, and clay, the quality and quantity of which was undetermined. (2) On and prior to above date, the defendant, the Trinity & Brazos Valley Railway Company, was engaged in building, constructing, and completing its roadbed for its main line of railway into and through Grimes county, Tex., and in the vicinity of the tract of land owned by plaintiffs, and for such purposes was desirous of obtaining suitable gravel and sand in sufficient quantities to be used profitably in ballasting and filling its said roadbed. (3) The plaintiff E. A. Edwards, on and prior to said date, was the agent of the other parties plaintiff, and knew that said defendant was so engaged in building, constructing, and completing its roadbed for its line of railway, and that defendant was desirous of obtaining gravel and sand of quality suitable for use in ballasting and filling in its said roadbed, and in the quantities to be sufficient to be handled for such purposes at a reasonable expense not in excess of its value for such purpose. (4) On the said 17th day of April, 1906, the plaintiffs and defendant entered into the contract hereinbefore set out. (5) At the time of the execution of the contract, it was in the contemplation of the parties thereto that the gravel and sand was desired by the defendant for use in ballasting and filling in its said roadbed, and that the same was to be so used, and that there existed on the tract of land owned by plaintiffs a quantity of gravel and sand of quality suitable for such purpose, which could be worked by steam shovel at a reasonable expense, not in excess of its value for such purpose. (6) On or about the 1st day of December, 1906, in pursuance of the foregoing agreement, the defendant build at a large expense a spur track for some distance into or near said alleged gravel pit, and removed therefrom a quantity of gravel, sand, and clay from said premises of the value of \$150. (7) The defendant expended, in an attempt to develop the gravel pit, the amount of money shown in the statement of facts (about \$3,300). (8) Defendant, after the execution of said contract, made investigation as to the quantity and quality of the gravel and sand upon the said premises, and discovered that the quantity of the gravel and sand upon said premises was not sufficient to enable it to work the same by steam shovel or in any other manner at a reasonable expense not in excess of its value for such purpose, and that the quality of same was not that required by defendant for the purposes of ballasting and filling in its roadbed, and that the defendant, after making such discovery, abandoned the same, and has since made no attempt to carry out the above agreement. (9) The purpose of the defendant in entering into the above agreement was to procure gravel which was suitable for ballasting and filling. (10) The gravel and sand upon said premises was not in sufficient quantity and not of such

quality and not so situated that same could be used by defendant for the purposes contemplated at the time of the agreement and could not be obtained in the manner contemplated by the agreement at a reasonable expense, not in excess of its value for such purpose."

We have set out sufficient of the answer to show that the defense urged by appellee to the action was a mistake on the part of both parties, or at least on the part of appellee, as to such material matter as constituted the essence which authorized the rescission or cancellation of the contract upon such grounds. Appellants insisted upon a compliance with the very letter of the contract and resisted the introduction of parol evidence to explain in any manner whatever the circumstances under which the contract was executed and to establish any of the facts upon which the defense rested. These facts were that the gravel bed was undeveloped, that the quantity and quality and situation on the land of the material was undetermined, the manner in which it was contemplated by both parties it was to be worked, the purposes for which it was understood by both parties it was desired, and the nonexistence on the ground of the material contracted for, or, if it did exist, the fact that it was not suitable for the purpose for which it was intended and was so situated that it was impossible to get it out by the use of a steam shovel, or in any other way, except at an expense largely in excess of its value when removed, together with the mistake of both parties, or at least of appellee, as to all of these matters. The introduction of this evidence was objected to on the ground, mainly, that the contract was plain and unambiguous in its terms, and parol evidence was inadmissible to vary or modify any of its terms, or to show what was intended by the parties.

The first seven assignments of error present generally this proposition, which involves really the sufficiency of the facts set out in the answer as a defense to the suit. Appellee did not seek by the evidence offered to contradict or vary the terms of the contract, and such was not its effect, but to establish the existence of facts and circumstances which, in equity, relieved him of its obligations. Whether these facts and circumstances authorized such relief will be hereafter considered, and is a question distinct from the admissibility of the evidence. Our conclusion is that the evidence was admissible. 2 Pom. Eq. Juris. § 857 et seq. The answer of the witness E. A. Edwards, referred to in the first assignment of error, was distinctly favorable to appellants, and, if it had been subject to the objection made, the error did not prejudice them. The evidence referred to in the second assignment was material as showing an effort in good faith on the part of appellee to comply with

its contract. That it should have constructed the dump upon which to lay its rails, to get to the gravel pit, at a cost of \$3,300, tends to support their contention that they were only stopped in the further prosecution of the work by the practical impossibility of removing the gravel. We have considered the assignments of error referred to and the several propositions thereunder, and we are of the opinion that all of the evidence objected to was properly admitted. Our reasons for this conclusion will appear from what is said in passing upon the objections to the conclusions of law of the trial court. If the court's conclusions are sound, it would necessarily follow that it was permissible for appellee to establish by parol the facts upon which such conclusions are formed, which were substantially the facts set out in appellee's answer.

By the eighth assignment of error appellants assail the finding of fact that the quantity and quality of the deposits of gravel, sand, and clay was undetermined. The objection to this finding, that the evidence showed that examination and testing had been made and approved by appellee, is not sound. Although the evidence shows that same examination was made to ascertain the quantity and quality of the material, nevertheless it is conclusively shown that neither of the parties knew either the quantity of the material or its quality, and none of the examinations or tests made were such as to enable appellee to determine either the quality or quantity. It supposed the quantity to be sufficient and the quality suitable, but was mistaken in both.

It is sufficient to say with regard to the objections set out in the ninth, tenth, eleventh, twelfth, and thirteenth assignments of error to certain findings of fact of the trial court, that these findings are all abundantly supported by the evidence, and the assignments are without merit. We have concluded that the evidence upon which the findings are based was admissible. If we are correct in this, and such evidence sufficiently support the findings of the court, no objection can be properly made to the findings of fact. Whether such findings authorize or support the conclusions of law predicated upon them, is another question.

It is immaterial, as we view the case, whether the conclusion of law of the trial court in its definition of the contract "as a license based upon royalty," as set out in the fourteenth assignment of error, is correct or not. It is, we think, entirely profitless to split hairs over this question. The contract by its terms conveyed to appellee so much of the sand, clay, and gravel upon the land as should be removed within five years after the date of the contract, and bound appellee to commence work within one year and to remove and pay for, at the stipulated price, as much as 500 cubic yards per month from the time the work began to the

end of the term. Upon the failure or refusal on the part of appellee to comply with the obligations of the contract, it became liable to appellants for whatever they may have sustained by reason of such refusal, unless appellee showed that it was entitled, in equity, and upon the grounds urged in its answer, to be relieved of the obligations of the contract. This is the substance. What name is given to the contract, whether "license," "lease," or "sale," is mere matter of form.

The trial court found, as a conclusion of law, that: "It having been in contemplation of the parties to the contract that the purpose of the defendant in entering into said contract was to obtain gravel and sand suitable for ballast and filling, and in quantities sufficient for such purpose, and to be worked by the method stipulated in said agreement, and at an expense such as would justify its use, and it having developed after the execution of said contract that the material of quantity and quality such as could be handled in the manner contemplated by the parties at a reasonable expense by defendant did not exist upon said premises, the defendant was not compelled to operate said gravel, sand, and clay, and had the right to surrender its rights under said contract, and there being no penalty provided for the failure to carry out the agreement by the defendant, and there being no proper measure of damages for such failure alleged and proven, no damages accrue to plaintiffs by reason of defendant's abandonment of the agreement" This is assigned as error by the fifteenth assignment and presents the decisive question in the case. The latter part of the findings: "There being no penalty provided for the failure to carry out the agreement by the defendant, and there being no proper measure of damages alleged and proven, no damages accrue to plaintiffs by reason of defendant's abandonment of the agreement"—was unnecessary and immaterial, in view of the conclusion that "the defendant was not compelled to operate said gravel, sand, and clay, and had the right to surrender its rights under the contract." If this conclusion be correct, appellants were not entitled to damages. If it be not correct, then both upon the pleadings and proof the proper measure of damages could have been applied, giving appellants compensation for the breach.

The question, however, is: Do the facts as pleaded and proven as set out in the conclusions of fact, entitle appellee, in equity, to be relieved of the obligations of the contract? This question is one of much difficulty, and as to its proper solution we are in great doubt. None of the cases cited in the briefs afford us much assistance, and we have been forced to recur to general principles of equity for a guide. The difficulty, however, lies in determining whether the facts of the present case bring it within the principles of equity invoked by appellee. We have approved the findings of facts of

trial court, in substance, that at the time the contract was entered into it was supposed by both parties that there existed on the tract of land a quantity of gravel, clay, and sand of quality suitable for the purpose of ballasting and filling in appellee's roadbed, and so situated as that it could be worked by steam shovel at a reasonable expense, not in excess of its value, for such purpose. This was believed to be the condition. It was further found by the trial court that this condition did not in fact exist, and this finding, as we have concluded, is supported by the evidence. We are inclined to the opinion that this was a mutual mistake of the parties, as to a material matter, and, if so, under well-settled principles, would authorize a cancellation of the contract. But we do not rest our decision upon the ground of mutual mistake, but upon the mistake on the part of appellee as to the existence on the land of material of the quality desired, and so located, and in such quantities, that it could be removed at an expense not in excess of its value when removed. The trial court finds that the material in such quantity, and of such quality, as that it could be removed by steam shovel, or in any other way, except at an expense in excess of its value after removal, did not exist on the land, that it was contemplated by the parties that it did so exist on the land, and that it was in contemplation of, and in reliance upon, this fact that the contract was made.

We make no excuse for quoting largely from Pomeroy on Equitable Jurisprudence and Equitable Remedies, for it is upon the principles of equity we find there stated that we base our conclusions: "There are two requisites essential to the exercise of the equitable jurisdiction in giving any relief defensive or affirmative. The fact concerning which the mistake is made must be material to the transaction, affecting its substance, and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject-matter, or essential in any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case mistake will not be ground for any relief affirmative or defensive. As a second requisite, it has sometimes been said in very general terms that a mistake resulting from the complaining party's own negligence will never be relieved. This proposition is not sustained by the authorities. It would be more accurate to say that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be violation of legal duty, a court of

equity will not interpose its relief; but even this more guarded mode of statement, each instance of negligence must depend to a great extent upon its own circumstances. It is not every negligence that will stay the hand of the court. The conclusion from the best authorities seems to be that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby. In addition to the two foregoing requisites, it has been said that equity would never give any relief from a mistake, if the party could by reasonable diligence have ascertained the real facts; nor where the means of information are open to both parties and no confidence is reposed; nor unless the other party was under some obligation to disclose the facts known to himself, and concealed them. A moment's reflection will clearly show that these rules cannot possibly apply to all instances of mistake, and furnish the prerequisites for all species of relief. Their operation is, indeed, quite narrow. It is confined to the single relief of cancellation, and even then it is restricted to certain special kinds of agreements." 2 Pom. Eq. Juris. (3d Ed.) § 856. "The most difficult cases are those where the mistake is due solely to the defendant, without negligence on his part, or inducement or advantage taken by the plaintiff. It is plain that not every material mistake in such a case will enable the defendant to avoid performance of the contract. The rule may be stated that where the mistake is solely due to the defendant, but without his fault, equity will refuse specific performance only where the mistake is of a vital part of the contract—of the corpus of the agreement—and of such nature that enforcement would be a great hardship." Id. § 783. "Where the court is satisfied that the result which bears so hard upon the defendant, though legally a constituent part of the contract, was not intended by the parties at the time of the agreement—in fact, was not in contemplation as the effect of the agreement, which was expressed in terms too unqualified—it will not specifically enforce the agreement." Id. § 791. "Where a contract in writing is executed under a mistake by only one of the parties as to a fact which is of the essence of the contract, the mistake constitutes a ground for a court of equity to rescind and cancel the apparent contract as written and place the parties in statu quo." 24 Am. & Eng. Ency. of Law, 618, and cases cited.

If it had developed that in fact "gravel overlaid by a deposit of sand and clay" did not exist at all on the land, we think it could not be questioned that appellee should be held excused from the obligation to take it out and to pay for it, even if it had been

gully of negligence in failing to discover this fact before making the contract. Or if it had been discovered that, while some of the material existed, yet there was only a limited quantity, and not as much as under the contract appellee was required to remove, it would have been entitled to be relieved of the obligation *pro tanto*. It could not be denied that this would have been a mistake as to the subject-matter, going to the very essence of the contract. This might be placed on the ground of mutual mistake, or, if appellants knew of this nonexistence of the subject-matter of the contract, it would have been a fraud on their part to take advantage of appellee's ignorance, as to such a matter. Bishop on Contracts, § 588; 9 Cyc. 390. We think there can be no substantial difference in the application of the principles referred to, between the nonexistence of the material and its existence on the land, in fact, but not in a gravel bed or beds as contemplated, but so scattered and in such quantities in each place, as that it could not be removed except at a ruinous expense, so that appellee or any other person, if compelled to pay for it, would still prefer to let it remain as it is rather than attempt to appropriate it. Appellee at least, and we think appellants also, contracted with reference to a gravel bed where the material existed in such quantity as that it could be taken out with a steam shovel; its track to be built into the deposit for that purpose. This seems to us to have been the subject-matter of the contract, and its very essence. Certainly, but for appellee's belief as to this, it would not have made the contract, which really would amount to a gift to appellants of the amount stipulated to be paid. The trial court does not find that the material in sufficient quantity did not exist on the land, but it does find that, if it does exist, the conditions are such that it cannot be utilized, and that, if required to pay for it, appellee would still leave it the property of appellants. It cannot be said that appellee was guilty of such negligence in failing to discover these facts as would close the door of equity to it in seeking to be relieved of the obligations of the contract. 2 Pom. Eq. Juris. 856, *supra*. The gravel was under the surface, and not exposed to view, only as actual working of the deposit would be likely to reveal the deficiency in either quality or quantity. So far as the application of the principles referred to is concerned, we can see no reasonable ground for making a distinction between a suit to compel specific performance in cases where that relief is

sought and the present case. If, in the present case, it would be inequitable to compel appellee to remove and pay for the gravel, if no other obstacle existed to such relief, it would be, to the same extent, inequitable to require him to pay damages for failure to remove it. The fundamental principle is that appellee, for the reason stated, is entitled in equity to be relieved of the obligations to perform the contract.

We must not be understood as holding that a mere mistake on the part of appellee in the cost of removing the gravel, whether arising from miscalculation of such expense, or from change in, or failure to take into account, any of the circumstances affecting such expense, would authorize the relief granted in this case. Such mistake would not, ordinarily, authorize rescission or cancellation of the contract.

For the reasons given, we are inclined to agree with the conclusions of the trial court, and to hold that there is no error in the judgment. None of the assignments, or propositions thereunder, present ground for reversal, and they are severally overruled, and the judgment affirmed.

Affirmed.

On Rehearing.

Upon request of appellants, on motion for rehearing, we make the following additional findings of fact:

Before the contract was executed, appellee, through some of its engineers, made some investigation of the premises with the view of determining the location and extent of the gravel beds on the land, and they made a blue-print map showing such location and extent which was attached to the contract and is part thereof. This blue print shows the location and situation of the gravel bed with reference to appellee's line of railway. On July 12, 1907, W. E. Green, who was then vice president and general manager of the company, wrote appellant Edwards stating, in substance, that investigation had developed the fact that there was not to exceed 6,000 yards of suitable gravel on the land that could be used for ballast, and that, such being the case, it would be a waste of money to undertake to put tracks in to get out that small amount of gravel. Edwards testified, and it is not contradicted, that, after the receipt of this letter, appellees took out some, he does not state how much, sand, gravel, and clay. No point was made of this in any of the assignments of error.

The motion for other additional findings, and for rehearing, is overruled.

Overruled.

McLEAN v. GULF & I. RY. CO. OF TEXAS
et al.

(Court of Civil Appeals of Texas. March 16, 1909. Rehearing Denied April 8, 1909.)

1. CARRIERS (§ 117*)—PERISHABLE FREIGHT—FAILURE TO TRANSPORT WITH REASONABLE DISPATCH.

A car of cabbage was loaded by 10 o'clock a. m. March 15, 1907, and defendant carrier immediately notified. Defendant permitted the car to stand on the siding without refrigeration until the night of the 16th, and the car was not then iced until the morning of the 17th, when it was found that the cabbage had already begun to deteriorate. On arrival at destination, the cabbage was a total loss. Ninety-five per cent. of all shipments of perishable produce were carried by defendant on its passenger trains, and the car in question could have been shipped on a passenger train which went north at 6 o'clock on March 15th but for defendant's rule against carrying more than one freight car at a time on its passenger train, and that a tank car was being carried on the train in question. *Held*, that such rule was no defense for defendant's failure to sooner move and refrigerate the shipment, under its obligation to transport perishable property with reasonable dispatch.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 510; Dec. Dig. § 117.*]

2. APPEAL AND ERROR (§ 548*)—FINDINGS—REVIEW.

Where there is no statement of facts in the record, and the court's findings are not controverted, the judgment, being one that the court could render under the findings, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 548.*]

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by Marrs McLean against the Gulf & Interstate Railway Company of Texas and others. Judgment for defendants, and plaintiff appeals. Reversed and rendered in part.

W. D. Gordon and Thomas J. Baten, for appellant. Hiram Glass and H. M. Whitaker, for appellees.

McMEANS, J. This is a suit by Marrs McLean, successor to McLean Bros., against the Gulf & Interstate Railway Company of Texas and the Kansas City Southern Railway Company, to recover as damages the value of two cars of cabbages shipped over the railways of defendants. From a judgment, rendered by the court without a jury, in favor of defendants, plaintiff appeals.

The court's findings of facts are as follows:

"I find that the firm of McLean Bros. were engaged in shipping cabbages from points along the Gulf & Interstate Railway during the year 1907, and that Marrs McLean is now, and was at the institution of this suit, the successor in interest of the said firm of McLean Bros.

"2. With reference to what is termed shipment No. 1, I find the following facts:

"(1) I find that this car was properly load-

ed at Stowell, Tex., on March 14 and 15, 1907; the loading being finished about 10 o'clock a. m. of Friday, March 15, 1907.

"(2) I find that the cabbages were fresh, hard, and green stock, and in good condition.

"(3) I find that immediately after said car was loaded Henry Hughes, who superintended the loading of said firm at Stowell, called up McLean Bros. at Beaumont, and notified them that the car was loaded and ready for shipment.

"(4) I find that Jack McLean, now deceased, for McLean Bros. immediately thereafter called up No. 308, over the Southwestern telephone, which was the Gulf & Interstate Railway Company's office number, and talked to some party whom he called Moffett, and notified this party that the car was loaded at Stowell, and asked that it be shipped at once. I find that these conversations occurred on the morning of March 15, 1907.

"(5) I find that this car was loaded on the side track of the Gulf & Interstate Railway at Stowell, and that this was the customary way of loading and shipping cabbages. I find that there was no agent of the Gulf & Interstate Railway at Stowell at this time.

"(6) I find that Marrs McLean, plaintiff herein, and one of the firm of McLean Bros., came up from High Island on the passenger train on Saturday evening, March 16, 1907, and as he passed Stowell about sundown, he saw this car of cabbages standing on the side track at Stowell.

"(7) I find that this car of cabbages arrived in Beaumont over the Gulf & Interstate Railway Company's line on Sunday morning, March 17, 1907, at about 5 o'clock; that it was immediately transferred to the icehouse, and iced about 9 or 10 o'clock a. m., and delivered to the Kansas City Southern Railway Company for transportation north to its destination.

"(8) I find that in ordinary weather cabbages will keep without icing about 24 hours after they are loaded in the cars, but, if not iced within 48 hours, that they will begin to decay, and refrigeration thereafter will not remove the decay.

"(9) I find that this car arrived 9 days after leaving Beaumont at St. Louis, Mo., and that the cabbages were entirely rotten, and absolutely worthless.

"(10) I find that the Kansas City Southern Railway Company and the Texarkana & Ft. Scott Railway Company hauled this car properly, and while in their custody was properly iced and re-iced.

"(11) I find that the value of this car when loaded, and the loss to plaintiff to be, \$405.73, and that the market price at destination was in excess of this amount.

"(12) I find that the distance from Beaumont to Stowell over the Gulf & Interstate Railway Company's line is 28 miles.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"(13) I find that the Gulf & Interstate Railway Company has a passenger train that passes Stowell, coming to Beaumont at about 6 o'clock p. m. each day, and that said passenger train came to Beaumont about this time on the 15th day of March, 1907, and that it did not pick up this car of cabbages at Stowell.

"(14) I find that over 95 per cent. of the car load shipments of cabbages during the season of 1907 originating along the line of the Gulf & Interstate Railway Company was handled by the passenger train which made daily trips, leaving Beaumont about 8 a. m., and reaching Bolivar, 70 miles distant, the southern terminus of said line, about 12 m., and returning leaving Bolivar about 4 p. m., arriving at Beaumont about 7:30 p. m., and that the Gulf & Interstate Railway Company had no regular freight service, and handled nearly all of its perishable produce shipments by said passenger train through its office at Beaumont, Mr. Moffett having charge thereof, and operating same from Beaumont to Bolivar and intermediate points by a private railroad telephone line, and by instructions given to the conductors.

"(15) I find that this car was picked up by a freight train some time during the night, and brought to Beaumont about 5 a. m. on Sunday, March 17th, as stated in subdivision No. 7, supra.

"(16) I find that if said car had been brought to Beaumont on the 15th of March, 1907, and then iced, the produce would not have been decayed, but that when it got to Beaumont on Sunday morning it was already heated and decaying, and that the icing of the car thereafter did not stay the decay.

"(17) I find that it was the custom of the Gulf & Interstate Railway Company office at Beaumont not to issue bills of lading until the cars were brought by the company to the yards at Beaumont, and that pursuant to this custom the car in question had a bill of lading issue therefor on the morning of March 17, 1907, and that it was then promptly turned over to the Kansas City Southern Railway Company, after being iced and forwarded without fault on its part to its destination.

"(18) I find that when said car arrived in Beaumont Sunday morning, Jack McLean, a member of said firm, inspected the same, and reported to the defendant's agent Scholibo that the contents were badly heated and decaying, and that in response to the latter's inquiry as to why he was sending the car north, the said McLean replied that he was going to send it out anyway to try to get his money out of it.

"(19) I find that the reason given to McLean Bros. by the Gulf & Interstate Railway Company's agent for not having said car brought to Beaumont on the passenger train on the 15th of March, 1907, was that it was against the rules of the company to bring

more than one freight car on the passenger train at a time, and that said passenger train had an oil car which it was bringing to Beaumont on that trip, and that the reason it was not picked up by the Saturday evening passenger train was that it was ordered to be picked up by the freight train, which was to follow the passenger that night.

"3. With reference to what is termed shipment No. 2, I find the following:

"(1) That said car was a refrigerator car which was sent down to Caplen loaded with 4,000 pounds of ice before it left Beaumont, and placed at Caplen by the Gulf & Interstate Railway Company, the morning of March 4th, about 11 o'clock a. m.; that it was then partially loaded by McLean Bros., immediately after placed on the side track, and then brought back to High Island, a distance of 10 miles from Caplen, and 40 miles from Beaumont, where it was finished loading on the 5th of March, 1907, and then brought by the Gulf & Interstate Railway Company's passenger train to Beaumont, arriving at the latter place on March 5th, at 7:45 p. m.

"(2) I find that it was immediately switched to the icehouse at Beaumont on the evening of March 5th, and there iced with 6,900 pounds of ice, and then, on the morning of the 6th of March, 1907, delivered to the Kansas City Southern Railway Company, and started north to Kansas City, its destination.

"(3) I find that this car was loaded with first-class produce, as described in plaintiff's petition, and that it was expeditiously and promptly handled by the Gulf & Interstate Railway Company, and that it arrived at Kansas City, Mo., at 12:20 p. m. March 10th, with the ice bunkers half full of ice.

"(4) I find that this car was not re-iced after leaving Beaumont until it arrived, at 2:40 p. m., March 8th, at Mena, Ark., 360 miles north of Beaumont, Tex., where the Kansas City Southern Railway Company re-iced it with 6,000 pounds of ice, and it was not re-iced thereafter until it arrived at Kansas City, Mo.

"(5) I find that the following is all of the evidence as to the icing of said car after it was brought to Beaumont from High Island, to wit: It was iced at Beaumont on the 5th of March, 1907, with 6,900 pounds of ice at a cost of \$10.05, which was charged to the shippers with the freight, and paid by them. I find that the Kansas City Southern Railway Company rendered a bill for icing at Mena, Ark., of \$21.50, March 8th, as aforesaid, and this was also paid by the shippers. The defendants' agent D. Salee, at Mena, Ark., testified that when this car arrived there, he looked in the bunkers, and judged that there was about 1,000 pounds of ice in the car, and that he put in 6,000 additional pounds. He stated that he was testifying partly from recollection

and partly from data—recollection as to icing and data as to time of arrival and departure, and that the bunkers had a total capacity of 7,000 pounds. From this evidence I conclude that the car was kept properly iced by the Kansas City Southern Railway Company.

"(6) I find from the evidence that the car was kept properly iced after leaving Mena, Ark., until its arrival at Kansas City.

"(7) I find upon arrival at Kansas City that said cabbages were decayed as alleged in the plaintiff's petition, and that as result thereof the plaintiff sustained a loss of \$340.14 as set up in plaintiff's petition.

"(8) I find that the cabbages when loaded in said car, and when brought to Beaumont on March 5, 1907, by the Gulf & Interstate Railway Company, were first-class produce of the character specified, and substantially as alleged in plaintiff's petition.

"4. I find that the bill of lading in each of the shipments was issued to McLean Bros., for said cars by the Gulf & Interstate Railway Company of Texas, shipment No. 1 on March 17, 1907, and shipment No. 2 on March 5, 1907, and that said bills of lading each had the words written in the face thereof, 'Ice at Beaumont—re-ice when necessary,' and that under these bills of lading both shipments were handled by the Kansas City Southern Railway Company after leaving Beaumont.

"5. I find that said refrigerator cars were both of proper character and construction, and that said produce was properly loaded therein, and that this character of produce, if the cars are properly iced, and kept iced with a sufficient quantity of ice, said produce would not decay or deteriorate, but would arrive at its destination in good condition."

As will be seen from the foregoing findings of fact, that the car at Stowell was loaded by 10 o'clock on the morning of the 15th of March, 1907, and the Gulf & Interstate Railway Company was immediately notified that the car was ready for forwarding; but, notwithstanding this said railway company permitted said car, loaded with perishable produce as it was, to stand on the siding without refrigeration from the morning of the 15th until the night of the 16th, and it was not iced until it reached Beaumont on the morning of the 17th, 48 hours after it was loaded. The excuse tendered by this railway company for its failure to sooner move the car avail it nothing. The fact that 95 per cent. of all shipments of perishable produce originating on the line of this defendant was carried into Beaumont by its passenger trains was found by the court. That defendant had a rule against carrying more than one freight car at a time in its passenger train cannot relieve it from its obligation to take and transport this character of property with reasonable dispatch, and this is especially true when

the perishable quality of the shipment tendered is shown, and it is not shown that the quality of the shipment carried in the tank car was of a perishable nature, or that its contents would have been damaged by leaving it, and taking the car of cabbages in its stead. We think that the facts found by the trial court conclusively show that this defendant was negligent in not sooner moving and refrigerating the shipment, and that as to this there is not room for ordinary minds to differ, and that the court erred in holding otherwise, and further holding that the defendant Gulf & Interstate Railway Company of Texas is not liable for the value of the cabbage lost by plaintiff thereby. Appellant makes no contention that the defendant Kansas City Southern Railway Company is in any wise responsible for the loss sustained by him in this shipment.

As to the shipment designated as "shipment No. 2" in the findings of fact, the appellant admits that the Gulf & Interstate Railway Company is not liable for his loss, but seeks to hold the Kansas City Southern for its alleged negligence in failing to keep the cabbage properly iced during the time the car was under its control. Here we are confronted by apparent contradictory findings of fact, viz., that the cabbages, when loaded in the car, and when brought to Beaumont on March 5th (delivery was made to the Kansas City Southern on the morning of the 6th) was first-class produce of the character specified, and substantially as alleged in plaintiff's petition, viz., "Fancy Bulk Cabbage," and that said produce was properly loaded, and that "this character of produce, if the car is properly iced, and kept iced, with a sufficient quantity of ice, said produce would not decay or deteriorate, but would arrive at its destination in good condition," and that "upon arrival at Kansas City said cabbages were decayed, as alleged in plaintiff's petition, and that as a result thereof plaintiff sustained a loss of \$340.14 as set up in plaintiff's petition." On the other hand, the court found that the car in question had an icing capacity of 7,000 pounds; that before it was sent out for loading it had 4,000 pounds placed in its bunkers; that when it was brought to Beaumont on the evening of March 5th it was iced with 6,900 pounds; that when it reached Mena, Ark., at 2:40 p. m., March 8th, it contained about 1,000 pounds, and 6,000 pounds were added, and that when the car arrived at Kansas City, its destination, its bunkers were half full of ice. Upon these findings of fact the court further finds that the car was kept properly iced by the Kansas City Southern, and upon this finding concludes, as a matter of law, that the plaintiff has failed to show that the Kansas City Southern was guilty of negligence in the matter of keeping the car properly iced. There being no statement of facts in the record, and the court's findings not be-

Southern Railway Company is affirmed; and, this court here proceeding to render such judgment against the Gulf & Interstate Railway Company of Texas as should have been rendered by the court below, it is ordered and adjudged that the plaintiff Marra McLean, do have and recover of and from the defendant Gulf & Interstate Railway Company of Texas the sum of \$405.75, with 6 per cent. interest per annum thereon from the 15th day of March, 1907, and all costs of suit, except the costs incurred by reason of the Kansas City Southern Railway Company having been made a party to this suit, which costs are adjudged against the plaintiff, for all which execution may issue.

Reversed and rendered in part. Affirmed in part.

TOMPKINS et al. v. THOMAS et al.†

(Court of Civil Appeals of Texas. March 16, 1909. Rehearing Denied April 8, 1909.)

BOUNDARIES (§ 9*) — CONSTRUCTION—OMITTED CALL.

A description of land in a deed gave the length and direction of three lines, running from the beginning point south, east, and north to a well-defined point, thence calling to go west and south far enough to include 400 acres conveyed. There was nothing to indicate that the lines thus given would not close, but a calculation demonstrated that a line running from the northeast corner only such a distance west as that a line running south from the northwest corner would reach the beginning point would not embrace the 400 acres within the boundaries described. The defect in the description consisted in the failure to state the length of two of the lines, and the omission of a line necessary to close the survey. *Held*, that the description was not fatally defective, but would be sustained by supplying the line necessary to close the survey, which would include the quantity.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 9.*]

Appeal from District Court, Tyler County; W. B. Powell, Judge.

Action by Richard Tompkins and others against J. W. Thomas and others. Judgment for defendants, and plaintiffs appeal. Reversed and rendered.

P. E. McMahon and A. T. McKinney, for appellants. Joe W. Thomas and W. A. Johnson, for appellees.

McMEANS, J. This suit was instituted by appellants against appellees to recover title and possession of 400 acres of land, part of the Wm. Cherry 1,476-acre survey in Tyler county. This appeal is from a judgment in favor of appellees upon a second trial. The

shown themselves entitled to a judgment, if the deed from Wm. Cherry to A. B. Worsham, under which they claim, contains a sufficient description of the land in controversy to identify it.

Appellants' fifth assignment of error is as follows: "The trial court erred in its first conclusion of law, which is as follows: 'First. I conclude that the deed offered in evidence from Wm. Cherry to A. B. Worsham, of date August 28, 1854, does not describe the land as set out in plaintiffs' petition with sufficient certainty to entitle plaintiffs to recover. I therefore find for the defendants, there being no extrinsic evidence to aid the description of said deed'—because said finding of law is contrary to law, and the evidence introduced on the trial of said cause, for the following reasons: The said deed from Wm. Cherry to Worsham does describe the land sued for in this case with sufficient certainty to identify the same, and to pass the title to said land from the said Cherry to the said A. B. Worsham by the terms of said instrument, because the terms of said deed, taken in connection with the location of the lines of the tracts conveyed out of said survey by the said Cherry to W. B. Dillon in 1849, and to H. M. Farrier in 1855, and the recitals in said deeds as shown by the evidence, and other extrinsic evidence adduced on the trial of said cause, conclusively show that the said Cherry intended to convey, and did convey, to the said Worsham the premises described in plaintiffs' amended petition, and delineated on the map thereto attached." We are of the opinion that the assignment must be sustained. The description of the land in the deed from Cherry to Worsham, under which appellants claim, is as follows: "A certain tract or parcel of land & being in Tyler county, situated on Cypress creek, a branch of Village creek, being a part of said Cherry headright, beginning at the N. E. corner of a survey for Elizabeth Strong, a stake from which a pine 15 in dia mkd J. P. brs S. 72 deg. W. 8 vrs., also a pine 15 dia mkd X brs N. 62 deg. 30' E. 1 vrs.; thence S. with the E. boundary line of said survey 1,000 vrs. to a corner of said Cherry survey a stake from which a W. O. 14 in dia mkd A. N. brs N. 55 deg. 50' E. 7 vrs., also a pine 12 in dia mkd X brs N. 67 deg. W. 7.6 vrs.; thence E. with said Cherry's S. boundary line 1,217 vrs. to the S. E. corner of said Cherry survey a stake, from which a red oak 5 in dia mkd A. N. brs N. 89 deg. W. 12.8 vrs., also a W. O. 8 in dia mkd X brs S. 72 deg. 15' N. 11 vrs.; thence N. along said Cherry's E. boundary line 1,456 vrs. to the S. E. corner of A. B. Har-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 26, 1909.

din survey; thence west and south far enough to include four hundred acres of land."

It was clearly the intention of the grantor to convey to Worsham 400 acres of land; and, in describing this quantity, he gave the length and direction of three lines, running from the beginning point south, thence east, thence north to a well-defined point, thence calling to go west and south far enough to include the 400 acres conveyed. There is nothing to indicate that the lines thus given will not close, but a mathematical calculation demonstrates that, a line running from the northeast corner only such distance west as that a line running south from the northwest corner would reach, the beginning point would not embrace 400 acres within the boundaries described. The defect in the description consisted in the failure to state the length of two of the lines, and the entire omission of a line necessary to make the survey close. That it was intended to convey to Worsham 400 acres is manifest from the fact that the last two calls show that the tract should extend far enough west to include this quantity, and from the further fact that the unsold balance in the tract of 1,476 acres was supposed to be 576 acres, as shown in the recitals in the deed from Cherry to Farrier, after deducting the 500 acres sold to Dillon, as to the proper description to which there is no question, and the 400 acres sold to Worsham. Now in order that the tract should extend far enough west to include the 400 acres, it was necessary to run from the northwest corner a distance of 2,283.25 varas, which would carry it far beyond the point where a line running south would reach the beginning point. But a line run from a point 2,283.25 varas from the northeast corner, and thence south 456 varas to the south boundary line of the Cherry survey, would include the 400 acres, but would need another call, viz., east with Cherry's south boundary 1,066.25 varas, to close the survey. It is obvious that this call was inadvertently omitted. By supplying this line the requisite quantity is conveyed, the survey is properly closed and the description complete. The omission by mistake of the calls for one line in a set of filed notes is a matter of not infrequent occurrence. "While, therefore, the proposition that the calls of description in question correct themselves, and show the land intended to be described, is not capable of mathematical demonstration, yet that it is true is reasonably certain. Upon such certainty we act in all the highest concerns of life, and it is sufficient for the purpose of the law." *Mansel v. Castles*, 93 Tex. 414, 55 S. W. 559.

As will appear from our opinion rendered on the former appeal, we held the description of the land in plaintiffs' petition, and in the deed under which plaintiffs claim, was so incomplete as to render the petition de-

murrable and the deed incompetent as evidence, in the absence of allegations of extraneous facts which would clear up the misdescription. At that time we overlooked the case of *Mansel v. Castles*, and our attention was not called to it in the briefs of either party. Following that case, we think our opinion reversing the judgment and remanding the cause was wrong, and that the judgment should have been affirmed. As all the facts appear to be fully developed, and as on the undisputed evidence appellants are entitled to a judgment for the title and possession of the land in controversy, this court will here render such judgment as the court below should have rendered. It is therefore ordered and adjudged that the appellants do have and recover of the appellees the title and possession of the land described in their petition, and recover of appellees all costs in this behalf incurred, for which they may have their writs of possession and execution.

Reversed and rendered.

MITCHELL v. RUSHING et al.

(Court of Civil Appeals of Texas. March 23, 1909. On Rehearing, April 15, 1909.)

1. APPEAL AND ERROR (§ 1062*)—REVIEW—HARMLESS ERROR—SUBMISSION TO JURY OF CONSTRUCTION OF CONTRACT.

While it is generally the duty of the court to construe written contracts, and instruct the jury as to their legal effect, the erroneous submission of such an issue to a jury is harmless error, except where the jury places a wrong construction on the instrument.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

2. CONTRACTS (§ 228*)—PERFORMANCE—RIGHT TO COMPENSATION.

Where parties to a contract accept the benefit of another party's services under the contract, and pay him a portion of the consideration, they cannot withhold the remainder of the consideration, unless the contract gives them the right to do so.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 228.*]

3. BROKERS (§ 49*)—COMPENSATION—CONTRACT.

Defendants, who had platted a subdivision, contracted with plaintiff for sale of the lots, giving him the exclusive right of sale for six months. Plaintiff was to exercise reasonable diligence to sell the property within the time specified. Defendants were to receive the proceeds until they amounted to \$2,300, after which the proceeds were to be divided with plaintiff as compensation for his services; and, if there should be any unsold lots after defendants had received \$2,300 an undivided quarter interest was to be conveyed to plaintiff. *Held*, that the provision requiring defendants to convey a part of the unsold lots, being only a part of the consideration, was independent of the provision requiring plaintiff to exercise reasonable diligence to sell all the lots; and, upon selling \$2,300 worth of lots, he was entitled to the share of proceeds of subsequent sales within

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the contract period, and also to a conveyance of a fourth interest in the unsold lots.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 49.*]

4. BROKERS (§ 80*) — COMMISSIONS—ACTION—DEFENSES.

The undertaking of plaintiff to exercise diligence to sell all the property was one for the breach of which defendants could recover in a separate action for damages, or by a plea in reconvention in the present suit.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 80.*]

5. CONTRACTS (§ 147*) — CONSTRUCTION — INTENTION OF PARTIES.

The dominant purpose in construing a contract is to ascertain the real intent of the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

6. APPEAL AND ERROR (§ 1177*)—DISPOSITION OF CAUSE—REVERSAL—NECESSITY FOR NEW TRIAL—SUFFICIENCY OF VERDICT.

In an action for compensation under a contract for the sale of lots in a subdivision, where an issue of fact was raised as to what lots were properly included in the description in the contract, and a general verdict for defendants was rendered, so that it could not be said that the jury had passed upon the question, on reversing the judgment, the cause will be remanded for a new trial, that the issue may be determined.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1177.*]

On Motion for Rehearing.

7. COURTS (§ 82*)—APPELLATE COURTS—RULES—NATURE—ASSIGNMENTS OF ERROR.

Rules as to presenting assignments of error, being for the convenience of appellate courts to aid in the orderly dispatch of business, are directory only, and may be waived by the courts.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 295; Dec. Dig. § 82.*]

8. APPEAL AND ERROR (§ 747*)—RESERVATION OF GROUNDS OF REVIEW — NECESSITY FOR CROSS-ASSIGNMENTS.

In the absence of cross-assignments of error questioning the correctness of the trial court's ruling striking out appellee's plea in reconvention on exception, the ruling cannot be reviewed.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 747.*]

Appeal from District Court, Bosque County; O. L. Lockett, Judge.

Action by L. B. Mitchell against J. A. Rushing and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

S. H. Lumpkin, for appellant. J. S. Bounds and Cureton & Cureton, for appellees.

HODGES, J. The appellees were the owners of a tract of land situated in the suburbs of Walnut Springs in Bosque county, a portion of which they had mapped and platted, caused a copy to be placed of record in the office of the county clerk of that county, and designated it as "Fairview and Roundhouse Addition to Walnut Springs, Tex." Being desirous of selling those lots, on the 24th day of July, 1906, they entered into the following

contract with the appellant, Mitchell: "This instrument is intended to witness the following contract, executed in duplicate, this day entered into by and between J. A. and C. C. Rushing, of the county of Bosque, state of Texas, hereinafter styled parties of the first part, and L. B. Mitchell, of Dallas county, state of Texas, hereinafter styled party of the second part, to wit: The said parties of the first part in consideration of the terms and considerations hereinafter specified give to the party of the second part the sole and exclusive right to sell for a period of six months from this date, the following described property, to wit: All those certain lots and blocks of land known as "Fairview and Roundhouse Addition to the Town of Walnut Springs, Bosque County, Texas," except those heretofore sold, upon the following terms and conditions: Said party of the second part agrees and binds himself to exercise reasonable diligence in his efforts to sell and dispose of the said property within the time specified and upon the terms hereinafter named. The said second party also agrees to direct and supervise the improvement and laying out said property by grading the necessary streets, staking off the lots and blocks and advertising the same preparatory to offering it for sale. All lots and blocks are to be sold for one-third in cash, balance in vendor's lien notes due in six and twelve months from date of sale, with interest at the rate of 10% per annum, unless other terms offered are mutually acceptable to the parties to this contract. The said party of the second part agrees and binds himself to deliver and pay to the parties of the first part all moneys and notes received from the sale of said land, lots and blocks until the said parties of the first part shall have received the sum of twenty-three hundred dollars, and all moneys and notes received from the sale of said land in excess of the sum of twenty-three hundred dollars shall be divided between the parties to this contract on the basis of 75% to the parties of the first part and 25% to the party of the second part as his compensation for selling said lots and blocks. The parties of the first part agree and bind themselves to make general warranty deeds to the purchasers of all lots and blocks sold. The parties of the first part are to defray the expenses incurred in the preparation, advertising, and sale of said property. Should there be any unsold lots after said parties of the first part have received the sum of twenty-three hundred dollars coming to them, a one-fourth undivided interest in said lots so remaining unsold is to be conveyed by general warranty deed by the parties of the first part to the party of the second part. Should the entire property be sold within the time specified the said parties of the first part are to take their proportion of one-third in cash and two-thirds

in notes, and the said party of the second part shall take the same proportion in cash and notes."

After the execution of this contract the appellant superintended the laying off and grading of the streets, according to the terms of his contract, and advertised an auction sale to take place on the 29th day of August following. On that day a large number of the lots were sold, and from which was realized in cash and notes the sum of \$3,410. The sum of \$2,300 was retained by appellees, and the excess over that sum was divided between the parties in the proportion specified in the contract. The appellant, who resided at Dallas, did not again return to Walnut Springs till a short time before the expiration of his option. Before leaving the latter place, however, he had an agreement with Bird & Morris, a firm of real estate agents, who also owned an interest in the property described in the contract, by which they were to represent him during his absence, and to accept and close with any offers for the purchase of lots at satisfactory prices. Bird & Morris, in pursuance of that authority, sold a number of the lots, and the appellees also sold several of them. The exclusive right to dispose of the lots, which had been given to the appellant, expired on the 24th day of January, 1907. After that time a large number of the lots were sold by the appellees, from which they realized the aggregate sum of \$2,935. Of this they paid the appellant \$172.82, which they claimed was his proportion of the receipts from lots sold during the six months in which he had been given the exclusive right to make sales, but refused to pay him any portion of the proceeds realized from the sales of the lots made after that time had expired. On the 12th day of February, 1908, the appellant filed this suit to recover one-fourth of the proceeds of the sales of the lots made by the appellees, and which they had refused to pay over to him, for a one-fourth undivided interest in the lots then unsold, and for partition. The appellees answered by general and special exceptions, a general denial, and specially denied that the contract sued on embraced any of the lots in Fairview and Roundhouse addition, north of what was called Denmark street as laid off and designated in the plat; that if the contract included any of those lots, it was inserted by a mistake. They further pleaded a failure of consideration, in that the appellant had failed to exercise reasonable and proper diligence in his efforts to sell said property. They also alleged that the appellant had agreed to return and hold other auction sales for the purpose of disposing of the remainder of the unsold lots, but had refused to do so. The jury returned a general verdict in favor of the defendants, from which the appellant prosecutes this appeal.

In addition to the facts above mentioned the testimony shows that a plat of what was known as "Fairview and Roundhouse

Addition to Walnut Springs" was placed of record in the office of the county clerk of Bosque county, showing the location of streets and alleys, together with the blocks and lots, numbered in the usual way. Denmark street is shown as one of the public streets running east and west, and north of it are quite a number of lots and blocks included in the recorded map. In view of the manner in which the errors charged have been presented by the appellant in his brief we find it more convenient to discuss the questions involved without reference to the assignments in detail. But we think it proper, in this connection, to call the attention of counsel for appellant to the fact that in the preparation of his brief he has ignored most of the rules adopted for guidance in the preparation of cases for appeal. To refuse to consider the assignments in this case because of the failure to comply with those rules would, we think, result in a miscarriage of justice, and for that reason alone we decline to sustain the objections made by the appellees.

The vital question presented is. Was the evidence sufficient to support the verdict and judgment? The suit is based upon the written contract hereinbefore set out, and this clearly entitled appellant to a judgment, unless his engagement to exercise reasonable diligence to dispose of the property during the six months of his exclusive option be treated as a condition upon the faithful performance of which his right to compensation was made to depend, and, further, unless the evidence justified the jury in finding that he had failed to comply with that provision of the contract. The appellant relies upon the following provision in the contract: "Should there be any unsold lots after said parties of the first part have received the sum of twenty-three hundred dollars coming to them, a one-fourth undivided interest in said lots so remaining unsold is to be conveyed by general warranty deed by the parties of the first part to the party of the second part [appellant]." The only defense urged against the enforcement of this provision is the alleged failure on the part of the appellant to exercise reasonable diligence, as he had agreed to do, in making sales of the lots after the auction sale by him on the 29th of August, 1906. This defense is presented in the form of a plea of failure of consideration. The court below submitted the question to the jury, with instructions to find in favor of the appellees in the event they found that appellant had not complied with this provision of his agreement. Generally it is the duty of the court to construe written contracts, and instruct the jury as to their legal effect; and it is error to submit such issues to the jury. *Soell v. Hadden*, 85 Tex. 187, 19 S. W. 1087; 1 Thompson on Trials, § 1196. But such an error, when committed, is available on appeal as a ground of reversal only in the

event the jury places a wrong construction on the written instrument; otherwise the error will be harmless. The verdict of the jury in this case can be accounted for only upon a construction which we think is erroneous; that is, that the right to an undivided interest in the unsold lots depended on the performance of the agreement to exercise reasonable diligence to sell the remainder of the property. The language of the contract is plain and unambiguous, and there is no necessity for resorting to extraneous circumstances, or parol testimony, to aid in its interpretation. But should this be done, the testimony which the appellees offered in that connection strengthens the construction which we have placed upon it.

It will be observed that the contract contains the provision that the appellant was not to receive any commissions on sales till after he had sold a sufficient number of lots to realize the sum of \$2,300. One of the appellees testified that the reason for inserting that provision was that they desired to first get back what the land had cost them and the expenses of making the sale. They estimated this at \$2,300. This accounts for why appellant's right to compensation was thus postponed till that sum was realized from his sales, and for the further fact that his commissions were fixed at the amount stipulated. The undisputed testimony shows that on the first day of the auction sales more than \$2,300 was received from the sale of lots. According to the plain language of the contract, he had then earned the compensation which appellees had agreed to allow him—one-fourth of the cash and notes in excess of \$2,300, and an undivided one-fourth of the lots remaining unsold. Any other construction would be treating the agreement to exercise reasonable diligence to dispose of all of the property, and that in which appellees bound themselves to convey an undivided one-fourth interest in the unsold lots, as mutually dependent covenants. The right to an undivided one-fourth of the unsold lots was only a part of the consideration which the appellant was to have for his services in selling a sufficient number of lots to make the receipts amount to \$2,300. It is not contended that at the end of the first day's sales appellant was not entitled to one-fourth of the excess of the money realized, nor is it disputed that he was also entitled to one-fourth of what his agents, Bird & Morris, sold thereafter. How, then, can it be said that he was entitled to one portion of the consideration which the contract gave him, and not to the other? No question is raised about appellant's having performed his contract in part at least, and that appellees had accepted the benefits of his services and paid him a portion of that consideration. Having done this, they cannot now be heard to say that he is not entitled to the remainder, unless they can point to a provision in

the contract which confers upon them the right to do so. *Wiley v. Inhabitants of Athol*, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 343; *Kauffman v. Reader*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247. The stipulations in this instrument must be treated as independent. The covenant by which the appellees agreed to convey a part of the unsold lots, being only a part of the consideration, must be regarded as independent of that provision requiring the appellant to exercise reasonable diligence to sell all of the lots. *Broumel v. Rayner*, 68 Md. 47, 11 Atl. 833; *Antonelle v. Kennedy*, 140 Cal. 309, 73 Pac. 966; *Deacon v. Blodget*, 111 Cal. 416, 44 Pac. 159; *Ry. Co. v. Butler*, 50 Cal. 577.

The dominant purpose in construing a contract in all cases is to ascertain the real intent of the parties. Had the parties intended that a failure to press the sale after the auction on the 29th of August should forfeit the right of the appellant to any of the unsold lots remaining thereafter, they failed to use any language expressive of such a purpose. We must therefore regard the undertaking on the part of the appellant to exercise reasonable diligence to sell all of the property as an independent covenant, for a breach of which the aggrieved parties might seek recompense in a separate action for damages, if any there were, or by a plea in reconvention in the present suit. There was no reason why they should have intended a forfeiture, on the part of the appellant, of any or all of his commissions for a failure to continue to exercise reasonable diligence to the end of his term of six months, because it was to his interest, as well as to that of the appellees, that he should sell the remainder of the property as rapidly as possible, and for as high a price as was practicable. The evidence is in conflict as to whether or not he agreed to have any other auction sales, or whether he did in fact exercise reasonable diligence in undertaking to sell the remainder of the lots; but, in view of the disposition we make of the case, we think a determination of that issue is wholly immaterial, and that it should not have been submitted to the jury. The contract sued upon had the effect of investing the appellant with an undivided one-fourth interest in the lots belonging to the plat of land which he was to sell, and which remained unsold after the auction sale made by him on the 29th of August, 1906. *Moss & Raley v. Wren* (Tex.) 113 S. W. 739. The court should have so instructed the jury.

There is some controversy as to whether those lots lying north of Denmark street were a part of the addition which the appellant was to sell. The contract merely describes the property as "all those certain lots and blocks known as 'Fairview and Roundhouse Addition to Walnut Springs.'" No reference is made to any deed or record

for the purpose of identifying the lots and blocks specified. The appellant testifies that he was shown the plat which was of record, and this was pointed out to him as the property he was to sell. It is an issue of fact as to how many lots, and what lots, were properly to be included within the description mentioned in the contract. The appellees having raised that question by a proper pleading, it was a pertinent issue to be submitted to the jury. On account of the verdict being general, we cannot say that the jury has passed upon that question. The case will therefore have to be remanded in order for this issue to be determined, and also for a partition of such property as the contract shows the appellant is entitled to have awarded to him in the division between him and the appellees.

The judgment is reversed, and the cause remanded.

On Rehearing.

In their motion for rehearing the appellees insist that this court should not have considered the assignments presented in the appellant's brief in the original disposition of the case. A sufficient reply to this is found in the fact that we have already considered the assignments objected to. We understand that the rules which it is claimed were violated in presenting the assignments on this appeal were adopted for the convenience of the appellate courts, to aid in the rapid and orderly dispatch of the business, and are directory only. Having once waived the authority to disregard those assignments for noncompliance with the rules, and having performed whatever additional labor was thereby entailed, it would be inexcusable in us to now set aside what we have done solely on account of the objection made.

It is also contended by appellees that we erred in our construction of the contract made between the parties to this suit. They insist that the appellees and the appellant sustained the relation of principals and agent; that appellant's contract was that of a broker, in which he undertook to perform certain services for a stipulated compensation, and that the failure to perform those services in whole or in part would be a good defense against an action to recover compensation, or at least as to so much thereof as had not been properly earned. They further claim that the disposition we make of the case puts them in the attitude of having to pay the agent his compensation and then sue him for damages for a failure to perform the services he contracted to perform. This argument indicates a misconception of the nature and terms of the contract and of the true subject-matter of this suit. It may be conceded as a fact that appellant, Mitchell, was a broker, and as such entered into the contract to sell certain real estate for the appellees, and

that this suit is for his compensation for making the sales in pursuance of that undertaking. The compensation Mitchell was to receive, and that for which he sues, was not to be gauged by the time he gave, or the energy he expended, or the degree of diligence he exercised in his efforts to sell the property, but by the results which he accomplished. When those results amounted to sales sufficient to enable the appellees to realize \$2,300, then, according to the plain terms of the contract, Mitchell had earned his compensation, and was entitled to demand its payment. Had he been hired for a salary to give his services for a designated term as an agent, or broker, and had failed in whole or in part to render the services which he had agreed to perform, then the rule relied on by the counsel for appellees would be applicable. Mitchell's agreement to exercise reasonable diligence to sell the property during the time he had the exclusive right to handle it was a covenant for the protection of the appellees against damages such as might result from the loss of advantageous sales while the property was exclusively in Mitchell's hands, and was no part of the consideration for his commissions. Let us suppose that Mitchell had given his entire time, and had exercised the utmost diligence to sell this property, but had failed to sell any or enough to realize the sum of \$2,300, clearly he would not have earned any part of the commissions, and would be entitled to no compensation. On the other hand, if he had given only a small fraction of his time to the sale of the lots, and had been ever so careless in his efforts, but had succeeded in making sales of all of the property, there could be no controversy about his having earned his full commissions. Hence whatever injury may have been sustained by the appellees by reason of the failure of Mitchell to exercise reasonable diligence in selling the lots would properly be classed as damages, recoverable in an action for that purpose, and could not be made available as a defense under a plea of failure of consideration. It cannot be said that a failure to exercise reasonable diligence in his efforts to sell the property was a failure to perform the consideration in this contract, unless it can also be said that the exercise of that diligence was itself the services for which he was to be paid. Appellees' construction of the contract is untenable, and the argument based upon it is equally so.

Appellees complain that in disposing of the case in the manner we have they are left practically remediless in recovering damages against Mitchell for the failure to exercise the reasonable diligence which he agreed to exercise in his efforts to sell the property. They claim that they filed in the trial court a plea in reconvention claiming damages, but that it was stricken out on ex-

ception. No cross-assignments having been presented in the record calling in question the correctness of this ruling of the court, we are not called upon to say whether or not the trial court erred in so doing. They were not forced to submit to that ruling without complaint, but, having done so, must abide the consequences.

The motion is overruled.

GOODWIN & McFARLAND v. BURTON et al.

(Court of Civil Appeals of Texas. March 26, 1909. Rehearing Denied April 15, 1909.)

1. PLEDGES (§ 58*)—ACTION ON RIGHT OF ACTION PLEDGED.

A creditor of a payee of a note who receives it as security for an indebtedness exceeding the note, or in payment of the indebtedness, is the legal owner thereof, and may sue the maker and the independent executrix of the deceased payee on his indorsement of the note.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 186; Dec. Dig. § 58.*]

2. BILLS AND NOTES (§ 460*)—ACTIONS—PARTIES.

The indorsee of a note may sue in one action the maker and the independent executrix of the payee on his indorsement of it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1437; Dec. Dig. § 460.*]

3. VENUE (§ 22*)—RESIDENCE OF PARTIES.

An action on a note against the maker and the independent executrix of the deceased payee indorsing it may be brought in the county of the residence of the independent executrix, though the maker resides in another county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 36; Dec. Dig. § 22.*]

4. BILLS AND NOTES (§ 369*) — RIGHTS OF BONA FIDE HOLDER.

Where the maker of a note placed it in the possession of the payee under an agreement limiting the payee's right to dispose of it, and the payee delivered it, in violation of the agreement, to an innocent purchaser, the maker was estopped as against the innocent purchaser from urging the defense that the note had never been delivered.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 951; Dec. Dig. § 369.*]

5. APPEAL AND ERROR (§ 731*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error complaining of the verdict on the ground that it is contrary to the evidence is too general to require consideration on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731.*]

Appeal from District Court, Anderson County; B. H. Gardner, Judge.

Action by A. G. Burton against A. A. Goodwin and others, in which defendants A. A. Goodwin and another seek judgment from codefendant Mrs. Mollie E. Pickens, executrix of S. N. Pickens, deceased. From a judgment for plaintiff and against defendants A. A. Goodwin and another on their cross-action against codefendant, defendants A. A. Goodwin and another appeal. Affirmed.

G. R. Whitley and Jno. F. Weeks, for appellants. W. B. Morris and Thos. B. Greenwood, for appellees.

PLEASANTS, C. J. This suit was brought by appellee Burton against A. A. Goodwin and E. J. McFarland, makers, and against Mrs. Mollie E. Pickens, independent executrix of the last will of S. N. Pickens, deceased, who was indorser, of two notes for \$493.27 each, executed January 30, 1907, and payable to S. N. Pickens or order six and twelve months after date respectively, with interest at 10 per cent. per annum and 10 per cent. attorney's fees in event default should be made in the payment of said notes at maturity. The petition alleges the execution and delivery of the notes, their transfer by S. N. Pickens to plaintiff for a valuable consideration on June 19, 1907, without notice to plaintiff of any defense which the makers might have to same, and the failure and refusal of defendants to pay same, though often requested so to do. Recovery is asked against all of the defendants for the amount of the principal and interest due upon said notes and the 10 per cent. attorney's fees as therein provided.

The defendants Goodwin and McFarland filed plea of privilege to be sued in Palo Pinto county where they both reside, and, in connection with and support of said plea of privilege, they also filed the following plea:

"Now comes A. A. Goodwin and E. J. McFarland, two of the defendants in the above styled and numbered cause, and say that the plaintiff cannot prosecute this suit against their defendants, viz., Mrs. Mollie J. Pickens, executrix of S. N. Pickens, deceased, and A. A. Goodwin and E. J. McFarland, jointly, because there is not, nor can there be, any joint cause of action existing against them; that, if in this cause there could be a cause of action at all, it would first be against Mrs. Mollie J. Pickens, the administratrix of the estate of S. N. Pickens, deceased, and that no suit could be brought against her at this time because as these defendants are informed and verily believe, and now charge the fact to be, the pretended claim against her by the indorsement of the said S. N. Pickens, deceased, of the note herein sued on, which has not in due form been presented to her as said executrix, and that the same has not been refused by her, and, if the same is not a binding obligation against the deceased S. N. Pickens, then this court could have no jurisdiction against her as administratrix of such estate, and that the joinder of these defendants, together with the said Mrs. Mollie J. Pickens, administratrix, is a nonjoinder of defendants for the sole purpose of giving this court jurisdiction against these defendants. That, if such note ever existed, it was not a binding obligation against these defendants, then they say that they are not

properly joined as defendants with the said Mrs. Mollie J. Pickens, for the reasons above stated. Wherefore they pray the court. A. A. Goodwin. E. J. McFarland, per A. A. G.

"Now comes A. A. Goodwin, for himself and his partner, E. J. McFarland, and says on oath that the above and foregoing allegations are true as to the best of his knowledge and belief. A. A. Goodwin.

"Sworn to and subscribed before me this 26th day of November, 1907. J. F. Brown, Clerk District Court, Anderson County. [L. S.]"

Subject to these pleas, said defendants filed an answer containing a general exception and several special exceptions to plaintiff's petition, the nature of which is unnecessary to set out, and also the following plea:

"And the defendants A. A. Goodwin and E. J. McFarland say that the note sued on by plaintiffs in this cause never was in fact executed and delivered by them to the said S. N. Pickens, or any other person, and that the said note was, in fact, never delivered to any person for any purpose whatsoever, and that the execution of same was made without defendants' knowledge or consent, and that they nor either of them have never at any time since ratified or confirmed the same. Wherefore the defendants pray that said note or instrument in writing is not their acts or deed and of this he puts himself upon the country, and for further plea in this behalf the defendants A. A. Goodwin and E. J. McFarland deny each and every allegation in plaintiff's petition, and say that the same is untrue and demand strict proof of the same."

This plea was verified by the affidavit of defendant Goodwin. They further answer, in substance, that the notes sued on were executed by said defendants in payment of the purchase money of an insurance business in the city of Mineral Wells sold to them by S. N. Pickens, on or about the 20th day of January, 1907; that they agreed to pay the said S. N. Pickens the sum of \$2,500 for said business, provided the premiums upon insurance then in force upon the books of said Pickens amounted to the sum of \$2,500 per annum; that they paid the said Pickens the sum of \$1,100 in cash and signed the two notes before mentioned with the distinct understanding that they were to remain in the safe in said insurance office until an examination of the books of said business by an expert should show that said annual premiums amounted to the sum of \$2,500, and were not to be delivered to, or become the property of, said Pickens, unless said examination of the books developed the fact before stated; that, after the examination of said books by an expert examiner began, said Pickens, knowing that the examination would show that the premiums on the policies in force on said books would not amount to \$2,500, and having a key to the safe in which the notes were deposited, took them

from said safe without the knowledge of defendants, and said notes were never delivered by these defendants, but were stolen from said safe as aforesaid; that the examination of said books by the expert examiner demonstrated that the premiums on the policies in force therein did not amount to more than \$600 per annum, and that upon ascertaining the facts that said notes had been stolen, and that the amount of said premiums was less than \$2,500, these defendants on June 12, 1907, before the pretended purchase of the notes by plaintiff, by an advertisement in the Daily Index, a daily paper published in the city of Mineral Wells, advised the public of the facts in regard to said notes and warned every one from purchasing same; that the plaintiff was in Mineral Wells at the time said notice was published and was a reader of said paper and saw and read said notice, or by the use of ordinary care could have seen the same before he acquired said notes, and is therefore charged with notice of the fact that the notes were void for want of consideration. It is further specially denied that the plaintiff purchased said notes or that the same were transferred to him as collateral security for any indebtedness due him from said Pickens. The answer concludes with a prayer that plaintiff take nothing against said defendants, and that they recover against their codefendant, Mrs. Mollie J. Pickens, executrix, the sum of \$1,100.

The defendant Mrs. Pickens answered by general denial of both the allegations of the petition and the answer of her codefendants, and, specially answering the prayer of said defendants' answer for judgment against her for the \$1,100 paid by them to her testator as part of the purchase money for said insurance business, she avers that, if the facts stated in the answer of said defendants are true, said defendants "with full knowledge of all material facts elected to affirm and did affirm and ratify the purchase by them of the insurance business of S. N. Pickens & Co., and their said promissory notes and the delivery of same to S. N. Pickens, and they cannot now successfully defeat payment of same after having so ratified their contract with S. N. Pickens & Co., and the delivery of said notes to him, and after having appropriated all the benefits of their purchase from S. N. Pickens & Co., and this she is ready to verify, wherefore she prays judgment," etc.

Upon the trial in the court below the case was submitted to a jury upon special issues, and upon the return of verdict judgment was rendered in favor of plaintiff in accordance with the prayer of his petition, and against defendants Goodwin and McFarland on their cross-action against Mrs. Pickens. From this judgment, the defendants Goodwin and McFarland have appealed.

The special issues submitted to the jury and the findings thereon are as follows:

"Question First: Did Goodwin and McFarland execute the notes sued on? To the first question we answer 'Yes.'

"Question Second: Were the notes sued on delivered to S. N. Pickens by Goodwin & McFarland, or by their authority? To the second question we answer 'Yes.'

"Question Third: Did Pickens without the knowledge or consent or authority of Goodwin or McFarland abstract the notes sued on from their possession? To the third question we answer 'No.'

"Question Fourth: Were the notes sued on ever transferred by Pickens to Burton, and, if so, when and for what purpose? To the fourth question we answer 'Yes; June 19, 1907, for indebtedness.'

"Question Fifth: At the time Burton acquired possession of the notes from Pickens, if he acquired them, did he have any notice that Goodwin & McFarland had repudiated the payment of the notes or any part thereof? To the fifth question we answer 'No.'

"Question Sixth: Did Burton receive the notes sued on for collection as the agent of Pickens? To the sixth question we answer 'No.'

"Question Seventh: Did Burton receive the notes sued on as a creditor of Pickens? To the seventh question we answer 'Yes.'

"Question Eighth: Were the notes sued on with or without consideration? To the eighth question we answer, 'With consideration.'

Appellants' first, second, and third assignments of error complain of the action of the trial court in not sustaining their plea of privilege and their plea questioning the right of appellee to maintain this suit against Mrs. Pickens. If Mrs. Pickens was a proper party to the suit, it is not contended that appellants' plea of privilege should have been sustained; but it is earnestly insisted that the evidence shows that appellee did not purchase the notes from S. N. Pickens, but only held them for collection for Pickens' account, and therefore he has no claim against Mrs. Pickens, and she was only made a party defendant for the purpose of conferring jurisdiction upon the trial court over the non-residents, appellants, herein.

The findings of the jury in answer to the fourth, sixth, and seventh questions, before set out, are to the effect that the notes were transferred by Pickens to appellee in payment of or as security for an indebtedness due him by Pickens, and that appellee did not hold the notes for collection as agent of Pickens. These findings are supported by the evidence. The appellee testified that Pickens owed him on June 19, 1907, a sum of money largely in excess of the amount of the notes, and that on said date "he indorsed them [the notes], and said he wanted to turn them over to me. I was to collect them and take them to Mr. Royal, and credit his account with them." He further testified that he never heard of any claim on the part of

the appellants that they had a defense to the notes until June 21st, after he "had bought the notes." He also states: "At the time the notes were transferred to me, I did not pay him [Pickens] a cent. He was considerably in my debt and had been for a long time. I did not receipt for them. I took them for collection. I took them as my notes. He said: 'Here, take these.' I expected to give him credit for them when they were paid."

Mrs. Pickens testified: "I have never claimed possession of these notes. I knew that Mr. Pickens had transferred them to Burton, and they were his property."

Mr. Royal, cashier of the Royal National Bank of Palestine, testified that appellee kept an account at his bank, and that under instructions from appellee he paid insurance premiums due by Pickens and had charged the amount so paid to appellee's account, and that the sums so paid by him which were charged to appellee's account amounted to over \$1,800, and at the time these notes were indorsed to appellee the account at the bank showed that Pickens owed appellee about \$1,200.

Appellee also testified that: "If the court were to hold that these notes were not good and were not a charge against these parties, I would still be in the same attitude towards the estate as if I were to receive the money. I would still have a claim against the estate as if I had never had the notes. I never gave him credit for them." This evidence shows that appellee is the legal holder and owner of the notes, and it matters not whether he holds them as security for the indebtedness due him by Pickens or took them in payment of such indebtedness. In either case he could maintain a suit thereon against Pickens as indorser if he were living, and can maintain this suit against Mrs. Pickens as independent executrix of said indorser. While Mrs. Pickens was not a necessary party, she is a proper party to the suit, and, such being the case, the fact that the other defendants reside in Palo Pinto county would not entitle them to require the suit to be brought in that county, and the pleas of privilege and misjoinder of parties were properly overruled.

The fourth assignment complains of the ruling of the court in admitting the notes in evidence over the objection of the appellants that there was no proof of their execution, and that defendants had filed plea of non est factum.

The appellant Goodwin testified that he and McFarland signed the notes, but that the rate of interest and the place of payment were inserted in the notes after they were signed. There is no issue raised by the evidence as to the actual signing of the notes by the appellants; the only issue being as to whether they were delivered to Pickens. Goodwin testified that they were placed in the safe in the office, and it was understood that they were not to be delivered to Pickens

until the business was checked up; that Pickens had papers in this safe, and had access thereto; and that witness did not know the notes had been taken therefrom until the 14th or 15th of June, 1907. He further testified that the examination of the books had shown that the business was not what it had been guaranteed to be by Pickens, and that under their agreement Pickens was not entitled to the notes.

A. M. Blount testified for the defendants that he was present at the time the trade between Pickens and appellants was made, and that the amount of the consideration was to be determined by the amount that the insurance business would receive from policy renewals during the year succeeding the date of the sale, such amount to be determined by the amount of premiums on the policies carried by the business at the time of the trade and shown by the books to be then in force. He further testified that the notes were executed and placed in the safe in the office with the understanding that, if the checking of the books showed the business to be less than the consideration for the sale, the notes were to be credited with the difference. He further testified that the understanding was that the notes were not to bear interest, and that the place of payment was not named. He investigated the books, and the amount of premiums on the policies carried on said books was about \$1,000 less than the amount appellants had agreed to pay for the business, which difference would more than cancel the notes. At the time the notes were signed and placed in the safe, and for several weeks thereafter, Blount was in the employ of Pickens, and had charge of the office and safe. Pickens had the only key to the box in the safe in which the notes were placed. The appellee and the appellant Goodwin and several other witnesses testified that Pickens was a man of highest integrity and had the confidence of all who knew him. The written contract of sale contained no guaranty of any kind. When the notes were indorsed and delivered to appellee, they were taken by Pickens from a bank in Mineral Wells where he kept his papers. The undisputed evidence shows that if there was any guaranty as to the value of the business, as claimed by appellants, or any limitation upon Pickens' right to dispose of the notes, or any change made in the interest rate specified in the notes, appellee had no notice thereof at the time he purchased. We think this evidence sustains the finding of the jury that the notes were executed—that is, signed and delivered—by appellants. If it be conceded that the evidence shows that the notes were to be held by Pickens until the examination of the books should determine what amount, if any, they should be credited with, this agreement would not affect appellee, who purchas-

ed from Pickens without notice of the agreement. In placing the notes in Pickens' safe, or in a safe under his control, appellants put them in his possession, and cannot be heard to say, as against an innocent purchaser, that the notes were never executed because not delivered to the payee.

The sixth assignment complains of the judgment giving appellee 10 per cent. interest on the notes. What we have said under the foregoing assignment disposes of this assignment, which is also overruled.

The seventh assignment, which complains of the verdict on the ground that it is contrary to the evidence, is too general to require consideration.

We are of opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

HOLDER v. SHELBY et al.

(Court of Civil Appeals of Texas. March 11, 1909. Rehearing Denied April 15, 1909.)

1. PARTNERSHIP (§ 325*)—ACTIONS BETWEEN PARTNERS—APPOINTMENT OF RECEIVER.

A violation of the right of a partner to share in the management of the firm affairs and to participate in the profits is a sufficient breach of the partnership contract to warrant the appointment of a receiver, and such receiver can be appointed either while the business is in full operation or in process of dissolution, and the appointment may be made without notice on the sworn petition of a partner, where his petition shows that the partnership property is in the hands of a third person, and that the petitioner has been excluded from participating in the management of it, and such appointment will determine no right as between the parties nor affect the title to the property.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 325.*]

2. PARTNERSHIP (§ 273*) — DISSOLUTION — GROUNDS OF ACTION.

A violation of the right of a partner to participate in the management of the partnership affairs and in the profits is sufficient to warrant a decree dissolving the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 620; Dec. Dig. § 273.*]

3. PARTNERSHIP (§ 322*)—ACTIONS BETWEEN PARTNERS—INTERVENTION BY CREDITORS.

In an action brought by a partner to dissolve the partnership and for an accounting and a receiver, creditors of the partnership may intervene to have their established claims ordered paid.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 322.*]

4. ESTOPPEL (§ 75*)—ACQUIESCENCE BY PERMITTING SALE OF PROPERTY.

Where the owner of goods intrusts the same to a partnership, and permits it to hold itself out as the sole owner of the goods and to conduct the business in its name, the owner is estopped, as to creditors of the firm, from claiming the goods or the proceeds of the sale of the same so long as such creditors are unpaid.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 192-195; Dec. Dig. § 75.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plished the stock, and at the expiration of such time turn it back to the owner or so much as was on hand, and to turn back goods of a like kind to an amount equal to the value of the original stock, and to pay the owner for the use thereof 10 per cent. on the invoice price, is not a contract which is against public policy.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 108.*]

6. PARTNERSHIP (§ 186*)—RIGHTS OF THIRD PERSONS—APPLICATION OF ASSETS TO LIABILITIES.

Where the owner of a stock of goods transfers them to R. under an agreement by which R. is to handle the stock for a year, and then turn back to the owner a stock of goods of similar kind and equal in value to the original stock, and to pay the owner for the use thereof 10 per cent. on the invoice price, and R. enters into partnership with S., if S. knew when he went into the firm of the contract with the owner, then, on dissolution of the firm, after the firm debts were paid, the owner would have the right to have set aside to him out of the surplus property the value of the original property in proportion that the value of the property R. put into the partnership bears to the aggregate value of the stock put in by both partners when the partnership was created, and the owner, as against the partners, will have the right to the proceeds of this distribution to him in priority of equities between the partners, but, if S. did not have notice of the contract with the owner when forming the partnership, then the owner would have a personal claim only against R. for the value of the goods under his contract, and in payment of such claim could have the interest of R. in the surplus of the firm property, after firm debts were paid, subjected to the payment of his claim, but in no event would the claim of the owner be a firm liability.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 186.*]

Appeal from District Court, Franklin County; P. A. Turner, Judge.

Action by C. A. Shelby against T. A. Holder and another to dissolve a partnership between C. A. Shelby and H. F. Ramsey, and for a receiver. The Paris Grocery Company, a creditor of the partnership, intervened. Judgment for plaintiff, and defendant Holder appeals. Affirmed in part, and reversed in part and remanded.

Appellee Shelby brought the suit to dissolve a partnership, and for an accounting, and for the appointment of a receiver to take charge of the stock of merchandise. It was alleged that said appellee and H. F. Ramsey on February 2, 1906, entered into a copartnership at will for the purpose of engaging in the sale of groceries and the manufacture and sale of leather goods; that they continued in said business until about the 1st day of January, 1907, when it was mutually agreed that the partnership should be dissolved; that notwithstanding the terms of said partnership agreement the defendant Ramsey on January 2, 1907, turned the

ence of said partnership the firm contracted debts, which were due, and the defendants refused to pay same, and had refused to permit the appellee to have anything to do with the partnership business, and had refused to account to him for the proceeds of the goods sold; that, on an accounting, the defendant Ramsey would be indebted to him in the sum of \$1,500. Upon presentation of the petition, which was verified by affidavit, to the judge of the court in vacation, a receiver was appointed who took charge of the merchandise, and, upon an order of the court, reduced the entire stock to money. Appellant Holder pleaded that he and Ramsey on November 1, 1905, entered into a contract, whereby appellant, who at the time exclusively owned the stock of goods, turned over the same to Ramsey for the space of 12 months; that Ramsey agreed to take the goods and carry on the business for said time, and from time to time replenish the stock and keep it up, and at the expiration of such time to turn it back to appellant, or so much as was on hand, and to turn back goods of a like kind to an amount to equal the value of the original stock, and to pay appellant for the use thereof 10 per cent. on the invoice price; that Ramsey took the said stock and continued the business under said agreement; that appellee Shelby, knowing at the time about the contract with appellant, and knowing his interest and the value thereof, and agreeing and assenting thereto, entered into the partnership with the said Ramsey. The prayer was for the value of the goods, or the amount received for them in the sale by the receiver, or for judgment against the firm for their value, and that he be paid pro rata with the other creditors, and for general and special relief that he might be entitled to in the premises. The appellee the Paris Grocery Company intervened in the suit, alleging that it was a creditor of the firm of Ramsey & Shelby, and prayed for judgment for its debt, and, that the same be paid out of the proceeds of the said firm property then being administered by the court in receivership proceedings. The case was tried to a jury, and, in accordance with their verdict, a judgment was entered in favor of the intervener against the firm of Ramsey & Shelby, and directing the payment out of the proceeds of the partnership property in the hands of the receiver and in favor of Ramsey the sum of \$504.45 against appellee Shelby, the amount on accounting found due him. The court further ordered the receiver after paying all costs of the receivership to pay all the partner-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ship creditors as set out in the petition and the judgment, and, if there were not sufficient funds for such purpose, to prorate the same among them. The court directed a verdict against appellant, Holder, who, from the judgment so entered against him, brings the case on appeal.

W. L. Tittle and R. T. Wilkinson, for appellant. A. L. Burford, R. E. Davenport, and C. A. Sweetor, for appellee.

LEVY, J. (after stating the facts as above). Assignments Nos. 1, 2, 3, and 4 are directed to the action of the court in overruling the appellant's motion to vacate the order appointing a receiver. The receiver was appointed on January 5, 1905, in vacation, and at once qualified and took possession of the stock of goods. After taking possession, and by order of the court, the receiver sold all the property for cash. This provisional order appointing the receiver was not contested or appealed from. The motion to dissolve now in question was not presented until the March term of the court, 1908, at which time the court overruled the motion. We do not think that this ruling of the court could in this case be disturbed, for the reason that, under all the pleadings, it could be affirmatively determined that the appointment of a receiver was warranted. The facts stated show a conflict of interest in the property and the exclusion of a partner from participation in the partnership business. As each member of a partnership has the right to share in the management of the firm affairs and to participate in the profits, a material violation of this right is a sufficient breach of the partnership contract to warrant a decree dissolving the firm and the appointment of a receiver; and it makes no difference whether the exclusion takes place while the business is in full operation or in the course of mutual dissolution. *Alderson on Receivers*, § 460; *Rische v. Rische* (Tex. Civ. App.) 101 S. W. 849; article 1465, Rev. St. 1895. Because the provisional order of appointment was made on the sworn petition, and without notice, did not in this case render the appointment of the receiver void. The allegations of the petition were sufficient, and were not subject to the objection urged. In order to warrant the appointment of a receiver on an application for that purpose, it does not have to appear conclusively that the plaintiff is entitled to recover. *Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536, 36 S. W. 802. The appointment of a receiver determines no right as between the parties, nor does it as between the parties, affect the title to the property in any way. That appellant was in possession of the property would not prevent the appointment. It is sometimes necessary to appoint a receiver of property where the interests of the parties to the suit are so connected with those of third persons that the necessary

possession of the receiver conflicts with the legal rights of such third persons. These third persons, however, have the legal right to test the question of their rights in the case, and the court will make such order for the protection of their rights, if any they show themselves to have, as may be just and equitable.

The court did not err in refusing to dismiss the intervention of the creditors named, and the sixth and seventh assignments are overruled. If the interveners, as simple creditors, and not lienholders, had sought the appointment of a receiver in the case, another question might be presented. But when partnership funds, as in this case, pass into the hands of a court for administration, this gives the creditors of the partnership such an interest therein as entitles them to intervene in that proceeding to have ordered paid their established claims. The Texas Produce Company had already obtained judgment for its debt in the justice court, and the amount of the claim for which the Paris Grocery Company sought judgment in the intervention was within the jurisdiction of the district court. As against appellant, we think these two interveners and the other partnership creditors of the firm of Ramsey & Shelby could legally claim to have the partnership property and assets of the said firm applied to the payment of their claims in preference to any claim appellant could show himself entitled to in this case. By permitting Ramsey and the firm of Ramsey & Shelby to hold themselves out as the apparent sole owners of the stock of goods, and to conduct the business in their names, the appellant is estopped, as to such creditors of the said firm, from claiming the goods, or the proceeds of the sale of the same, so long as such creditors remain unpaid. By reason of the estoppel, appellant's claim, as he may or may not establish, is postponed in participation of the proceeds of the sale of the property until such creditors are first paid therefrom.

The remaining assignments of error present the question of the rights of appellant in the case against Ramsey & Shelby and Shelby individually. The answer of appellant sets up the facts authorizing a judgment against Ramsey individually, but he does not in words pray for a judgment against him. He, however, does pray for such general relief as he may be entitled to in the premises; and, under such pleading, we are inclined to think that the questions presented could be successfully asserted. The court gave a peremptory instruction to find against appellant, and we are of the opinion that this was error. The contract made between appellant and Ramsey was not as between the said parties void and against public policy, and for that reason issuable facts in relation to such contract arose between the parties in the case, and which should have been submitted to the jury. If the appellee

Shelby knew at the time he went into partnership with Ramsey of the contract that appellant had with Ramsey about the goods, then, after the partnership debts were paid, the appellant, as beneficial owner, would have the right to have partitioned and set aside to him out of the surplus partnership property the value of the property in proportion that the value of the goods and property which Ramsey put in the partnership at the time of forming the partnership bears to the aggregate value of the entire stock put in by both partners at the time the partnership was created by Ramsey and Shelby. And appellant, as against both Ramsey and Shelby, would have the right to the proceeds of this distribution to him in priority of equities between the parties. If, however, Shelby did not have notice of the contract with Holder at the time of his forming the partnership with Ramsey, then the appellant would have to look alone to a personal claim against Ramsey for the value of the goods and interest under his contract, and could in payment of his claim have subjected the interest of Ramsey in the surplus of the partnership property after firm debts were paid, together with such interest, if any, that might be awarded Ramsey in the accounting between him and his partner as the evidence might warrant. We do not think that the claim of appellant in the case could be held to be a partnership liability in any event. Neither could there be a liability to appellant on the ground of conversion of the property by the firm. Appellant by the contract with Ramsey authorized the daily sale of the goods; and, if either Ramsey or the firm of Ramsey & Shelby sold the goods, it was the use and disposition of the property in a way not inconsistent with authority from appellant so to do.

The judgment will be affirmed so far as it directs the payments of firm creditors and authorizes and requires the receiver to pay the partnership debts, but is reversed and remanded for a trial of the issues between appellant and Ramsey & Shelby.

DAWSON v. BALDRIDGE et al.

(Court of Civil Appeals of Texas. April 7, 1909.)

1. APPEAL AND ERROR (§ 837*)—REVIEW—SCOPE—TEMPORARY INJUNCTION.

No notice can be taken of an unsworn answer in determining whether a trial court erred in dissolving a temporary injunction.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 837.*]

2. INJUNCTION (§ 172*)—DISSOLUTION—ANSWER TAKEN AS TRUE.

On motion to dissolve an injunction on bill and answer, the answer, when sworn to in so far as responsive to the bill, is taken as true.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 876; Dec. Dig. § 172.*]

3. INJUNCTION (§ 172*)—TEMPORARY INJUNCTION—DISSOLUTION—WHEN PROPER.

A temporary injunction will be dissolved when the answer is sworn to, and equivocally denies all the material allegations of the bill, unless irreparable mischief is likely to ensue from its dissolution, or unless some peculiar circumstances exist.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 374-384; Dec. Dig. § 172.*]

4. HUSBAND AND WIFE (§ 266*)—SALE BETWEEN—COMMUNITY PROPERTY.

A pretended sale by a husband of a stock of merchandise to his wife, purchased by the wife with money borrowed upon the faith of her separate property as security, was ineffectual, as it is not the separate property of the wife, but community property.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 266.*]

5. INJUNCTION (§ 171*)—TEMPORARY INJUNCTION—DISSOLUTION—BILL TAKEN AS TRUE.

On motion to dissolve a temporary injunction, the bill must be taken as true, in the absence of a sworn answer traversing the equity of the bill.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 373; Dec. Dig. § 171.*]

Appeal from Edwards County Court; A. P. Allison, Judge.

Action by J. A. Dawson against J. D. Baldrige and others. From an interlocutory order dissolving a temporary injunction, plaintiff appeals. Reversed and rendered.

This is an appeal from an interlocutory order dissolving a temporary injunction issued in this case, restraining the defendants J. D. and M. S. Baldrige from handling, using, appropriating, or in any manner consuming or withdrawing, any part or parcel, item or article, of property belonging to the mercantile business of Baldrige, Whatley & Allen, located at Barksdale, in Edwards county, until further order of the court. It would be foreign to this appeal to state more of the proceedings in the case, or express any opinion upon the merits of the case, than is necessary to a decision of the question whether the temporary writ of injunction should have been dissolved.

The grounds upon which the writ was granted, as disclosed by plaintiff's petition, which was filed February 12, 1909, are, substantially, that on October 4, 1904, plaintiff's wife, Una Dawson, was the owner in her own right, as her separate property, of a general stock of goods, wares, merchandise, and fixtures of the value of \$1,200, which were in Bandera, Bandera county, Tex., and in possession of the defendant J. D. Baldrige, who had theretofore been conducting in that town a mercantile business; that on said date the indebtedness of such business was ascertained to be \$893, and then plaintiff entered into a written contract with Baldrige concerning said stock of goods, etc., which is as follows: "The State of Texas, County of Bandera.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This agreement made and entered into this 8th day of October A. D. 1904, by and between Mrs. Una Dawson, who is herein joined by her husband, J. A. Dawson, for the sole purpose of expressing his assent hereto, party of the first part and J. D. Baldrige, party of the second part, both parties being residents of Bandera county, Texas, witnesseth: First. The said party of the first part, being the owner in her own separate right, of that certain stock of goods, wares and merchandise and store fixtures, situated in the town of Bandera, valued at twelve hundred dollars, and with which the said party of the second part, has heretofore been doing business as a merchant, agrees, consents and contracts to and with the said second party, that he the said second party may remove the said stock of goods, wares, merchandise and fixtures, to the village of Concan in Uvalde county, Texas, and there enter into copartnership with the firm of Caddell Bros., or with either of them, and shall there remain in the full and peaceable possession of the said goods, wares, merchandise and fixtures, upon the faithful performance by him, the second party, of the stipulations and agreements entered into and agreed to be done by him. The said party of the second part hereby agrees, contracts and binds himself to take charge of said stock of goods, wares, merchandise and fixtures, and of the said business of merchandising, at said village of Concan, or other place that may be mutually agreed upon hereafter and enter into said copartnership with said Caddell Bros., and conduct said business in a good, careful and prudent businesslike manner, in his own name, or in the name of said Baldrige and Caddell Bros. and from the proceeds thereof, pay off all the present indebtedness, owing by said business heretofore conducted by him at Bandera, and elsewhere amounting to the sum of eight hundred and ninety-three no/100 dollars. To keep good and accurate book accounts of each and every transaction had by him in the management of said business, which said books shall be at all times open and subject to the inspection and examination of the said party of the first part, her agent or attorney. The said party of the second part shall receive as full compensation for his said services the sum of thirty dollars per month, from the proceeds of said business, from this date until the said indebtedness shall be paid, when the stock of goods, wares, merchandise and fixtures then on hand shall be equally divided, or in the event that said parties shall desire to still do business together, then articles of copartnership may be entered into by them. Third. In the event that either party to this contract shall fail, refuse or neglect to perform the conditions by her or him herein entered into, then this contract shall at once terminate, and the party so failing, re-

fusing or neglecting to perform his or her agreements shall forfeit to the other party all his interests and rights herein conferred. In witness whereof, the said parties have hereunto signed their names in Bandera, this the day and date first herein written, signing in duplicate. Una Dawson. J. A. Dawson. J. D. Baldrige." This instrument was duly acknowledged by the parties thereto.

The petition then alleges that the defendant J. D. Baldrige retained possession of the property under the agreement, for the purposes stated in the agreement, charged with the duties he obligated himself thereby to discharge; that, while no time was specified in the agreement within which Baldrige should pay off the indebtedness, a reasonable time was contemplated by the parties, which is alleged in the petition to be four years; that a reasonable time has elapsed, and that Baldrige has in fact heretofore, on October 8, 1908, paid off and discharged said indebtedness, and that during the period from the date of the contract up to that time he had used and consumed the \$30 per month allowed him by the contract for his services; that there was on hand on October 8, 1908, after paying off the indebtedness of \$893 as stipulated, and in Baldrige's possession merchandise belonging to said business of the total value of \$800, which was then subject to division, one-half of which was the property of plaintiffs; that, though often demanded, the defendant has failed and refused to deliver to plaintiffs their share of the goods, or pay them the value thereof, and that under the last paragraph of the contract, by reason of Baldrige's failure to perform his part of the agreement, plaintiffs became entitled to all the merchandise on hand, or the value thereof, amounting to \$800, but that, if they are mistaken in this, they are at least entitled to an undivided half interest in the stock of goods, or the value thereof, which is alleged to be \$400; that about two years ago, the exact date being unknown by plaintiffs, the defendant J. D. Baldrige, without their knowledge or consent, made some pretended sale or transfer of said stock of merchandise to his wife, M. S. Baldrige, by which he attempted to pass the title thereto for the purpose of defrauding plaintiff out of said goods; that the attempted sale being a sham, fraudulent and colorable only, passed no title to said property.

The petition then alleges that Baldrige, some time after the pretended sale to his wife, the date being unknown to plaintiffs, after removing the stock of goods to Barksdale, Edwards county, formed a partnership in the mercantile business with one W. N. Whatley, who brought additional capital thereto, the firm then organized being known as Baldrige & Whatley; that the interest and capital placed in that firm by Baldrige

was the identical stock of goods, in its various changes and mutations, that he had received from plaintiffs; that about January, 1906, one G. M. Allen bought an interest in said firm of Baldridge & Whatley, and the firm name was changed to Baldridge, Whatley & Allen, and is still continued at Barksdale under such firm name; that Allen brought additional capital into the firm, but that the only capital placed in the firm by Baldridge was that placed in the partnership of Baldridge & Whatley, which was as before alleged; that the capital in the present firm is of the value of about \$4,000, of which Whatley and Allen each own about two-fifths or \$1,600, and the Baldridges the remainder of about one-fifth, or \$800; that each and all the members of said firm are in possession of said business, and handling and carrying on therewith a general merchandise business, each having the privilege of withdrawing from the business and appropriating to his own use whatever he may desire; that Baldridge is withdrawing therefrom constantly, and appropriating the corpus and interest thereof to his own use in large quantities and values, to plaintiffs' injury and great damage, without legal right so to do; that said property is in danger of being lost, removed, and materially injured; that Baldridge is insolvent, and to permit him to consume said property will work great and irreparable injury to plaintiffs, who will lose all he withdraws and consumes; that Whatley and Allen are each resident citizens of Edwards county, Tex., and are the owners of the four-fifths interest in said firm and business, as aforesaid, and became such owners without notice of plaintiffs' interest in the property brought into the firm by Baldridge, and are in possession thereof, and for the purpose of affecting them with such notice they are made parties defendant.

Plaintiffs aver that the facts alleged require the appointment of a receiver to take charge of and manage said business, at least as to the interest of the Baldridges, which interest should be taken from their possession and control, and that they should be enjoined from having or exercising any right or control thereof, or from withdrawing therefrom, or appropriating to themselves in any manner any part thereof, until the question of ownership shall be decided by the court, and that, unless they are so enjoined, plaintiffs will suffer great loss and irreparable injury. Plaintiffs suggest the appointment of Whatley and Allen as receivers, pray for an accounting, etc., showing the interest of the Baldridges in the firm property, etc., and for an injunction such as was temporarily granted, for judgment against Baldridge such as plaintiffs may be entitled to under the allegations and proof thereof in their petition. The allegations in the petition were duly sworn to by J. A. Dawson; and, upon such

petition, the temporary writ of injunction was awarded and issued. The defendants Baldridge answered at great length; but, as their answer was not sworn to, no notice can be taken of it by this court in determining whether the trial court erred in dissolving the temporary injunction.

The motion to dissolve the injunction contains the following statement made and sworn to by J. D. Baldridge, viz.: "I, J. D. Baldridge, do solemnly swear that I am one of the defendants in the above-entitled and numbered cause, and that my wife, M. S. Baldridge, is also a defendant in said cause; that the stock of goods in which plaintiffs had an interest at the date of the contract alleged and set up by them in their petition in this cause was moved from Bandera, Tex., to Concan in Uvalde County, Tex., and with said stock of goods defendant J. D. Baldridge conducted a mercantile business for about nine months, until the latter part of June, 1905, at which date said business was suspended, for the reason that it was being run at a loss, and that when so suspended said stock of goods, wares, and merchandise and accounts then on hand and belonging to said business was of the invoice price of \$1,000.10, but was not of a market value of more than \$900, and that at said date when said business was suspended, there was existing as valid subsisting indebtedness against said business an aggregate amount of \$1,056.13, including \$100 then due to J. D. Baldridge for services rendered by him in attending to said business; that on or about July 1, 1906, deponent says that, in order to pay off said indebtedness due on said business, he was compelled to sell said goods, wares, and merchandise, and did sell the same, to M. S. Baldridge for a valuable consideration, a consideration in excess of the value of said goods, wares, and merchandise, and that said M. S. Baldridge paid therefor, by and with her individual, separate funds borrowed by her, and for the repayment of which she gave her personal obligation, and pledged her separate estate; that said sale to M. S. Baldridge was not made for the purpose of defrauding creditors, nor for the purpose of defrauding plaintiffs, but was made for the purposes stated above; that said M. S. Baldridge is the legal and equitable owner in her own separate right of said goods, wares, and merchandise, representing the Baldridge interest in the firm of Baldridge, Whatley & Allen, and that J. D. Baldridge has no interest whatever in said business in his own right." No evidence was heard nor considered by the court in determining whether the injunction should be dissolved; but it seems the court acted alone upon the statement contained in defendants' motion to dissolve.

Ben H. Kelly and Fisher & Walker, for appellant. W. D. Love and J. T. Friestman, for appellees.

NEILL, J. (after stating the facts as above). Upon motion to dissolve an injunction on bill and answer the answer, when sworn to, in so far as it is responsive to the bill, is taken as true. And the rule is that, when the sworn answer fully and unequivocally denies all the material allegations of the bill upon which complainant's answer rests, the injunction will be dissolved. This rule, however, requires positive averments in the answer, and not merely general allegations of denial based on information and belief. The denial must be of the same positive character as the averments in the bill on which the complainant's equities are based. Nor will an answer suffice where it is not fully responsive to the bill. But where the allegations of the answer are full and responsive to the bill, and fully deny its equity, the injunction will be dissolved, unless apparent irreparable mischief is likely to ensue from its dissolution, or unless some peculiar circumstances exist to warrant a departure from the rule. High on Injunction, § 1505. But the dissolution, like the granting of the interlocutory injunction, is largely a matter of judicial discretion, to be determined by the nature of the particular case under consideration. A dissolution, therefore, does not necessarily follow upon the coming in of the answer denying the material allegations of the bill upon which the injunction issued, and the court may, in the exercise of a sound judicial discretion, refuse a dissolution and continue the injunction for a hearing, where the circumstances of the case seem to demand this course. Especially will this discretion be exercised where fraud is the gravamen of the bill, or where it is apparent to the court that a dissolution of the injunction would result in greater injury and hardship than its continuance to the hearing, or where it is apparent that by the dissolution complainant would lose all the benefit which would otherwise accrue to him should he finally succeed in his cause. A temporary injunction should not be dissolved where its dissolution would result in irreparable injury to the plaintiff. High on Inj. § 1508.

Taking the view of the pleadings and the proceedings most favorable to the action of the court in dissolving the injunction, and regarding the facts set out in the motion as the defendants' answer to plaintiffs' bill, it will be seen that there is not a full and unequivocal denial of all the material allegations relied upon by plaintiffs for the injunction. But on the contrary, it rather intensifies the plaintiffs' showing of their right to the writ, in that it shows that defendant J. D. Baldrige, in violation of the trust reposed in him by plaintiffs, as shown by the written agreement, has without authority made a simulated sale of plaintiffs'

property, intrusted to his care and management, to his wife, and is claiming possession and the right to dispose of it under such fictitious sale. The pretended sale to his wife is no better than a sale of the property by Baldrige to himself; i. e., no sale at all. For, as is held in *Heidenheimer v. McKeen*, 63 Tex. 229, merchandise purchased by the wife with money borrowed upon the faith of her separate property as security is not the separate property of the wife, but community property of the husband and wife.

The sworn allegations in defendants' motion to dissolve the injunction being no answer, such as equity requires, to the plaintiffs' bill, which must be taken as true in the absence of such an answer, it necessarily follows that the court erred in dissolving the temporary injunction. Wherefore such interlocutory order is reversed and vacated, and judgment is here rendered reinstating said injunction to its original force and effect, to so remain until the case is finally disposed of on its merits.

Reversed and rendered.

HOUSTON & T. O. R. CO. v. SHAPARD.†

(Court of Civil Appeals of Texas. March 27, 1909. Rehearing Denied April 15, 1909.)

1. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

Where the court charged that the burden was on plaintiff to prove that he was injured as the direct result of defendant's negligence, and that if the open switch, into which plaintiff's train ran, was not the result of the negligence of defendant's servants, the jury should find for defendant, and that they should construe all parts of the charge together, an instruction that if the open switch was the result of the negligence of defendant's servants in not properly closing it, or in not keeping it closed, and plaintiff's injuries, if any, were the direct result of the negligence of defendant's servants in regard to the switch, and plaintiff did not assume the risks, then he was entitled to recover, was not objectionable as assuming that defendant's servants were negligent "in not properly closing the switch."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 428-430; Dec. Dig. § 191.*]

2. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—INSTRUCTIONS.

Such instruction was also not objectionable as submitting the negligence of defendant's employees in not "properly" closing the switch, on the theory that the only negligence charged was that the switch was not "closed"; there being no distinction presented by the evidence between "closing" and "properly closing" the switch.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1156; Dec. Dig. § 293.*]

3. TRIAL (§§ 251, 252*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

It is error to charge on an issue not presented by the pleadings or on which there is no evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587, 596; Dec. Dig. §§ 251, 252.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 13, 1909.

erly closing it or in not keeping it closed, and plaintiff's injuries were the direct result of defendant's negligence in regard to the switch, etc., he was entitled to recover, was not objectionable as assuming the negligence of defendant's employes in not keeping the switch closed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 428-430; Dec. Dig. § 191.*]

5. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—OPEN SWITCH—EVIDENCE.

In an action for injuries to a railroad fireman by his engine running into an open switch, evidence held not to warrant a conclusion that the switch was closed by the brakeman of another train and was afterwards forcibly thrown open by an unauthorized person.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 959; Dec. Dig. § 276.*]

6. APPEAL AND ERROR (§ 852*)—REVIEW—THEORY OF VERDICT—ERRONEOUS INSTRUCTION.

The fact that the evidence preponderates strongly in favor of the verdict is of weight in determining whether the verdict was the result of an alleged erroneous theory resulting from one of the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3402; Dec. Dig. § 852.*]

7. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—RAILROADS—OPEN SWITCH—INSTRUCTIONS—BURDEN OF PROOF.

Plaintiff was injured by his engine running into an open switch and colliding with a freight train. The court charged that if the freight brakeman closed the switch, and it was afterwards, and before the arrival of plaintiff's train, opened by some unauthorized person so that the act could not have been prevented by defendant's use of ordinary care, or if the jury believed that such opening could not, by the exercise of ordinary care, have been discovered by defendant's servants in time to have closed the switch before plaintiff's train arrived, or if the jury believed that the switch being open was not the result of negligence on defendant's part, they should find for defendant. Held, that such instruction was not objectionable as placing the burden of proof of showing that the switch being open was not due to defendant's negligence on it; the court having also directly charged that the burden was on plaintiff to show that his injury was the direct result of defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1140, 1141; Dec. Dig. § 291.*]

8. DAMAGES (§ 38*)—EARNING CAPACITY—IMPAIRMENT OF MIND.

That plaintiff's mind was not as accurate as it was before he was hurt may be considered on the question of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 237; Dec. Dig. § 38.*]

9. WITNESSES (§ 236*)—MANNER OF TESTIFYING—EXPLANATION.

Where, in an action for injuries, plaintiff on direct examination hesitated and apparently thought or studied before answering questions, and his counsel asked him why he did this, his answer, that he did not know, except that his mind was not as accurate as it was before he was hurt, was not objectionable on the ground that it was for the jury to determine

10. EVIDENCE (§ 9*)—X-RAY PHOTOGRAPHS—JUDICIAL NOTICE.

Courts will take judicial notice of the accuracy of an X-ray photographic view of the bones of a living body, when properly taken.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 8; Dec. Dig. § 9.*]

11. EVIDENCE (§ 359*)—X-RAY PHOTOGRAPHS.

In an action for injuries, X-ray photographs shown to have been properly taken were not objectionable on the ground that, without cutting away intervening tissue, it was impossible to tell whether the pictures correctly represented the condition of plaintiff's injured bones.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1510; Dec. Dig. § 359.*]

12. TRIAL (§ 29*)—RECEPTION OF EVIDENCE—REMARKS BY COURT.

Defendant's counsel asked a witness if he frequently found switches opened by persons not connected with the road, and if he knew of any method by which railroad companies could avoid such conditions. After this question had been answered in the negative, plaintiff's counsel said that he did not object to it, but did not think it was a proper question, and the court remarked, "I don't think the question is proper." Held, that the court's statement was improper, but related to the admissibility rather than the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 81; Dec. Dig. § 29.*]

13. APPEAL AND ERROR (§ 1046*)—STATEMENTS BY COURT—PREJUDICE.

Where, in an action for injuries to a railroad fireman by running into a freight train on a siding because of an open switch, the evidence preponderated in favor of the theory that defendant's brakeman on the freight train standing near the switch had failed to close it, and it was improbable that the switch after having been closed had been tampered with by some miscreant, an erroneous remark of the court that he did not believe a question, calling for a witness' opinion as to whether there was any method by which railroads could prevent switches from being tampered with, was proper, though not objected to, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134; Dec. Dig. § 1046.*]

14. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

It is not error to refuse requests to charge substantially covered by the instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

15. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Plaintiff, a railroad fireman, 27 years of age, was injured by his engine colliding with a freight train on a siding because of an open switch. He was earning at the time of the accident \$125 a month, but his earnings for five months before had averaged \$65 a month. He sustained a compound fracture of both bones of one leg between the knee and the ankle. One of the bones never properly united, in consequence of which his foot was turned in, interfering with his walking. He would never have proper use of that leg, but in time would secure some substantial use of it. When he lay in the hospital, about a dozen small pieces of bone were taken from his leg. After he was thrown from the cab, as he lay on the ground,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

his legs and feet and some parts of his body were severely burned. *Held*, that a verdict allowing plaintiff \$25,000 was excessive and should be reduced to \$17,500.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Charles P. Shapard against the Houston & Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed on condition.

Baker, Botts, Parker & Garwood and Lane, Jackson, Kelley & Walters, for appellant. O. T. Holt and Lovejoy & Parker, for appellee.

REESE, J. This is a suit by appellee against appellant to recover damages for personal injuries alleged to have been received by him as the result of a collision between an engine on which plaintiff was riding, and on which he was employed as fireman, and another engine on defendant's railway line. It was alleged by plaintiff that the accident, which was the occasion of his injuries, was caused by the engine on which he was fireman, and on which he was riding, leaving the main track and colliding with an engine attached to a freight train standing on a side track, and that the switch leading from the main track to the siding had been left open through the negligence of defendant's agents and servants. Defendant pleaded general denial and assumed risk. Upon a trial with a jury, there was a verdict for plaintiff for \$25,000, and from the judgment this appeal is prosecuted.

The facts with regard to the accident, as disclosed by the evidence, are as follows: Appellee was in the employ of appellant as a fireman on a passenger engine, which, with its train of 10 cars, left Houston, north bound, at 9:20 o'clock p. m. on December 18, 1906. The train, which had been running at a speed of about 60 miles an hour, when approaching the station at Thornton, slowed down to about 30 miles an hour, and was running at about this speed, approaching the station. When the engine got within about 50 yards of a switch just south and a short distance from the station, the engineer discovered that the switch was open. An engine attached to a south-bound freight train was standing on the side track into which the switch led, and about 75 feet from the switch. The passenger engine plunged through the open switch into the freight engine. Appellee, who had just previously been engaged in testing the water in the boiler of his engine, had just gotten back into his seat on the left side of the cab when the engineer exclaimed that the switch was open. He tried to get through the window in front of the cab, intending to get out on the running board alongside of the boiler and jump

from there to the ground; but his clothing caught, and when the collision occurred he was thrown back into the cab, and caught in some way, and his leg broken, and from there he was thrown to the ground, where he lay until some one came to his relief and carried him to a place of safety. An oil tank car was next to the freight engine, and in some way the oil escaped therefrom and covered the ground. This oil caught fire, and appellee suffered some injuries by being burned before he was removed. Both of the bones of his leg were broken between the knee and the ankle. The passenger train was due to arrive at Thornton at 2:30 a. m., but was about 13 minutes late. The evidence justifies the conclusion that the freight train south bound arrived at Thornton, finished the switching, and went in on the siding a few minutes earlier. One Maddox was the head brakeman of the freight train, and in the discharge of his duties as such he opened the switch to let the freight engine in on the siding. It was his duty to then close the switch, "lining it up" for the main line for the passage of the north-bound passenger train then due. He testified: That he closed the switch and locked it securely after the freight engine passed into the siding, and then went up to the station, lay down, and went to sleep; that, when the passenger train approached, the conductor sent him down to the freight engineer, who with his fireman had remained on his engine, with orders; and that as he was standing by the freight engine the passenger train came in and the engine crashed into the freight engine. Whether Maddox closed the switch, and it was afterwards opened by some unauthorized person before the arrival of the passenger train, or failed to close it, was the issue upon which the case turned. It was further charged, however, by plaintiff, that, if Maddox closed the switch, appellant, its agents and employes were guilty of negligence in failing to see that it was kept closed until after the passage of the passenger train. The headlight of the freight engine, as was customary in such cases, after it passed into the siding, was covered so that it gave no light in the direction of the passenger engine. When the engineer of the passenger train discovered that the switch was open, he did everything possible to prevent the disaster, but it was impossible to materially check the speed of the train in the short distance intervening. He could not have discovered the open switch in time to avoid the disaster. When the freight engine went in on the siding, it stopped at a distance of certainly not more than 75 feet (appellee testified about 30 feet) from the switch, and both the engineer and his fireman remained on the freight engine up to the moment of collision. The switch was unquestionably

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

...heard trying to throw it back, or "fooling with it," which was denied by him. It would have required considerable force and violence to break the lock, and it could not have been done without being heard by the engineer and fireman on the freight engine. The evidence fully authorized a finding that Maddox was mistaken about having closed the switch after the freight train went into the siding. The injuries received by appellee were permanent and serious. The court submitted to the jury the issues of negligence of appellant in leaving the switch open, and also in failing to use proper care to keep it closed, and the issue of assumed risk on the part of appellee.

By its first assignment of error, appellant assails the following charge given by the court: "Guided by these instructions, if you believe from a preponderance of the evidence that the said switch being open, and said train being so deflected, was the result of the negligence of defendant's servants and employes in not properly closing the switch, or in not keeping the same closed; and further believe that plaintiff's injuries, if any, were the direct result of the negligence, if any, of defendant's servants and employes in regard to said switch, and that he did not assume the risks, then you will find for the plaintiff, and assess his damages as hereinbefore instructed." The first objection to this charge is that it assumes that appellant's servants and employes were guilty of negligence "in not properly closing the switch." We think this is not a fair criticism of the charge. Standing alone, the jury could not have so understood it. If there were any doubt, however, on this point, it is relieved by reference to paragraph 4 of the charge immediately preceding, whereby the jury was instructed that the burden of proof was upon appellee to prove by a preponderance of the evidence that he was injured as the direct result of the "negligence" of appellant, and to paragraph 6, immediately following the paragraph containing the charge objected to, that, if the jury believed that the switch being open was not the result of the negligence of appellant's servants or employes, to find for appellant. The jury was carefully told to construe all parts of the charge together. It must have been understood by the jury that negligence vel non in the matter of the open switch was a matter to be determined by them. One part of the charge may be looked to for the purpose of qualifying another. *Baker v. Ashe*, 80 Tex. 361, 16 S. W. 36; *Railway v. Matulla*, 79 Tex. 581, 15 S. W. 573.

There is no merit in the second objection to this charge, that it submitted to the jury the issue of negligence of appellant's

...closed, only that it was not closed. The evidence did not present any ground for a distinction between "closing" and "properly closing" the switch. If it was not "properly closed," it was not closed.

The third proposition under this assignment presents the same objection, with the added qualification that there was no evidence that the switch was not "properly closed." The proposition that it is error to charge upon an issue not presented by the pleadings, or upon which there is no evidence, is sound; but it has no application here. The substance of the issue, as stated by the charge, was presented by both the pleadings and evidence.

The fourth objection to the charge is that it assumes the negligence of defendant's employes in not keeping the switch closed; whereas, there was no evidence tending to show that there was any duty imposed on said employes to see that the switch was kept closed, after it was once closed and locked. Certainly this was not assumed by the charge, but the issue was submitted. We are not prepared to say that, in the circumstances of this case, the duty did not rest upon the employes of appellant to use ordinary care to see that the switch was kept closed until the passing of the passenger train, for the protection of the freight train as well as the passenger train. The freight engine was just inside of the switch not more than 75 feet away, according to Maddox's testimony, 30 feet according to that of appellee. The passenger train was due then and must have been expected to arrive every moment. The brakeman of the freight train was on the ground. He testified that, when he came down to give the engineer his orders, as he stood by the engine, if he had thought of it, by glancing at the switch target, in a few feet of him, he could have seen that the switch was open. An open switch in such circumstances was fraught with such frightful danger, of the destruction of life and property, that it is too much to say that, whatever may have been the duty of employes of the appellant as to safeguarding switches scattered along the line, they should have used some degree of care to see that this one remained closed until the passenger train passed, and, if the accident was due to want of ordinary care in this regard, appellant would be liable; but, if we are mistaken in this, the evidence is so preponderating that Maddox is simply mistaken about having closed the switch, and that it was not afterwards violently and forcibly thrown open, or in any way opened by any unauthorized person, that the conclusion cannot be escaped that the verdict of the jury was based upon this theory and could not have been influenced by the

charge referred to. That the switch was open is practically admitted. At least it is established beyond question by the undisputed testimony. If Maddox closed it, then some miscreant, in a spirit of pure and wanton deviltry, in the short time elapsing from the closing of the switch by Maddox to the arrival of the passenger train, went to the switch, broke the lock, or in some way opened it, and threw the switch, and this in 100 yards of the station, and in from 30 to 75 feet from where the engineer and fireman of the freight train sat in the cab of the engine. The thing is improbable to the verge of incredibility. Such a thing might have been done in some lonely out of the way place, but at that time and that place, and all without attracting the attention of the engineer and fireman of the freight train, is so extremely improbable of occurrence that it is inconceivable that the jury so found, when all of the evidence points to the conclusion plainly and clearly, in spite of Maddox's testimony, that, while he may have intended to close the switch, and may have thought he did so, he is mistaken. He testifies in one place that his "recollection is that he lined up the switch for the main line." It might possibly have been unlocked by some one having a key and changed without noise; but even this, with the engineer and fireman so near, is barely possible. Clearly the lock was not broken. Some evidence was offered that it had disappeared and had never been found; but, on the other hand, the testimony showed that it would have been practically impossible to have broken the lock and thrown the switch without attracting the notice of the engineer and fireman on the freight engine. Maddox would naturally shrink from admitting even to himself that he had left the switch open, and doubtless has deceived himself into believing that he closed it. Taking all the evidence into consideration, we conclude that it is not conceivable that the jury should have been influenced by the charge referred to, in basing their verdict upon the theory presented. As said by this court in *Railway Co. v. Groves*, 44 Tex. Civ. App. 63, 97 S. W. 1084, 16 Tex. Ct. Rep. 897: "Again, however, the question is whether the jury were misled, for, in the absence of some feature of the charge apparently indicating a contrary opinion on the part of the trial judge, all the probabilities are that the jury found according to the undisputed proof. It is a common thing for appellate courts to look to the state of the proof in determining whether some slight error either of law or procedure is harmless. The fact that the evidence strongly preponderates in favor of the verdict is of weight in such an inquiry."

The fifth proposition under the first assignment presents substantially the same objection, and is, we think, equally without merit.

The objection presented in the sixth proposition is not sound.

The first assignment of error, the various propositions under which we have discussed, presents no ground for reversal, and is overruled.

The second assignment of error presents the objection to the paragraph of the charge upon the defenses urged by appellant that it shifted the burden of proof and placed it on defendant to show that the switch being open was not due to its negligence. We do not think, in view of the entire charge, which must be looked to, that the paragraph referred to could have been so understood by the jury. The charge is as follows: "On the other hand, if you believe the brakeman, Maddox, properly closed the switch, and that it was afterwards, and before the arrival of the passenger train, tampered with and opened by some unauthorized person, whether an employé of the company or not, if his duties were in no way connected with the throwing of said switch, and that it was so tampered with and opened at such time and in such manner that such action could not have been prevented by the use of ordinary care on the part of the agents and servants of defendant, or believe that such tampering with an opening could not, by the exercise of ordinary care, have been discovered by the agents and servants of defendant in time to have closed the switch before the passenger train arrived, or if you believe said switch being open at the time of the accident was not the result of negligence on the part of defendant's servants or employes, then, in either event named in this paragraph, you will find for defendant." The difference between believing that a thing did not occur, and not believing that it did occur, while it is a real distinction having reference to a state of mental equilibrium between the two states of mind of belief or unbelief, cannot be supposed to have been in the minds of the jury, or affected their proper determination of the issue of negligence, especially in view of another portion of the court's charge directly instructing them that the burden of proof was upon plaintiff to prove by a preponderance of the evidence that appellee's injury was the direct result of the negligence of defendant. A further answer to this assignment is that the charge referred to, at all events, does not present affirmative error. The assignment is without merit.

The third assignment does not require discussion, and is overruled.

While the plaintiff was testifying, seeing that he stopped and apparently thought or studied before answering questions put to him, his counsel asked him why he did this, to which he replied that he did not know any reason, except that his mind was not as accurate as it was before he was hurt. The question and reply thereto were objected to by appellant on the ground that it was for

the jury to determine from witness' appearance and manner his credibility and the weight of his testimony, and that this explanation was self-serving. The objection was overruled, and appellant excepted. The correctness of this ruling is assailed by the fourth assignment of error. If the answer conveyed the impression that appellee's mental processes had been affected by his injury, it was proper for him to so state. It was a legitimate subject of inquiry as affecting the question of damages. It was not properly objectionable that the information should have been elicited, as it was, in explanation of his hesitation in answering questions. The witness' reply was, in substance, that his mind and memory did not compare with what they were before his injury, which was the reason he did not reply more promptly to questions put to him. There was no error in the ruling complained of.

There was no error in the matter of the admission in evidence of the photographs of the bones of appellee's injured leg, taken with an X-ray instrument, in connection with the testimony of Dr. Boyd, as to the character and use of the instrument and the manner in which the photographs were taken. The burden of appellant's objection seems to be that, without cutting away the intervening flesh, skin, etc., it was impossible to tell whether these pictures correctly represented the condition of the injured bones. It would be strange if in the trial of cases in courts use could not be made of facts elicited by means of a process, the usefulness and absolute accuracy of which has been so completely demonstrated as have been photographic views of the bones of a living body by means of the X-ray. When properly taken, as these views were shown to have been, it is a matter of such common knowledge that they accurately represent what they purport to show that even courts may take cognizance of the fact. There was no error in the admission of the photographic views, and the testimony of the expert medical witnesses in connection therewith. It was shown that the instrument used was a correct instrument of the kind, and had been frequently used by the witness. The fifth, sixth, and seventh assignments of error, presenting appellant's objections to the introduction of the pictures and the testimony of physicians, based thereon, as to the condition of the injured bones, are overruled. 16 Cyc. 856; *Luke v. Calhoun Co.*, 52 Ala. 115.

The eighth assignment of error is as follows: "The court erred in making certain remarks while the witness Ed. Maddox was upon the stand testifying, which testimony and remarks of the court were as follows: The witness testified: 'In my experience and within my knowledge switches are thrown improperly, and nobody can explain how they get that way. Very often switches are meddled with by outsiders, and thrown

without the action of the train crew. That is done very often.' Whereupon defendant's counsel asked him the following question: 'Do you know of any way that it could be avoided, that you could keep people from throwing switches that way?' To which plaintiff's counsel objected, as follows: 'There is no evidence here that people throw any switches, except the people who have charge of the road. That is the only evidence so far.' Whereupon the court remarked: 'That is hardly a question of expert knowledge.' Defendant's counsel then asked this witness if he frequently found them that way, and if he knew of any method, in view of his experience, by which railroad companies could avoid such conditions. To which the witness answered: 'No, sir; I do not.' Whereupon plaintiff's counsel said: 'I don't object to it. I don't think it is a proper question, but I shall not object to it.' Whereupon the court remarked: 'I don't think the question is proper.' To which remark of the court defendant's counsel excepted. Whereupon the court stated that he meant to say that the evidence was inadmissible. The remarks of the court were clearly upon the weight of the evidence, and were upon a vital issue raised by the defendant in its behalf, and tended to destroy said evidence, and seriously prejudiced the rights of the defendant in this case."

We think that there is a marked distinction on this point, between this case and *Thomson v. Kelley*, 97 S. W. 326, 16 Tex. Ct. Rep. 637, decided by this court. Evidence in the latter case was admitted as to certain calls in a survey denominated "passing calls," upon the issue as to the true location of the lines of the survey. The trial judge in admitting this evidence remarked, and repeated the statement in the presence and hearing of the jury that these calls were of little or no force in locating the corners. This court held that this was a direct comment upon the weight of the evidence, which was clearly admissible, and as objectionable as if the jury had been instructed by the court as to the weight to be given these "passing calls" in the determination of the issue presented. In its probable effect on the jury we think there is a great difference between such a statement from the court and the remark made in this case that the evidence was not proper, or was not admissible. Such statement bore only upon the admissibility of the evidence which was admitted without objection. It was not proper, however, for the court to make even this statement. When counsel stated that he made no objection to the testimony, the court was not called upon to make any statement whatever upon its propriety, or admissibility, and should not have done so. In view, however, of the state of the evidence upon the issue as to whether Maddox failed to close the switch, or the same was, after having been closed, tam-

testimony was not admissible—upon which point, as it was admitted without objection, we are not called upon to express an opinion—that fact did not deprive it of such probative force as the jury may have seen fit to give it. *Railway v. Johnson*, 92 Tex. 382, 48 S. W. 568, cited by appellee to support the contention, in answer to the assignment, that testimony not legally admissible can have no probative force, does not so hold. This court held to the contrary in *Gray v. Fussell*, 106 S. W. 455. Our conclusion is, however, that the action of the court does not present reversible error.

The appellant requested three separate special instructions presenting the issue as to whether Maddox left the switch open, or it was, after having been closed by him, tampered with by some other person. These charges are substantially the same and were all refused, and the refusal is complained of in the ninth, tenth, and eleventh assignments of error. We are mindful of the rule announced in the *Rogers* (91 Tex. 58, 40 S. W. 956), *McGlamory* (89 Tex. 638, 35 S. W. 1058), and *Washington* (94 Tex. 510, 63 S. W. 534) Cases, the entire correctness of which is not questioned, and the effect of which we are not inclined in any way to minimize; but we are of the opinion that the rights of appellant, in the presentation of its defenses, were sufficiently guarded in the court's charge, which, we think, in this particular, fully complied with the rule announced in the cases cited. In substance and effect the charge of the court was identical with the requested charges. In such case it was not error to refuse the special charges requested, and the assignments referred to are overruled. The charge of the court in this particular has been heretofore copied. One of the refused charges—and they are all the same in substance—is as follows: "You are instructed that if you believe from the evidence that the switch, which connected the main with the side track on which the collision occurred, was properly closed by the switchman Maddox before the arrival of the passenger train, and that afterwards, and before the arrival of said passenger train, it was tampered with and opened by some unauthorized person (whether an employé of the company or not, if his duties were in no way connected with the throwing of said switch), and that it was so tampered with and opened at such time and in such manner that such accident could not have been prevented by the defendant, its agents, or servants, by the use of ordinary care, or at such time that such tampering with and opening could not, by the use of ordinary care, have

of the verdict as excessive to such an extent as to indicate that it was not the result of a fair consideration of the evidence, but of "prejudice or passion or some other improper motive." The jury allowed appellee \$25,000. The evidence showed that both bones of the leg were broken between the knee and the ankle, that one of the broken bones has never properly united, and in consequence the foot is turned in, interfering with his walking, and that he will never have proper use of that leg, although in time he will acquire some substantial use of it. While he lay in the hospital, about a dozen small pieces of the bone of his leg were taken out. The broken bone protruded through the flesh and clothes and stuck in the ground when appellee fell out of the cab. According to his testimony, the flames from the burning oil reached him and set his clothing on fire, and his legs and feet and some parts of his body were severely burned. He endured very great physical suffering for several months from the burns and from the wounds on his broken leg, which required some time to heal. Appellee at the time of the trial was 27 years old. His earnings the month previous to the accident were about \$125. The average for five years before had been \$65 a month. Giving full faith to the evidence upon this issue, including appellee's testimony as to the amount of his physical suffering, we cannot agree that the verdict should stand. The amount is so unreasonably large, in view of all the evidence, as to indicate that it was not the result of a fair consideration of the evidence. Upon this ground the trial court should have granted appellant's motion to set aside the verdict and grant a new trial. A remittitur of \$7,500, reducing the amount to \$17,500, will still allow appellee, in our judgment, liberal compensation for his injuries.

If appellee will file in this court within 20 days from March 18, 1909, a remittitur of \$7,500, the judgment will be reformed and affirmed for \$17,500; otherwise, for the reasons given, it will be reversed, and the cause remanded.

BRUNNER FIRE CO. v. PAYNE.

(Court of Civil Appeals of Texas. March 30, 1909.)

1. APPEAL AND ERROR (§ 649*) — RECORD — STATEMENT OF FACTS—MOTION TO CORRECT.

Where, on disagreement of counsel, the trial judge certified the statement of facts in the record as a correct statement made by him, it was error to refuse to consider appellant's motion, filed the last day allowed, to correct

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the same and require the court stenographer to present his notes of the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 649.*]

2. APPEAL AND ERROR (§ 1074*)—REVIEW—HARMLESS ERROR—STATEMENT OF FACTS.

Such error was harmless, where, considering the corrections as made, the evidence was such that there could have been no judgment other than that rendered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1074.*]

3. APPEAL AND ERROR (§ 938*)—REVIEW—PRESUMPTIONS—QUALIFICATION OF BILL OF EXCEPTIONS.

In the absence of a bill of exceptions signed by the judge or bystanders, it will be assumed on appeal that a qualification of a bill of exceptions presented by appellant was made with appellant's consent.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 938.*]

4. EXCEPTIONS, BILL OF (§ 59*)—ALLOWANCE—QUALIFICATION.

Where appellant presents a bill of exceptions, the court has no right to qualify it, but, under the express provisions of Sayles' Ann. Civ. St. 1897, arts. 1367-1369, must either sign it, or, if not correct, indorse his refusal to do so, and then file what he considers a proper bill, leaving appellant to his remedy of a bill by bystanders, if not satisfied.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 59.*]

5. APPEAL AND ERROR (§ 501*)—REVIEW—RECORD—ADMISSION OF EVIDENCE.

Rulings as to the admission of evidence will not be reviewed, where the record fails to show that the rulings were excepted to, or any bill of exceptions taken.

[Ed. Note.—For other cases; see Appeal and Error, Cent. Dig. §§ 2300, 2303; Dec. Dig. § 501.*]

6. DEDICATION (§ 51*)—USE OF STREET BY PUBLIC—EXTENT.

Where a street was laid out and dedicated as a public highway, the fact that the public confined its actual use for purposes of travel to a narrow portion, grading and working it for that purpose, did not affect its right to use the entire width, nor the effect or extent of dedication and acceptance.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 95; Dec. Dig. § 51.*]

7. ADVERSE POSSESSION (§ 92*)—PAYMENT OF TAXES—CLAIMANT NOT IN POSSESSION.

Payment of taxes by one who has never been in possession will not avail under the statute of limitations of five years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 515; Dec. Dig. § 92.*]

8. APPEAL AND ERROR (§ 742*)—ASSIGNMENT OF ERROR.

An assignment of error not followed by a statement from the record will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

9. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT AND SUFFICIENCY OF EVIDENCE—UNCONTROLLED EVIDENCE.

Where the undisputed evidence establishes a fact, it is not error for the court to so instruct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 452; Dec. Dig. § 194.*]

10. ADVERSE POSSESSION (§ 116*)—INSTRUCTIONS—CONSTRUCTION.

An instruction that if the jury believed from the evidence that a certain person, one of the owners in plaintiff's chain of title, had 10 years' peaceable and adverse possession of the premises, using and claiming the same against all other persons, they should find for plaintiff "on this issue," is not objectionable as requiring, if there was a finding for plaintiff as to such adverse possession, a general finding for plaintiff on the entire case.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.*]

11. ADVERSE POSSESSION (§ 116*)—EVIDENCE—INSTRUCTIONS.

Where the evidence showed that a certain person, from whom plaintiff claimed title, bought a certain tract of land and built a residence thereon and resided on the same more than 10 years thereafter, and that the lots in question were a part of such tract, the issue of adverse possession was raised, justifying an instruction thereon.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.*]

12. MUNICIPAL CORPORATIONS (§ 671*)—OBSTRUCTIONS IN STREET—ACTION TO ABATE—EVIDENCE.

Evidence of 10 years' adverse possession of land by one in plaintiff's chain of title and of plaintiff's possession for more than 10 years is sufficient evidence of title to entitle plaintiff to maintain an action for the removal of a building in the street, obstructing the entrance to such premises.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 671.*]

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Action by T. B. Payne against the Brunner Fire Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. O. Van Velzer, for appellant. Tharp & Whitehead, for appellee.

REESE, J. T. B. Payne instituted this action against the Brunner Fire Company, a corporation, alleging in his petition: That he was the owner of lots 108 and 109 in Magnolia addition to the city of Houston, holding title from the sovereignty, and especially from one Isaac Brashear, who acquired title in 1852, and who had title under the statute of limitations of 5 and 10 years; that lot 108 fronts 148 feet on Patterson street, a public street, part of said Magnolia addition, which had been regularly laid off in lots and blocks and streets; that he bought in 1894; that plaintiff was about to erect his residence on said two lots for the purpose of making his home there, when defendants constructed a building 20 feet high and 40 feet long and extending along Patterson street, in the street, and within a few feet of said lot 108, thereby cutting off his entrance to said property on Patterson street and rendering it unfit for a home. Plaintiff prayed that said building be declared a nuisance and be ordered to be removed. Defendants made general denial and specially denied plaintiff's ownership of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the building was in Patterson street, or that it interfered with plaintiff's use and enjoyment of his property. Much other matter was set out in the answer which is not material to the case as presented on this appeal. Upon trial with a jury there was a verdict for plaintiff, upon which judgment was rendered declaring the building a nuisance and ordering its removal. From the judgment, its motion for a new trial having been overruled, defendant appeals.

It is proper that we should, in limine, dispose of the matters urged in the twenty-fourth, twenty-fifth, and twenty-sixth assignments of error, which relate to the alleged refusal of the trial court to hear and consider appellant's motion to correct the statement of facts, and to correct the same, and the matters connected therewith. The corrections, which it is claimed should have been made, are set out in the twenty-sixth assignment. The statement of facts in the record is certified by the district judge as a correct statement made by him, upon disagreement of counsel. On the same day it was filed, which was the last day allowed, appellant's counsel filed with the court a motion to correct the same, and asked also that the court stenographer be required to present his notes of the testimony and be sworn as to the same. The court refused to consider the motion, or to allow the stenographer to be sworn in support thereof, and refused to sign appellant's bill of exceptions to such action. This action is shown by bills of exception in the record signed by bystanders, under the statute. No attempt is made by appellee in the brief filed by his counsel to explain or deny the matters set out in these assignments, or to rebut the statements in the bystanders' bills of exceptions. He objects to their consideration for violation of the rules in their preparation and presentation. The assignments are not strictly in compliance with the rules, but the matters presented involve so grave an abuse of judicial discretion that we are not disposed to pass them by without consideration, on this account.

Appellant's counsel was confronted with a novel condition, and may be pardoned from a strict compliance with the rules. We think the court committed grave error in refusing to consider the motion, and in failing to lend appellant's counsel all the assistance possible in determining whether there were any errors in the statement of facts, and, if there were, in correcting the same, so that it might indubitably present the facts as they were given in evidence. The record suggests that in some respects the statement of facts does not do this. It was at least incumbent upon appellee, not-

true. In the interest of fairness and a proper administration of justice, we would reverse the judgment and remand the case for a new trial, but for the fact that, assuming that the statement of facts should be corrected as claimed by appellant, and considering such corrections as made, the evidence still would be such that no judgment could have been rendered other than the one that was rendered. Upon the undisputed evidence the court would have been authorized to instruct a verdict for appellee. In this state of the record, it would not be proper to remand the case for a new trial.

Appellant complains further, in the twenty-seventh assignment of error, of the refusal of the court to settle his eighth bill of exceptions in the form in which it was presented, and in qualifying the same. In the absence of something in the way of a bill of exceptions signed by the judge or bystanders, under the statute, we cannot say that the qualification of the bill by the court was not done with consent of appellant. Without such consent the judge had no right to qualify the bill, but should have either signed it, or, if not correct, should have indorsed his refusal to do so, and should then have made out and filed what he considered a proper bill, leaving appellant to his remedy of a bill by bystanders, under the statute, if he was not satisfied with such bill. The statute (Sayles' Ann. Civ. St. 1897, arts. 1367-1369) prescribes very clearly the duty of the judge, and the rights of litigants in such cases, and should be observed.

Taking up the other assignments of error in the order in which they are presented, the first, second, third, and fourth assignments are addressed to the action of the court in the admission of evidence of certain maps or plats. These assignments are all presented together in a group. Each of them present a different question. What propositions there are are presented as under the four assignments. The statements under the proposition are altogether insufficient to show that error was committed, and finally it is not suggested in either the assignments, the propositions, or any of the statements thereunder, or in the argument upon the propositions, that any bill of exceptions to any of the rulings complained of was taken. No reference is made to any bill of exceptions, without which the error, if any, would not be reversed. The assignments will not be considered.

The fifth and sixth assignments of error complain also of the admission of the testimony of certain witnesses. No bill of exceptions is referred to in the assignments, propositions, statement, or argument. The statement does not show or even refer to

the evidence objected to. It is not suggested that the ruling of the court was excepted to, or any bill of exceptions taken. The assignments will not be considered.

The seventh and eighth assignments of error, presented together, are addressed to the refusal of the court to give two special charges requested by appellant. The general nature of these charges is only vaguely suggested by the assignments. The charges are not set out, either in substance or form, in either the assignments, propositions, statements, or arguments. It appears probable from the brief that they were upon the issue of dedication of Patterson street. If we are correct in this, the assignments, if considered, are without merit. The undisputed evidence shows that, when Colby laid out and platted Magnolia addition in 1888, he laid out a 50-foot street along one side of the addition, and named it "Patterson street." It was so laid out for a public street, and has been used by the public as a public highway or street ever since. The evidence of dedication by Colby and acceptance and use by the public is complete and is undisputed. A plat showing the division into lots, blocks, and streets was at once recorded. Appellant undertook to prove by certain witnesses that the actual use of the ground so laid out as a street, by the public for purposes of travel, has been confined to a comparatively narrow space, near the middle of this street, which has been graded and used, and that part of this ground, on which the firehouse is erected, has never been so used for travel, and "does not belong to anybody," and lies between appellee's lots and the street. This is the sum and substance of the evidence tending to rebut the evidence of dedication and use as a street of the ground next to appellee's lots. It does not raise an issue as to such dedication and use. If Colby laid out a 50-foot street and dedicated it as a public highway—and this is shown by the undisputed evidence—and the public confined its actual use for purposes of travel to a narrow portion of said 50 feet, grading and working it for that purpose, which is the extent of appellant's evidence, this would not affect the right of the public to use the entire 50 feet whenever it chose, nor the effect or extent of dedication and acceptance. The effect of appellant's contention is that, to preserve its rights to a highway, the public must use for purposes of travel every foot of it. This is not the law. Probably it was not necessary to grade, work, or build bridges across the entire width of the dedicated strip. It appears that when the town of Brunner was laid off, adjoining the Magnolia addition, a strip 25 feet wide alongside of Patterson street was left for a street, increasing the width of Patterson street to 75 feet. The evidence indicates that the graded and used roadway covers a part of the 50-foot strip and a part of the 25 feet added on the

Brunner side. If appellant's contention that the portion not graded and used had never been accepted as a street be sound, the result would be that the ground on which the building is erected would belong to appellee as a part of his lot abutting thereon. There was no issue of complete dedication and acceptance by long use by the public of the entire 50-foot strip called Patterson street.

We are inclined to think that the evidence did not present the issue of title in appellee under the statute of limitations of five years, as set out in assignments of error 9 to 11. There was no evidence of payment of taxes by any one except appellee, who has never been in actual possession. The assignments will have to be sustained, but, for reasons hereafter shown, this does not require a reversal of the judgment.

The thirteenth assignment is not followed by any statement from the record, and will not be considered. It appears, however, to be entirely without merit.

The fourteenth, fifteenth, and sixteenth assignments, presented together, complain of the refusal of special charges requested, and of the court's charge. They are not accompanied by any statement showing, either in form or substance, the charges referred to. We can only conjecture, in a general way, what they relate to. This is not sufficient to require a consideration of the assignments.

The court did not charge that plaintiff had shown a record title down to himself, but that he had shown such title from Isaac Brashear to himself. There was no error in this. Where the undisputed evidence establishes a fact, it is not in error for the court to so instruct the jury. The seventeenth assignment of error, presenting this objection to the charge of the court, is without merit.

The eighteenth assignment does not present reversible error. The court, on the issue of title, charged the jury that, if they believed, from the evidence, that Isaac Brashear, one of the owners in appellee's chain of title, had 10 years' peaceable and adverse possession of the premises, cultivating, using, and enjoying the same, and claiming the same against all other persons, they should find for plaintiff "on this issue"; that is, the issue of title. The other issues, as to location of the lots and the existence of the street contiguous thereto, were submitted in other portions of the charge. Appellant's objection to the charge that, under it, a finding in favor of appellee as to the 10 years' adverse possession by Brashear required a general finding for plaintiff on the whole case, is not tenable. Nor can the objection be sustained that the evidence did not raise the issue of such adverse possession. In fact the evidence on this point is not disputed, and shows: That

same more than 10 years thereafter; and that the lots in question, which came by consecutive conveyance to appellee, were a part of this 50 acres out of said lot 23 of the Hollingsworth survey aforesaid. Upon the issue of title, as well as upon all other issues on the case, the court might very well have instructed a verdict for appellee. The eighteenth assignment is overruled.

The other assignments and the propositions thereunder are overruled without further discussion. They present no reversible error.

There was no evidence introduced by appellant to rebut the evidence of appellee, except such as tended to show that only a portion of the 50-foot strip dedicated as Patterson street has ever been graded or used as a highway by the public, and that this used portion did not extend to appellee's lots; but there was a vacant strip between upon which the firehouse was erected. Otherwise the evidence introduced by appellee was undisputed, and showed, on the issue of title: That Brashear bought, in 1852, 50 acres of land, on which he then settled, and upon which he continued to reside with his family for more than 10 years; that in the partition of his estate this land, or a part of it, was set apart to his daughter, Mrs. Jones, who sold it, in 1887, to the Ohio Wool-growing Company, who in turn, in 1888, sold and conveyed to F. W. Colby; that Colby had it divided and platted into lots and blocks and streets, as Magnolia addition, in 1888, laying off Patterson street as a public street, and having the plat duly recorded; that appellee's lots are a part of this Magnolia addition, and by a regular chain of mesne conveyances have come down to appellee, who bought in 1894. Upon this evidence, both by virtue of Brashear's 10 years' adverse possession, use, and enjoyment, and by virtue of his naked possession alone, appellant showing no right, appellee was entitled to maintain this action. *Boyd v. Miller*, 22 Tex. Civ. App. 165, 54 S. W. 412. He was not required, we think, to show such title as would have been required to entitle him to recover in an action of trespass to try title. *Railway v. Wallace*, 74 Tex. 581, 12 S. W. 227; *Tel. Co. v. Wofford* (Tex. Civ. App.) 42 S. W. 119; *Pac. Ex. Co. v. Dunn*, 81 Tex. 86, 16 S. W. 792; *Linard v. Crossland*, 10 Tex. 461, 60 Am. Dec. 213.

Upon the other issues the evidence is equally conclusive in showing the existence of Patterson street as a public highway, that appellee's lot abuts thereon, and that the firehouse interferes with appellee's ac-

tion street. The evidence was of such a character as to authorize a peremptory instruction to the jury to return a verdict for plaintiff, and in such case the errors committed by the trial court do not require a reversal of the judgment. So the assigned errors not considered would not, if considered and sustained, authorize a reversal.

The judgment is therefore affirmed.

Affirmed.

GAFFNEY et al. v. CLARK et al.

(Court of Civil Appeals of Texas. April 29, 1909.)

1. EVIDENCE (§ 66*)—PRESUMPTIONS.

It is presumed that a vendor knew the boundaries of the land which he sold.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 86; Dec. Dig. § 66.*]

2. TRESPASS TO TRY TITLE (§ 38*)—PROCEEDINGS—PLEADINGS—NOT GUILTY—EFFECT.

A plea of not guilty in trespass to try title, as to the part of land not disclaimed by defendant, put plaintiff on proof of his title, and, on his failure to show title, defendant would be entitled to judgment denying a recovery of the land not disclaimed.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 53; Dec. Dig. § 38.*]

3. TRESPASS TO TRY TITLE (§ 47*)—CROSS-ACTIONS.

Defendant in trespass to try title, after pleading not guilty by plaintiff, could seek affirmative relief by having disputed boundaries between them established.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 47.*]

4. TRESPASS TO TRY TITLE (§ 47*)—CROSS-ACTIONS—PLEADING—EFFECT.

In trespass to try title, defendant pleaded not guilty as to the part of the land described in his answer, and further alleged that the boundary between his and plaintiff's land was in dispute, and in effect admitted that plaintiff owned the land east of the true boundary of a certain survey, but was estopped from claiming it. *Held*, that defendant's plea to establish the boundary was an affirmative defense, and, having failed to show that plaintiff was estopped to claim to the true boundary, defendant was bound by his admission that plaintiff owned the land up to that boundary, notwithstanding the fact that plaintiff failed to prove title to the land in controversy, so that defendant was not entitled to have the boundary established as asserted by him.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 47.*]

5. TRESPASS TO TRY TITLE (§ 38*)—CROSS-ACTION—BURDEN OF PROOF.

Where, in trespass to try title, defendant pleaded not guilty and, in a cross-action, sought to have the boundary established between himself and plaintiff, the burden was on defendant to prove that the boundaries were as alleged by him, even though plaintiff failed to sustain the burden of showing title in the principal action.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 38.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On motion for rehearing. Motion overruled.

For former opinion, see 115 S. W. 330.

Moore, Park & Birmingham and Lennox & Lennox, for appellants. A. L. Beaty, for appellees.

LEVY, J. We have carefully considered the record and the questions presented in this case and on motion for rehearing, and feel constrained to adhere to our former ruling in the case.

It is insisted that we are in error in holding the evidence insufficient to support estoppel. We do not think so. It is argued that the case of Hefner and Lockhart v. Downing, 57 Tex. 576, is decisive of the principle involved in the instant case and rules the same. We think there is a clear distinction between that case and the instant one. Downing had run and marked a line as the boundary for a part of the way between the land owned by him and the land belonging to Hefner. Afterwards the latter had extended and completed the line and sold to it as the true line a part of the land to another party, who sold same to Lockhart. There was evidence tending to show that during a number of years Downing had recognized and treated the line so run and marked as the true boundary line, that he had cut timber in accordance with it, and stood by and without objection had permitted Hefner's vendees to occupy and improve it as their own. The question was as to whether the evidence made an issue as to an estoppel as against Downing to deny that the line so run, marked, recognized, and acquiesced in was the true boundary line. The court held that it was sufficient to raise such an issue. There the evidence was sufficient to support a finding that Downing intended his acts and conduct to influence the acts and conduct of Hefner, and sufficient to support a further finding that Hefner's acts and conduct with reference to the land were so influenced. Hefner, as against Downing, clearly was in a position to assert an estoppel. Having acquired his rights by their purchase of the land without notice of facts which might preclude them from doing so, Hefner's vendees as clearly were entitled to assert, as against Downing, the estoppel as against him in favor of Hefner. Independent therefore of acts and conduct of Downing, with reference to the land, which might be held to create a further estoppel in their favor as against him, they might have been entitled to protection against Downing's claim to the land. There is no evidence here that Charles Gaffney's acts and conduct were intended to influence, or that same did influence, the then owners of the Caudle survey to act with reference to it or in a way they otherwise would not have acted. Appellees therefore can claim nothing on account of their being the suc-

cessors to the rights of the then owners of the Caudle survey, and must rest their claim of an estoppel on acts and conduct of Charles Gaffney intended to influence, and which did influence, them to buy the land. There is no pretense in the evidence that the acts and conduct of Charles Gaffney were intended in any way to induce appellees to buy the land. The acts and conduct acted upon occurred five years before they became, or pretended to have become, the purchasers. Another marked distinction between the two cases, as we understand them, lies in the fact that Hefner sold, and his vendee bought, the land to the boundary line as they claimed it to be. There is no evidence in this case showing, or tending to show, that appellees' vendors sold to the line as appellees claim it to be. The presumption would be that their vendors knew the boundaries of the land they sold to appellees; and in the absence of evidence showing that appellees in purchasing did not acquire from their vendors information as to the true line, and in the absence of evidence, if they did acquire such information, showing how in the face of such information they were misled by the acts and conduct of Charles Gaffney complained of, we think they are not in a position to claim an estoppel.

It is insisted that the appellants did not prove title and the case should be affirmed. Appellees disclaim title to all of the Martin survey except the portion thereof described in their answer, as to which they defended by a plea of not guilty. The effect of this plea was to put appellants on proof of their title. They proved no title. Appellees therefore were entitled to a judgment denying to appellants a recovery as against them of the portion of the Martin survey not disclaimed. Such a judgment would have left as an open question the location of the west boundary line of the Martin survey. Anticipating such a result of the litigation, and wishing the line to be established, appellees did not rest upon their plea of not guilty and its consequences, but by further pleading, as they had the legal right to do, invoked the jurisdiction of the court for the purpose of securing a decree establishing the line. By such pleading they asserted that appellants owned land adjoining theirs on the east, and that there was a dispute between them as to the location of the boundary line between them. They asserted that the boundary line was at the point designated in their pleading, or, if it was not, that appellants were estopped to deny that it was at that point. A trial of the issues resulted in a finding of the jury that the true line was west of the point where appellees claimed it to be, but that appellants were estopped to deny that it was any farther west than they (appellees) claimed it to be. This court held, and adheres to the ruling, that appellants were not so estopped, and therefore

that the judgment, in so far as it must be rested on that finding, was erroneous. It would seem to follow logically that the judgment in so far as it established the boundary line between the parties was erroneous, for the jury found the true line to be farther west, and the judgment establishing it at the point designated therein necessarily was rested entirely on the supposed estoppel. Could it be contended that such is not the result because the effect of appellees' plea of not guilty was to put appellants on proof of their title to the land in dispute, and that, having failed to prove such title, it is no concern of theirs that the judgment established the line at a place not authorized by the evidence, and that this court is without authority to revise the judgment in that particular? We are not willing to agree that such was the effect of the plea of not guilty. Appellees' pleading seeking an establishment of the line, except in so far as it attempted to set up an estoppel, was not in any sense a defensive pleading; instead, it was for affirmative relief. In it they expressly averred ownership in appellants in the land in the Martin survey adjoining their land on the east. In trying that issue there was no occasion for appellants to prove title to the land east of the true west boundary line of the Martin. Admittedly they owned that land. The contention, in effect, was: Appellants owned the land east of the true west boundary line of the survey, but are estopped from claiming it, and therefore appellees should recover it.

Now that it has been determined that appellants are not estopped, can the appellees contend that the land should be decreed to be in them because appellants, relying upon the admission in the pleading, failed to prove that they owned the land? We cannot agree that the law supports such contention. Had appellees not by their cross-action presented and had tried an issue strictly as to the boundary, unquestionably on appellants' failure to prove title the judgment should have been against them. If appellees had then by another suit sought to have the line established, after such a suit the burden of establishing title would not have been on appellants, and unquestionably, with like proof in the record with the finding of the jury, the line would have been established at a point west of the point it was established by the judgment here complained of; and title to the land in dispute thereby in effect would have been determined to be in appellants, instead of appellees. Can it be held that merely because the two issues were tried in one instead of two suits, the law, measuring the property rights of the parties, is different? Does the defendant, in a trespass to try title suit, who seeks by a cross-action to establish the boundary line between his own and the plaintiff's land, occupy a posi-

tion different from that occupied by him as the plaintiff in the suit to establish such line? As defendant seeking affirmative relief of the court, should he be held unaffected by an admission of title, which, if made by him as a plaintiff seeking the same relief, would bind him? We think not. In either case, as to the affirmative relief sought by him, the suit is his. As to such affirmative relief in either case, he has the same rights and is charged with the same burdens. In either case, asserting the boundary line to be at a given point and asking a decree to establish it accordingly, he must prove it to be at that point. Failing in such proof, he is not entitled to such a decree. We are unable to see how, when he happens to be a defendant asking such relief, he should be held entitled to it notwithstanding he fails to make such proof, because the plaintiff failed on another issue in the case to discharge the burden on him. We do not mean to be understood as saying that a defendant in a trespass to try title suit pleading not guilty does by pleading other defenses relieve the plaintiff of the necessity of proving title; but when such defendant, in a cross-action, seeks affirmative relief, and with reference to such issue admits title to be in plaintiff, then we think he is as much bound by such admission as he would be if a plaintiff presenting such issue for adjudication.

The motion for rehearing was ordered overruled.

BLAIR v. GUARANTY SAVINGS, LOAN & INVESTMENT CO.

(Court of Civil Appeals of Texas. March 16, 1909.)

1. MORTGAGES (§ 445*)—FORECLOSURE BY ACTION—PETITION—SUFFICIENCY.

Where vendees of land mortgaged the same to secure a loan applied for the purpose of taking up or extending vendor's lien notes and a mechanic's lien, with the understanding that the notes and lien were to be assigned to the mortgagee as additional security, and the money was so used, and the notes and lien were, together with the vendor's superior title, assigned to the mortgagee, that the petition to foreclose the mortgage failed to set up such facts was immaterial; there being no defense that the property was a homestead.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1308, 1309; Dec. Dig. § 445.*]

2. HOMESTEAD (§ 191*)—FORECLOSURE OF MORTGAGE—NECESSITY FOR ASSERTION OF RIGHT IN FORECLOSURE SUIT.

Mortgagors submitting to a judgment foreclosing the mortgage lien could not thereafter claim that the mortgage was void because of the homestead character of the property.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 362; Dec. Dig. § 191.*]

3. MORTGAGES (§ 497*)—FORECLOSURE—JUDGMENT—CONCLUSIVENESS.

A mortgage foreclosure judgment establishes conclusively both the debt and the lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1473; Dec. Dig. § 497.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. MUNICIPAL CORPORATIONS (§ 981*)—TAXES—COLLECTION—TAX SUITS—PARTIES—REDEMPTION FROM TAX SALES.

Houston City Charter (Sp. Acts 29th Leg. 1905, p. 147, c. 17) art. 3, § 8, providing that in suits for taxes due the city the proper persons shall be made parties defendants, etc., and that the deed made under the sale shall vest a perfect title in the purchaser, means a perfect title as against the parties to the suit, and hence an incumbrancer not made a party to the tax suit had the same right to redeem from the tax lien as he had before the tax sale; the purchaser at such sale being, as to him, subrogated only to the lien of the city for taxes, penalties, and costs, not including the costs of the tax suit and sale.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2134; Dec. Dig. § 981.*]

5. MUNICIPAL CORPORATIONS (§ 981*)—TAXES—TAX SALES—REDEMPTION—CHARTER PROVISIONS—APPLICATION.

Houston City Charter (Sp. Acts 29th Leg. 1905, p. 149, c. 17) art. 3, § 11, requiring an owner redeeming from a tax sale to pay double the amount paid by the purchaser, applies solely to summary sales by the tax collector, and has no application to a sale under a judgment of foreclosure of the lien, the procedure for which is prescribed by section 8.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2135; Dec. Dig. § 981.*]

6. TAXATION (§ 709*)—TAX SALES—REDEMPTION—INTEREST.

One entitled to redeem from a tax sale is liable to the purchaser for interest on the amount due only from the date of the sale to the time he tenders such amount to the purchaser and offers to redeem.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1434; Dec. Dig. § 709.*]

7. MUNICIPAL CORPORATIONS (§ 981*)—TAX SALES—REDEMPTION—LIABILITY FOR RENTS.

Where the provisions of a city charter under which a tax sale was made required the sheriff to put the purchaser in possession, the purchaser was not liable to account for rents while in possession to one subsequently held entitled to redeem from the tax lien because not made a party to the suit to foreclose the same.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2134; Dec. Dig. § 981.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by the Guaranty Savings, Loan & Investment Company against J. M. Blair. From the judgment, defendant appeals. Reformed and affirmed.

Blair & Kirkpatrick, for appellant. Hutcheson, Campbell & Hutcheson, for appellee.

REEDSE, J. The Guaranty Savings, Loan & Investment Company instituted this action in the district court against J. M. Blair in trespass to try title for a certain lot in the city of Houston. Plaintiff also set up the purchase by Blair of said lot under a judgment for city taxes and sought to redeem. Plaintiff afterwards abandoned its action of trespass to try title, and the suit became one solely to redeem from the tax sale. Upon trial plaintiff had judgment sustaining

its right to redeem upon payment of the amount of taxes, costs, and penalties sued for in the tax suit, with interest thereon, together with costs of that suit. From the judgment defendant prosecutes this appeal.

The facts are as follows: J. L. Britton sold and conveyed the property to William and Mary Bartley January 25, 1896, reserving the vendor's lien to secure eight notes for \$50 each, given for the purchase money. The Bartleys, being desirous of securing an extension of these notes, procured from the appellee a loan of \$600. The Bartleys on February 1, 1899, executed to appellee a deed of trust on the property to secure the \$600. The money thus procured was applied, in accordance with the agreement and understanding of the parties, to take up the vendor's lien notes aforesaid and also a mechanic's lien given by the Bartleys, husband and wife, executed as required by the statute, for improvements on the property, for \$150, and the vendor's lien notes and mechanic's lien were assigned and transferred to appellee, as was also the superior title of Britton, as vendor. The assignments of the notes and superior title were dated March 1, 1899, and of the mechanic's lien March 7, 1899, and were both duly recorded in March, 1899. The deed of trust recites that the money was for the purpose of extending the vendor's and mechanic's liens, that the liens are not waived, but appellee is expressly subrogated to the rights of the holders thereof as additional security. At the date of the deed of trust, the property was occupied by the Bartleys as a home, and they continued to so occupy and use the same until some time thereafter, but abandoned the same prior to the institution of the suit to foreclose the said deed of trust, as hereafter set out. On July 16, 1906, appellee instituted suit against the Bartleys, husband and wife, on the note for \$600 and to foreclose the mortgage or deed of trust lien. This suit was numbered 40,518 in the district court of the Sixty-First district of Harris county. Service was had January 22, 1907, and thereafter judgment was rendered against the defendants for debt and foreclosure. Order of sale was issued, under which sale was made, and deed executed to appellee. In cause No. 89,043 in the district court of the Eleventh district of Harris county, on October 15, 1906, the city of Houston recovered judgment against William and Mary Bartley for \$62.15 taxes, costs, and penalties due the city on the property in question, and foreclosing the tax lien on the property. Order of sale issued on this judgment, under which appellant became the purchaser of the property, and the property was conveyed to him. The date of the institution of this suit is not shown. The proceedings in both of the cases aforesaid were in all things regular. Appellant paid at the sale to him \$85.43, being the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

amount of the tax judgment and also costs of that suit, and costs of sale. The date of appellant's purchase is not shown, but it seems to be assumed that it was prior to the date of service on the defendants Bartleys in cause No. 40,518. The date of appellee's purchase is not shown, but it appears that it was subsequent to the rendition of the judgment in the tax suit. Appellee was not made a party to the tax suit, nor was appellant made a party to the suit of appellee against the Bartleys. Appellant has had possession of the property since February 1, 1907, and the rental value is agreed to be \$6 per month. The cause was tried February 6, 1908.

By the first two assignments of error, appellant questions the right of appellee to redeem at all, on the ground that the property was, at the time of the execution of its deed of trust, the homestead of the Bartleys, and the deed of trust therefore void. Incidentally to this the statement is made that, in the petition to foreclose the deed of trust, no reference is made to the vendor's lien and superior title transferred to appellee, nor of the mechanic's lien. It is indisputably clear from the evidence that the \$600 loan was applied for by the Bartleys for the purpose of taking up or extending the vendor's lien notes and the mechanic's lien, with the understanding that these were to be assigned to appellee, as additional security, and that the money was so used and the notes and mechanic's lien assigned to appellee, together with Britton's superior title. Appellee thus became subrogated to all the rights arising from these liens, and became also vested with Britton's superior title as vendor. It does not matter that appellee did not set up these facts in the suit to foreclose the deed of trust. It was not necessary to do so except to meet a defense that the property was the homestead, on the part of the Bartleys. We gather that no defense was made to this suit; the property having been abandoned. Independently of all of this, however, having submitted to a judgment foreclosing the lien, it would be too late now for the Bartleys to set up the claim that the deed of trust was void, on account of the homestead character of the property. Certainly appellant cannot be heard to so impeach the judgment. The judgment establishes conclusively both the debt and lien. *Barrett v. Eastham*, 28 Tex. Civ. App. 189, 67 S. W. 199. This disposes of the contentions of appellant as set out in the first and second assignments of error, which are overruled.

This leaves only the question of the amount required to be paid by appellee to redeem the property from the tax sale. It is admitted by appellee that the tax lien was superior to its lien and title, and its right to redeem is resisted by appellant only on the ground that the property was the homestead of the Bartleys, and therefore appellee's deed of

trust was void, which contention, as we have said, cannot be sustained. Both parties refer, in their brief, to the provisions of section 11, article 3, of the Charter of the City of Houston (Sp. Acts 29th Leg. 1905, p. 149, c. 17), upon the question of the right to redeem and the terms upon which redemption may be had. This section of the charter, we think, applies solely to summary sales of property delinquent for taxes by the tax collector, and the redemption thereof, and has no application to the present case, which is a sale under a judgment of foreclosure of the tax lien, the procedure in which is prescribed by section 8, article 3, of the Charter. Appellee held his title and right subject to the superior lien of the city for taxes. He had the right to pay such taxes and redeem the property from such superior lien. This right was not foreclosed by the judgment under which appellant bought; appellee not having been a party to that suit. Section 8, art. 3, of the Charter, provides that: "The proper persons shall be made parties defendant in such suits, shall be served with process, and other proceedings had therein, as provided by law for suits of like character in the district courts of this state, and in case of foreclosure an order of sale shall issue and the land be sold thereunder, as in other cases of foreclosure, which order of sale shall have all the force and effect of a writ of possession between the parties to the suit and any person claiming under the defendant by any right acquired after the filing of the suit." It is further provided that the deed made under such sale "shall be held in all courts of law or equity in the state to vest a good and perfect title in the purchaser thereof." By this is meant, we think, a good and perfect title as against the parties to the suit. 2 Cooley, Taxation, 886; Blackwell, Tax Titles, 548; *Yenda v. Wheeler*, 9 Tex. 408; *Id.*, 11 Tex. 562; *Dyer v. Bank of Mobile*, 14 Ala. 622; *Stafford v. Flizer*, 82 Mo. 393; *Evans v. Robberson*, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701; *Nashville v. Cowan*, 78 Tenn. 209.

The question, however, is not free from doubt under the authorities. See *Ferguson v. Quinn*, 97 Tenn. 46, 36 S. W. 576, 83 L. R. A. 689, and authorities cited in note. We think therefore that appellee was not bound nor its rights foreclosed by the sale to appellant. Not having been made a party to that suit, appellee, holding under the junior incumbrance, has the same right to redeem from the tax lien, which is the superior incumbrance, as it had before the sale. The sale and sheriff's deed, so far as concerns appellee's rights, only subrogated appellant to the lien of the city of Houston for the taxes, tax penalties, and tax costs, which appellant has paid. It cannot be said that appellee should be required to pay double the amount paid by the purchaser at the tax sale. The provision of the charter requiring

the owner to do this only (and specially) applies to summary sales by the tax collector. Sections 8 and 11, art. 3, Charter City of Houston (Sp. Laws 29th Leg.); *San Antonio v. Berry*, 92 Tex. 319, 48 S. W. 496. What appellee should be required to pay, then, in order to redeem, is the amount of the claim of the city for taxes, penalties, and costs, not including the costs of the tax suit or the costs of the sale. This amount is \$62.15, and appellant is entitled to interest at 6 per cent. upon this amount from the date of the sale to him, October 15, 1906, to October 15, 1907, when appellee made the tender and offered to redeem. 2 Jones, Mortgages, § 1075. To the extent that the judgment of the trial court required appellee to pay the costs of the tax suit and sale, it was erroneous, and the first cross-assignment of error of appellee is sustained.

By its second cross-assignment of error, appellee contends that appellant should be required to pay rents while in possession, or, at least, that the rents should be applied to the payment of the amount of taxes, etc., paid by appellant. To this we do not agree. Appellant's deed gave him the title and right of immediate possession as against Bartley, who was foreclosed. The case of *Bente v. Sullivan* (Tex. Civ. App.) 115 S. W. 353, does not apply. The provisions of the charter of the city of Houston under which the sale was made especially provides that the sheriff shall put the purchaser in possession under the authority of the order of sale in 20 days. As the case stands we do not think appellant should be required to account to appellee for rents. 2 Jones, Mortgages, §§ 8, 11; *Renard v. Brown*, 7 Neb. 449.

None of the assignments of error of appellant, or propositions thereunder, present any ground for reversal of the judgment.

Upon the first cross-assignment the judgment will be reformed so as to require appellee to pay to appellant \$62.15, with interest at 6 per cent. per annum from October 15, 1906, to October 15, 1907, and as thus reformed the judgment is affirmed.

Reformed and affirmed.

ARTHUR v. PORTER.

(Court of Civil Appeals of Texas. April 14, 1909.)

BROKERS (§ 44*) — COMMISSIONS — WHEN EARNED.

An owner employing a broker to effect an exchange of lands, without limiting the time of performance, may withdraw his proposition to exchange, before its acceptance, and thereby defeat the right of the broker to commissions, where the withdrawal is made in good faith, and based on the owner ascertaining that the property to be received in exchange was not worth as much as the broker had represented.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 45; Dec. Dig. § 44.*]

On motion to reconsider motion for rehearing or to certify questions to Supreme Court. Motion for rehearing granted, and the judgment of the trial court reversed, and cause remanded.

For former opinion, see 116 S. W. 127.

RICE, J. At a former day of this term, this case was affirmed and motion for rehearing overruled, since which time appellant has filed another motion asking us to reconsider the said motion for rehearing and to grant the same, and, if for any reason we cannot do this, then to certify the questions involved to the Supreme Court for their opinion thereon, because he insists that there is a direct conflict between the decision in this case and that of the Court of Civil Appeals of the Fourth District in the case of *Evans v. Gay*, 74 S. W. 575, wherein the trial court refused a similar charge to the one under consideration, and its refusal was held error.

It appears from the evidence that appellee, who was a real estate broker, was employed by appellant to effect an exchange of property owned by him for a certain house and lot owned by one Cox; but the contract was silent as to the time of performance. It was shown that appellee was acting for both appellant and Cox, and was to receive a commission from each of them in the event the exchange was consummated, and that this fact was known to appellant. Appellant went in company with appellee to inspect the Cox property, and was told by appellee that the buildings thereon cost about \$3,000, and that the lot was very valuable. That upon their return therefrom appellant was induced by appellee to allow him to make a proposition for exchange of said property to Cox, just to start the trade; appellee saying that appellant would have ample time pending negotiations within which to ascertain the value of Cox's property. And with this understanding appellant consented for appellee to make the proposition to Cox for exchange of their said properties, which was done. It appears that negotiations for the trade were pending some time, and before Cox finally accepted appellant's proposition, but while considering the matter, he ascertained the value of Cox's property to be several hundred dollars less than appellee had represented it to him. Whereupon he came to the conclusion that he could not afford to make the trade, and went at once to Cox's store to tell him about it, but was unable to find him. That within a day or two thereafter he saw appellee, and told him that Cox's property was not worth what he had represented it to be, and that he could not afford to make the trade.

There was other evidence corroborative of appellant's statement that he had told

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

appellee that he would not carry out the trade, and appellee, upon cross-examination, admitted that appellant had made such a statement to him, but that he had not informed Cox of it, because appellant had not requested him so to do. The general charge of the court failed to submit the issue raised by this evidence, and appellant asked a special charge, which told the jury that he had a right to withdraw his proposition at any time before Cox had accepted it, and notice to Porter would be notice to Cox of that fact, and if the jury believed that appellant had notified Porter that he would not make the trade before Cox accepted it, if Cox did accept it, then they should find a verdict for defendant. After a full consideration of the question raised, we think that we were in error in holding that this charge was properly refused, and now believe that the same ought to have been given. There was no time fixed for the consummation of this contract, so that if appellant, before his proposition was accepted by Cox, saw fit to change his mind and withdraw his proposition, and the same was done in good faith, he had a right to do so, and the evidence fails to disclose anything to indicate that the withdrawal of his proposition was influenced by bad faith on his part; but, on the contrary, it appears that it was induced by reason of the fact that he had ascertained that the Cox property was not worth as much as appellee had represented it.

In *Evans v. Gay*, supra, it is said: "There are two substantial reasons, however, why the judgment should be reversed. In the first place, if the contract did not fix a certain time in which plaintiff could sell, there was no obstacle to defendant's right to withdraw the property from sale by notifying the plaintiff. Such an act, however, might be done at a time and under circumstances of unfairness to the broker, which would entitle the latter to redress; but this case is not brought upon any such theory. Where the arrangement is that if the broker procure a purchaser for land, and the contract is silent as to the duration of the contract, the owner has the right to withdraw the land from sale at any time before a purchaser is found"—citing *Mechem on Agency*, § 968. And the court held that a special charge embodying this phase of the law was improperly refused.

In *Mechem on Agency*, § 968, it is said: "Where no time is agreed upon, the broker is entitled to a reasonable time in which to find a purchaser, after which, if he be unsuccessful, the principal may revoke the broker's authority, without liability at any time, subject only to this exception: That it be not done for the purpose of avoiding the payment of commissions while availing himself of the broker's efforts by taking into his own hands the completion of negotia-

tions then pending. Upon this subject the language of Judge Finch of the New York Court of Appeals is worthy of reproduction: 'Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject, of course, to the right of the seller to sell independently; but, that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right, before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though to some extent the seller might justly be said to have availed himself of the fruits of the broker's labor.'" See, also, *Peach River Lumber Co. v. Montgomery* (Tex. Civ. App.) 115 S. W. 87.

Believing the evidence was sufficient upon this issue to justify the giving of said special charge, we hold that it was error to refuse the same, and now here grant appellant's motion for rehearing, and, for the error aforesaid, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

GULF, C. & S. F. RY. CO. v. DICKENS.

(Court of Civil Appeals of Texas. March 31, 1909.)

1. NEW TRIAL (§ 140*)—HEARING—SUFFICIENCY OF EVIDENCE—BIAS OF JUROR.

Evidence on motion for new trial on the ground of prejudice by a juror held to show that the juror had formed and expressed a decided opinion as to the merits, and was prejudiced so that defendant had not had a trial before a fair and impartial jury.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 140.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. JURY (§ 126*)—CHALLENGES—GROUNDS OF CHALLENGE.

Under Rev. St. 1895, art. 3208, defining a challenge for cause as an objection to a particular juror which disqualifies him to serve in the case or in the trial court's opinion renders him an unfit juror, and section 3209, relating to the examination on challenge for cause, a challenge for cause is proper on any ground which unfits one to act as a juror.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 555; Dec. Dig. § 126.*]

3. JURY (§ 97*)—COMPETENCY OF JURORS—BIAS.

Bias or prejudices by a juror in favor of or preconceived ideas of the rights of one of the parties are incompatible with a fair trial by an impartial jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431-437; Dec. Dig. § 97.*]

4. NEW TRIAL (§ 42*)—GROUNDS—DISQUALIFICATION OF JUROR—BIAS AND EXPRESSION OF OPINION.

Where a juror expressly stated on his voir dire that he had no prejudice or bias and had formed or expressed no opinion as to the merits, but the evidence on motion for new trial showed that he had stated about a week before trial that plaintiff ought to recover the full amount of his demand against defendant railroad, which fact defendant's attorneys did not learn until after trial, and also stated to the other jurors that he heard that defendant offered plaintiff a considerable sum to compromise, which was untrue, it was reversible error to deny a motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 76, 79; Dec. Dig. § 42.*]

5. DAMAGES (§ 48*)—SUBJECTS OF COMPENSATION—MENTAL ANGUISH.

While mental anguish resulting from negligent injuries is a subject of compensation, such anguish must be the natural result of the injury, and is not the subject of recovery where it is not connected with the bodily injury and is caused by the contemplation of the physical condition of the injured party, or of any extraneous suffering or inconvenience that might result therefrom, whether to the injured person or relatives.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 100; Dec. Dig. § 48.*]

6. DAMAGES (§ 54*)—ITEMS OF COMPENSATION—MENTAL ANGUISH—HUMILIATION.

Mental anguish which an injured person would suffer upon meeting others because of his deformed condition, or because his injuries had made him an object of pity, sympathy, or curiosity to the public, is too remote to be the subject of compensation.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 100; Dec. Dig. § 54.*]

7. TRIAL (§ 119*)—ARGUMENTS OF COUNSEL—MATTERS NOT WITHIN ISSUES—SUBJECTS OF COMPENSATION.

Since a servant in an injury action was not entitled to recover for mental anguish of that nature, it was error for his counsel in argument to state that plaintiff would suffer mental anguish because of his injury whenever he met a stranger or went to a public gathering or place, etc.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 284; Dec. Dig. § 119.*]

8. MASTER AND SERVANT (§ 204*)—INJURIES—ASSUMPTION OF RISK.

Act April 24, 1905 (Laws 1905, p. 386, c. 163), providing that the plea of assumed risk, where the ground of the plea is knowledge of the defect and danger, shall not be available to

a railroad where the employé notified the employer of the defect, etc., is not limited to cases of defective machinery, but applies to a brakeman's action for injuries by stepping into a hole in the track while coupling cars.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 204.*]

9. MASTER AND SERVANT (§ 293*)—INJURIES—INSTRUCTIONS—CARE REQUIRED.

In a brakeman's action for injuries caused by stepping into a hole in the track while coupling cars, the use of the word "approaches," in an instruction that it was the company's duty to exercise ordinary care to keep its approaches to the track in a safe condition, meant those places where employes must approach the track to work, and not such an approach as a crossing, and the jury must have understood it in the former sense.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

For other definitions, see Words and Phrases, vol. 1, pp. 465, 466.]

10. TRIAL (§ 194*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

A requested charge was properly refused which stated that certain facts would be contributory negligence, when the question was for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 465; Dec. Dig. § 194.*]

Appeal from District Court, Bell County; Jno. M. Furman, Judge.

Action by W. W. Dickens against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Terry, Cavin & Mills and A. H. Culwell, for appellant. A. L. Curtis and Winbaurn Pearce, for appellee.

FISHER, C. J. This is a suit by appellee for the recovery of damages on account of personal injuries received while engaged in the service of appellant as a switchman at Temple, Tex. It is alleged that, while he was engaged in the service of switching cars, he was caused to fall under the train, by reason of which he received serious and permanent injuries. The negligence charged is that, while he was in the performance of his duty in coupling a car, his foot slipped into a hole which was negligently permitted to be and remain near the railway track, and that the railway company failed to furnish him a safe place at which to work. Appellant answered by general and special exceptions, general denial, pleas of contributory negligence, and assumed risk. Verdict and judgment below were in appellee's favor against the railway company for the sum of \$37,500.

Appellant's twenty-seventh and twenty-eighth assignments of error are to the effect that the trial court erred in refusing to grant appellant's motion for a new trial on account of the fact that one B. T. Wynn, who was a juror at the trial and participated in finding and returning the verdict against the appellant, was not a fair and impartial juror, in

*For other cases see same topic and Section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that he entertained a bias in favor of the plaintiff, and that he had, prior to the trial, expressed an opinion about the merits of the case, wherein he had substantially stated to one W. P. Cox and J. L. Durden that Dickens ought to recover the amount he had sued for, to wit, \$50,000 or \$60,000; that the juror on his voir dire was especially interrogated as to the fact whether he entertained any prejudice or bias for or against either of the parties to the suit, and whether he had entertained or had expressed an opinion as to the merits, all of which he answered in the negative; that neither the appellant nor any of its attorneys had any notice or knowledge of the fact that the juror was not a fair and impartial juror, and that he had had the conversation with Cox and Durden as stated until after the trial; that, if they had known at the time of his examination touching his service and qualification as a juror that he had so expressed himself in favor of the plaintiff, he would have been challenged for cause, and, if such challenge had not been sustained, they would have peremptorily challenged him. Therefore the appellant contends that the juror Wynn was not competent and qualified, and that he was biased in favor of the plaintiff and prejudiced against the defendant, and that he went into the jury box with his mind made up that the plaintiff was entitled to recover.

It appears from the bill of exceptions that the evidence introduced upon the disposition of this question is substantially as follows: Wynn, the juror, testified: That he did not know anything about the merits of the case before he was taken on the jury. That he had heard that Dickens was run over and got cut up, and so stated in his examination before he was accepted, and he stated in his examination he did not have any opinion about the case, neither did he have any bias in favor of or prejudice against the railway company, nor had he any such bias or prejudice at that time. He knew Dickens when he saw him. That he had no opinion when he was taken as a juror. That he was not on the regular jury, but was picked up on the morning the case went to trial by the deputy sheriff. That he lived in Temple. That he knew Mr. W. P. Cox. That he had never had any conversation with Mr. Cox, but had had with the other man. This other man referred to was John L. Durden. That it was not a fact that on or about Sunday, January 26th, about a week before the case was tried, that he had a conversation with one or both of these parties, and he goes on and expressly denies that he had a conversation with either Cox or Durden near the Harvey House in the town of Temple about a week before the trial. Cox testified that he lived in Temple, and knew the juror Wynn, and stated that Wynn, in a conversation with him and Durden, asked the question how much Dickens was suing for, and he replied about \$50,000 or \$60,000. Wynn said

that he thought he ought to have it. The case was discussed, and Wynn asked the question how it happened. Wynn expressed sympathy for Dickens. Durden undertook to tell him all he knew about it, and detailed how the accident occurred. This was the conversation that occurred near the Harvey House about a week before the trial. The evidence of Durden is substantially to the same effect as that of Cox. All of these parties, it seems, lived in Temple, where the accident happened, and where the plaintiff resided. It also appears that the juror Wynn on his voir dire was especially interrogated with reference to his bias and prejudice and his opinion as to the merits of the case.

The evidence further shows that the conversation referred to was not known to the appellant or its attorneys at the time of the formation of the jury, and was not discovered until after the trial. The bill of exceptions further states that the preponderance of the evidence showed that this conversation had taken place, and that that was the view of the court, and that it was the conclusion of the court that neither the defendant company nor any of its officers or attorneys in charge of the case knew of the conversation until after the conclusion of the trial; that the court, however, was further of the opinion that the conversation and statements there made by Wynn were not of such a character as disqualified him from jury service in this case; that the court was of the opinion that the defendant had not shown that the juror was biased in favor of the plaintiff or prejudiced against the defendant at the time he qualified, and that he had such an opinion relative to the merits of the case as would disqualify him from performing the service of a juror at the time of the trial of the case; that the fact that he had expressed the opinion to Cox and Durden one week before the trial did not show that he was disqualified from jury service herein or entertained the same views relative to this case at the time of trial hereof as he expressed to Cox and Durden. The views of the court upon this subject are possibly more tersely stated in this explanation which he appends to the bill: "I cannot say that the language imputed to the court is the exact language used by it from the bench, but it in effect is the meaning of what was intended. I concluded that, giving all parties credit for intending to be truthful, I would rather believe that the conversation of Wynn with Cox and Durden was so unimportant that it had escaped his memory than to believe that the evidence of any witness was false; and, as Wynn on his voir dire and as a witness in this hearing has testified he had no opinion as to the merits, I could not hold such conversation with Cox and Durden would overcome his sworn testimony and his sworn answers on his voir dire. Hence I find he was a competent juror." This state-

ment of the court is to the effect that the conversation between Cox and Durden and Wynn, did occur as testified to by the former, although denied by the latter, but he undertakes to avoid its effect as showing the expression of the opinion of the juror as to the amount plaintiff was entitled to by the statement that the question was unimportant, and had probably escaped the recollection of the juror, and that his statement on his voir dire disclaiming any opinion should be given controlling effect in overcoming any statement he had previously made indicating he was not fair and impartial.

However difficult the task may be to produce satisfactory evidence of the unfairness of a juror, and however reluctant the courts may be to disturb verdicts on such alleged grounds, we have no hesitancy in this instance in reaching the conclusion that the proof is ample so far as concerns this juror to establish the fact that the appellant has not had a trial before a fair and impartial jury, a right accorded all litigants, even though one be a railroad corporation. The record discloses on other branches of the motion for new trial, the circulation among the jurors in their retirement of a statement by this juror to the effect that he had heard it stated that the railway company had offered the appellee a considerable sum in settlement, which fact the bill of exception shows was not true, nor was there any evidence upon that subject. This is merely referred to as having some bearing on the question we are now considering; that is, whether the juror was impartial, and as a fact having some weight to be considered on this branch of the motion in determining his partisanship. The trial court, while finding that the conversation was as testified to by Cox and Durden, concluded that it was so unimportant that he had rather believe that it had escaped his (Wynn's) memory than to believe that his evidence on his voir dire was false, wherein he stated that he had no opinion as to the merits. This is throwing over the juror a mantle of charity that he has no desire to wear, for he did not claim that he had forgotten anything, nor that anything that was said was unimportant, but he denied in toto the conversation, and says that no such conversation occurred, although the court had deliberately, after hearing all the evidence and giving him an opportunity to testify which he availed himself of, found that such conversation did occur. There is nothing to indicate that he has a poor recollection of events, and in his examination upon this subject, and in testifying as to other questions about his conduct when on the jury, he seems to have a distinct recollection of what transpired. And, if he may not have recollected on his voir dire the conversation, the testimony of the other parties to it when examined on the motion for new trial, to-

gether with the pointed inquiry made of him concerning it, would have revived and refreshed his recollection; if not as to all that was said, certainly as to the fact that there was a conversation which he denies. But is it likely that he had forgotten the conversation when on his voir dire he was asked the direct question whether he had expressed an opinion about the case? According to the witnesses who testified as to this conversation and who were believed by the court, Wynn's expressions were very emphatic in favor of the plaintiff to the effect that he ought to recover a large sum. He doubtless understood the responsibilities and duties of a juror, and admits on his voir dire that he was asked the question as to his opinion about the merits. We test his recollection or knowledge of the occurrence by the evidence that he was present and participated in the transaction, and, when that is found to be the fact, it is not likely that a matter of importance will be forgotten in so recent a time. That it was important he must have known; for, if he had admitted his statement as testified to, he would have been objected to as a juror, and he doubtless understood when on his voir dire that this was the purpose of his so being interrogated as to his opinion.

While the statute does not, in express terms, allow a juror to be challenged on account of having expressed an opinion or entertained an opinion about the merits of the case, still the general power given to the trial court by virtue of articles 3208, 3209, Rev. St. 1895, will permit a challenge to be entertained on any ground that unfits a person to sit on the jury; and for opinions entertained by jurors challenges were allowed under these articles in *Couts v. Neer*, 70 Tex. 473, 9 S. W. 40. A fair and impartial trial by a fair and impartial jury is what the law exacts, and this requirement becomes a delusion if men with bias or prejudice or preconceived ideas of the rights of one are allowed to sit in judgment on his case. *Hughes v. State* (Tex. Cr. App.) 60 S. W. 565. The facts show that counsel for the appellants were misled into the belief that the juror was fair and impartial, and they did all that could be done to obtain from him the facts, and only learned the truth after the trial. We feel sure that the learned trial judge would have allowed the challenge to the juror if he had told upon his examination the facts that were developed on the motion for new trial. Consequently we are of the opinion that these assignments present reversible error, for which the judgment must be reversed.

The errors complained of in some of the other assignments as to the misconduct of some of the jurors and of their considering facts that were not offered in evidence will doubtless be guarded against, as far as possible, on another trial, and will not likely again occur.

The objection to the argument of Mr. Curtis will not likely again arise. His prompt withdrawal of it indicates the fact that he will probably not repeat it.

We have met with more serious difficulty in considering the argument of Mr. Pearce, which is complained of in the nineteenth assignment. In discussing the mental suffering of the appellee, he used this language: "He suffers in his mind. That he is not the same Will Dickens in his family that he was before he was chopped up. He suffers that to-day, he will suffer that to-morrow, and he will suffer that when his hair is white and whiter still—mental anguish. He will suffer that whenever he meets a friend. He will suffer that whenever he meets a stranger. He will suffer that when he goes to a public gathering. He will suffer mental anguish when he passes across the street." The argument at this point was objected to by counsel for defendant, whereupon Mr. Pearce responded: "I do not blame you. An exception is all there is." Counsel for the defendant responded: "I will take a bill of exceptions to that remark." Mr. Pearce then continued his address in the following language: "He testified upon the stand that he suffered in mind, and I am telling you what suffering in mind is, or rather, gentlemen of the jury, I am reminding you of what mind suffering is. As I started to say that he had, he would in crossing the street, or he would in going into a public house or private house, that he would be made the object of the curious eye—suffers mentally." Whereupon this was objected to and the bill of exceptions was taken. The court refused to check the argument, and it was permitted and did remain as a part of the argument of counsel to the jury.

In the case of *Maynard v. Oregon R. R. & Navigation Co.*, 46 Or. 15, 78 Pac. 983, 68 L. R. A. 479, the question of what may be considered as elements of mental suffering is very fully discussed, and we think states the correct rule upon this subject: "In that case the injured party was asked the following question: 'Mr. Maynard, what, if any, mental suffering or agony have you sustained or had since the injuries that you received down here?' And he was allowed over objection to answer: 'Well, I suffered distress a good deal when I realize my condition. I am not able to work, and it distresses me to think about my little girl, and how I am going to support her and educate her and raise her up. Those are the matters that distress me.' Then followed a motion to strike out the whole of the answer last given as immaterial, irrelevant, and not responsive to an issue in the case, and as calculated to unduly prejudice the minds of the jury against the defendant, which was denied. Based upon these premises, the defendant insists that the court erred (1) in permitting the plaintiff to testify that he had a little girl 13 years old, because it is

apparent that the only object plaintiff had in inquiring concerning her was to show that she was dependent upon him for support, which could not properly be considered as an element of damages in the case; and (2) in refusing to take the last answer of the witness from the consideration of the jury, because the distress or mental anguish of plaintiff suffered on account of his own condition in not being able to work and earn a livelihood, or on account of his little girl, in not being able to support and educate her, were also not proper elements of damages upon which to base a recovery against the defendant. We will discuss these alleged errors in their inverse order, as counsel have so discussed and presented them. It is undoubtedly true that one suffering from injuries to his person due to the negligence of another may recover for mental distress and anguish resulting from the same cause. *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638; *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219, 232; *Chicago v. McLean*, 35 Ill. App. 273; *Ferguson v. Davis County*, 57 Iowa, 601, 609, 10 N. W. 906; *Kendall v. Albia*, 73 Iowa, 241, 245, 34 N. W. 833; *Kennon v. Gilmer*, 131 U. S. 22, 26, 9 Sup. Ct. 696, 33 L. Ed. 110, 112. Such mental distress or anguish, however, as is not the natural result of the accident, but is produced by the operation of the mind in the contemplation of the physical condition to which the injured party is reduced, or in contemplation of any extraneous suffering or inconvenience that such condition might entail, whether it respects the person himself or others dependent upon him, is not regarded as matter proper to form the basis of consequential damages. The doctrine is enunciated in *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313, 320, in the following language: 'It is the mind that either feels or takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury, unless the mind is overpowered and consciousness is destroyed. The mental anguish which is not proper to be considered is where it is not connected with the bodily injury; but was caused by some mental conception not arising from the physical injury.' So anguish of the mind, wholly sentimental, arising from the contemplation of a disfigurement of the person, cannot be considered for the purpose of swelling the damage. The reason for the rule is forcibly stated in *Chicago, B. & Q. R. Co. v. Hines*, 45 Ill. App. 299, as follows: 'The law regards supposed injuries to sentimental feelings of this character as too remote and speculative to allow it as an element of damages in cases where no malice exists.' Of like character is *Augusta R. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706, *Giffin v. Lewiston*, 6 Idaho, 231, 55 Pac. 545, and *Chicago, R. I. & P. R. Co. v. Caulfield*, 63 Fed. 396, 11 C. C. A. 552, 27 U. S. App. 358. The same principle was controlling in *Planters'*

month's rent of \$6 on his house would soon be due and that he had just that amount with which to pay it; the appellate court saying: 'The mental anguish which appellee experienced on account of the fact that his house rent would soon be due, which he would be unable to meet, and which (such is the implication) would result in the inconvenience or suffering of his family, does not naturally result from the injury.' * * * Again, in *Atchison, T. & S. F. R. Co. v. Chance*, 57 Kan. 41, 45 Pac. 62, it was said, which language indicates the state of the case also: 'The court erred in refusing to strike out the testimony to the effect that Finnigan was troubled by the sickness and confinement of his wife, and the fear that he would leave her and the child in a dependent and helpless condition. Under the decisions of this court a recovery may be had for mental suffering or anguish of mind resulting from physical pain and suffering endured by the injured party; but it is improper to admit evidence as to mental suffering on account of the circumstances or condition of others.' A like ruling was made in *Texas Mexican R. Co. v. Douglass*, 69 Tex. 694, 7 S. W. 77, upon a similar state of facts as appears in this last case. See, also, *Parsons v. Lindsay*, 28 Kan. 426. Now, in regard to the matter which it was sought to have withdrawn from the jury, there are two features involved: First. The witness says, in effect, that he suffered a good deal of distress by realizing his condition that he was not able to work. This related to his mental suffering, as he was asked about that, but it was not such as would naturally result from his physical infliction. It arose by reason of the consideration or mental deduction that his infliction rendered him unable to work—a cause arising independently of the injury sustained. The fact that he was rendered incapable of pursuing his labors was a condition entirely legitimate for swelling the damages, but his meditation upon that fact and the mental distress and anguish produced from such meditation would be wholly aside from and independent of any suffering caused by the accident or the physical infliction received; and, as the authorities say, it is too remote, speculative, and uncertain upon which to base an estimate of damages. The other feature consists in the distress that it caused him when he thought of his little girl and how he was going to support and educate her, and it needs no further remark to show that this is extraneous of any distress of mind arising from the injuries received. So we conclude that the trial court erred in not withdrawing the witness' answer from the consideration of the jury." The serious objection to

that the appellee might be entitled to.

There is an assignment of error complaining that the verdict is excessive; and, while we are not prepared to express an opinion upon this question, and are not required to do so, still we will say this much: That verdicts for such amounts are not usual in cases of this character so far as shown by the records of this court, and it is doubtless the case that the jury in awarding the amount returned gave considerable weight to the mental suffering of the plaintiff on account of his injuries, not only what he had suffered up to the time of the trial, but what he may suffer in the future. And the statement made by counsel in his argument in informing the jury what might be considered along that line doubtless had its effect or was calculated to have the effect of inducing them to believe that they could consider as mental suffering those elements of mental emotion discussed by the counsel. The reference to the fact that Dickens would experience mental suffering to-day or to-morrow, or at one place as well as another, is possibly not objectionable, but the mental anguish that he would experience when he meets a friend or when he meets a stranger, or that will arise from the fact that he had become an object of pity, sympathy, or of curiosity to the public generally or individually, is not the kind of mental suffering that the law gives compensation for. It is too remote. A discussion of this question would really be only a repetition of what has been said in the authority cited. Therefore we are of the opinion that much of the argument quoted was objectionable.

The second, third, fourth, fifth, sixth, fifteenth, and seventeenth assignments, and possibly some not mentioned, all relate to the subject of assumed risk. The court submitted this case to the jury on the theory that the act of the Legislature of April 24, 1905 (page 386, c. 163, Sess. Laws), was not applicable. That statute relates to assumed risk, and qualifies the old doctrine, as fully explained in *St. Louis Ry. Co. v. Mathis* (Tex.) 107 S. W. 535. It was urged in argument that this statute is not applicable, that it merely related to defective machinery, etc. We do not think that this is merely the effect of the statute, and in our opinion it would apply to a defect of the character alleged in this case.

The charge which is requested in the seventh assignment of error and which the court refused to give, was substantially given in the main charge of the court.

There are some assignments of error that complain of certain charges, which, in effect, instructed the jury that it was the du-

ty of the appellant to exercise ordinary care to keep its approaches to the railroad track in a reasonably safe condition. The word "approaches" employed in these charges was evidently intended to mean, and doubtless the jury so understood it, to correspond to the facts and the allegations of negligence charged. It was not intended to mean an approach, such as a crossing of the track, but was evidently intended as an instruction to the effect that the railway company should exercise ordinary care to keep those places where its servants must work—that is, those places where they must approach the track for that purpose, when engaged in the work—in an ordinarily safe condition.

The charge complained of in the tenth assignment of error was properly refused. It loses sight of the fact that it was a question to be determined whether the plaintiff had to get on the ground in order to make the coupling.

The point presented in appellant's eleventh assignment of error, wherein it complained of the refusal of the court to give a certain charge, is practically covered by the main charge of the court and some of those given at the request of the appellant. Furthermore, the charge requested was objectionable on the ground that it practically informed the jury that certain facts would constitute contributory negligence. Whether walking between the cars would be contributory negligence would be a question of fact to be passed upon by the jury.

There was no error in permitting the witness Blent to testify as to the condition of the coupling apparatus on the cars in question to show that the same was broken. That was all material as having some bearing on the question in accounting for the conduct of the plaintiff. The defect in the coupling apparatus was not presented as an issue of negligence, but it was proper to be inquired into as explaining why the plaintiff had to resort to the method that he did in order to undertake to uncouple the cars.

The twenty-third assignment, as to the question of variance, is overruled.

For the error pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

GULF, C. & S. F. RY. CO. v. DICKENS.
(Court of Civil Appeals of Texas. March 31, 1909.)

Appeal from District Court, Bell County; John M. Furman, Judge.

Action by the Gulf, Colorado & Santa Fe Railway Company against W. W. Dickens to vacate a judgment for defendant herein in another suit on the ground of fraud. From a judgment for defendant on demurrer to the petition, plaintiff appeals. Affirmed.

Terry, Cavin & Mills and A. H. Culwell, for appellant. A. L. Curtis and Winbourn Pearce, for appellee.

FISHER, C. J. The reversal of the judgment of the court below in cause No. 4,373 (118 S. W. 612) disposes of this case.
Judgment affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. THOMPSON.

(Court of Civil Appeals of Texas. April 1, 1909. Rehearing Denied April 15, 1909.)

1. CARRIERS (§ 20*) — TRANSPORTATION OF GOODS—PENALTY FOR DELAY OR DISCRIMINATION—CONSTRUCTION OF STATUTE.

Rev. St. 1895, art. 4574, which provides that a railroad company which shall fail or refuse, under regulations of the Railroad Commission, to receive and transport without delay or discrimination, tonnage, etc., destined to any point on or over the line of a connecting line, shall be guilty of unjust discrimination, etc., and provides a penalty for such discrimination, being penal, the penalty can be recovered only by showing that acts complained of come within the very terms of the statute, and its terms cannot be extended so as to embrace acts not covered by their language.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

2. CARRIERS (§ 13*) — TRANSPORTATION OF GOODS—CONSTRUCTION OF STATUTE—"DELAY"—"DISCRIMINATION."

The term "discrimination" is used in the section in its ordinary acceptation as meaning a delivery showing a preference in favor of or against a shipper in the performance of any act essential to the completion of that service, and is synonymous with "delay" as used in the section.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 3, p. 2099; vol. 2, pp. 1949, 1950.]

3. CARRIERS (§ 13*) — TRANSPORTATION OF GOODS — FAILURE TO FOLLOW OWNER'S ROUTING—"UNJUST DISCRIMINATION."

While the owner of goods shipped on a railroad generally has the right to designate the route, and it is the receiving carrier's duty to observe the owner's directions in delivering to a connecting carrier, the duty is one growing out of the particular contract of carriage or imposed as a common-law obligation, and a breach of the duty by requiring of a connecting carrier, as a condition upon which it should receive goods, that they should be transported over a different route from that selected by the owner, requiring a violation by the connecting carrier of Rev. St. 1895, art. 4535, under which a connecting carrier, receiving goods from another carrier destined to a point on its line, must carry them on its line to destination, unless the person having a right to do so had routed them otherwise, is not an "unjust discrimination" within art. 4574, making it unjust discrimination for a railroad to fail or refuse under regulations of the Railroad Commission to receive and transport without delay or discrimination tonnage, etc., destined to a point on or over a connecting line.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 13.*]

4. CARRIERS (§ 79*)—CARRIAGE OF GOODS—CONTRACT OF SHIPMENT.

The provisions of a contract of shipment, whether verbal or written, under which goods are carried by a railroad, determine the route and connections to be observed.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 79.*]

5. CARRIERS (§ 79*)—CARRIAGE OF GOODS—ACQUIESCENCE IN ROUTING GIVEN BY CARRIER.

After a carrier has refused to route cars as desired by a shipper, if the latter permits the carrier to take the cars for shipment, he acquiesces in the routing actually given by the carrier.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 79.*]

6. CARRIERS (§ 51*)—CARRIAGE OF GOODS—ACCEPTANCE OF BILL OF LADING—EFFECT.

Where a shipper accepts a bill of lading with knowledge of its contents, it becomes binding upon him; and hence where he accepts a bill upon which the routing specified by him had been erased and another substituted, with knowledge of the change, he is bound by the bill as changed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 148, 149; Dec. Dig. § 51.*]

7. MANDAMUS (§ 12*)—GROUNDS—PERFORMANCE OF LEGAL DUTY.

Mandamus lies only to compel the performance of an existing legal duty and cannot be the means of imposing that duty.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 89-92; Dec. Dig. § 12.*]

8. MANDAMUS (§ 133*)—SUBJECTS OF RELIEF—ISSUE OF CERTAIN BILL OF LADING.

As Rev. St. 1895, art. 322, providing for the issuance of a written receipt or bill of lading by a carrier when demanded, stating the quantity, character, order, and condition of the goods, does not require it to specify the route desired by the shipper, there is no legal duty to incorporate the route in a bill of lading, and mandamus will not lie to compel it.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 133.*]

9. MANDAMUS (§ 133*)—SUBJECT OF RELIEF—DELIVERY OF SHIPPER'S ROUTE TO CONNECTING CARRIER.

There being no statutory requirement imposing on a carrier the duty of delivering to a connecting carrier the routing instructions of the shipper, and the common-law duty, when delivering a through shipment to a connecting carrier to also deliver a waybill or the routing instructions under which the shipment is to be made, not requiring such act, mandamus will not lie to enforce performance of it.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 133.*]

10. MANDAMUS (§ 133*)—GROUNDS—EXISTENCE OF LEGAL RIGHT, DUTY, AND DEFAULT IN PERFORMANCE.

Under the rule that before mandamus will lie the party seeking it must show an existing legal right to the service demanded, a corresponding duty on the part of the one upon whom the demand is made, and a default in the performance of the duty, no person can be compelled by mandamus to render a particular service until he has been given an opportunity to perform it; nor can another claim that he has been deprived of a service until he has placed himself in a situation to make an immediate demand for its performance, and the writ will not lie to compel a railroad company to ship lumber by a certain route, and give the shipper a bill of lading specifying the route, upon a mere showing by the person asking the writ that he expected to remain in the lumber business at a certain place and expected in the future to buy lumber and tender it to the carrier with direction to ship it by the route specified.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 133.*]

Appeal from District Court, Travis County; Chas. A. Wilcox, Judge.

Action by James A. Thompson against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Flist & McClendon and D. K. Woodward, Jr., for appellant. Cochran & Penn, for appellee.

HODGES, J. This suit was instituted by the appellee to recover penalties for unjust discrimination provided for in article 4574 of the Revised Civil Statutes of 1895.

Findings of Fact.

At the time of filing this suit, and for some years prior thereto, the appellee was engaged in the business of retailing lumber at Taylor, in Williamson county, Tex. He purchased a large amount of his lumber from the Thompson-Tucker Lumber Company at its mills at Willard, a small station situated on the line of the appellant railway company running from Trinity, in Trinity county, through Corrigan, in Polk county, to Colmesnell, in Tyler county. On different dates between April 1, 1906, and September 5, 1907, the appellee purchased of the aforesaid lumber company 57 car loads of lumber delivered f. o. b. the cars at Willard, for the purpose of having the same shipped to him at Taylor, and which was thereafter so shipped and delivered on different dates during that period of time. There were three routes by which such shipments could be made from Willard to Taylor; one over the appellant's T. & S. line to Trinity, thence over the International & Great Northern Railway to Houston, and from there over another line of the appellant's to Taylor; another from Trinity over the International & Great Northern Railway to Palestine, and thence over the same company's line to Taylor; still another from Willard to Corrigan, thence over the Houston, East & West Texas Railway to Houston, and from there over the appellant's line to Taylor. The distances from Willard to Taylor over these respective routes were as follows: Over the first mentioned 278 miles; the second, 236 miles; and the third, 272 miles. Over each route the Railroad Commission had established a rate, which was the same for all. The appellee had for some time previous to the first-mentioned date, and during all of the time the shipments were made, desired that his lumber should be carried over the appellant's line to Trinity, thence over the International & Great Northern Railway, via Palestine, to Taylor, claiming that it reached its destination by that route in a shorter time, and for other personal reasons. Acting for him in the method of routing the shipments, the agent of the Thompson-Tucker Lumber Com-

pany, on the several occasions when each of the 57 cars of lumber were to be delivered to the appellant for shipment, and before they were received by the appellant at Willard, tendered to the appellant's agents in charge of the trains upon which the cars were to be shipped duplicate receipts upon the following blank form:

Willard, Texas.....190..

Delivered by
Thompson & Tucker Lumber Company
to M., K. & T. R. R. Co.

In apparent good order, the articles named below, to be delivered in like good order, without unnecessary delay.

To
At
Via
Marks
As per conditions of Company's Bill of Lading. Lumber.

Initial.	Car No.
.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

Train No..... Conductor.
..... 190.

The blanks "To," "At," and "Via" in each of the 57 receipts were filled in pencil so as to read: "To order J. A. Thompson, Taylor, Tex., % I. & G. N. Ry. Co. At Trinity, Tex., for continuous transportation by I. & G. N. Via Trinity, Palestine and I. & G. N. Ry." In the shipment of January 10, 1907, all the words in pencil (italics above) were erased; in 24 of the shipments the words "for continuous transportation by I. & G. N. (Via) Trinity, Palestine and I. & G. N. Ry." were erased; and in the balance the words "Trinity, Tex., for continuous transportation by I. & G. N. (Via) Trinity, Palestine and I. & G. N. Ry." were erased.

The bill of lading referred to in the above-mentioned receipt was that found on one of the blank forms in general use by the appellant railway company. Among other provisions, that form contains an undertaking on the part of the appellant to deliver the freight at the point of destination if that point is on its line; if not, then to deliver to its next connecting carrier; and also a provision limiting its liability for damages to that which occurs upon its own line.

There was no local agent at Willard, and the bills of lading, or "receipts," as they are called, were signed by the conductors in charge of the trains. The receipts were usually tendered by an agent of the lumber company called the "shipping clerk." This clerk was not present upon all of the occasions when the cars and receipts were tendered to the appellant for transportation. In most of the instances, whether present or not, a note was attached to the

duplicate receipts left for the conductor to sign, in which he was requested that, unless he would handle the cars according to the routing instructions given in the receipts, not to undertake to handle them at all. The officials in charge of the management and control of the appellant's line were well aware of the desire of the appellee that the cars containing his lumber should be routed by way of Trinity and Palestine over the International & Great Northern Railway to Taylor; and the agents of the lumber company, at the time they tendered the duplicate receipts above referred to, in addition to the note attached, verbally requested that those wishes be carried out. The conductors, however, acting under orders from their superiors, disregarded those instructions, made the erasures before mentioned, and after doing so signed the receipts and delivered them to the shipping clerk of the lumber company if he was present, and, if not, left them where they could be obtained by him upon his return, and then would take charge of the car, transport it to Trinity, and there deliver it to the International & Great Northern Railway Company, accompanied by a waybill providing for its carriage to Houston, and there to be delivered again to the appellant for shipment to Taylor.

The court found that the appellee accepted those receipts as signed after the erasures showing the routing via Palestine had been made, and allowed the appellant to take charge of the cars of lumber with no routings except those remaining upon the receipts as shown. The testimony is sufficient to show that the desire of the appellee to have his cars containing the lumber shipped from Willard to Taylor routed by way of Palestine over the International & Great Northern Railway, while well known to the appellant and the officials in charge of that department of its business, had been uniformly disregarded, and all of the 57 cars were routed by way of Trinity and Houston, and thence over the appellant's main line to Taylor. The reason given by the appellant's general freight agent was that he desired his company to get the benefit of the long haul from Houston to Taylor, which it would not do if the routing was by way of Palestine over the International & Great Northern Railway. At the time these shipments were made, there was in effect between the appellant and the International & Great Northern Railway Company a traffic agreement, by which it was understood between the two companies that all freight originating on the appellant's T. & S. branch and destined to points on or over appellant's line south of Waco should be carried by way of Houston. This traffic agreement was then on file with the Railroad Commission, but there was no other evidence of whether or not it had been approved by the commission.

Some time previous to the date of any of the shipments here under consideration, there had arisen between the appellant and the appellee a similar controversy concerning the routing of his lumber from Willard to Taylor. This controversy ultimately resulted in a suit by appellee for the statutory penalties, but the litigation was settled by compromise. During the time of that controversy, the general freight agent of the appellant had informed the freight agent of the International & Great Northern Railway Company that, if the latter company did not respect appellant's routing of shipments originating at Willard destined to Taylor by way of Houston, all of the freight originating at Willard would be carried by way of Corrigan over the Houston East & West Texas Railway to Houston, thus diverting that traffic from the International & Great Northern Railway Company. By reason of this threatened diversion of the traffic, the International & Great Northern Railway Company thereafter followed the routing indicated in the waybills delivered to it by the appellant company. The refusal of the appellant to deliver the 57 cars of lumber to the International & Great Northern Railway Company with appellee's routing instructions contained in the receipts made out at Willard is the basis of this suit.

Conclusions of Law.

The petition is very voluminous, but avers the facts substantially as stated above. From a judgment in favor of the appellee for penalties aggregating \$8,550, and a judgment awarding a writ of mandamus compelling the appellant at all times in the future, when the appellee shall tender to it on its line of railway at Willard any lumber in car load lots for shipment from that point to Taylor, at the freight rate established by the Railroad Commission, with directions to appellant given at the time of such tender that the same shall be carried by it over its line of road to Trinity and there delivered to the International & Great Northern Railway Company for carriage by it by way of Palestine to Taylor, to receive such shipments so tendered and to issue to appellee its receipt, or bill of lading, therefor, specifying the routing thereof given by the appellee, and further directing upon such receipts of any such shipments from plaintiff with such directions and routing instructions, to carry such shipments of lumber over its line of railway to Trinity, and there deliver the same to the International & Great Northern Railway Company, together with the routing instructions above referred to, this appeal is prosecuted.

Counsel for appellee thus states the proposition upon which he relies for a recovery in this case: "We contend that the instruction given by the appellee in the receipt

tendered by him for each shipment, and the instructions given by the appellee to the appellant at the time of each shipment in addition to those contained in the receipt tendered, remain binding upon the appellant, notwithstanding the erasures by appellant of the routing in the receipt tendered, since no other routing was agreed to by appellee; and that when the appellant carried the shipment to Trinity and there delivered it to the International & Great Northern Railway Company, representing to said company that such shipment was routed by way of Houston, and demanding of said International & Great Northern Railway Company, as a condition upon which said shipment should be delivered to it, that it should carry the shipment to Houston and there deliver it back to appellant, thus giving a routing instruction different from that given by the appellee, and imposing upon the International & Great Northern Railway Company a condition which it had no right to exact, * * * appellant was guilty of unjust discrimination." Upon the correctness of that proposition he relies for an affirmance of this judgment.

Article 4574 of the Revised Civil Statutes, which defines the character of "unjust discrimination" here complained of, in subdivision 2 contains the following provision: "Every railroad company which shall fail or refuse, under such regulations as may be prescribed by the commission, to receive and transport without delay or discrimination the passengers, tonnage and cars, loaded or empty, of any connecting line of railroad, and every railroad which shall, under such regulations as may be prescribed by the commission, fail or refuse to transport and deliver without delay or discrimination any passengers, tonnage or cars, loaded or empty, destined to any point on or over the line of any connecting line of railroad, shall be deemed guilty of unjust discrimination; provided, perishable freights of all kinds and live stock shall have precedence of shipment." There are other provisions of the statute which prescribe the penalties that may be recovered by the aggrieved party on account of any violation of those requirements. The question, then, is: Did the appellant violate the provisions of this statute defining "unjust discrimination"?

By the terms of the article referred to, appellant was required to receive and transport without delay or discrimination the cars for any connecting carrier, and was prohibited from failing or refusing to transport and deliver without delay or discrimination cars destined to a point on or over the line of any connecting carrier. Under the well-established rule for the construction of penal statutes, such as that here under consideration, the appellee would be entitled to recover penalties only by showing that the acts complained of come within the very terms of the statutes; and these will not be extend-

ed so as to embrace acts not covered by their language, although those acts be wrongful. *S. A. & A. P. Ry. Co. v. Stribling*, 99 Tex. 319, 89 S. W. 963; *Hill & Morris v. Railway Co.* (Tex. Civ. App.) 75 S. W. 874; *Schloss v. Railway Co.*, 85 Tex. 601, 22 S. W. 1014. It is not here insisted that there was any delay or discrimination in receiving and transporting the cars on the line of the appellant, or that there was any failure or refusal to deliver the cars without delay to the International & Great Northern Railway Company, the connecting carrier in this instance. Unless we hold that the conduct of the appellant amounted to a violation of the duty to deliver without "discrimination," no offense for which a penalty may be recovered is charged or shown. The term "discrimination," as used in the requirement that carriers "shall deliver without delay or discrimination," etc., is only a part of the statutory definition of what it takes to constitute "unjust discrimination," and must be taken in its ordinary acceptation, and to mean a delivery without showing any preference in favor of or against a shipper in the performance of any act essential to the completion of that service. It has been held that the terms "delay" and "discrimination," as used in this article, are convertible, and that "discrimination" means "delay." *G., C. & S. F. Ry. Co. v. Lone Star Salt Co.*, 26 Tex. Civ. App. 531, 63 S. W. 1025. The duty which devolved upon the appellant as a common carrier, when it received the appellee's cars of lumber destined to a point on another line of railroad, was to deliver the same to its connecting carrier in accordance with the statutory requirements. The terms of the statute do not exact anything more than that the physical delivery of the cars or freight shall be done without delay or discrimination. When this was done its statutory duty was performed. There is no complaint that this service was performed in a manner showing a preference in favor of other shipments or shippers, or that in the physical handling of the cars by the appellant the delivery was not made according to the requirements of law. Where, then, is the offense?

The appellee contends that it lies in the fact of the appellant's giving a routing different from that embodied in the instructions delivered to it at the time the freight was received at Willard, that the erasures made by the appellant's conductors in the receipts tendered them for signature at the time the cars were delivered did not change the legal effect of those instruments, and that the freight was in fact received routed via Palestine to Taylor over the International & Great Northern Railway Company from Trinity. We may concede this contention to be correct, and may also concede that the traffic agreement between the appellant and the International & Great Northern Railway Company, by which all freight originating on that

line destined to points south of Waco should be carried by way of Houston, was insufficient to justify either road in insisting on carrying these cars by way of Houston over the objection of the appellee. Still, this would not constitute a statutory offense on the part of the appellant, although it might as to the other carrier. That the owner generally has the right to designate the route over which his goods shall be transported is well settled. *Inman v. Railway Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37; *G., C. & S. F. Ry. Co. v. Irvine* (Tex. Civ. App.) 73 S. W. 540. It may also be admitted that there is a duty resting upon the receiving carrier to transmit and deliver to its connecting carrier the routing instructions under which the goods are being transported. This duty, however, is one which grows out of the particular contract of carriage, or is one imposed as the common-law obligation of the carrier, and does not result from the statutory requirement. Hence no penalty can be recovered for its breach. In the *Stribling* Case, above referred to, the Supreme Court held that, while it was a wrong for the carrier to deny the owner the right to designate the route his freight should be carried, it was not one for which the statute had provided a penalty. The statutory definition of "unjust discrimination" no more includes the wrongful conduct of refusing to deliver to the connecting carrier the routing instructions of the owner than it does the offense of refusing to permit the owner in the first instance to name the route to be taken by the shipment. Whatever the contract of shipment provides, whether verbal or written, under which the freight is carried, determines the route and connections to be observed.

In this case it cannot be said that the appellant received the lumber for shipment via Palestine in the face of its positive and express refusal to do so. Whatever might be implied from its conduct in accepting the freight for shipment with the notice not to take the cars, unless it would handle them according to the routing instructions of the owner, is negated by the specific act of the appellant's agents in each instance erasing a stipulation to that effect from the bills of lading, and in its repeated express refusals to route those cars by way of Palestine, as desired by the appellee. This practice had continued for such a length of time, that, as one of the witnesses stated, the demand for the routing by way of Palestine became a mere matter of form. It is also in evidence that this persistent refusal on the part of the appellant antedated these shipments by several months, and had at one time resulted in a suit for penalties growing out of shipments being diverted to the line of the Houston, East & West Texas Railway. The evidence also justifies the conclusion that the International & Great Northern Railway Company was fully cognizant of

the wishes of the appellee to have his freight routed by way of Palestine, and of the controversy with appellant, and yielded to the demand of the appellant to carry by way of Houston and there redeliver solely on account of the fear of losing all of the shipping from Willard. The court found that, after the appellant had refused to route the cars according to the wishes of the appellee, he then permitted appellant's agents to take the cars for shipment. If so, he must have acquiesced in the routing actually given by the carrier. The conclusion of counsel for appellee that the erasures did not alter the routing under which the cars were ultimately carried is not sustained. When a shipper accepts a bill of lading, with knowledge of its contents, it becomes binding upon him. *Railway Co. v. Batte* (Tex. Civ. App.) 94 S. W. 345; 1 Hutch. on Carriers, § 171. The freight was promptly delivered to the International & Great Northern Railway Company. Its destination was Taylor, a point on the line of that road. Under the provisions of article 4535 of the Revised Civil Statutes, it became the duty of the International & Great Northern Railway Company, upon the receipt of the freight destined for that point, to transport it over its line to its destination, unless the party having a right to do so had routed it otherwise. The gist of the offending committed by the appellant therefore seems to consist, not in failing or refusing to deliver the freight to its connecting carrier without delay or discrimination, but in exacting from the latter, as a condition upon which it should receive the freight, that the same should be transported over a different route from that selected by the owner. Pushing this contention to its ultimate analysis, it amounts simply to a charge that the appellant wrongfully induced the International & Great Northern Railway Company, its connecting carrier, to violate its statutory duty, and forced that road to carry the freight over a different route and deliver to a different connection from that demanded by the owner. No penalty is provided by statute for such conduct as that charged against the appellant, even though it may be violative of the shipper's rights. *S. A. & A. P. Ry. Co. v. Stribling*, supra.

Counsel for appellee insists that the Stribling Case above referred to supports their contention in this suit. We do not think the analogy between the facts of that case and those here involved is sufficiently strong to make the ruling there in all respects decisive of this. In that case the controversy arose between the San Antonio & Aransas Pass Railway Company and the plaintiff in the suit regarding the shipment of four car loads of hogs from Kerrville to Graphite. The above-named railroad company was the initial carrier, and refused to route the cars according to the wishes of the shipper. The latter desired them carried over the road of

the defendant in the suit to San Antonio, there delivered to the International & Great Northern Railway Company to be carried to Austin and from there over the Houston & Texas Central Railway Company to Graphite. The carrier insisted upon routing them by way of San Antonio, thence to Giddings over its own road, there to be delivered to the Houston & Texas Central Railway Company, to be carried to their destination. Three of the cars were shipped under bills of lading signed by the shipper according to the route selected by the carrier. The shipper testified that he signed the bills without reading them, and did not agree to the routing therein specified. The court, however, held that those were the contracts under which the shipments were made, and that, notwithstanding the shipper had the right to select the routing of his freight in this instance, he had in fact entered into a contract which routed them according to the way they were actually carried. In that connection the court said: "The penalty is not given for the refusal of the carrier to allow the owner of the goods to select the roads over which they shall be carried, but for the failure or refusal to transport and deliver as they are actually destined." For a refusal to receive and transport freight in accordance with the routing selected by the owner there are other remedies which may be invoked. For the fourth car the court held the plaintiff in the suit was entitled to recover a penalty, for the reason that the bill of lading under which that car was shipped only bound the appellant company to carry the freight as far as San Antonio, specifying Graphite as the ultimate destination. The court held that the initial carrier should have delivered this car to the International & Great Northern Railway Company, its connecting carrier, at San Antonio; but having failed to do so, and insisting on carrying the freight on to another point, Giddings, and there deliver it to another carrier, it had committed a violation of the law requiring it to deliver without delay or discrimination to its connecting carrier. In that case there was an actual failure and refusal to deliver to the connecting carrier named in the contract under which the shipment was made. Here there was an actual delivery to the proper connecting carrier, a compliance with the very terms of the statute.

We think both the evidence and the pleadings insufficient to support a judgment for the statutory penalties sued for. We are also of the opinion that the judgment awarding a peremptory writ of mandamus was error. As a basis for that writ, the appellee alleges, in substance: That he expects to continue in the lumber business at Taylor, and expects and intends to purchase in the future large numbers of car loads of lumber from the aforesaid lumber company at

ning through Willard, and he will be compelled to make all of his shipments over the line of the appellant as the initial carrier; that appellant refuses to allow him to have such shipments carried over the International & Great Northern Railway by way of Palestine to Taylor, and unless restrained will continue such refusal in the future, and will continue to refuse to accept such shipments from Willard to Taylor and to issue receipts therefor specifying that the same shall be carried by it to Trinity and there delivered to the International & Great Northern Railway Company for carriage by way of Palestine to Taylor, and will in future deliver shipments to the International & Great Northern Railway Company only upon condition that the latter will carry same to Houston and there deliver said lumber back to the appellant; that appellant will in future represent to the International & Great Northern Railway Company that all such shipments are destined to go by way of Houston, and will deliver waybills to said International & Great Northern Railway Company showing such routing by way of Houston, and will not, unless required by order of the court to do so, accept shipments of lumber from appellee at Willard and deliver same to said International & Great Northern Railway Company at Trinity with the routing desired by appellee, and unless restrained from so doing, and required to receive and transport in the future, appellee will suffer great inconvenience, annoyance, and damages, etc. In addition to a prayer for the penalties, he asks for a decree perpetually restraining appellant from in any manner attempting to prevent appellee from securing his rights under the law to have such shipments of lumber as he shall hereafter make from Willard to Taylor carried from Willard to Trinity by appellant, and thence over the International & Great Northern Railway via Palestine to Taylor, when he directs this to be done, and perpetually restraining appellant from carrying such shipments by any other route, and perpetually restraining appellant, when such shipments are delivered by it to the International & Great Northern Railway Company, from representing to that company that such shipment is routed by any other way than is directed by appellee, and also requiring appellant, when any such shipment is tendered to it at Willard with directions that the same shall be by it carried to Trinity and there delivered to said International & Great Northern Railway Company for carriage by the latter to Taylor via Palestine, to receive such shipment and "issue its receipt, or bill of lading, therefor, speci-

continue in the lumber business at Taylor, and expected in the future to buy lumber in car load lots in the town of Willard and tender such shipments to the defendant company at Willard with directions to carry the same to Trinity and there deliver to the International & Great Northern Railway Company for transportation by that company by way of Palestine to Taylor. Allen, the general freight agent of the appellant company, testified: That he had known for the past four or five years that appellee wanted all of his shipments carried to Trinity and there delivered to the International & Great Northern Railway Company, and by it carried to Palestine, thence to Taylor; that he had denied him that right all the time, and expected, unless this court required them to do otherwise, to continue to deny him that right. In response to that portion of the petition, the court rendered substantially the following judgment: That appellant, its officers and agents, are required at all times in the future, when the plaintiff, Thompson, shall tender to it at Willard any car loads of lumber for shipment to Taylor, with directions that the same shall be carried by appellant over its line to Trinity and there delivered to the International & Great Northern Railway Company for transportation by it via Palestine to Taylor, to receive such shipments so tendered and "issue to plaintiff its receipt, or bill of lading, therefor, specifying the routing thereof given by plaintiff"; and further ordered appellant, upon receipt of such shipment with such directions for routing, to carry same to Trinity and there deliver it to the International & Great Northern Railway Company, "together with the routing instructions relating thereto as given by the plaintiff." It was further ordered that the clerk issue "the proper writ of mandamus commanding observance by defendant, its officers, servants, agents and employes of this judgment."

The complaint in this appeal being directed against the judgment rendered, and not against the full measure of what the pleader evidently sought, we may pass by as unimportant the question of whether or not the judgment was responsive to the pleading, and, by indulging that construction with which both parties appear to be satisfied, assume that the prayer of the appellee was for the very writ which was granted. It will be observed that the judgment awarding the writ commands the performance of two distinct services: (1) The giving of a receipt, or bill of lading, specifying the routing given by the appellee; and (2) the delivery of the cars to the connecting carrier,

together with the routing instructions of appellee. A writ of mandamus will not lie except to compel the performance of an existing legal duty. The writ itself cannot be the means of imposing that duty. *Arberry v. Bevers*, 6 Tex. 457, 55 Am. Dec. 701; *Screwmen's Association v. Benson*, 76 Tex. 552, 13 S. W. 379; *T. & M. Ry. Co. v. Jarvis*, 80 Tex. 467, 15 S. W. 1089; 13 Ency. Plead. & Prac. 493, 497. Article 322 of the Revised Civil Statutes provides for the issuance of a written receipt, or bill of lading, by the carrier when demanded, "stating the quantity, character, order and condition of the goods." There is nothing in this provision requiring the receipt, or bill of lading, to specify the route over which the owner may wish his freight transported, and hence there was no legal duty devolving upon the agents of the appellant to do what the court here commanded them to do in making out the bill of lading. That portion of the judgment was wholly unwarranted by the statute. There appears not to be any common-law duty imposed upon the carrier to issue a written bill of lading. *Johnson v. Stoddard*, 100 Mass. 306; 4 *Elliott on Railroads*, § 1415. As to the second provision of this order, we know of no statutory requirement imposing upon the carrier the duty of delivering to the connecting line the routing instructions of the owner or shipper. It is doubtless its common-law duty, when delivering a through shipment to a connecting carrier, to also deliver a waybill or the routing instructions under which the shipment is to be made. 4 *Elliott on Railroads*, §§ 1432, 1440; *L. & N. Ry. Co. v. Stock Yards Co.* (Ky.) 97 S. W. 787. This duty, however, would be discharged by the performance of service less than that which the court required in this case, and it is not necessary for us to discuss the full extent of this common-law requirement.

There are other reasons which we think are conclusive against the right of the appellee to the writ here granted. Before mandamus can be made available, the party seeking it must show an existing legal right to the service demanded, a corresponding duty on the part of the person or corporation upon whom the demand is made, and a default in the performance of that duty. No such a state of facts as that is here shown. The appellee testified that he expected to continue in the lumber business at Taylor, and expected in the future to buy lumber in car load lots at Willard and tender same for shipment to the appellant company with directions to carry to Trinity and there deliver to the International & Great Northern Railway Company for transportation by that company via Palestine to Taylor. Those are the facts upon which he predicates his right for the protection of which he sought the issuance of the writ. This, we think, is but

the assertion of an abstract right of which he intends in the future to avail himself, and without indicating at what time in the future he expects to make these demands upon the agents of the appellant. Admitting, for the purposes of this discussion, that the appellant has indicated a purpose to continue in future to refuse to route such shipments in accordance with the wishes of the appellee, this could be considered as no more than a declaration concerning a future action or policy of the company. It was not the breach of an existing concrete duty which it was then called upon to perform. No person can be compelled by mandamus to render a particular service till he had been given at least an opportunity to perform it, nor can another claim that he has been deprived of a service till he has placed himself in a situation to make an immediate demand for its performance. The writ will not issue to protect an anticipated omission of duty, but it must appear that there has been actual default of a clear legal duty then due at the hands of the party against whom the relief is sought. *Northern Warehouse Co. v. O. R. & Nav. Co.*, 32 Wash. 218, 73 Pac. 389; *High on Extraordinary Legal Remedies* (3d Ed.) § 12. How can it be said that the appellee was deprived of the service which he here seeks to have performed, until those conditions have arisen when he had a right to their performance? Or how can it be said that the appellant was in default, until it was placed in the attitude where it might have actually performed the service demanded at its hands and then refused?

We do not wish to be understood as holding that, upon a proper showing, the performance of the duties here referred to could be enforced through mandamus. That question is not here decided. Thompson having failed to say when he intended to make his shipments, Allen's declarations as to what he would do when shipments were tendered is nothing more than a threat upon his part to refuse to do what may or may not be demanded of appellant at an indefinite time in the future.

The judgment of the district court will therefore be reversed, and judgment here rendered in favor of the appellant.

MCADOO v. WILLIAMS et ux.†

(Court of Civil Appeals of Texas. March 24, 1909. Rehearing Denied April 21, 1909.)

VENDOR AND PURCHASER (§ 244*)—BONA FIDE PURCHASERS—CONSIDERATION.

The recital in a deed of a consideration is not alone sufficient to prove payment thereof, so as to constitute grantee an innocent purchaser.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 609; Dec. Dig. § 244.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
118 S.W.—40 † Writ of error denied by Supreme Court May 19, 1909.

Stewarts and Geo. F. Burgess, for appellant. Joseph Coney, for appellees.

JAMES, C. J. The petition of McAdoo was in the ordinary form of trespass to try title, alleging that plaintiff owned an undivided half of a certain lot in Galveston, and that defendants Williams and wife owned the other half, and prayed for judgment for title and possession of plaintiff's half and for partition. Defendants pleaded not guilty; a general denial; that the land sought to be partitioned was and had been defendants' homestead for 20 years; that on or about July, 1900, defendants, being indebted to Wm. H. Smith, an attorney at law, for legal services in the sum of \$200, executed to said Smith a mortgage to secure same, which was in the form of a deed to an undivided half of the lot, which deed was intended by all parties to constitute a mortgage only; that the plaintiff, McAdoo, purchased the said mortgage interest from Smith in their homestead, and he has no other claim, right, or title in the land, except that which he acquired from Smith; and that, whether the deed is a deed or a mortgage, the court can only ascertain the fact, "for it is estopped by the Constitution and the decisions of our Supreme Court from decreeing a partition of defendants' homestead to satisfy either claim."

Plaintiff filed no further pleading, and did not plead that he was entitled to be protected because he was a purchaser in good faith and for value from Smith, which would seem to be necessary in order to raise such an issue, in view of the special pleading by the defendants. *Rivers v. Foote*, 11 Tex. 662. However this may be, there was not sufficient testimony to show that McAdoo stood in the attitude of an innocent purchaser from Smith. The recital in the deed was not enough to prove payment of the consideration expressed. *Bremer v. Case*, 60 Tex. 151; *Sickles v. Epps* (Tex.) 8 S. W. 124. Besides, there were circumstances in the evidence which tended to show that McAdoo was a simulated, and not an actual, purchaser. The case was tried by the judge, who gave a general judgment for the defendants, without any findings of fact. The testimony showed that, at the time of the execution of the deed to Smith by Williams and wife, the property was occupied by the latter as their home, and that this has been its use ever since; and the testimony was amply sufficient to warrant the finding that the deed was not intended by the parties to it as a conveyance, but only as security for a debt. The deed having been found

KETTERSON et al. v. INSCHO.

(Court of Civil Appeals of Texas. April 7, 1909.)

1. ESCROWS (§ 12*)—NOTES—TIME OF TAKING EFFECT—DELIVERY.

A note placed in escrow, to be delivered on compliance with specified conditions, becomes binding on the maker and indorser on the fulfillment of the conditions, though there is no delivery.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. § 13; Dec. Dig. § 12.*]

2. ESCROWS (§ 12*)—TIME WHEN INSTRUMENT TAKES EFFECT.

A deed or bill of sale placed in escrow, to be delivered on compliance with specified conditions, becomes effective on the fulfillment of the conditions, though there is no actual delivery.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. § 13; Dec. Dig. § 12.*]

3. ESCROWS (§ 12*)—TIME WHEN INSTRUMENT TAKES EFFECT.

A bill of sale of a half interest in property was placed in escrow, together with a note for the price, to be delivered on the buyer procuring an indorser of the note. The buyer procured an indorser, and the note was delivered to the seller, but the bill of sale was continued in escrow pursuant to an agreement to which the seller was not a party. *Held*, that the buyer and indorser were liable on the note from the time of its delivery to the seller.

[Ed. Note.—For other cases, see *Escrows*, Dec. Dig. § 12.*]

4. BILLS AND NOTES (§ 299*)—LIABILITY OF INDORSER—WAIVER.

The failure of the payee to fix the liability of the indorser by suit, as provided by Rev. St. 1895, art. 304, may be waived by the indorser.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 701; Dec. Dig. § 299.*]

5. BILLS AND NOTES (§ 452*)—LIABILITY OF MAKER.

The right of the seller to sue the buyer on a note for the price is not affected by the fact that after the maturity of the note the seller executed, without consideration and at a time he had no title, a bill of sale of the goods to the indorser at the latter's request.

[Ed. Note.—For other cases, see *Bills and Notes*, Dec. Dig. § 452.*]

Appeal from Harris County Court; Blake Dupree, Judge.

Action by R. D. Inscho against J. B. Ketterson and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Chas. A. Warnken and Byers & Byers, for appellants. C. O. Clamp, W. H. Ward, and Seth S. Searcy, for appellee.

NEILL, J. This suit was brought by appellee on August 23, 1906, against appellants, to recover a balance of \$300, with in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

terest and attorney's fees, due on a promissory note for \$500, made by the latter to the former June 16, 1905, and payable six months after date. The defendant Ketterson answered by a general denial, a plea of failure of consideration, and of accord and satisfaction. Heaton, in addition to the matters pleaded by his codefendant, pleaded that he was an accommodation indorser, and that plaintiff, knowing such fact, had failed to fix his liability by instituting suit against the principal within the time prescribed by statute. He then, by way of a cross-action against Ketterson, pleaded that the payments on the note had been made by him for Ketterson as such indorser, and prayed judgment against him for the amounts so paid, and which might be recovered against him in this action, as an indorser on the note. By supplemental petitions the plaintiff denied all the matters specially pleaded by the defendants, except the allegation of Heaton that his relation to the note was that of an indorser, which was admitted. And, in replication to that part of Heaton's answer which pleads plaintiff's failure to sue in time to fix his liability, he pleaded the latter's waiver. The defendant Ketterson, in reply to his codefendant's cross-action for the recovery over against him of the \$200 paid by the latter on the note, averred that such payment was not obligatory on Heaton as an indorser, but was voluntary, and that, therefore, he (Ketterson) is not liable to him therefor. The trial of the case resulted in a verdict and judgment in favor of plaintiff against defendants for the amount due on the note, and a judgment in favor of Heaton on his cross-action over against Ketterson as prayed for. Both defendants have appealed from the judgment in plaintiff's favor against them, and have assigned errors. No error as to the judgment in favor of Heaton against Ketterson appears from the latter's brief to be insisted on.

The note sued on was executed by Ketterson as principal, in pursuance of a written agreement executed by him and the plaintiff alone on June 16, 1905, which, omitting its caption and signature of the parties, is as follows:

"This agreement between R. D. Inscho and Jno. B. Ketterson bears witness: Said Inscho agrees for the consideration herein-after mentioned to sell, convey and deliver unto the David Crockett Oil Company, certain articles, machinery and tools mentioned and described in a bill of sale of even date herewith from R. D. Inscho and H. S. Stevens to David Crockett Oil Company and which said bill of sale has not been delivered.

"Said Ketterson agrees, in consideration of said sale and conveyance to pay to the said Inscho for his portion of said property the sum of \$50.00 cash, the receipt of which

is hereby acknowledged, and to execute and deliver to said Inscho his promissory note of even date with this instrument, for the sum of \$550.00 payable six months after its date at Houston, Texas, bearing eight per cent. interest from date until paid and providing for ten per cent. additional on the amount of principal and interest then owing as attorney's fees if said note is placed in the hands of an attorney for collection or is sued upon, and further to procure an endorser on said note who shall be satisfactory and agreeable to said Inscho. Upon said Ketterson procuring said endorser to the satisfaction of said Inscho, said bill of sale shall be delivered to said Ketterson and the note delivered to said Inscho. It is expressly agreed and understood between said parties that in case said Ketterson shall fail to procure such satisfactory endorser on or before the 5th day of July, 1905, then, and in that event said amount of \$50.00 already paid shall be forfeited by said Ketterson to said Inscho as liquidated damages and no title or interest in said property shall pass to said company in the interest of said Inscho therein."

The bill of sale stipulated for and described in this agreement was executed on the same day by Inscho and Stevens, and, according to the arrangement of the parties, placed with the note in escrow in the hands of W. H. Davidson, to be delivered to the grantee, in so far as Inscho was concerned or affected by it, upon Ketterson's procuring an indorser of the note to the satisfaction of Inscho, as stipulated in the agreement. He did procure Heaton as an indorser, who being satisfactory to Inscho, the note was then delivered to him (Inscho) by Davidson, with whom it had been placed in escrow to be delivered upon such condition. It seems, however, that the bill of sale to the property was still held in escrow, not for the performance of any agreement or condition as between Ketterson and plaintiff, but under another agreement between the David Crockett Oil Company and Wilson, who owned the other half interest in the property, that it should be so held by Davidson until the company paid Wilson according to agreement for his half interest, which it failed to do.

Under these facts, which are undisputed, there can be no doubt as to the liability of defendants upon the note in the respective capacities in which they executed it, unless the plaintiff is precluded from recovering by some act or omission on his part occurring after the note was delivered to him.

When a note is delivered in escrow, to be held until a certain event happens, or certain conditions are complied with, the liability of the maker and indorser commences as soon as the event happens or the conditions are fulfilled, even though there be no

Just as such a Ketterson procured Heaton as an indorser satisfactory to Inscho, the bill of sale to the latter's half interest in the property became effective, and vested title thereto absolutely and irrevocably in the David Crockett Oil Company. And the maker and indorser of the note became liable thereon to Inscho according to the tenor and effect of the instrument. It was not plaintiff's fault that the bill of sale remained in escrow, but it was the fault of the oil company in not paying Wilson for his half interest in the property, as it had agreed with him to do as a condition precedent to its being delivered to the company by the depository. This was an agreement which plaintiff was not a party to, and by which he could be in no way affected. It would be a monstrous doctrine to deprive a party, who has fully performed his part of a contract, of his rights under it because a party to another and different contract has not performed his contract.

Reduced to its logical sequence, according to defendants' theory, Inscho, though he had sold his half interest in the property in consideration of which the note sued on was given, would be compelled to pay the consideration to Wilson which the oil company had agreed to pay him for his half, so the bill of sale held in escrow could be delivered to the company, before he could recover upon the note given in consideration for the conveyance by him of his own half. Thus, the theory is brought to a reductio ad absurdum.

It clearly appears from the letters written by Heaton to Inscho on January 26, 1906, and July 15, 1906, that the former waived the latter's failure to fix his (Heaton's) liability as indorser by suit, as is provided by article 304, Rev. St. 1895.

The right of the plaintiff to maintain his action against Ketterson as principal on the note was not affected by plaintiff's making a bill of sale to the property for which the note was given, after its maturity, to Heaton at the latter's solicitation; for at that time plaintiff had no title whatever in the property to convey, and, besides, the pretended conveyance was wholly without consideration.

If there be any error in the court's charge, it arises from its being too favorable to the appellants. All special charges asked by defendants, on the refusal of which errors are assigned, were properly refused.

We have considered all the assignments of error and have concluded none of them requires a reversal of the judgment. It is therefore affirmed.

1. CARRIERS (§ 223*)—INJURY TO ANIMALS—DEFENSES—FREE TRANSPORTATION.

Where, pursuant to plaintiffs' subcontract for railroad construction, defendant transported their outfit from the place where they had finished work to another point free of charge to plaintiffs, that fact was no defense to their claim for damages to their mules from negligent transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 932; Dec. Dig. § 223.*]

2. CARRIERS (§ 229*)—INJURIES TO ANIMALS—DAMAGES.

The measure of a carrier's liability for injuries to mules from negligent transportation was the difference between the market value of the mules at destination at the time of delivery and what would have been their market value at the same time and place in the condition they would have been had they been transported without negligence, and this, though the mules were kept for use and not for sale.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 930, 963, 964; Dec. Dig. § 229.*]

3. CARRIERS (§ 228*)—INJURIES TO ANIMALS—MARKET VALUE—EVIDENCE.

In an action for injuries to mules resulting from negligent transportation, plaintiff could not recover where there was no evidence as to the market value of the mules at destination.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

4. TRIAL (§ 76*)—EVIDENCE—OBJECTIONS—TIME.

An objection that a witness had not qualified himself to testify as to the market value of mules, not made until after plaintiff had made his opening argument to the jury, was too late.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 183-190; Dec. Dig. § 76.*]

5. CARRIERS (§ 230*)—INJURY TO ANIMALS—MARKET VALUE.

Evidence that the value of two mules killed as the result of a carrier's negligent transportation was \$200 each was sufficient to authorize submission of the issue of the market value of the mules at destination to the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.*]

6. EVIDENCE (§ 474*)—COMPETENCY—MARKET VALUE.

Where a witness offering to testify as to the market value of certain mules at a certain time and place testified that his only knowledge was what one man had told him who came to buy mules, he was incompetent.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 474.*]

7. EVIDENCE (§ 543*)—MARKET VALUE—COMPETENCY.

A witness otherwise qualified may testify as to the value of mules described to him, which he had never seen.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 543.*]

Appeal from Grimes County Court; T. P. Buffington, Judge.

Action by Gillespie & Carlton against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Terry, Cavin & Mills and A. H. Culwell, for appellant. T. C. Buffington and J. T. Bowen, for appellees.

REESE, J. This is a suit by Gillespie & Carlton in the county court against the Gulf, Colorado & Santa Fé Railway Company to recover damages for 2 mules killed and 27 others injured while being transported from Glen Flora to Navasota by defendant railway company. It is alleged that the loss and injury were occasioned by negligence of the railway company, and trial with a jury resulted in a verdict for plaintiff for \$300 as the value of the two mules killed, and \$250 damages for injuries to the others. From the judgment upon this verdict, its motion for a new trial having been overruled, defendant prosecutes this appeal.

Appellees had been working at Glen Flora as subcontractors under one Owens, who had a contract with appellant to grade its road-bed. Their contract with Owens required him, when they had finished the work upon which they were engaged, to transport, or have transported, their outfit, consisting of 29 mules, wagons, scrapers, etc., to Navasota, free of charge to appellees. When they had finished their work, they applied to appellant's agent at Glen Flora for a car in which to transport their outfit to Navasota, which was furnished them. They loaded the stuff, and it was billed to Navasota in Owens' name, and upon arrival there was delivered to them. They paid nothing for the transportation. There is no evidence that they practiced any deception upon the agent in order to procure the free transportation, or that the agent did not know all about the ownership of the property. The evidence excludes any loss from misrepresentation or fraud on the part of appellees. That they paid no freight to appellant for the carriage of the mules is no defense to their claim for damages here set up. The fourth assignment of error presenting this objection to the judgment is without merit.

By the first assignment of error appellant assails the action of the court in refusing its motion for a new trial on the ground therein urged that the evidence did not authorize the submission to the jury of the issue of damage to the 27 mules. The following is all the evidence on this point:

James Gillespie, one of the plaintiffs, testified: "The mules were shipped to Navasota, Grimes county, Tex., over the Santa Fé Road, and were in good condition and sound when received by defendant for shipment, 29 head. The 27 mules were badly injured, bruised, and skinned on heads, legs, and hips; one badly skinned from his hip down. The 27 head of mules were unable to work, on account of their injuries received, for nearly three weeks, and I lost the use of them for that time, and had to buy feed and care for them for nearly three weeks."

Lee Hudlin, for plaintiff, testified: "I went on the same train but not in the car with the mules. At Bellville the train was switched around, bumped and jerked the mules, and beat them up. I went out to see about them one time. One mule was down. I got him up; another had his leg sticking out through a crack or door in the car."

Ben Deason, for plaintiff, testified: "I saw the gray mule with his leg broken. He was about 15½ or 15 hands high—a big mule. I don't know the market value of mules. I went to see the mules to take him out to my pasture, but he was too badly hurt to move."

The measure of damages for the injuries to these mules is the difference between their market value at Navasota at the time of delivery in the condition they were in and what would have been their market value at the same time and place in the condition in which they would have been if they had been transported without negligence on the part of appellant. This is the general rule, and it does not affect its application that the mules were to be kept for use and were not for sale. *G. & S. F. Ry. Co. v. Stanley*, 89 Tex. 44, 33 S. W. 109; *Ry. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292; *Railway v. White*, 35 Tex. Civ. App. 522, 80 S. W. 641; *Railway v. Thompson* (Tex. Civ. App.) 44 S. W. 9. The jury could not apply this rule without some evidence as to this market value. The evidence quoted above, which is all there is on the subject, was not sufficient to authorize the submission of this issue.

Upon the issue of damages for the loss of the two mules, the measure of damages was their market value at Navasota at the date of the delivery there. Appellees undertook to establish this by the testimony of appellee Gillespie and T. D. Williamson. After Gillespie had testified that the value of the mules was \$200 each, and after the testimony had closed and plaintiff had concluded his opening argument to the jury, appellant moved the court to strike out Gillespie's testimony on the ground that he had not qualified himself to testify as to the market value of the mules in Navasota. This motion was refused, and appellant took a bill of exceptions, and complains of the ruling in the fifth assignment of error. The objection to the testimony came too late. It should have been made as soon as it developed that the witness was not qualified to speak. No excuse is shown for not making the objection more promptly. The assignment is overruled. *Maverick v. Maury*, 79 Tex. 441, 15 S. W. 686. This testimony authorized the submission of this issue to the jury, and there was no error in overruling the motion for a new trial on the ground that there was no evidence of the market value of these two mules. This disposes of the second and third assignments of error.

The witness Williamson, for appellee, as to the value of the two mules, testified in

chier that he knew the market value of the mules as described by plaintiff, in Navasota, and that their market value was \$300 to \$400. Upon cross-examination he then testified that he had not bought nor sold any mules in Navasota in 1905 or 1906; that he had not seen any mules sold there during that time, and was not advised as to the market quotations of mules at that time and place, and that the only knowledge of such value that he had was what one man had told him, who came out to where he lived to buy mules. Appellant promptly moved to strike out the testimony of the witness as to the market value of the mules, which the court refused to do, and allowed the testimony to go to the jury, to which appellant excepted. Clearly the witness showed that he had no knowledge of the matter about which he had testified, and the evidence ought to have been stricken out. The sixth assignment of error presenting the question must be sustained.

There being no other evidence as to the market value of the two mules, except that of appellee Gillespie, we cannot say that the testimony of Williamson was not prejudicial to appellant. It was no objection to Williamson's testimony that he had never seen these two mules. If he had been otherwise qualified to speak, he might have testified as to the market value of such mules as were described to him. It follows from what we have said that the measure of damages as to the injured mules was properly stated in the special charge requested by appellant and refused, the refusal of which is made the basis of the tenth assignment of error, and that the charge of the court on this point, as set out in the eighth assignment of error, was erroneous.

There was no error in the charge of the court in the particulars pointed out in the seventh assignment of error, which is overruled.

For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

RAINEY v. KEMP.

(Court of Civil Appeals of Texas. March 19, 1909.)

1. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

The error in admitting immaterial evidence not influencing the verdict is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

2. JUSTICES OF THE PEACE (§ 86*)—WRONGFUL ATTACHMENT—EVIDENCE.

In an action for wrongful attachment sued out of justice court, under which a stock of merchandise was seized and detained and plaintiff's

tions of the officer making the levy are immaterial.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 294; Dec. Dig. § 86.*]

3. JUSTICES OF THE PEACE (§ 135*)—WRONGFUL LEVY—EVIDENCE.

In an action for wrongful levy of execution sued out of justice court, under which a stock of merchandise was seized, the intentions of the officer making the levy are immaterial.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 447; Dec. Dig. § 135.*]

4. WITNESSES (§ 331½*) — IMPEACHMENT — COMPETENCY OF EVIDENCE.

Where, in an action for wrongful attachment and execution under which a stock of merchandise was seized, plaintiff testified as to his rating in a commercial agency, the report of the agency was admissible as impeaching evidence.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 331½.*]

5. JUSTICES OF THE PEACE (§ 86*)—WRONGFUL ATTACHMENT—EVIDENCE.

In an action for wrongful attachment plaintiff may show the falsity of the grounds stated in the affidavit of attachment, and that there was no probable cause to believe them true, and he may introduce the affidavit though made by an agent.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 294; Dec. Dig. § 86.*]

6. PRINCIPAL AND AGENT (§ 121*)—SCOPE OF AGENCY—EVIDENCE.

The testimony of an agent in an action by a third person against the principal as to the extent of his agency is admissible on such issue.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 413-415; Dec. Dig. § 121.*]

7. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action for wrongful attachment, the evidence showed that the only bond for the attachment was the one signed by defendant's wife, and that he ratified it by seeking to foreclose the attachment, an instruction that defendant's wife was not the agent of defendant unless she was expressly authorized was not prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

8. JUSTICES OF THE PEACE (§ 130*)—JUDGMENT—CONCLUSIVENESS.

A judgment of a justice court quashing an attachment on the ground that no affidavit or bond was made before issuance or levy is conclusive of those facts as against plaintiff therein accepting the judgment, and he cannot, when sued for wrongful attachment, question the facts.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 130.*]

9. ATTACHMENT (§ 375*)—WRONGFUL ATTACHMENT—DAMAGES.

The measure of damages for wrongful attachment under which a stock of merchandise was seized and detained for a time was the difference between the cash market value at the time of the seizure and the reasonable market value at the time the attachment was quashed and legal interest on the value of the stock during the detention.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1378; Dec. Dig. § 375.*]

10. ATTACHMENT (§ 375*)—WRONGFUL ATTACHMENT—DAMAGES.

In an action for wrongful attachment, depreciation in value of the goods is an element of actual but not of exemplary damages.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 375.*]

11. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action for wrongful attachment, the jury found against plaintiff on the issue of exemplary damages, the error in an instruction that depreciation in the value of the goods was an element of exemplary damages was not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. § 1068.*]

12. TRIAL (§ 194*)—INSTRUCTIONS—PROVINCE OF JURY.

An instruction which collates the evidence presented as a defense and directs the attention of the jury to the same is erroneous as impressing the jury with the court's view of the importance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 441; Dec. Dig. § 194.*]

13. ATTACHMENT (§ 377*)—WRONGFUL ATTACHMENT—EXEMPLARY DAMAGES—ADVICE OF COUNSEL.

One sued for wrongful attachment is not relieved from liability for exemplary damages because he acted on the advice of counsel, unless he in good faith made a full disclosure of the facts within his knowledge.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1889; Dec. Dig. § 377.*]

Appeal from District Court, Matagorda County; Wells Thompson, Judge.

Action by J. H. Rainey against C. D. Kemp. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Holland & Krause, for appellant. Gaines & Corbett, for appellee.

REESE, J. J. H. Rainey sued C. D. Kemp in the district court to recover damages for the wrongful, unlawful, and malicious suing out by Kemp of a writ of attachment out of the justice court, under which his stock of merchandise was seized and detained by the officer and his place of business closed for about 35 days, and also for the wrongful and malicious suing out of an immediate execution out of the justice court upon a judgment in the same case, the writ of attachment having been quashed, and the seizure of his stock of merchandise thereunder. Damages, both actual and exemplary, were claimed in the aggregate sum of over \$10,000. Upon trial with a jury there was a verdict for defendant, and from the judgment plaintiff appeals.

We are inclined to think that the constable, Showalter, should not have been allowed to testify, over the objection of appellant, that when he made the levy there was no more goods than sufficient to pay defendant's debt. The evidence was immaterial under the pleadings. The evidence, however, could not have influenced the verdict, and is not cause for reversal. We only pass

upon it in view of another trial. The objection is presented in the first assignment of error. The same may be said with reference to the testimony of the same witness that he had no intention to injure appellant in making the levy, as set out in the second and third assignments. The constable's intentions or motives were matters of no concern. We call attention to what has been said by the Supreme Court in *Ross v. Kornrumpf*, 64 Tex. 395, 396, that in a case like the present, where each party had produced evidence sufficient to establish his side of the question upon this issue, "a feather's weight of illegal testimony must not be thrown into the scales to turn them in favor of either of the litigants."

There was no error in the admission in evidence of the report of R. G. Dun & Co. Mercantile Agency, to show appellant's commercial rating, under the facts of this case. Appellant had testified as to his rating in Dun's Agency, and the report was admissible to contradict him. The eighth and ninth assignments of error presenting the question are overruled.

The affidavit of attachment made by Browning as agent of appellee was admissible to show the grounds upon which the attachment was sued out. There was evidence which tended to show that it was upon this affidavit the attachment was predicated, and that, even if it was not made until after the writ of attachment issued and was levied, appellee pressed the attachment and secured a judgment foreclosing the same, which was afterwards set aside and the attachment quashed on the ground that it was issued and levied before the affidavit was made. Nevertheless, upon the issue of whether the attachment was sued out without probable cause, appellant had the right to show the falsity of the grounds stated in this affidavit, and that there was no probable cause to believe them true. In connection with this, he had a right to introduce the affidavit as showing the grounds upon which appellant was seeking the benefit of the attachment, and it was error to exclude the affidavit. The twelfth assignment of error presenting the question is sustained.

The giving of the special charge numbered 14, referred to in the twenty-second assignment, wherein the jury was instructed not to consider the declarations of Browning as to the extent of the authority given him by Kemp, was error. This was not a case of proof of agency by the declarations of the agent to a third person, but the testimony of the agent himself as to the extent of his agency, and was admissible, and entitled to consideration for that purpose. Browning testified positively that he was appellee's agent and authorized to make the affidavit in the protection of his interest, and this state-

among the papers to which the name of appellee appears to have been signed by his wife, and that appellee ratified her acts by adopting the attachment and seeking to have the same foreclosed, it was error to give the special charge that Mrs. Kemp was not the agent of Kemp unless she was expressly authorized. We do not see how this could have prejudiced appellant. It would have rather tended to the conclusion that there was no valid bond given for the attachment.

As we view the case, the judgment of the justice court quashing the attachment on the ground that no affidavit nor bond was made before its issuance or levy was conclusive of that fact. Appellee accepted that judgment, and should not be heard now to question the facts upon which it was based. The court, however, submitted these issues to the jury, and no objection is made by appellant to the charge on this ground.

The court erred in that portion of its charge to the jury wherein they were instructed that the measure of damages was the difference between the reasonable cash market value of the goods at the time of the levy and the reasonable market cash value at the time the attachment was quashed, and 6 per cent. on said sum. The jury must have understood that in estimating the damages, if any, the 6 per cent. was to be computed upon the difference in value, and not upon the value, the true measure being legal interest upon the value of the goods during the time they were detained by the officer under the illegal process. *Davidson v. Oberthier*, 42 Tex. Civ. App. 337, 93 S. W. 478; *Willis v. Whitsitt*, 67 Tex. 673, 4 S. W. 253. Appellant requested an instruction upon this point which properly presented the law, but which was refused. It cannot be said that it must be concluded that the jury found against the appellant upon the issue of the wrongful or unlawful issuance of the attachment, and hence the error was harmless. The jury may have found that the attachment was wrongful, but that there was no deterioration in value of the goods, and hence no amount upon which interest was to be computed under the charge. If properly instructed on this point, they might have found for appellant, and allowed him interest at the legal rate on the value of the goods while detained, which, although an insignificant amount in itself, would have entitled appellant to recover also the costs. The thirteenth and fourteenth assignments of error on which this question is presented must be sustained. This also sufficiently disposes of the eighteenth assignment of error.

appellant on the issue of exemplary damages, that this error would not be ground for reversal.

It was error to give the charge requested by appellee wherein the jury was instructed that they might take into consideration, on the issue of appellant's right to recover exemplary damages, the statements made by Shelton, the act of appellant in attempting to sell his stock to O'Connell and others, and also his acts in delivering to the Houston Drug Company certain drugs in payment of his account, and in offering to turn over to his drug store creditors his stock of drugs in settlement of his accounts. In this requested charge appellee collated about all of his evidence interposed as a defense to the claim for exemplary damages, and endeavored to direct the attention of the jury thereto in a most emphatic manner. This could not but have had the effect of impressing the jury with the court's view of the importance and weight of this testimony, and was calculated to be very prejudicial to appellant. *Dupree v. T. & P. Ry. Co.* (Tex. Civ. App.) 96 S. W. 647.

The jury should not have been instructed, as was done in special charge given at the request of appellee, as to the effect upon the liability of appellee for exemplary damages of his having acted upon the advice of counsel, without coupling with the same the condition that he had in good faith made a full and free disclosure of all the facts within his knowledge. If appellee had disclosed to his attorneys that his information came from Shelton alone, and also the reputation of his informant, as testified by himself, it can hardly be supposed that he would have been advised to act upon this alone.

We are inclined to think that the errors indicated entitled appellant to a new trial, and that the judgment should be reversed and the cause remanded, and it is so ordered.

STROTTER et al. v. BRACKENRIDGE.
(Court of Civil Appeals of Texas. May 27, 1908.)

1. HUSBAND AND WIFE (§ 133*)—WIFE'S SEPARATE ESTATE — ACTION FOR MONEY FURNISHED FOR IMPROVEMENTS—EVIDENCE.

Evidence held to show that money lent a husband and wife was not used for the improvement or benefit of the wife's separate property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 487; Dec. Dig. § 133.*]

2. HUSBAND AND WIFE (§ 150*) — ACTIONS AGAINST WIFE—MONEY FURNISHED FOR IMPROVEMENT OF SEPARATE ESTATE.

To hold a married woman liable upon a contract under Rev. St. 1895, art. 2970, pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

viding that a wife may contract debts for expenses incurred for the benefit of her separate property, etc., it must be shown that some improvement has been made upon or labor furnished for the purpose of utilizing her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 575-581; Dec. Dig. § 150.*]

Appeal from Travis County Court; John W. Hornsby, Judge.

Action by R. J. Brackenridge against H. W. Stroter and wife. Judgment for plaintiff, and defendants appeal. Affirmed as to the mentioned defendant, and reversed and rendered as to the feme defendant.

See, also, 118 S. W. 634.

D. W. Doom and D. H. Doom, for appellants. N. A. Rector, for appellee.

KEY, J. R. J. Brackenridge brought this suit against H. W. Stroter and his wife, Minnie Stroter, seeking to recover upon a written obligation for \$160, with interest and attorney's fees. The case originated in a justice of the peace court, but was appealed to and finally tried in the county court. H. W. Stroter seems to have made no defense, but Mrs. Stroter pleaded her coverture as a defense. The plaintiff sought to hold Mrs. Stroter liable upon the theory that the contract was for the benefit of her separate property. The county court sustained that contention and rendered judgment against both defendants, authorizing execution to be levied upon either community property of the defendants or separate property of Mrs. Stroter. The defendants have appealed and present the case in this court upon several assignments of error, all of which relate to the liability of Mrs. Stroter.

The undisputed testimony shows that a tract of land was conveyed to Mrs. Stroter for a recited consideration of \$500 in cash and a vendor's lien note for \$300, signed by Mrs. Stroter and her husband. The deed also recites that the property is conveyed to Mrs. Stroter as her separate estate, but it does not show that the cash consideration paid was her separate property. Thereafter the plaintiff, Brackenridge, loaned Stroter and his wife \$100, and received from them a written contract, the pertinent terms of which are as follows:

"(1) That the said R. J. Brackenridge, party of the first part, agrees, at the request of the said parties of the second part, to furnish them, at their fair cash value, the labor and materials necessary to be used in constructing the following improvements, viz.: A three-strand wire fence on the south line of a 165-acre tract with posts at the intervals of a rod (16½ feet) apart, the corner posts to be well braced, on the homestead of said parties of the second part, consisting of 165 acres, situated in the county of Travis, in the state of Texas, and more particularly

described as follows: Known as the Henkel's tract of land a part of the Wilkinson Sparks one quarter league situated on the west side of the Colorado river about three miles from the city of Austin. (2) That the said H. W. Stroter and his wife Minnie Stroter, parties of the second part, in consideration of said labor and materials being so furnished, agree to pay the reasonable cash value of the labor and materials so used in constructing said improvements on their said homestead, amount to (\$160) one hundred and sixty dollars, to the said party of the first part, on or before the 21st day of June, A. D. 1903, at Austin, in Travis county, Texas, with interest thereon at the rate of ten per cent. per annum from date until paid; and if an attorney is employed to collect the same, after maturity, an additional ten per cent. on the amount to be collected for attorney's fees; and the said party of the first part is hereby declared to have a mechanic's lien on the improvements so made and the said one hundred and sixty-five acres upon which the same are situated, to secure the payment of the money to become due for said labor and materials, as herein specified; and the said parties of the second part hereby agree to keep, at their own expense, the said improvements insured against fire, for the benefit of said party of the first part, as his interest may appear, and upon their failure so to do said party of the first part may so insure said improvements, the expense of such insurance to be and become a part of the indebtedness secured by the mechanic's lien aforesaid. Witness our hands, this the day and year first above written. [Signed] H. W. Stroter. Minnie Stroter.

"\$160. Received, Austin, Texas, June 21, 1902, of R. J. Brackenridge for labor and materials used in constructing improvements in accordance with the foregoing contract, amounting to one hundred and sixty dollars, in consideration of which we, or either of us, promise to pay to R. J. Brackenridge or order, on or before the ——— day of June, A. D. 1903, at Austin, in Travis county, Texas, the sum of one hundred and sixty dollars, with interest thereon at the rate of ——— per cent. per annum from date until paid; and if an attorney is employed to collect the same after maturity, an additional ten per cent. on the amount to be collected for attorney's fees; and to secure the payment of which the said R. J. Brackenridge is hereby declared to have a mechanic's lien on our homestead, as prescribed and provided for in the foregoing contract, until paid. [Signed] H. W. Stroter. Minnie Stroter."

The land referred to in the contract is the same land that was conveyed to Mrs. Stroter by the deed above referred to. Thereafter the plaintiff, Brackenridge, bought the vendor's lien note referred to in that deed, pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the contract were not made. The plaintiff testified that when he let H. W. Stroter have the \$160, which he loaned him, Stroter said that he intended to use it to make the improvements referred to in the contract, and that such improvements were necessary to protect the property. It was also shown that Mrs. Stroter was not present on the occasion referred to, and she objected to the plaintiff's testifying as to what her husband had said in reference to the matter. It was shown that Mrs. Stroter was a married woman at the time that the land was conveyed to her and at the time of the making of the contract upon which the suit was brought and continuously since then.

Without deciding other questions presented, we sustain appellants' fourth proposition under the second and third assignments of error, to the effect that the money loaned by the plaintiff to the defendants was not used for the improvement or benefit of the land referred to in the contract, or of any other separate property of Mrs. Stroter. The power of a married woman to bind herself by contract is regulated by article 2970 of the Revised Statutes of 1895, which reads: "The wife may contract debts for necessities furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property, and for such debts suit may be brought in the manner prescribed in article 1201." It is not pretended in this case that the contract was for necessities for Mrs. Stroter or her children; and it is clear, we think, that she is not liable under the remaining portion of the statute, because the proof fails to show that any expense was incurred for the improvement of the property alleged by the plaintiff to be the separate estate of Mrs. Stroter. In order to hold a married woman liable upon a contract under the latter clause of the statute, it must be shown that some improvement has been made upon or labor furnished for the purpose of utilizing her separate property. If it be conceded that the land referred to in the contract was Mrs. Stroter's separate property, the proof entirely fails to show that any improvement was made thereon by the plaintiff, or anything done by him which resulted in a benefit to that property. The most that can be said in behalf of the plaintiff is that he loaned the defendants \$160, and that Mr. Stroter, in the absence of Mrs. Stroter, promised to use the money for the benefit of her separate estate and failed to keep that promise. Such state of facts falls short of bringing the case within the purview of article 2970.

Affirmed in part, and in part reversed and rendered.

STROTER et al. v. BRACKENRIDGE.

(Supreme Court of Texas. March 31, 1909.)

HUSBAND AND WIFE (§ 138*)—CONTRACTS FOR BENEFIT OF WIFE'S SEPARATE ESTATE.

To render a wife personally liable for money lent, under Rev. St. 1895, art. 2970, providing that a wife may contract debts for all expenses incurred by her for the benefit of her separate property, she must herself have contracted the debt for which suit is brought, and her husband as such cannot bind her personally for debts contracted by him, though for the benefit of her separate estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 529; Dec. Dig. § 138.*]

Certified Question from Court of Civil Appeals of Third Supreme Judicial District.

Action by R. J. Brackenridge against H. W. Stroter and wife. From a judgment for plaintiff, defendants appealed to the Court of Civil Appeals (118 S. W. 632). On certified question.

D. W. Doom and D. H. Doom, for appellants. N. A. Rector, for appellee.

BROWN, J. This is a certified question from the Court of Civil Appeals of the Third Supreme Judicial District. The statement and question are as follows:

"As shown by copy of opinion hereto attached, this court has heretofore reversed and rendered this case, holding that the appellant Mrs. Stroter was not bound by the written contract signed by her, because of the fact that she was a married woman when she signed the same. Our opinion sets up all the material facts, except that it fails to show, as does the record, that the fence referred to in the contract was a reasonable and proper improvement upon the land. In the opinion referred to it was not our intention to say that Mrs. Stroter or Brackenridge had no notice of the purpose for which the money was borrowed. However, the record shows that the former had such notice only as was disclosed by the written contract. The case is now pending in this court on motion for rehearing. In considering that motion we have agreed to and do hold that the land referred to in the contract was, at the time the contract was made, the separate property of Mrs. Stroter. The other question, and the one upon which this court decided the case, is material and, as the case is not appealable to the Supreme Court, and the question referred to is one of practical importance, we have decided to certify it for decision.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"With the foregoing statement and explanation, the Court of Civil Appeals certifies to the Supreme Court for decision the specific question: Did this court rule correctly in holding that the facts set out in our opinion, with the additional facts herein stated, fall to bring the case within the purview of article 2970 of the Revised Statutes of 1895 of this state, and therefore that Mrs. Stroter could not be held liable upon the contract referred to?"

The warrant for Mrs. Stroter's personal liability must be found in the following article of the Revised Statutes of 1895: "Art. 2970. The wife may contract debts for necessities furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property, and for such debts suit may be brought in the manner prescribed in article 1201." To render Mrs. Stroter personally liable, she must have contracted the debt for which the suit is brought for the benefit of her separate property. The husband as such cannot bind her personally for debts contracted by him even for the benefit of her separate estate. If he be authorized by her to make such contract so as to become her agent, then she might be bound for the debt so contracted. *Magee v. White*, 23 Tex. 189; *Sorrell v. Clayton*, 42 Tex. 188. Mrs. Stroter joined in the contract, which was made in writing with Brackenridge, by which the latter was to furnish "at their fair cash value the labor and materials necessary to be used in constructing the following improvements:" Here follows a description of the fence which was to be built around the tract of land, the separate property of the wife. Mrs. Stroter and her husband also signed a paper in the form of a receipt and note by which the receipt of \$160 was acknowledged which was to be applied to the making of a fence around the land. It contained a promise to repay the money and also gave a lien upon the homestead of Stroter and his wife. Brackenridge's testimony shows that he agreed to lend \$160 to Stroter, who promised him that he would place the improvements upon the land and pay for them with the money furnished by Brackenridge. Mrs. Stroter was not present when this transaction occurred, and it is not shown by the evidence that she knew anything of such an agreement on the part of her husband, except what appears in the papers. In closing up the opinion in this case, the Court of Civil Appeals uses this language: "The most that can be said in behalf of the plaintiff (Brackenridge) is that he loaned the defendants \$160, and that Stroter, in the absence of his wife, promised to use the money for the benefit of her separate estate and failed to keep that promise. Such state of facts falls short of bringing the case within the purview of article 2970."

We are of opinion that the Court of Civil Appeals reached the right conclusion in this case from the facts as presented, and that that court did not err in reversing and rendering the judgment herein.

GRIFFIN v. TUCKER, County Attorney.

(Supreme Court of Texas. April 28, 1909.)

1. INTOXICATING LIQUORS (§ 36*)—LOCAL OPTION ELECTION—DECLARATION OF RESULT.

It being the duty of the commissioners' court, under the statute, to simply count the votes cast at a local option election and declare the result of such count, the part of its order declaring the election void is ineffectual, and the part declaring that, if such court has no power to declare the election void then it declares its result to be against prohibition, is a sufficient performance of its duty.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 43; Dec. Dig. § 36.*]

2. INTOXICATING LIQUORS (§ 30*)—LOCAL OPTION ELECTION—COMMISSIONERS' AND JUSTICES' PRECINCTS.

Even if, under Const. art. 16, § 20, requiring the Legislature to enact a law whereby the voters of a county, justice's precinct, town, city, or such subdivision of a county as may be designated by the commissioners' court, may determine whether sale of intoxicating liquors shall be prohibited within the prescribed limits, the commissioners' court may not, for the mere purpose of a local option election, combine several subdivisions of a county having no connection for any other purpose, yet it may order an election in a commissioners' precinct, having lawful existence for other purposes, though such precinct contain several justices' precincts.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 30.*]

3. INTOXICATING LIQUORS (§ 30*)—LOCAL OPTION ELECTIONS—CONSTITUTIONAL PROVISION—"FROM TIME TO TIME."

The words "from time to time," in Const. art. 16, § 20, providing that the Legislature shall enact a law whereby the voters of a county, justice's precinct, town, city, or such subdivision of a county as may be designated by the commissioners' court may determine "from time to time" whether the sale of intoxicating liquors shall be prohibited "within the prescribed limits," do not prevent the Legislature from authorizing such an election in a subdivision of the county in part of which local option is in force, and in part of which it is not in force.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 30.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 2991; vol. 8, p. 7067.]

4. INTOXICATING LIQUORS (§ 31*)—LOCAL OPTION—SUCCESSIVE ELECTIONS—COMMISSIONERS' AND JUSTICES' PRECINCTS.

Under Rev. St. 1895, art. 3384, as amended by Laws 1897, c. 235, c. 162, authorizing the commissioners' courts to order local option elections in counties, commissioners' precincts, justices' precincts, towns, and cities "whenever" the courts may deem it expedient, and requiring them to order such elections "when" petitioned as prescribed, such an election may be held in a commissioners' precinct whenever ordered, though local option is in force in a justice's precinct forming part of it, and not in the rest of it; it not being inhibited by article 3393, as amended by Laws 1905, p. 378, c. 158, providing that, after an election has been held as directed, no other shall be held within two years

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 31.*]

5. INTOXICATING LIQUORS (§ 40*)—LOCAL OPTION ELECTIONS—COMMISSIONERS' AND JUSTICES' PRECINCTS.

Where a local option election, resulting in the declaring of prohibition, has been had in a justice's precinct, a subsequent election in a commissioners' precinct, embracing the justice's precinct, resulting in a declaration against prohibition, will not affect the status as to prohibition in the justice's precinct.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 40.*]

6. INTOXICATING LIQUORS (§ 34*)—LOCAL OPTION ELECTION—BALLOTS.

In a local option election, ballots reading "For Local Option" and "Against Local Option" are not to be counted, but only those reading "For Prohibition" and "Against Prohibition."

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 34.*]

7. COURTS (§ 89*)—LOCAL OPTION ELECTIONS—CONSTRUCTION OF STATUTES.

As far as statutes affect a contest of a local option election, the Supreme Court will put its own construction on them, and not follow that of the Court of Criminal Appeals.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 89.*]

Certified Questions from Court of Civil Appeals of First Supreme Judicial District.

Proceeding by J. W. Griffin against H. B. Tucker, county attorney, to contest an election as to sale of intoxicating liquors. The decision was against Griffin, and he appealed to the Court of Civil Appeals, which certifies questions to the Supreme Court. Questions answered.

Marshall & Marshall, for appellant. George J. Clough, for appellee.

WILLIAMS, J. Certified questions from the Court of Civil Appeals for the First District as follows:

"Because our conclusions of law in the above-styled cause pending in this court on motion for rehearing are apparently in conflict with the opinions of the Court of Criminal Appeals in the cases of *Ex parte Heyman*, 45 Tex. Cr. R. 532, 78 S. W. 349, *Ex parte Mills*, 46 Tex. Cr. R. 224, 79 S. W. 555, and *Ex parte Randall*, 50 Tex. Cr. R. 519, 98 S. W. 870, and because of the importance to the public of a correct determination of the questions presented, we think it proper to certify for your decision the questions hereinafter propounded. This proceeding was instituted by appellant to contest the declared result of an election held in commissioners' precinct No. 3 of Liberty county on July 27, 1907, to determine whether intoxicating liquor should be sold in said precinct. Said commissioner's precinct No. 3 is composed of justices' precincts Nos. 3 and 6. At the

election to determine the question of whether intoxicating liquor should be sold therein had been held in either of said precincts within two years preceding the order for said election in commissioners' precinct No. 3. The ballots used at this election were ordered by the county judge of Liberty county, and sent by him to the election officers at the several voting boxes in said precinct, and were furnished the voters by said officers as provided in the general election law. These ballots had printed thereon the following: 'For Local Option' and 'Against Local Option.' No other ballots were used at said election, but a number of the voters erased the words 'For Local Option' and 'Against Local Option,' and wrote thereon 'For Prohibition' or 'Against Prohibition,' in accordance with their views upon the question submitted in the call for the election. Many of the voters, however, used the ballots as printed and voted 'For Local Option' or 'Against Local Option.' If all of the ballots are counted, those reading 'For Local Option' and 'For Prohibition' exceed in number those reading 'Against Local Option' and 'Against Prohibition.' The number of ballots 'Against Prohibition' exceeds the number 'For Prohibition.'

"The commissioners' court at a meeting held on August 7th for the purpose of opening the returns, counting the votes and declaring the result of said election, made the following order: 'Commissioners' court met in special session August 7, 1907, for the purpose of opening the polls and counting the votes of a local option election, or an election to determine whether the sale of intoxicating liquors should be prohibited in commissioners' precinct No. 3, Liberty county, Tex., said election being held on the 27th day of July, 1907. Commissioners present were: (naming them.) After opening the polls, counting the votes, and thoroughly canvassing the returns, it is ordered that inasmuch as this court is unable, by reason of irregularities in the ballots and returns, to determine the true expression of the voters in said election, that said election be and the same is hereby declared void and of no effect and that this court declare neither "For Prohibition" nor "Against Prohibition." To this order I. B. Simmons, county judge, very respectfully protests. It is further ordered in the alternative that in case the above order cannot be made effective because of lack of power or jurisdiction in this court to declare said election void that the result of said election be and the same is hereby declared "Against Prohibition."

"Upon a hearing of appellant's contest the court below held that the election was void

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

we respectfully certify for your decision the following questions:

"(1) Is the order of the commissioners' court above set out a sufficient declaration of the result of said election to authorize the district court to entertain a proceeding brought to contest same under the provisions of the statute relating to election contests?"

"If this question is answered in the affirmative, we ask:

"(2) Did the commissioners have authority to order a local option election for said commissioners' precinct?"

"If this question be answered in the affirmative, then we ask:

"(3) Was the use of the ballots above described such an irregularity as requires or authorizes the holding that the election was void and ordering a new election as provided by article 3397, Sayles' Statutes?"

"If the third question be answered in the negative, then we ask:

"(4) Should the ballots reading 'For Local Option' and those reading 'Against Local Option' be counted?"

From the opinion of the Court of Civil Appeals accompanying the certificate it appears that all the questions have been decided by that court—the first three in the affirmative and the fourth in the negative. Nothing is said in the opinion upon the first question, but the affirmative decision of it was necessarily involved in the action taken by the court. We are of the opinion that all of the questions were rightly decided, and we deem it unnecessary to say more except upon the first and second. As to the first, it needs only to be said that the statute does not intrust to the commissioners' court the power to set aside an election. It is made the duty of that court simply to count the votes, and declare the result of such count, which the court in this instance did. The part of the order declaring the election to be void must be treated as ineffectual, and its declaration of the result of the count must be taken as the performance of its statutory duty.

The answer to the second question involves a review of the decisions of the Court of Criminal Appeals, respect for which, as well as the importance of the question itself, demands more extended discussion. It seems to be contended in this case upon the authority of two propositions affirmed in the decisions of the Court of Criminal Appeals that the holding of the election in the commissioners' precinct composed, as it was, of the two judges' precincts, was unauthorized and void. The first of these propositions is laid down in *Ex parte Heyman*, 45 Tex. Cr. R. 532, 78 S. W. 349, and *Ex parte Mills*, 46 Tex. Cr. R. 224, 79 S. W. 555, referred

together two or more justices' precincts, and that the statute attempting to give to the commissioners' court authority so to compose local option districts is unconstitutional. But the reason given by the court for this holding is that the reference in the constitutional provision to such subdivisions of a county as might be "designated" by the commissioners' court under legislative authority is to political subdivisions existing for other purposes, and not to new ones to be created by the court for local option purposes alone. The reasoning does not apply to commissioners' precincts, although they may be composed of part or all of the territory also embraced within two or more justices' precincts. Commissioners' precincts have lawful existence apart from any designation that may be made of them as local option districts, and consistently with the decisions referred to may be "designated" for such elections. A provision of the statute expressly authorizes such designation, and its validity is unaffected by those decisions. Hence it cannot be admitted that a local option election in a commissioner's precinct is excluded by the mere fact that it contains two or more justices' precincts. No question as to the correctness of the doctrine above stated is presented by the facts of this case. But there is another doctrine laid down in the case of *Ex parte Randall*, 50 Tex. Cr. R. 519, 98 S. W. 870, and perhaps in the others just cited, which, if correct, condemns as unlawful the election now in question. That doctrine is that no valid election can be held in any subdivision of a county unless at the time it is ordered the status of all the territory which it contains is the same in respect of the operation of the prohibitory law; that, if that law is in force in part and not in force in other parts of the territory so contained, no election can be held in the containing subdivision until that law has been repealed by the voters in that part in which it has been put in force. The situation to which this doctrine applies existed in this case when the election was held and the question as to the validity of that election cannot be determined without affirming or denying the proposition stated. The opinions of the majority of the court in the cases referred to (from which Mr. Justice Brooks dissented) seem to rest both upon the constitutional provision (article 16, § 20) and upon the statute. It is necessary, therefore, that we consider both.

The constitutional provision is as follows: "The Legislature shall at its first session enact a law whereby the qualified voters of any county, justice's precinct, town, city (or such subdivision of a county as may be designated by the commissioners' court of

we deem it best to condense rather than copy them. Article 3384, Rev. St. 1895, as amended by Laws 1897, p. 235, c. 162, authorizes the commissioners' courts to order elections in counties, commissioners' precincts, justices' precincts, school districts, towns, and cities, whenever the courts may deem it expedient, and requires them to order such elections when petitioned as prescribed. It further provides (1) an election shall not be denied to a city, town, or school district composed of two or more of the named subdivisions; (2) that no town or city shall be divided in holding an election in another subdivision; and (3) that no school district which has adopted local option shall be divided in a subsequent election for another subdivision, covering a part of its territory. The last three provisions have no application to the present question. Article 3393 as amended in 1905 (Laws 1905, p. 378, c. 158) provides that, after an election has been held as directed, no other shall be held within two years "within the same prescribed limits," but that after that time the commissioners' court may, when deemed expedient, and shall when petitioned as provided, order another election for the county, justice's precinct, or such subdivision of a county as may be designated by the court for the same purpose; that the election shall be ordered to be held, notice given, votes returned and counted, result declared and published, in all respects as provided for the first election; and that the proceedings, if prohibition be carried, shall have the same force and effect and the same conclusiveness as are given to them in case of the first election. By article 3394 it is provided that, when "such second election" results against prohibition, an order shall be entered setting aside the previous one enforcing prohibition, and an official announcement and publication shall be made. Article 3395 prescribes these rules: (1) Failure to carry prohibition in a county shall not prevent an immediate election in a justice's precinct, designated subdivision of the county, town, or city. (2) Failure to carry in a town or city shall not prevent an election in the entire justice's precinct or county in which the town or city is situated. (3) The holding of an election in a justice's precinct shall not prevent an election in the county. (4) Where prohibition is carried for the entire county, no election can thereafter be held in any justice's precinct, town, or city of the county until after prohibition has been defeated in the county. (5) Where prohibition has carried in a justice's precinct, no election can be had in a town or city therein until after prohibition has been defeated in the precinct.

ed for that division "within the prescribed limits." No right is given to the voters of one subdivision to determine the question for another subdivision, or to limit the power of the voters in the other to determine the question "within its prescribed limits." The exercise of the right by one is not made dependent upon any decision which may have been made by another. But a county is cut up into precincts, districts, or other subdivisions for various purposes, and the same territory must, therefore, form all or a part of more than one of these. If the right be given to each to adopt or reject the prohibitory law as its voters may determine, how is the right of one to be made to consist with that of another? The Constitution contains no provision which answers the question, and it follows that the regulation of the subject is left to the Legislature. The Constitution, it is true, says that the law is so to provide that the voters may determine the question "from time to time," and this is what the Court of Criminal Appeals regarded as bearing upon the proposition under consideration; but we can see nothing in the provision which affects the plenary powers of the Legislature to regulate the holding of elections in different subdivisions. It implies that the determination of the question of prohibition in a county or a subdivision once made is not to be perpetually binding, and that provision shall be made whereby the voters therein shall have opportunity to vote upon it from time to time; but it prescribes no rule from which the effect of an election in one subdivision upon the right of the voters in another is to be determined. The framing of the law so that the right intended to be secured to the voters in the localities may be exercised is expressly committed to the Legislature, and we must look to the statutes in order to determine as to the validity of such elections as that in question.

Article 3384, before stated, provides for elections in counties, commissioners' precincts, justices' precincts, towns and cities. Provisions have been made by statute for other divisions, but these have been held to be unconstitutional by the Court of Criminal Appeals under the doctrine first above stated. We confine our attention to those divisions just mentioned to avoid complicating the discussion with other questions not involved in the case before us. The commissioners' court is empowered whenever it may deem it expedient, and is required when petitioned in the manner provided, to order an election in any one of these divisions. The power or the duty here defined to order an election in one is not limited by the fact

that an election has already been held in another, whether the other be a constituent part of the one or not. The court may act whenever it deems it expedient, and must act when petition is made in accordance with the provision. The courts are not authorized to put any limitation upon this provision unless it is expressed or clearly implied in some other part of the statute. It follows that an election may be held in a commissioners' precinct whenever ordered, unless there is something further in the statute to forbid. Perhaps the opinions of the majority of the Court of Criminal Appeals are founded principally on the provision of article 3393, which forbids a second election "within the same prescribed limits" in less than two years after a first has been held. It is in the assumption that this means that no election can be held in any subdivision which embraces another or part of another in which one has been held within two years that we believe the fallacy to exist. We think it clear from the language of the statute that it has no such meaning. The inhibition is against a second election "within the same prescribed limits"—i. e., the limits of the subdivision in which the first was held—and not within the different limits of another subdivision. Articles 3393 and 3394, dealing with second elections, refer all the time to elections in the same subdivision, and are intended to prescribe the conditions under which the voters may exercise the right to determine from time to time what shall be the rule therein. They prescribe no rule as to the effect of such elections upon the right given by article 3384 to the voters of other subdivisions to have elections within their limits. Besides that, the inhibition is only against an election within the same limits. The concluding provision of article 3393 gives to the second election, if prohibition has carried, only the same effect that was given to the first—that is, to establish the prohibition only in the same limits; while article 3394 makes a negative vote have only the effect of setting aside the order enforcing prohibition entered as the result of the first election. And no other effect is given to any election by these provisions. All this makes it clear to our minds that the inhibition against another election has reference only to those subdivisions wherein a first election has been held, and not to other and different ones. And it follows that there is in these articles no limitation upon the broad authority given by article 3384 for elections in commissioners' precincts whenever the prescribed conditions concur, resulting merely from the fact that an election has been held within two years in a part of the territory composing such precincts. Article 3395 does prescribe rules as to the consequences of elections in some of the subdivisions upon the right to hold them in other

ers, but contains nothing which militates against our views. The fact that it is not exhaustive and prescribes no rule such as is made with reference to the county as to the effect of an election in a subdivision partly composing a larger one (and this is the most that can be claimed for it) is probably due to the fact that it has not been amended as often as article 3384 and adjusted to the changes made in that article defining the different subdivisions which may be made local option districts. In the Randall Case it is said that the articles discussed do not authorize such elections as that in question, and it is true that article 3395 does not confer the authority. It is equally true that it does not deny or limit the authority as it is given without qualification in article 3384.

It is further argued, in effect, that the Constitution and the statute intends that the voters of each subdivision shall have the right to determine by their votes what the rule therein shall be; that, when once established, the rule cannot be repealed but by the votes in the same territory; and that, when an election has been held in a subdivision, it is set apart as a local option district, and cannot be used as part of the territory of any other such district less than the county. At least, this is our understanding of the theory. It is true that, when the prohibitory rule is put in force, it cannot be repealed or displaced except by the vote of the district which adopted it. It is quite as true that an election, however resulting, in a larger including subdivision has no such effect. If it result in the defeat of prohibition, the rule remains unaffected in the territory that had before adopted it. If it result in the adoption of prohibition, that rule is extended to the whole, where before it was in force only, in a part, of the territory. If the included territory has rejected prohibition, it is still the right, given by article 3384, of the voters of any lawful including subdivision to say whether or not the law shall be put in force therein, which means that the law shall be made to operate over every foot of the territory in which the election is held. So there is no conflict of rights. The theory that an election sets apart the district in which it has been held so that it can form no part of a larger district for election purposes or some other by which too frequent elections and some incidental confusion would have been avoided might have been a good one for the Legislature to have acted upon in devising a system; but we cannot see from the statutes that it has done so. The right of each subdivision is given by article 3384 in the same language, and this is inconsistent with the theory stated. In the right given to a subdivision is implied the power by adopting prohibition to put a rule in force whereby the sale of liquor shall be

made unlawful in every foot of its territory, and from this it results that no part of that territory can make the sale lawful in such part, since that would be inconsistent with the power of the larger so to establish the law throughout its extent. And this is not allowed to affect the right of an included subdivision to adopt the law for itself when it has been rejected by the including one. *Aaron v. State*, 34 Tex. Cr. R. 103, 29 S. W. 267. But we see nothing in the statute or the Constitution by force of which the right of a subdivision to have an election throughout its extent may be taken away by the action of part of its territory constituting a smaller one. If this may be done, it is apparent that it is in the power of smaller subdivisions included in larger ones to defeat the exercise of the right given to the latter, as may readily be shown by illustration. In some counties the commissioners' precincts are so laid off that their lines come to a common corner at the county seats, so that part of each is included in the county town and in the justice's precinct. These are made subdivisions for local option purposes, and are given the right to adopt or reject the law within their limits. Now, is it not apparent that, under this doctrine, the vote adopting the law in either of these included subdivisions destroys for the time at least the rights of the voters of each of the commissioners' precincts to hold any election to de-

termine the question for itself? The illustration might be extended by supposing other modes of subdividing the county. And, further, the same logic might make the vote of the towns exclude elections in justices' precincts. We discover nothing in the Constitution or the statute either declaring or implying such a rule.

Much more might be said upon the question, but we have sufficiently indicated the reasons which induce us reluctantly to disagree with the views of the majority of the Court of Criminal Appeals. The subject has been ably discussed in the opinions of Judge Hurt in *Aaron v. State*, supra, *Ex parte Brown*, 35 Tex. Cr. R. 443, 34 S. W. 131, and *Ex parte Fields*, 39 Tex. Cr. R. 50, 46 S. W. 1127, in the dissenting opinion of Mr. Justice Brooks in the *Heyman Case*, and in the opinions of the Courts of Civil Appeals in the cases of *Kimberley v. Morris*, 10 Tex. Civ. App. 592, 31 S. W. 809, and *Kidd v. Truett*, 28 Tex. Civ. App. 618, 68 S. W. 310, and in the present case.

Ordinarily this court follows the construction given to penal statutes by the Court of Criminal Appeals, since the enforcement of such statutes must be in accordance with such construction; but the decision of questions coming within the scope of cases of contested elections is intrusted to the civil courts, and must be in accordance with their own construction of the controlling constitutional and statutory provisions.

BLAKE v. THIRD NAT. BANK OF ST. LOUIS.

(Supreme Court of Missouri. April 13, 1909.
Rehearing Denied May 1, 1909.)

1. PARTNERSHIP (§ 181*)—PAYMENT OF INDIVIDUAL DEBT WITH PARTNERSHIP ASSETS.

A partner cannot apply assets of the firm to his individual debt, and the creditor acquires no title as against the firm, irrespective of whether he knows it is its property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 316; Dec. Dig. § 181.*]

2. BANKS AND BANKING (§ 102*)—AUTHORITY OF AGENT.

The manager of a private bank conducted by a partnership is without authority to bind it by the payment of the individual debt of a partner out of firm assets.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 239; Dec. Dig. § 102.*]

3. PARTNERSHIP (§ 181*)—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—PAYMENT OF INDIVIDUAL DEBT OUT OF FIRM ASSETS.

A note was executed to a member of a firm of private bankers, individually, who so indorsed it, and was then sent to another bank, with a letter stating that the maker wanted more money than such banking firm could spare, and asking that the bank handle the note and pass the amount to the credit of the banking firm, which would guarantee the note. The bank to which the note was sent placed the amount to the credit of the banking firm, which gave a like credit to the maker of the note. Subsequently the manager of the private bank and the partner who had indorsed such note issued a new note in discharge thereof, without the knowledge of the other partner, in the name of such firm, and it was paid out of assets of the firm. *Held*, that the liability on the original note was that of the individual partner who indorsed it, and not of the banking firm, and that the payment of the note in discharge thereof out of the firm assets was a fraud upon the firm, rendering the other bank liable to return the amount received.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 316; Dec. Dig. § 181.*]

4. PARTNERSHIP (§ 157*)—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—RATIFICATION.

A partner who has given the firm's note to pay his individual debt cannot alone ratify it so as to make it binding on the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 282; Dec. Dig. § 157.*]

5. PARTNERSHIP (§ 157*)—ACTS OF PARTNER—RATIFICATION—AUTHORITY OF AGENT.

The manager of a private bank conducted by a partnership cannot ratify a note given by a partner in the firm name to pay his individual debt.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 282; Dec. Dig. § 157.*]

6. BANKRUPTCY (§ 304*)—PARTNERSHIP—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—PAYMENT OF INDIVIDUAL DEBT WITH FIRM ASSETS—TRUSTEES—ACTIONS—QUESTIONS FOR JURY.

A note was executed to a member of a firm of private bankers, individually, who so indorsed it, and was then sent to another bank, with a letter requesting the latter bank to favor the firm by cashing the note and passing the amount to the firm's credit, and that as collateral it might hold another note then in its possession. The bank to which the note was sent credited the firm with the amount thereof, and it gave a

like credit to the makers of the note. Subsequently the manager of the bank and the partner who had indorsed the note issued a new note in discharge thereof, without the knowledge of the other partner, in the name of such firm, and it was paid out of assets of the firm. *Held*, that the fact that the partner alone was the indorser and not the banking firm, coupled with the issuance of the new note when the bank knew that the other partner was not present, was sufficient to take the right to recover the amount paid in satisfaction of the note to the jury or to the court sitting as a jury, as having been a payment of the individual debt of the partner out of firm assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 463; Dec. Dig. § 304.*]

Burgess and Lamm, JJ., dissenting.

In Banc. Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action for money had and received by Daniel F. Blake, trustee in bankruptcy of the estate of George Y. Salmon and another, copartners, against the Third National Bank of St. Louis. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

I. P. Ryland, Edward C. Crow, and Mann & Daniel, for appellant. Lyon & Swarts, for appellee.

GRAVES, J. For a long time prior to May 5, 1903, and on said date, there was in Clinton, Mo., a copartnership composed of G. Y. Salmon and H. W. Salmon, engaged in the banking business as private bankers, under the firm name of Salmon & Salmon. At all the dates of the transactions involved in this suit Thomas M. Casey was the man in charge and manager of the banking business of the said Salmon & Salmon. For a long time prior to May 5, 1903, and thereafter up to October 20, 1903, there existed a copartnership, composed of G. M. Casey and W. A. Towers, under the firm name of Casey & Towers, which said firm was engaged in the cattle business. June 28, 1905, the banking business of the said firm of Salmon & Salmon was placed in the hands of a receiver by the state court. On the same date proceedings in bankruptcy were instituted in the United States District Court at Kansas City, and later an adjudication of bankruptcy followed, and the plaintiff, Daniel F. Blake, was made trustee in bankruptcy of the estate of Salmon & Salmon, and all property, books, and papers were turned over to him by the receiver of the state court. The plaintiff in this action, as trustee as aforesaid, instituted suit against defendant to recover more than \$40,000 as for money had and received. The petition is in 34 counts, but as all are practically identical, save as to amount and dates, one count thereof will fairly state the petition. Count No. 30 reads: "And for still other and further cause of action against defendant, plaintiff states that defendant is indebted to plaintiff, as trustee in bankruptcy of the estate of George Y. Salmon and Har-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vey W. Salmon, partners as Salmon & Salmon, in the sum of five thousand dollars, on account of money had and received from said banking firm of Salmon & Salmon by defendant, on the 23d day of September, 1904, to the use of said banking firm of Salmon & Salmon, which sum of money defendant agreed to repay to Salmon & Salmon. Wherefore plaintiff prays judgment against defendant in the sum of \$5,000, together with interest and costs." Defendant, after having unsuccessfully demurred to the petition, and after having unsuccessfully moved to make said petition more definite and certain, answered by way of general denial, with an admission of its corporate existence. Trial was had before the court without the intervention of a jury, and the court, upon the conclusion of plaintiff's evidence, gave a declaration of law, in the nature of a demurrer to the testimony, as to each count, except Nos. 1, 2, 14, 16, 17, 18, 25, 26, 27, and 28, which were dismissed by plaintiff. Judgment was entered for the defendant, and from this judgment, after an unsuccessful motion for new trial, the plaintiff appeals to this court.

The evidence in the record is short, and in substance shows the following: On May 5, 1903, Casey & Towers executed and delivered to G. Y. Salmon the following note:

"Clinton, Mo., May 5th, 1903.

"On demand after date we promise to pay to the order of G. Y. Salmon ten thousand & no-100 dollars for value received, and payable at the banking house of Salmon & Salmon, Clinton, Mo., with interest from date at the rate of eight per cent. per annum; and if interest be not paid annually to become as principal and bear the same rate of interest.

"\$10,000.00. Casey & Towers.

"P. O. ——— G. M. Casey.

"Due. ——— W. A. Towers."

Indorsed as follows:

"Demand, protest and notice waived.

"G. Y. Salmon."

On the same day, the following letter was addressed to G. W. Galbreath, the cashier of defendant, at St. Louis, Mo.:

"Dear Sir: We enclose herewith note \$10,000.00 Casey & Towers, et al, endorsed by our G. Y. Salmon, with the request that you please favor us by cashing same and passing to our credit the amount thereof. As collateral thereto you can hold the \$20,000.00 real estate note now in your possession. Note is made on demand for the reason that parties expect to pay same soon.

"Yours very truly,

"Salmon & Salmon. C."

The evidence shows that the note was indorsed by G. Y. Salmon, the payee, and the proceeds were credited to Salmon & Salmon on the books of defendant, and that, upon receiving notice of this credit, Salmon & Sal-

mon gave Casey & Towers credit on their books for a like amount.

On September 12, 1903, Casey & Towers made another note to G. Y. Salmon, as follows:

"No. ———.

"Clinton, Mo., Sept. 12th, 1903.

"On demand after due we promise to pay on the order of G. Y. Salmon twenty thousand & no-100 dollars, for value received, and payable at the banking house of Salmon & Salmon, Clinton, Mo., with interest from date at the rate of eight per cent. per annum; and if interest be not paid annually to become as principal and bear the same rate of interest.

"\$20,000.00.

Casey & Towers.

"P. O. ———,

G. M. Casey.

"Due. ———,

W. A. Towers."

Indorsed on back as follows:

"Demand, protest and notice waived.

"G. Y. Salmon."

This note, so indorsed, was sent to Mr. Galbreath in St. Louis, Mo., with the following letter of date September 12, 1903:

"Dear Sir: Enclosed herewith we send you demand note of Casey & Towers, G. M. Casey and W. A. Towers for \$20,000.00, endorsed by our G. Y. Salmon, which we ask you to please handle and pass the amount thereof to our credit. Casey & Towers are shipping into their farm in this county a large lot of steers to sell to feeders, and in so doing are drawing on us for more than we can carry them for. And hence we ask that you please handle this note as a special favor to us. It will only run for a short time, as they are going to sell the steers right away, and out of the proceeds thereof take up this note. If you will kindly handle some for us, we hereby guarantee that during the time you carry it our credit balance with you shall not fall below \$25,000.00, and that it shall be kept up to at least that amount as security for the payment of said note, and if it should fall below, or even fall to \$25,000.00, you are at liberty to charge our account with this note, and this letter shall be your authority for so doing.

"Yours very truly,

"Salmon & Salmon. C."

The proceeds of this note was likewise placed to the credit of Salmon & Salmon in the Third National Bank of St. Louis, and Salmon & Salmon, being so informed, placed a like credit to Casey & Towers in their bank.

These two notes were held by defendant until April 1, 1904. October 20, 1903, G. M. Casey died, thus dissolving the firm of Casey & Towers, which at that time was insolvent, and G. Y. Salmon was indorser on their paper and the paper of G. M. Casey to the extent of \$150,000. On April 1, 1904, a representative of defendant visited Clinton, and procured from Casey and G. Y. Salmon the following notes:

St. Louis, Mo., ten thousand dollars, for value received, with interest at the rate of six (6) per cent. per annum from date.

"Salmon & Salmon."

"\$20,000.00. Clinton, Mo., April 1st, 1904.

"On demand after date we promise to pay to Third National Bank of St. Louis, or order, at the banking house of said bank, at St. Louis, Mo., twenty thousand dollars, for value received, with interest at the rate of six (6) per cent. per annum from date.

"Salmon & Salmon."

At the date of the trial each of said notes had indorsed across the face thereof: "Paid Jan. 14, 1905. Third National Bank, St. Louis, Mo."

With each of these notes the representative of defendant took a collateral security agreement, signed by Salmon & Salmon, by which the two Casey & Towers notes were put up by Salmon & Salmon as a pledge or security for the two notes last above set out. These two agreements are marked "Paid" on the same date and in the same manner as the two notes aforesaid.

Under the evidence G. Y. Salmon signed the name "Salmon & Salmon" to these two notes and those two agreements, and under the evidence Casey & Towers, G. Y. Salmon, and Salmon & Salmon were in fact insolvent, although the insolvency of G. Y. Salmon and Salmon & Salmon was not disclosed to the defendant or its representatives. The only consideration for the last two notes signed by Salmon & Salmon were the two notes signed by Casey & Towers, which notes were first herein fully set out. The evidence further discloses the fact that G. Y. Salmon, being an indorser on the notes, had to take them up, or the bank of Salmon & Salmon would have to close.

The record further discloses that the first of each month the interest on the Casey & Towers notes would be charged to the account of Salmon & Salmon by the defendant bank, and up to the failure of Casey & Towers the bank of Salmon & Salmon would collect the interest from said firm.

On the back of these notes signed "Salmon & Salmon" were indorsement payments and credits of principal and interest at different and sundry dates, as paid by Salmon & Salmon, and the different counts of the petition are based upon these several payments. These payments were made by Salmon & Salmon, and the amounts thereof taken from the assets of Salmon & Salmon. The evidence discloses that Casey, as manager of Salmon & Salmon, had the full power to manage the business and sign the name of Salmon & Salmon. All the dealings as to these notes were between Salmon

Casey, and some \$100,000 life insurance of G. M. Casey, but as to how it was held and what was done with it does not clearly appear. This testimony of Major Salmon was what he got from Mr. Casey, and he (Salmon) understood that out of the insurance he was to be reimbursed for an individual note for \$70,000 held by him against G. M. Casey.

The record further discloses that Major H. W. Salmon had no knowledge about any of these note transactions; that he was never consulted as to them, nor informed about them; that he never consented to the taking of the firm's (Salmon & Salmon) money to discharge the obligation of G. Y. Salmon. Such are the facts disclosed by the record.

1. That one partner, without the knowledge and consent of the other partner, cannot use the partnership property or assets to discharge his own personal obligation, is well-settled law; and that, if he does so use the property and assets of the copartnership, then the party receiving such property, whether money or other property, in the payment of the individual obligation of one of the copartners, on receiving the same, is liable to the copartnership, is also well-settled law. *Flanagan v. Alexander*, 50 Mo. 50; *Ackley v. Staehlin*, 56 Mo. 558; *Price v. Hunt*, 59 Mo., loc. cit. 263; *Phelps v. McNeeley*, 66 Mo. 554, 27 Am. Rep. 378; *Forney et al. v. Adams*, 74 Mo. 138. As well said by the learned editor of the *American State Reports*, vol. 7, p. 378, in a note to the case of *Davies v. Atkinson*: "The general rule, then, as deduced from the above propositions—and this rule is settled beyond controversy—is that a partner may not use the firm assets or make a valid transfer of its property in payment of his private or individual debts, or pledge the same for that purpose." Nor may he settle a private debt with the firm's note. *Howell v. Sewing Machine Co.*, 12 Neb. 179, 10 N. W. 700; *Parsons on Partnership*, § 121; *Lanier v. McCabe*, 2 Fla. 32, 48 Am. Rep. 173. And many of the cases go to the extent that knowledge upon the part of the creditor receiving partnership property from one of the copartners, that the property so received on the individual debt, was partnership, is not required; in other words, that the transfer passed no title, and the party receiving the firm's property from one partner on an individual debt was liable to the firm, whether he knew at the time he received it that it was the firm's property or not.

In the early case of *Rogers v. Batchelor*, 12 Pet. 221, 9 L. Ed. 1063, Mr. Justice Story said: "In the case of a partner paying his own separate debt out of the partnership

illegal conversion of the funds; and the separate creditor can have no better title to the funds than the partner himself had. Does it make any difference that the separate creditor had no knowledge at the time that there was a misappropriation of the partnership funds? We think not. If he had such knowledge, undoubtedly he would be guilty of gross fraud, not only in morals, but in law. That was expressly decided in *Sheriff v. Wilks*, 1 East, R. 48, and, indeed, seems too plain upon principle to admit of any serious doubt. But we do not think that such knowledge is an essential ingredient in such a case. The true question is, whether the title to the property had passed from the partnership to the separate creditor. If it has not, then the partnership may reassert their claim to it in the hands of such creditor."

After a review of the early cases, he concludes thus: "But we think that the true principle to be extracted from the authorities is that one partner cannot apply the partnership fund or securities to the discharge of his own private debt without their consent; and that without their consent their title to the property is not divested in favor of such separate creditor, whether he knew it to be a partnership property or not. In short, his right depends, not upon his knowledge that it was partnership property, but upon the fact whether the other partners had assented to such disposition of it or not."

Much of the language above quoted was quoted and approved by this court in the case of *Ackley v. Staehlin*, 58 Mo. 558.

Again, in the case of *Phelps v. McNeeley*, 66 Mo., loc. cit. 558, 27 Am. Rep. 378, where it is said: "It was held in the case of *Flanagan v. Alexander*, 50 Mo. 50, that one partner has no power or authority whatever, without the consent of his copartners, to appropriate the assets of his partnership to the payment of his individual indebtedness. While a partner can dispose of the property by a bona fide sale, he cannot appropriate it without the consent of his copartners to the payment of his individual debts, either with or without knowledge of the creditor that such property was partnership property. *Ackley v. Staehlin*, 58 Mo. 561."

It is true this case is in terms overruled in the case of *Goddard-Peck Grocery Co. v. McCune*, 122 Mo., loc. cit. 431, 25 S. W. 904, 29 L. R. A. 681, but only on the question as to the right of copartners prior to the dissolution of the partnership to bona fide appropriate, by consent of all the partners, the firm property to the payment of individual debts. We think there was a misunderstanding of the real point decided in *Phelps*

with the consent of all the partners, partnership property cannot be applied to individual debts of copartners; but if it does so hold it was rightly overruled. Nor did Judge Black understand the *Phelps Case* as it seems to have been understood in the *McCune Case*, supra, for in *Sexton v. Anderson*, 95 Mo., loc. cit. 381, 8 S. W. 568, he says: "With us each partner is liable for all the partnership debts. The partners may, so long as the firm exists, do with their property as they see fit. The firm creditors have no lien on the partnership property for the payment of their debts while the firm continues to exist. Partners have the right to have the partnership property applied to partnership purposes, but this is a right or lien which they may waive. Hence the great majority of adjudicated cases are to this effect, that all the partners may, by their joint act, dispose of partnership property in liquidation and payment of a debt owing by an individual member of the firm. The qualification is that the transaction must be in good faith and not for fraudulent purposes. *Rogers v. Batchelor*, 12 Pet. 221, 232, 9 L. Ed. 1063; *City v. Willey*, 35 Iowa, 323; *Case v. Beauregard*, 99 U. S. 124, 25 L. Ed. 370; *Schmidlapp v. Currie*, 55 Miss. 597, 30 Am. Rep. 530. The cases of *Flanagan v. Alexander*, 50 Mo. 50, *Ackley v. Staehlin*, 58 Mo. 558, *Price v. Hunt*, 59 Mo. 258, and *Forney v. Adams*, 74 Mo. 138, are all in accord with what has been said. These cases recognize the right of one partner to apply partnership property, with the consent of the other partners, to the payment of his debt. Nor is the authority of these cases shaken by the subsequent case of *Phelps v. McNeeley*, 66 Mo. 555, 27 Am. Rep. 378, for they are in terms approved." But however this may be, the quotation we use from the *Phelps Case* is upon a point not questioned in the *McCune Case*, i. e., that, where there has been no consent given by the other partners, one partner cannot use firm assets in the discharge of individual debts, and it is immaterial whether the creditor knew or did not know that it was firm property he was receiving.

So, too, in *Price v. Hunt*, 59 Mo., loc. cit. 263, it was said: "It is settled that one member of a firm cannot appropriate the partnership effects, without the consent of his copartners, to the payment of his individual debts, either with or without the knowledge of the creditors that the property belonged to the firm."

To a like effect is the language of *Smith, P. J.*, in *Ewart v. Tootle & Co.*, 50 Mo. App., loc. cit. 327, wherein he said: "While one partner can dispose of the property by a bona fide sale, he cannot appropriate it, without the consent of his copartner, to the payment

of his individual debts, either with or without the knowledge of the creditor that such property is partnership property."

So that this court has followed throughout the rule laid down by Mr. Justice Story: The reason of the rule is that in the disposition of property a copartner is the agent of the copartnership, and whilst having full power to dispose of the firm property and assets in the course of the business of the firm, yet, when a copartner undertakes to apply the assets of the firm to his individual debt, he is going beyond the scope of his authority as the agent of the firm, and his acts are void, and pass no title to the property, as against the firm or creditors of the firm, unless consent of the other copartners to such transaction is shown. So that in this case, if the obligation of the Third National Bank, on the Casey & Towers notes, were the obligations of G. Y. Salmon individually, then he, as copartner and agent of the firm of Salmon & Salmon, had no right to execute the notes in question, and had no right to take the assets and funds of the firm to pay said notes, without the assent of H. W. Salmon, and this the evidence shows he did not have.

Nor could Casey, as manager, go further than G. Y. Salmon. As manager he was but the agent of the firm, and had full power to transact all business of the firm, but when he went beyond the scope of his authority and took firm assets to pay individual debts of one of the partners, without the knowledge or consent of the other, then his acts are not any more binding than if done by G. Y. Salmon himself. Both were agents of the firm. *Johnson v. Realty Co.*, 62 Mo. App., loc. cit. 160. The law seems to be well settled, but the real difficulty in this case is its application to the facts. This we undertake next.

2. We shall discuss the \$20,000 note first. When Casey & Towers gave that note, it was to G. Y. Salmon, and not to the firm of Salmon & Salmon. When G. Y. Salmon placed his name on the back thereof as an indorser, it was the act of G. Y. Salmon, and not of Salmon & Salmon. Without further showing than the note itself, the liability was on the makers and the indorser G. Y. Salmon and not on Salmon & Salmon. When the note was sent to defendant it was with the letter of September 12, 1903, *supra*. This letter to our mind clearly indicates that the firm of Salmon & Salmon was not placing this note as their own. This letter clearly shows that Salmon & Salmon had not bought this note of G. Y. Salmon, for in effect it says that Casey & Towers wanted more money than they (Salmon & Salmon) could spare. If the firm had bought the note and it was their property, the regular course would have been an indorsement of the firm if they desired to rediscount. The letter says, "and hence we ask that you please

handle this note as a special favor to us," not that they want to rediscount a note which they had purchased. This letter clearly indicates that Salmon & Salmon did not have the spare cash to invest in this note; that they wanted to help Casey & Towers get their money from some other source. The very fact that they undertake by the letter to guarantee the note instead of placing the firm name on the back thereof as an indorser indicates that the firm did not own the note.

When the defendant got this note and letter, it must have known (1) that Casey & Towers, and not Salmon & Salmon, wanted \$20,000; (2) that Salmon & Salmon had not purchased the note, because the letter indicates that the firm did not have the spare cash; (3) that the firm wanted defendant to discount the note for Casey & Towers, so that they might have the money in their cattle business, and suggested that such action would be taken as a special favor to Salmon & Salmon. The only thing in the entire letter is the statement to pass the proceeds to the account of Salmon & Salmon with defendant bank. This, to our mind, is not against our theory of the case. This was but one of the several modern methods of transferring funds. The proceeds were so credited in St. Louis, and when Salmon & Salmon were notified they gave Casey & Towers credit for a like sum. This letter clearly indicated to defendant such would be done. Defendant could not read this letter without knowing that the money was ultimately to go to Casey & Towers, and, so knowing, they would, as a reasonably prudent business house, have known that depositing the proceeds to the credit of Salmon & Salmon was simply the means of transferring the fund, and not otherwise. They could not read this letter and for a moment think that Salmon & Salmon were to get this money for their own use, but the letter to the contrary told them who was to get the money, and how it was to be used, and by whom and how the note was to be paid, i. e., by Casey & Towers out of the proceeds of cattle to be sold. That funds are frequently transferred in the manner directed by this letter is well known. As said in *Bank v. Express Company*, 93 U. S. 185, 23 L. Ed. 872: "We cannot close our eyes to the well-known course of business in the country." Defendant knew, or ought to have known, from the tenor of this letter that Salmon & Salmon would credit Casey & Towers with the proceeds when advised that they had received such credit. It is and was an ordinary method of transferring funds.

So that up to this point, i. e., the discounting of this note by defendant, we have Casey & Towers, as a firm, and G. M. Casey and W. A. Towers, individually, liable to defendant for \$20,000 and the accruing interest. In addition, G. Y. Salmon was individually liable

either the liability of Casey & Towers, or the individual liability of G. Y. Salmon, one of the copartners.

So the matter stood until April 1, 1904, when the Salmon & Salmon notes were given. In the meantime G. M. Casey had died, and the firm of Casey & Towers was dissolved, and not only so, but was likewise insolvent, so the evidence runs. Then we have the unusual occurrence of a city bank sending out a representative to one of its country correspondents to get a settlement. The settlement, so far as this note of \$20,000 was concerned, was that G. Y. Salmon, who was liable as indorser to defendant, issued a new note in the name of Salmon & Salmon to defendant to discharge his own liability. This he did without consultation with his copartner, and without his knowledge or consent. Salmon & Salmon was not bound by the act of Casey expressed in the latter part of the letter, nor was the firm bound by this new note, which was the sole act of one partner in an attempt to use the assets of the firm to liquidate a personal liability. Defendant cannot complain, because it must have known on April 1st that it had but two sources to look to for the payment of the \$20,000 note, i. e., the property of Casey & Towers, insolvent, and so known to be at the time, and G. Y. Salmon, the indorser. With its agent present, defendant takes the note signed Salmon & Salmon, by G. Y. Salmon, without the consent of H. W. Salmon. After receiving the note, they received interest thereon and payment thereof out of the assets of Salmon & Salmon, a firm in fact insolvent, but not known to be insolvent, unless the singular action of defendant in sending a man out for an adjustment might indicate its knowledge of the firm's condition. That the defendant got the sum of \$20,000 and certain monthly interest payments from Salmon & Salmon is thoroughly shown. The conduct of defendant with the knowledge it had from the letter is such as to work a fraud upon the firm of Salmon & Salmon and its creditors, represented in this case by the trustee, plaintiff herein. We conclude that defendant is liable for the amounts, both principal and interest, received upon this note, unless relieved therefrom by certain other contentions by it urged, which we next discuss.

3. Defendant urges several reasons why it should not be held liable:

(a) It first says that the notes, both the original and subsequent ones, were treated by Salmon & Salmon as representing their liabilities. What we have said about the letter sent with the \$20,000 note, and the note taken in lieu thereof, in paragraph 2 disposes of this contention.

(b) Next defendant says: "Even though

on, there was a valuable consideration for the giving of the new notes, which the partnership ultimately paid." This contention is not borne out by the facts. The firm never admitted liability thereon. Under the evidence all that was done can be thus summed up: G. Y. Salmon recognized his liability as indorser on the Casey & Towers note; that as a member of the firm of Salmon & Salmon he could not afford to be sued on his contract as an indorser; that without the knowledge or consent of his copartner he undertook to cancel his liability by giving a firm note; that, after so giving it, either he or Casey paid it out of the firm money. Cases cited by defendant are not in point, and do not bear them out in this connection.

(c) It then contends that there was ratification by the firm. The evidence does not so show. Maj. H. W. Salmon said he never heard of the notes until some three or four days before the trial. G. Y. Salmon alone could not ratify an unauthorized act, any more than he could divert the firm assets to pay his own debt. It would be a peculiar state of the law to say that G. Y. Salmon alone could not legally bind the firm by giving the firm's note to pay his individual obligation, which is the reading of the law, and yet say that, after he had done so, he alone could so ratify the unlawful act as to make it binding. Consent and knowledge upon the part of the other copartners must be shown just as much in the ratification as in the original note. Without the consent of H. W. Salmon, his copartner, G. Y. Salmon could not bind the firm by the notes given, nor without that consent can he bind the firm by attempted ratification. Thomas M. Casey's powers were no greater than those of G. Y. Salmon. They were both mere agents of the firm; one, by reason of being a partner, and the other, by reason of being a manager. One had no greater authority than the other.

(d) Next, it is urged: "The moneys were paid voluntarily by Salmon & Salmon with a full knowledge of the facts, and cannot be recovered by their trustee." This statement of the law is well enough if it accorded with the facts. The firm of Salmon & Salmon never voluntarily paid this money. It was paid by the agents of the firm in fraud of the firm's rights, and without knowledge of one member of the firm. Had G. Y. Salmon or T. M. Casey on April 1, 1904, taken \$20,000 in cash out of the vaults of the bank without the consent of H. W. Salmon and paid G. Y. Salmon's personal obligation as an indorser on this note to defendant, would it be said for a moment that the firm of Salmon & Salmon could not have recovered from defendant? We think not. Yet such a payment stands in no better light than the par-

tial payments, made out of the firm assets, on this unauthorized note, and without the knowledge or consent of H. W. Salmon. When defendant took the note from G. Y. Salmon, signed "Salmon & Salmon," to discharge the individual liability of G. Y. Salmon, it was a fraud upon the firm, to which defendant was a party, and all subsequent transactions were tainted with this fraud.

(e) Lastly, it is urged: "This is an action for money had and received, and the plaintiff has made no showing to entitle him to recover moneys which in equity and good conscience the defendant should return." If we have correctly analyzed the situation at the time the Salmon & Salmon note was given on April 1, 1904, and if the conduct of defendant in taking said note without the consent of Maj. Salmon thereto operated as a fraud upon the firm, then there is complete room for equity and good conscience. Defendant knew that it was getting the firm's obligation for an individual debt, and when it got the money it knew it came from the firm assets.

We are clearly of the opinion that as to this note and the payments thereon, both principal and interest, the court nisi was in error.

4. As to the first \$10,000 note given by Casey & Towers, the letter sent with it is not so strong as the letter accompanying the \$20,000 note just discussed. Whilst this is true, we are of the opinion that the fact therein indicated, to the effect that G. Y. Salmon alone was the indorser and not Salmon & Salmon, was sufficient to put defendant upon inquiry as to the character of this note. This, coupled with what was done on April 1, when defendant's agent saw and knew that H. W. Salmon was not present, was sufficient to take the counts involving the sums paid on this note to the jury or to the court sitting as a jury.

The judgment should be reversed, and the cause remanded to be further proceeded with in accordance with the views herein expressed. It is so ordered.

VALLIANT, C. J., and FOX and WOODSON, JJ., concur. BURGESS and LAMM, JJ., dissent. GANTT, J., being a creditor of the Salmon estate, does not sit.

STATE ex rel. POTTER et al. v. RILEY.

(Supreme Court of Missouri. April 13, 1909.
Rehearing Denied May 1, 1909.)

1. JUDGMENT (§ 354*)—VACATING JUDGMENT—MOTIONS—IRREGULARITIES APPARENT OF RECORD.

A motion under Rev. St. 1899, § 795 (Ann. St. 1906, p. 758), authorizing the setting aside of judgments for irregularity on motion made within three years after the term at which the

judgment was rendered, must be based on an irregularity patent on the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 691; Dec. Dig. § 354.*]

2. JUDGMENT (§ 336*)—VACATING JUDGMENT—MOTIONS—NATURE OF REMEDY—"WRIT OF ERROR CORAM NOBIS."

A motion to vacate a judgment on the ground that it was entered after the death of the party against whom it was rendered and supported by evidence dehors the record takes the place of the common-law writ of error coram nobis, the purpose of which was to make apparent to the court by evidence dehors the record of some error which did not appear of record and which was unknown to the court, and, where death did not appear of record but had to be shown by evidence, the writ of error coram nobis was the common-law remedy.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 664; Dec. Dig. § 336.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7536, 7538.]

3. JUDGMENT (§ 382*)—VACATING JUDGMENT—MOTIONS—PERSONS ENTITLED TO RELIEF.

A motion to set aside a judgment dismissing the cause after the death of plaintiff, suing to have a deed adjudged a mortgage, and obtaining a judgment determining that the deed was a mortgage and appointing a referee to take an accounting between the parties, is properly filed by plaintiff's heirs at law, for they are privies to the record as heirs and are injured by the judgment of dismissal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 723; Dec. Dig. § 382.*]

4. JUDGMENT (§ 334*)—WRIT OF ERROR CORAM NOBIS.

A writ of error coram nobis can only be procured by one who is a party or privy to the record or injured thereby.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 641; Dec. Dig. § 334.*]

5. ATTORNEY AND CLIENT (§ 76*)—TERMINATION OF RELATION—DEATH OF CLIENT.

The death of the client terminates the relation of attorney and client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 127; Dec. Dig. § 76.*]

6. JUDGMENT (§ 486*)—COLLATERAL ATTACK—DEATH OF PARTY.

Where a party dies pending a suit wherein the court has acquired jurisdiction of the person and subject-matter before the rendition of judgment, and a judgment is rendered against the party without any showing of such death, the judgment is voidable only and cannot be collaterally attacked.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 922; Dec. Dig. § 486.*]

7. JUDGMENT (§ 486*)—COLLATERAL ATTACK—DEATH OF PARTY BEFORE SUIT.

But where the party was dead at the time of the institution of the suit, the judgment is void and may be collaterally attacked.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 922; Dec. Dig. § 486.*]

8. DISMISSAL AND NONSUIT (§ 48*)—VALIDITY.

An order of dismissal entered at a term subsequent to the rendition of a final judgment in the cause is void.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 96; Dec. Dig. § 48.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

finally submitted to the court and not afterward, an order of dismissal entered while the whole case was under submission and before the rendition of judgment is void on the face of the record.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 15; Dec. Dig. § 7.*]

10. MANDAMUS (§ 164*)—PLEADING—ADMISSIONS.

The matters well pleaded by relator in mandamus and not denied by respondent in express terms are admitted as true.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 349; Dec. Dig. § 164.*]

11. JUDGMENT (§ 217*)—FINAL JUDGMENT.

A decree adjudging deeds to be mortgages, and appointing a referee to take evidence on the questions of the value of the improvements placed on the lands by defendant and the amount of the mortgage debt, was not final, and there could be no final decree until the report of the referee and the exceptions thereto had been passed on by the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 394; Dec. Dig. § 217.*]

12. JUDGMENT (§ 217*)—"FINAL JUDGMENT"—"INTERLOCUTORY JUDGMENT."

Generally a judgment which at once disposes of the entire controversy, settling the rights of the parties, leaving nothing for further consideration, is final, while a judgment which merely settles some preliminary point or reserves for future determination some detail essential to the complete adjustment of the litigation is not final but interlocutory only.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 394; Dec. Dig. § 217.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7663; vol. 4, pp. 3712-3714; vol. 8, p. 7692.]

13. DISMISSAL AND NONSUIT (§ 7*)—POWER OF COURT—STATUTES.

A decree adjudged that deeds were mortgages, and appointed a referee to take evidence on the questions of the value of improvements placed on the lands by defendant and the amount of the mortgage debt. The referee made a report, but no hearing was had thereon and exceptions taken thereto. *Held*, that though Rev. St. 1899, § 714 (Ann. St. 1906, p. 711), provides that the exceptions to the referee's report shall be argued without delay, the cause was not finally submitted to the court within section 639 (page 658), providing that plaintiff shall be allowed to dismiss his suit before the cause is finally submitted.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 15, 16; Dec. Dig. § 7.*]

14. MANDAMUS (§ 3*)—ADEQUACY OF OTHER REMEDY.

Mandamus does not lie to compel a court to set aside an order dismissing a cause entered after the death of plaintiff and reinstate the cause, since the heirs of plaintiff may file a motion to vacate the judgment of dismissal.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 8; Dec. Dig. § 3.*]

15. JUDGMENT (§ 518*)—VACATING JUDGMENT—DIRECT ATTACK.

A motion to vacate a judgment in lieu of the common-law writ of error coram nobis is

A judgment on a motion to vacate a judgment in lieu of the common-law writ of error coram nobis is a final judgment and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 478; Dec. Dig. § 82.*]

17. APPEAL AND ERROR (§ 82*)—ORDERS APPEALABLE—"SPECIAL ORDER AFTER FINAL JUDGMENT."

A judgment of dismissal and for costs is a final judgment, and an order overruling a motion to vacate the judgment is a special order after final judgment and appealable under Rev. St. 1899, § 806 (Ann. St. 1906, p. 769), authorizing an appeal from any special order after final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 478; Dec. Dig. § 82.*]

For other definitions, see Words and Phrases, vol. 7, p. 6585.]

In Banc. Mandamus by the State, on the relation and to the use of Jane C. Potter and others, against Henry C. Riley, to compel respondent to set aside an order of dismissal of a cause and to reinstate the cause. Peremptory writ denied.

Fordyce, Holliday & White, for plaintiffs.
L. R. Thomason, for respondent.

GRAVES, J. This is an original proceeding in this court by which relators seek by mandamus to compel Hon. Henry C. Riley, judge of the circuit court of Mississippi county, to set aside an order of dismissal heretofore entered by him in said court in a cause then pending wherein James M. Potter was plaintiff and Thomas Bullivant et al. were defendants, and to reinstate the cause and to proceed with said cause, and to hear and determine the same. This court issued its alternative writ of mandamus, the allegations of which are, in substance, as follows: That relator and one Francis J. Bullivant, son of Thomas Bullivant, are the only heirs at law of James M. Potter, deceased, who died January 5, 1896; that relators are all nonresidents of Missouri, but said Francis J. Bullivant is a resident of Missouri; that two relators (naming them) are minors and appear by their next friend, Samuel W. Fordyce; that at the time of his death James M. Potter was the owner of certain real estate in Butler county, Mo.; that in September, 1890, said James M. Potter instituted in the circuit court of Butler county an equitable action against Thomas Bullivant, Stephen M. Chapman, and others to determine their respective rights and interests in and to said real estate; that a change of venue in said cause was granted to the circuit court of Mississippi county; that said cause was dismissed as to all defendants except Bullivant and Chapman; that on October 12, 1892, said cause was finally submitted upon the pleadings and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence in the said circuit, over which respondent, Henry C. Riley, presided as the regular judge thereof; that the court made and entered of record a decree determining that the said James M. Potter was the owner of said real estate, and that certain deeds given by said James M. Potter to Thomas Bullivant were in fact mortgages, and by consent of all parties to the cause appointed J. Perry Johnson as a referee to determine the value of certain improvements in said land erected by Bullivant, and to take an accounting between the parties; that said decree was final, and no appeal was taken therefrom; that the referee made and filed his report, to which Bullivant and Chapman filed exceptions; that before said exceptions were passed upon by the court the said Potter died on the date aforesaid; that on April 7, 1896, the death of James M. Potter not having been suggested to the court in said cause, on the motion of L. D. Grove, who had been the attorney of record for said Potter, the respondent, as judge of said court, wrongfully and unlawfully entered an order or judgment of dismissal in said cause; that James M. Potter died intestate, and no administration had been had upon his estate, and all his real estate has descended to relators and Francis J. Bullivant; that on October 8, 1907, relators filed their written motion in said cause and in said court requesting said court to set aside said order of dismissal and reinstate said cause; that respondent wrongfully overruled said motion, and refused to reinstate said cause; that respondent at all said times was and is now the judge of said court; that in making said order of dismissal respondent violated section 639, Rev. St. 1899 (Ann. St. 1906, p. 658); that said cause had been finally submitted to respondent, and he had no legal right to dismiss the same; that said dismissal was after a final decree and judgment had been entered in the said cause, and after the term had expired at which said decree was entered, contrary to the laws of this state; that the respondent had no right to dismiss the cause upon the motion and suggestion of L. D. Grove, because his authority to act terminated with the death of Potter; that the respondent at the time individually knew of the death of Potter; that the death of Potter had been suggested in another case pending in respondent's court on the same day that the order of dismissal was made; that it is the legal and ministerial duty of respondent to set aside such order and judgment of dismissal and reinstate said cause; that said Stephen M. Chapman has recently instituted suit against relators in Butler county, in which he seeks to quiet title in him to the lands involved in the Potter suit aforesaid; that Francis J. Bullivant has refused to join relators herein, although requested so to do; that relators will be unable to present all the facts as to the title to this land, if called upon to defend the suit in Butler county, last

above stated, owing to the fact that many of the witnesses have since died, and the notes of their testimony in the Potter case have been lost or destroyed; that relators have used due diligence in attempting to enforce their rights (here following is a statement of the distant residence of relators, alleging same to be in Nova Scotia, others in Canada, and that two are minors); that they, the relators, have no adequate remedy at law. This is followed by a prayer for our writ of mandamus. Such are the facts recited in the alternative writ.

By way of return the respondent says: That he admits that he is judge of the circuit court of Mississippi county; admits making the order of dismissal; that he denies having any knowledge of the death of Potter, either individually or otherwise; that said order was made on the application of L. D. Grove, an attorney at law, who was attorney of record for Potter, who, at the time, represented he was attorney for Potter; that said order so made is not void, nor subject to collateral attack, nor to be set aside upon motion unless motion be made within three years. The return then proceeds in this language:

"Respondent further says that on heretofore the ——— day of April, 1906, and at the regular April term of the circuit court of Mississippi county, Missouri, one Francis J. Bullivant, as an heir at law of the said James M. Potter, presented to the court his motion to set aside the order of dismissal made and entered in the cause wherein said James M. Potter was plaintiff and Thomas Bullivant and others defendants; that upon the presentation of said motion it was stipulated and agreed by the parties thereto that the said James M. Potter was dead at the time said judgment and order of dismissal was entered; that upon the hearing of said motion it was further shown to the court, by the introduction in evidence of certified copies of the land records of Butler county, Missouri, the situs of the lands in controversy in said suit, that the said James M. Potter, the plaintiff in said cause, had by his general warranty deed dated January 3, 1896, and which said deed is duly recorded in Book No. 53, at page 141, the same being one of the land records of Butler county, Missouri, conveyed to Jane C. Potter, one of the relators herein, said lands; that it was further shown to the court that the said Jane C. Potter had by her quitclaim deed, dated the 19th day of April, 1901, and recorded in Book No. 49, at page 488, the same being one of the land records of Butler county, Missouri, conveyed all her right, title, and interest in and to said lands to parties other than the relators herein or either of them. Respondent further says, that upon the hearing of the motion of the relators to set aside the judgment and order of dismissal and reinstate the cause of James M. Potter versus Thomas Bullivant and others, it was

ing of relators' said motion, the relators have an adequate remedy by appeal. All of which is respectfully submitted."

To this return, relators filed their plea, in substance as follows: They deny that L. D. Grove represented to respondent that he was attorney for James M. Potter when the order of dismissal was made. They aver that it is mandatory upon respondent to reinstate and redocket the cause. They aver that section 795, referred to, but not specifically named in respondent's return, is not applicable to this case. They deny that upon the hearing of the motion of Francis J. Bullivant any deeds or certified copies thereof were introduced showing that James M. Potter had conveyed to parties other than relators. They aver that the alleged deed from James M. Potter to Jane C. Potter, who is one of the relators herein, was notoriously fraudulent and void, and was never in fact executed, and that at the time it was claimed that it was executed the said James M. Potter was in extremis and was in an unconscious and comatose condition, and because the said alleged instrument does not describe the lands with such particularity as to convey the same. They further say that at the hearing of their motion on October 8, 1907, it was stipulated that James M. Potter died December 30, 1895, and that relators and Francis J. Bullivant were his heirs at law. Relators further say that at the hearing of said motion it would have been shown by evidence that Potter died intestate, and that the deeds above mentioned were void, and that relators and Francis J. Bullivant were the heirs at law of Potter; but the respondent informed the attorneys of the relators at the time that the matters involved were well known to him, as he was judge in the former proceedings, and he did not care to go into them, and thereupon overruled relators' motion as aforesaid. Relators further aver that at the time there was on file and of record a stipulation in said cause showing the death of Potter on December 30, 1895, and showing that relators and Francis J. Bullivant were his heirs at law, and that they have no adequate remedy by appeal. The pleading then concludes with a prayer for the remedies asked in the alternative writ.

To this pleading, respondent filed no replication.

This court appointed Hon. Arthur L. Oliver as a commissioner to take the testimony in the cause and report the same, together with his finding of facts, to this court. Such has been done, and the findings so found by the commissioner are as follows:

"First. I find that the relators, Jane C. Potter, Dexter D. E. Potter, Mary C. Na-

and surviving heirs, as children and grandchildren of one James M. Potter. That the said James M. Potter died intestate on or about the 30th day of December, 1895. That the respondent, Henry C. Riley, is and was at all times mentioned in relators' petition the duly elected, qualified, and acting judge of the circuit court of Mississippi county, Mo.

"Second. I find that prior to the death of the said James M. Potter, during the month of September, 1890, he, the said James M. Potter, instituted a suit in equity against one Thomas Bullivant, Stephen M. Chapman, Charles F. Hendricks, Byrd Duncan, Patrick Harmon, and Wm. F. Neal, defendants, in the circuit court of Butler county, wherein it was sought by the plaintiff, Potter, to have certain alleged incumbrances set aside, which had theretofore been given by him on his lands located in Butler county, Mo., or to have the status of these incumbrances determined by the court. That this original suit was transferred by change of venue to the circuit court of Mississippi county, Mo., where the cause of action was there dismissed as to all defendants except Thomas J. Bullivant and Stephen M. Chapman. That in October, 1892, the issues of this original suit were finally submitted to the respondent, H. C. Riley, as judge of the circuit court of Mississippi county aforesaid, and a judgment (which was not offered in the hearing before me) was by him rendered in favor of the plaintiff, James M. Potter. That thereupon one J. Perry Johnson was appointed as referee to ascertain and determine the value of certain improvements on the lands then in litigation, and that said referee thereafter filed his report, to which the defendants Bullivant and Chapman filed their exceptions.

"Third. I further find that thereafter, while the exceptions to the referee's report of defendants Bullivant and Chapman were pending in said circuit court of Mississippi county, and before they were ruled upon by the respondent, H. C. Riley, one L. D. Grove, who, I find, was acting as the attorney of James M. Potter in his lifetime, appeared as Potter's attorney on the 7th day of April, 1896, and had the following order made on record:

"'James M. Potter, Plaintiff, vs. Thomas Bullivant et al., Defendants. From Butler County. Now comes the plaintiff, by attorney, and on motion this cause is dismissed. It is therefore considered and adjudged by the court that the defendants recover of and from the plaintiff the costs and charges herein expended, and that execution issue therefor.'

"I find that, at the time the above order was made, James M. Potter, the plaintiff, had then been dead about three months, but

the evidence fails to show that any evidence of death was ever made to the court at or prior to that time, or that the court of its own knowledge knew of Potter's death. The evidence does show that on the same day, in another and different suit wherein James M. Potter was defendant, his death was suggested and not denied, and one Jane Potter was made party defendant.

"Fourth. Your commissioner further finds that thereafter, to wit, on the 8th day of October, 1907, the relators herein, by their attorneys, filed a motion in the circuit court of Mississippi county, wherein they sought to have the court set aside the order of dismissal made in the case of James M. Potter v. Thomas J. Bullivant et al. on the 7th day of April, 1896, and that said motion was by the respondent, H. C. Riley, overruled. That at the time of the submission of this motion, on October 8th, 1907, it was stipulated and admitted by the parties in said motion, and offered before the respondent, H. C. Riley, in support of said motion, the following: 'First. That James M. Potter, the plaintiff in the above-entitled suit, died on or about the 30th day of December, 1895, and before the order of dismissal was made in said suit. Second. That Eliza Buchner, Mary G. Nasmith, Jane C. Potter, Dexter D. E. Potter, Edith Potter, and Robert Potter, together with Francis J. Bullivant, are interested as heirs at law of James M. Potter, deceased, who was formerly the plaintiff in the above-entitled suit.'

"I further find that at the time of the submission of relators' motion in October, 1907, there was no evidence introduced on the hearing of said motion in the circuit court of Mississippi county, Mo., and before the respondent, showing that James M. Potter had prior to his death conveyed the lands in controversy; but that on another and different motion filed by one Francis J. Bullivant (who is not a party to this suit) on April, 1905, and passed upon by the respondent on the 5th day of October, 1906, defendants in that motion offered at some time in vacation certain exhibits to the respondent in support of their contention that said James M. Potter had conveyed said lands in controversy."

Such are the facts pleaded and the facts proven in this record.

1. In respondent's brief we are cited to section 795, Rev. St. 1899 (Ann. St. 1906, p. 758), as being of force and vitality in this cause. This section permits the setting aside of judgments for irregularities upon motions filed within three years after the terms of their rendition. This motion was filed long after the expiration of the time prescribed by this statute, and, as we take it, was not intended to be a motion under this section of the statute. A motion contemplated by this statute must be one based upon an irregularity which is patent on the record, and not one depending upon proof de-

hors the record. *Phillips et al. v. Evans et al.*, 64 Mo., loc. cit. 22; *Latschaw v. McNees*, 50 Mo., loc. cit. 384; *Powell v. Gott*, 13 Mo., loc. cit. 461, 53 Am. Dec. 153.

The motion in question is more in the nature of a writ of error coram nobis, the very purpose of which is to make apparent to the court by evidence dehors the record some error of fact which did not appear of record and which was unknown to the court. In fact, if the death does not appear of record, but must be shown by evidence allunde, the writ of error coram nobis is the remedy. In this state a motion to vacate the judgment charging the fact or death and supported by proof takes the place of the common-law writ of error coram nobis. The general rule as to the remedy is thus stated in 11 Ency. of Plead. & Prac. p. 847: "If, however, the fact of death must be shown dehors the record, the remedy is the writ of error coram nobis." *Powell v. Gott*, 13 Mo., loc. cit. 461, 53 Am. Dec. 153; *Ency. of Plead. & Prac.* vol. 5, pp. 26, 27; *Dugan v. Scott*, 37 Mo. App., loc. cit. 669; *Craig v. Smith*, 65 Mo. 536.

In the case of *Craig v. Smith*, supra, there was both a patent error of record, i. e., the sheriff's return, which showed a non est as to the moving defendant, and an error of fact, in this: that the attorneys representing two of the defendants (there being three, including the movant) had filed an answer for defendants without specifying for which defendants the answer was intended, when they had no authority to appear for but two, and not for the party filing the motion to vacate the judgment. The motion was filed within three years, and this court treated it both as a motion in the nature of a writ of error coram nobis and as a motion under the statute, now section 795, Rev. St. 1899.

In *Ency. of Plead. & Prac.* vol. 5, pp. 26, 27, supra, the office of the writ is thus described and defined: "The office of the writ of coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact, such as the death of either party pending the suit and before judgment therein, or infancy, where the party was not properly represented by guardian, or coverture, where the common-law disability still exists, or insanity, it seems, at the time of the trial, or a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned."

In *Powell v. Gott*, supra, we said: "This was a motion to set aside a judgment obtained against an infant who appeared by attorney. The judgment was rendered in 1841, and the motion was made in 1847, about two years after the defendant attained

others of his family, to establish the truth of the facts stated therein. The motion was overruled by the circuit court. This is in the nature of a writ of error coram nobis. The object of this motion is to correct an error in fact, upon which certain proceedings in law have been based."

And in this state it has been held that no statute of limitations applies to such proceeding. *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Latshaw v. McNees*, 50 Mo., loc. cit. 384. In the latter case it is said: "As this error does not appear upon the face of the pleadings, it can only be brought to the attention of the court by a proceeding in the nature of a writ of error coram nobis. The usual way is by motion supported by affidavits or evidence. If the motion is sustained, the husband and wife are allowed to make any defense to the merits they may have, and the case is retried. This motion is allowed at any subsequent term after final judgment. I know of no statute of limitations against such a motion. The statute of limitations in regard to irregularities applies to such as appear on the face of the proceedings, and not to such as are brought before court by evidence allunde, as in this case. See *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Ex parte Toney*, 11 Mo. 661; *Groner v. Smith*, 49 Mo. 318; *Ex parte Page*, 49 Mo. 291."

The relators herein are proper parties to file such a motion in the original case. They are the heirs at law of Potter, and are injured by the judgment. They are privies to the record as such heirs of Potter. In 5 *Ency. of Plead. & Prac.* p. 31, this rule is announced: "A writ of error coram nobis can only be procured by one who is a party or privy to the record, or injured thereby." See, also, *Holford v. Alexander*, Assignee, 12 Ala., loc. cit. 289, 46 Am. Dec. 253, wherein, on a discussion of who can sue out such a writ, it was said: "It is laid down in the elementary books that a writ of error can be brought by him only who was a party or privy to the record, or injured by the judgment, and who consequently will derive advantage from its reversal. Heirs, executors, administrators, reversioners, remaindermen, terre-tenants, or a husband who marries after a judgment against his wife, and perhaps others, who are not parties to the proceeding sought to be revised, may join in the prosecution of a writ of error." Numerous cases are cited by the court in support of this point.

2. Respondent contends, among other things, that the judgment of dismissal was voidable only and not void, and being only voidable it cannot be attacked in this, a collateral proceeding, as he terms the case in hand. That the death of Potter terminated the relationship of Grove and Potter as attorney and client cannot be questioned.

motion of Grove is a fact found and undisputed.

But the immediate question before us is, Does the death of a party to a suit, after being duly under the jurisdiction of the court, both as to person and subject-matter, make an adverse ruling to him void, or does it render such judgment only voidable? The cases are not uniform upon the question, but the weight of authority is to the effect that such a judgment is voidable only. In *Black on Judgments*, § 200, it is said: "The great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the subject-matter and the persons during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void nor open to collateral attack."

The author has collated a number of authorities, and among them the old case of *Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229. In this case our court, speaking through Scott, J., said: "In the case of *Warder v. Tainter*, 4 Watts (Pa.) 278, the court says the authorities are abundant to show that in no case is a judgment rendered by a court of general jurisdiction considered void on account of the death of the defendant having taken place before the rendition of it; that, at most, it is only voidable. If the death of the defendant will not render a judgment void, no reason is perceived why the death of the plaintiff should have that effect. There being, then, a valid sale under a writ, supported by a judgment not void, the title of *Coleman* passed by it."

Van Fleet, in his work on *Collateral Attack in Judicial Proceedings*, § 602, undertakes to give the reason for the rule thus: "Jurisdiction over the parties being shown by the record, any movement for or against them is an implied finding that they are in life and legally competent to protect their rights. The recital usually is that the parties, either in person or by attorney, are present, or neglect, after due notice, to be present. Those are matters to be determined from the evidence; and the determination is not void because the evidence was false or insufficient."

The case of *Coleman v. McAnulty*, *supra*, has been cited and approved upon this question in the following cases: *Fithian v. Monks*, 43 Mo., loc. cit. 521; *Bank v. McWharters*, 52 Mo., loc. cit. 35; *Lewis v. Coombs*, 60 Mo., loc. cit. 48; *Postlewaite v. Ghiselin*, 97 Mo., loc. cit. 425, 10 S. W. 482.

Our cases are not wholly uniform on the subject. In *Sargeant v. Rowsey*, 89 Mo. 617, 1 S. W. 823, *Sherwood, J.*, holds that where a defendant in an action to foreclose a mortgage dies during the pendency of the suit, and decree entered without suggestion of death and the bringing in of the heirs, a sale

under such decree carried no title and is a nullity.

The Missouri cases seem to agree that if at the institution of the suit the defendant was in fact dead, then the judgment was a nullity. But, on the other hand, the Sargeant Case, *supra*, seems to stand alone in the list of cases wherein the court had acquired jurisdiction of the person and the subject-matter prior to the death. It is true that in the case of *Hinkle v. Kerr*, 148 Mo. 43, 49 S. W. 864, *Brace, P. J.*, touches the questions, and the distinction between the two classes of cases, i. e., those cases wherein the party was dead at the institution of the suit, and those cases wherein the party was alive and duly served with process at the institution of the suit, but dies pending the action and before final judgment, somewhat tenderly and suspiciously and in a degree doubtfully, yet the case finally passed off on the question that the party was a woman under coverture. However, *Gantt, P. J.*, in the case of *Shea v. Shea*, 154 Mo., loc. cit. 606, 55 S. W. 869, 77 Am. St. Rep. 779, gets back to the old moorings of the *McAnulty Case, supra*, and summarizes the Missouri doctrine thus: "It is well settled in this state, whatever may be the judicial opinion in other jurisdictions, that an action begun and prosecuted against a defendant who was dead when it was begun is absolutely void, and can be attacked collaterally as well as directly. *Bollinger v. Chouteau*, 20 Mo. 89; *Williams v. Hudson*, 93 Mo. 524, 6 S. W. 261; *Crosby v. Hutton*, 98 Mo. 196, 11 S. W. 613; *Graves v. Ewart*, 99 Mo. 13, 11 S. W. 971; *Jaacks v. Sullivan*, 128 Mo. 177, 30 S. W. 890. But the great weight of authority in this country is that, where a court has acquired jurisdiction of the subject-matter and of the person, the death of the defendant before the judgment is rendered will not render the judgment void for that reason. *Yaple v. Titus*, 41 Pa. 195, 30 Am. Dec. 604; *Warder v. Tainter*, 4 Watts (Pa.) 279; *Collins v. Mitchell*, 5 Fla. 364; *Freeman on Judgments* (4th Ed.) § 140."

So, too, says *Black, J.*, in *Williams v. Hudson*, 93 Mo., loc. cit. 528, 6 S. W. 262: "As the representatives of *Bougher and Crapster* were not made defendants in the tax suit, and as *Bougher and Crapster* were dead when that suit was commenced, the judgment, as to them and their representatives, is void. Had they died after suit commenced and service of process upon them, another question would be presented; but a suit commenced and prosecuted against a dead man gives the court no authority to enter judgment against him; the judgment is void as to him."

The learned annotator of *L. R. A.*, in volume 49, loc. cit. 160, in commenting on the case of *Kager v. Vickery*, 61 Kan. 342, 59 Pac. 628, 78 Am. St. Rep. 318, which holds the judgment void, says: "The majority of cases hold that a judgment taken against a

party who dies after suit, but before judgment, is not void. These cases generally hold that such judgments cannot be attacked collaterally; that they are erroneous and voidable, and that they are open to an attack in the proper manner, by motion or by writ of error *coram nobis*," etc.

To like effect is 1 *Freeman on Judgments*, § 153.

From all we conclude the right rule to be that if the party dies during the pendency of a suit wherein the court by legal process has acquired jurisdiction over both the person and the subject-matter but before judgment, and a judgment is rendered against such party so dying, without there being anything of record showing such death, then such judgment is voidable only and not void. But, on the other hand, if the party was dead at the institution of the suit, and the court for that reason acquired no jurisdiction over the person or subject-matter, then such a judgment is void. And in the case at bar we hold that, if the vitality of this judgment of dismissal is dependent solely upon the one question of the death of *Potter* pending the suit, such judgment cannot be attacked or impugned in this, a collateral proceeding.

3. Relators say that they do not depend entirely upon the question that the judgment is void because *Potter* was dead at the rendition thereof. They, in addition, urge that the cause was under submission, and say that the dismissal was without authority of law, and therefore void upon the face of the record itself. In other words, that under the record disclosures and the law such act was nugatory and void. In this contention relators plant themselves behind *Rev. St. 1899, § 639 (Ann. St. 1906, p. 658)*, which reads: "The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterwards."

A reference to the facts found by our commissioner shows that in the original suit of *Potter v. Bullivant et al.* the cause was submitted to the court, who found in favor of *Potter*; that is to say, that the deeds in question were mortgages, and not in fact deeds. Our commissioner further finds that a referee was appointed "to ascertain and determine the value of certain improvements on the lands then in litigation, and that said referee thereafter filed his report, to which the defendants *Bullivant and Chapman* filed their exceptions." Our commissioner then continued: "I further find that thereafter, while the exceptions to the referee's report of defendants *Bullivant and Chapman* were pending in said circuit court of Mississippi county, and before they were ruled upon by the respondent, *H. C. Riley*, one *L. D. Grove*, who, I find, was acting as the attorney of *James M. Potter* in his lifetime, appeared as *Potter's* attorney on the 7th day of April,

or not these exceptions had been heard and submitted to the respondent for his decision. The only thing appearing is that such exceptions were filed, and they might have been withdrawn before being heard and determined by the court. The parties were entitled to be heard upon their exceptions, and when heard they would be submitted to the court for a decision therein. The record fails to show such hearing, and as a consequence the exceptions within themselves were not under submission, within the terms of the statute, *supra*.

But going back to the further findings of our commissioner, we see that there is a finding to the effect that in 1890 James M. Potter instituted a suit in equity against Bullivant and Chapman and others in the circuit court of Butler county, wherein it was sought by plaintiff to have certain alleged incumbrances set aside, or to have the status of the same determined by the court; that by change of venue said cause went to Mississippi county, where a dismissal was taken as to all defendants except Bullivant and Chapman. Then our commissioner in words finds and says: "That in October, 1892, the issues of this original suit were finally submitted to the respondent, H. C. Riley * * * and a judgment was by him rendered in favor of the plaintiff, James M. Potter. That thereupon one J. Perry Johnson was appointed as a referee to ascertain and determine the value of certain improvements on the lands in litigation, and that the said referee thereafter filed his report, to which the defendants Bullivant and Chapman filed their exceptions."

If from this record of found facts there was either a final judgment in this case, or the whole case was before the court under submission, then either of said conditions would be fatal to the contention of respondent: First, if there was a final judgment, then the order of dismissal should not have been entered, and, being entered at a later term, was *coram non iudice*. *Mohler v. Wiltberger*, 74 Ill. 163; *Long v. Thwing*, 9 Ind. 179; *Danforth v. Love*, 53 Mo. 217. And, secondly, if the whole case was under submission and no final judgment, then the order of dismissal was in the face of an express statute (Rev. St. 1899, § 639, *supra*), and void on the face of the record.

(a) Was the judgment entered a final judgment? In determining this question, in addition to the facts found, we must take into consideration the undenied allegations of the alternative writ. Such undenied allegations stand as admitted. 13 Ency. of Plead. & Prac. p. 784. The above authority says: "All matters well pleaded by the relator which are not denied by the respondent in express terms

cause was finally submitted to the court upon the pleadings and evidence, for its determination of the issues thereby joined, and the court thereupon made and entered of record a decree determining that the said James M. Potter was the owner of the said real estate, that certain deeds given by said James M. Potter to said Thomas Bullivant were in fact mortgages, and by consent of all parties to the cause appointed a referee, one J. Perry Johnson, to determine the value of certain improvements on said lands erected by said Thomas Bullivant, and to take an accounting to ascertain the state of accounts between the parties in reference to the subject-matters of said suit."

This allegation stands undenied by the return, and is therefore admitted. This, coupled with the facts found, fully shows the character of the judgment. Was it a final judgment? We are of opinion that the decree or judgment in the Potter case was not a final judgment. Whilst it settled the principal equities, it left other matters to be passed under review by the court before the full equities could be adjudicated. The decree pleaded determined that the deeds were mortgages; but the petition or bill in equity not only prayed for that relief, but, as averred in the alternative writ, it further asked the chancellor "to determine their respective interests in and to the said real estate." A part of this controversy was determined by the chancellor, but another part was referred to a referee. Before final decree the report of the referee must necessarily pass under the judicial review of the chancellor. The amount of the mortgagee's interest in the lands could not be decreed until this report was made to and passed upon by the court.

In *Black on Judgments*, § 41, it is said: "The difficulty appears to arise in relation to those decrees which, while settling the general equities of the cause, leave something for future action or determination. And the true rule seems to be that, if that which remains to be done or decided will require the action or consideration of the court before the rights involved in the cause can be fully and finally disposed of, the decree is interlocutory; but it is none the less final if, after settling the equities, it leaves a necessity for some further action or direction of the court in execution of the decree as it stands."

And in section 44 the same author says: "The most difficult cases in which to draw the line between final and interlocutory decrees are those in which the decree, after finding the general equities, orders reference to a master for some specific purpose. Yet there are not wanting principles upon which to base a reasonable and accurate distinction in these cases. As the condensed result of the

numerous authorities on the subject, we may formulate the following specific rules: First, where a decree is made disposing of the general equities of the case, but ordering a reference to a master to ascertain damages, or to find certain facts, or to do anything else necessary to be done before a final adjustment of the rights of the parties can be had, if the functions of the master are to be judicial, and not merely ministerial, and the provisions depending on his report are not already incorporated in the decree, then the decree is interlocutory and not final. Second, where a decree ascertains and fixes all the rights of the parties, but a reference is ordered to a master to do or ascertain something that is necessary to carry the decree into effect, if the functions of the master are to be merely ministerial and not judicial, or if all the consequential directions depending on the result of the proceedings before him are given in the decree itself, then the decree is final and not interlocutory. To take a single illustration, the reference of a case to a master, to take an account upon evidence, and for the examination of the parties, and to make or refuse allowances affecting the rights of the parties, and to report his results to the court, is not a final decree. For his report is subject to exceptions from either side, which must be brought to the notice of the court before it can be available. It can only be made so by the court's overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment."

Evidently the decree for our review, whilst not before us in *hæc verba*, evidently provided for the referee to take evidence upon two questions, i. e., (1) the value of improvements placed on the lands by defendants, and (2) the amount of the mortgage debt; and, further, that such referee report to the court. In such case there could be no final decree until the report of the referee and the exceptions thereto were passed upon by the court.

Again, discussing final and interlocutory decrees, 23 Cyc. 786, says: "Although there cannot be two final judgments in the same case, it is sometimes proper to enter an interlocutory judgment for the final disposition of the case. Generally speaking, the judgment is final if it at once disposes of the entire controversy settling the rights of the parties, and leaving nothing for further consideration; but interlocutory if it merely settles some preliminary point or matter, or reserves for future determination some detail essential to the complete adjustment of the subject of litigation. The judgment is ordinarily final when rendered in pursuance of a general verdict, or on submission of the entire case to the court, or on a submission for decision on the pleadings. But an interlocutory judgment may be entered where it is necessary to frame an issue on which the parties may properly go to trial, or on overruling

a demurrer, where leave is given to amend the pleading or to plead over, or where the court has not before it all the papers necessary to settle the form of the final judgment, or reserves the decision of some point affecting the amount recoverable or the right to modify the judgment, or finds it necessary to appoint a master or referee to find issues in the case, unless where the action to be taken on the coming in of his report is definitely prescribed. So, also, a judgment is generally interlocutory if it embodies a condition, the performance of which is necessary to make it effective, or a condition on the performance of which it may be released. And, in the action of account, it is usual and proper to render a preliminary judgment that 'the parties do account.'"

In the case at bar it was necessary to appoint a master or referee to find issues in the case, and the action to be taken on the coming in of his report was not definitely prescribed by the decree under which he was appointed. We take it that there was left a very material portion of this case to be passed upon by the court upon the coming in of the report of the referee. The judgment mentioned in the alternative writ is not a final judgment, as we read and understand the cases, so that the contention of relators that no order of dismissal could be made because of a final judgment is untenable.

(b) If the judgment was not final, as we have found, then was the case under submission, so as to make Rev. St. 1899, § 639, applicable? We think not, under the record before us. There is nothing to show that there had been any hearing upon the report and exceptions taken thereto. Had the record disclosed that there had been a hearing upon these exceptions and this report, and the chancellor nisi had taken the same as submitted to him for judgment thereon, a different case would be presented. By section 714, Rev. St. 1899 (Ann. St. 1906, p. 711), the parties were entitled to argue their exceptions to the report of the referee. The law says, "and shall be argued without delay," thus showing that a hearing is contemplated before a submission. Under the facts before us this cause had not been finally submitted to the court so as to bring it within the purview of Rev. St. 1899, § 639, *supra*.

4. By our first paragraph we reach the conclusion that the motion filed by relators in the original suit of *Potter v. Bullivant et al.* was in the nature of a writ of error coram nobis, and that the relators were such privies to the record that they had a right to come in and file the same. By our second paragraph we reach the conclusion that the judgment of dismissal is not a void judgment, but voidable only, and, inasmuch as the motion to vacate was overruled, it stands there as bar to further action, and cannot be questioned in a collateral proceeding. By our third paragraph we hold that the first judgment

From this it follows that the peremptory writ should be refused for two reasons: (1) Because the relators had the right to file the motion to vacate, and after receiving an adverse judgment thereon had the right to appeal; and (2) because the judgment of dismissal is only voidable, and cannot be attacked in this proceeding. We cannot compel the court to proceed with the cause so long as this voidable judgment remains in force. Nor can we say that if relators had the right to file the motion to vacate the judgment, as we conclude they did have, they then did not have ample redress by way of appeal from the order or judgment overruling their motion. In this state a motion to vacate a judgment for error of fact, and not for patent error of record, supported by evidence dehors the record, takes the place of the common-law writ of error coram nobis, and is in the nature of an independent and direct attack upon the judgment in the court committing the error. A judgment upon such a motion is within itself a final judgment, from which an appeal will lie. But even if there was a question as to this, of which we think there is none, yet the judgment of dismissal and for costs in the original proceeding was a final judgment, and the order overruling the motion to vacate such judgment was at least a "special order after final judgment in the cause," so as to permit an appeal under Rev. St. 1890, § 806 (Ann. St. 1906, p. 769).

The peremptory writ should be denied; and it is so ordered. All concur.

PEARCE v. HOYT.

(Kansas City Court of Appeals. Missouri.
April 19, 1909. Rehearing Denied
May 3, 1909.)

1. LANDLORD AND TENANT (§ 231*)—RENT—BURDEN OF PROOF.

In an action for rent, the admission by defendant that he was the lessee of plaintiff, and had not paid the matured rent demanded, cast on him the burden of excusing his apparent default by proof of a breach of the contract by plaintiff pleaded in his answer.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 926; Dec. Dig. § 231.*]

2. LANDLORD AND TENANT (§ 173*)—RENT—EVICTION.

In an action for rent, the defense that defendant had been evicted by being deprived of the use of part of the premises was not sustained merely by a showing that, on attempting to show the premises to a prospective subtenant, he found the door of a stairway which was held in common with an adjoining owner locked; it appearing that the door had been locked by defendant's former subtenant, and the refusal of the adjoining owner to unlock the door being due to the incivility of the demand.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 173.*]

Metcalf, Brady & Sherman, for appellant.
Joseph A. Guthrie, for respondent.

JOHNSON, J. Action by a lessor against her lessee to recover rent due and unpaid. Plaintiff alleges that the rent of the demised premises for the months of July, August, and September, 1907, of \$200 per month, was not paid by defendant, and is due and payable under the terms of the lease. In effect defendant admits in his answer that he is the lessee of the premises as charged in the petition, and that he did not pay the rent in controversy; but he seeks to justify his action on the ground that he was evicted from a part of the demised premises, and, being thus deprived of the beneficial enjoyment thereof, is himself the injured party, and is excused in law from paying the rent by plaintiff's breach of her covenant to give him continuous and peaceful possession of the entire premises. The reply, in addition to a general denial, contains pleas of waiver and estoppel. A motion to strike out the new matter in the reply was filed by defendant and overruled by the court. Defendant excepted and argues that the ruling on the motion was erroneous. The trial to a jury resulted in a verdict and judgment for plaintiff for the full amount demanded in the petition. Defendant appealed.

The premises are known as 549 and 551 Main street, in Kansas City, and are used for business purposes. A three-story business building fronting on Main street covers the lot to its full width. Adjoining this building on the north is another business house owned by a stranger to this suit. A common stairway affords access from Main street to the second and third floors of both buildings. Half of this stairway is on the premises of plaintiff; the other half on those of the adjoining proprietor. Double doors are at the street entrance to the stairway. A life insurance company owned the premises a number of years and rented them from month to month to a merchant named Quinn. January 23, 1906, the insurance company sold and conveyed the property to defendant by warranty deed. February 15, 1906, defendant conveyed to plaintiff by warranty deed. On the same day plaintiff leased in writing the property to defendant for a term of three years, beginning on the first day of the following month, at a monthly rental of \$200. As a part of the transaction, a separate written contract was signed by the parties, in which it was agreed that defendant "accepts the lease so made as aforesaid to himself, subject to the rights of the said Quinn, and agrees and consents to be bound by all

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the provisions of the said lease to him as fully as though he were in actual possession of said premises at this date. The said Sallie McCloud Pearce agrees, however, that, whenever so requested in writing by the said Hoyt, she will terminate said tenancy of said Quinn as soon as it may be lawfully done after receipt of such notice." It appears from the evidence that the sale of the property to plaintiff and the letting thereof to defendant were parts of one transaction, and that defendant's agreement to become plaintiff's lessee was an inducing cause of the sale. Quinn was paying \$175 per month rent for the whole property, and on March 5, 1906, defendant notified him in writing that beginning May 1st the rent would be raised to \$250 per month. Quinn accepted defendant as his landlord and paid the rent to him, but vacated the premises a month or two after the rent was raised. Defendant paid plaintiff \$200 per month until July 1, 1907, when he quit paying. After Quinn moved out, defendant in repairing the building closed up the inside entrance from the first floor to the stairway, leaving the stairway without any entrance except that from the street. In March, 1907, defendant entered into negotiations to lease the property to a man he thought would be a desirable tenant. This man went to inspect the premises, and found he could not obtain entrance to the stairway on account of the street doors being locked. He reported this fact to defendant, who sent a young man from his office to make demand of the adjoining proprietor to remove the lock from the doors. The demand was made in a manner so uncivil and peremptory that it angered the adjoining proprietor into refusing to comply with it. Defendant lost his customer he claims on account of access to the upper floors being denied him. On April 20th following plaintiff and the adjoining proprietor entered into a written agreement to keep the street doors open for the common use and benefit of the occupants of both buildings. Defendant was wrong in thinking, as he did, that the adjoining proprietor had obstructed the entrance to the stairway. His own tenant, Quinn, had locked the doors some years before, and kept them locked, because he did not wish that entrance to be used. The doors were locked when defendant sold the property to plaintiff, and remained in that condition until plaintiff and the adjoining proprietor agreed to open them. All defendant had to do to open the doors himself was to have Quinn give him the key, but it did not occur to him to do this. There is no serious dispute over any of the facts we have stated, and they may be taken as the established facts of the case. Other facts appear in evidence, but those stated control the disposition of the case.

The admission by defendant in his answer and evidence that he was the lessee of plain-

tiff under the lease pleaded in the petition, and had not paid the matured rent demanded, cast on him the burden of excusing his apparent default by proof of the existence of the breach of the contract by plaintiff pleaded in his answer. He has failed completely to sustain this burden, and the learned trial judge would have committed no error had he peremptorily instructed the jury to return a verdict for plaintiff. The rule invoked by defendant, "that the tenant, whose occupancy is prevented by a wrongdoer is not compelled to proceed against him but may take his action against his lessor on his covenant to deliver possession" (*Rieger v. Welles*, 110 Mo. App. 166, 84 S. W. 1136), has no application here, for the reason that no facts or circumstances have been adduced by defendant to support the conclusion that he was deprived of the stairway either by plaintiff or by the adjoining proprietor. He has proved nothing but the fact that a year after he leased the premises he found the street doors locked. This fact alone does not warrant the inference that he was excluded from the use of the stairway by plaintiff, the adjoining proprietor, or even by a wrongdoer. On the contrary, the facts stand undisputed in the record that his own subtenant, Quinn, locked the door for purposes of his own, and that defendant could have opened it either by procuring the key or forcing the lock. The conclusion cannot be avoided that defendant seized on the mere fact of finding the door closed as a foundation on which to lay a defense to the enforcement of what was proving to be a burdensome lease. His defense is wholly without merit.

In this view of the case, the question of whether or not the court erred in overruling defendant's motion to strike out parts of the reply is immaterial. The same may be said of other questions argued by counsel.

The judgment is for the right party, and is affirmed. All concur.

ERHART v. WABASH RY. CO.

(Kansas City Court of Appeals. Missouri.
April 19, 1909. Rehearing Denied
May 3, 1909.)

1. RAILROADS (§ 484*)—FIRES—QUESTION FOR JURY.

In an action against a railroad company, the question whether the fire was communicated by sparks from defendant's engines *held* for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.*]

2. EVIDENCE (§ 153*)—BEST EVIDENCE—FIRES—OWNERSHIP OF BUILDING—PAROL EVIDENCE.

In an action against a railroad company for destruction of a building by fire, plaintiff's testimony that she owned and occupied the building was competent evidence of title; for, while title to realty cannot ordinarily be proved by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
118 S.W.—42

A railroad company destroying buildings by fire cannot reduce the owner's recovery therefor by showing that he received insurance; the railroad company being a stranger to the insurance contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 113; Dec. Dig. § 64.*]

Appeal from Circuit Court, Macon County; Nat. M. Shelton, Judge.

Action by Sarah C. Erhart against the Wash-Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. L. Minnis and Robertson & Robertson, for appellant. C. A. Barnes and Fyke & Snider, for respondent.

BROADDUS, P. J. This action is to recover damages for the burning of plaintiff's houses, furniture, and trees on her premises. The trial resulted in a judgment for plaintiff in the sum of \$1,600, from which defendant appealed.

The appellant's first contention is that under the pleadings and testimony the plaintiff did not make out a case for recovery. The fire occurred on the 16th day of September, 1907, in Centraalia, at about the hour of noon. The fire was communicated to plaintiff's house from sparks from a burning building near the tracks of the defendant's railroad, which plaintiff claims was set afire by sparks emitted by defendant's engines. The burning building which set fire to plaintiff's house was what was known as the Priebe-Simeter poultry house, and was situated about 100 feet north of defendant's main track and about 75 feet north of defendant's switch tracks. The poultry house was a frame structure with a shingle roof, was 60 feet long by 20 feet wide, with an ell 20 feet by 32 feet joined onto the north side. At the time it was occupied by Swift & Co., who were engaged in the egg and poultry business. The main part of the building was two stories high without any ceiling between the upper floor and the roof. This upper story was occupied as a place of storage for lumber for egg cases and empty barrels. It was shown that a short time before the fire, which burned the building and which occurred at about 10:30 o'clock a. m. of the day, two of the defendant's engines were engaged in switching nearby. There was evidence that the engines of the defendant while in operation threw out sparks, but no one seemed to have noticed that they did so on the occasion in question. There was a brisk and somewhat variable wind blowing from the south and southwest at the time. Plaintiff introduced evidence tending to show that the fire was first discovered in the roof

and much unadmitted, with holes in it sufficient to admit the light. The defendant's evidence tends to prove that the fire started inside under the roof, which must have been communicated by some one of the employees of Swift & Co., who were shown to have been habitual smokers while at their work. It was also shown that the engines that had been switching moved slowly—not over the rate of two miles an hour—and defendant's engineers testified that under such conditions they did not throw out sparks.

We believe there was ample evidence on the part of the plaintiff tending to show that the fire caught in the roof of the building. It then remains to be seen if there was any evidence tending to show that the fire was communicated by sparks from defendant's engines. There being no direct proof of that fact, the matter must rest upon inference to be drawn from the circumstances and surroundings. It may be inferred that, going at the rate of two miles an hour, an engine would not ordinarily throw out sparks so as to set fire to a building 75 or 100 feet away. But we must take into consideration that the engines, while switching, at times were still, and that in starting up they do sometimes throw out sparks, as it requires more power to start them than it does to continue a slow movement afterwards. This, we believe, to be common observation and experience. With a brisk wind blowing from the south from defendant's tracks, sparks from an engine could be carried north to the roof of the building, which in its condition was very susceptible of being ignited; and, if the fire started in the roof, there is no other reasonable manner in which to account for its origin except by sparks from one of defendant's engines. *Gibbs v. Railroad*, 104 Mo. App. 276, 78 S. W. 835. The evidence left it as a question for the jury.

It is contended that it was not shown by competent evidence that plaintiff was the owner of the building—that title to land cannot be shown by oral evidence. The only evidence introduced was that of plaintiff that she owned and occupied it as her place of residence, and that she had about 10 years previously caused its construction at a cost of \$1,600. The defendant objected to the manner of proving ownership. In *Bank of Aurora v. Linzee*, 166 Mo. 496, 65 S. W. 735, which was a suit in ejectment, it is held that oral evidence is not the best evidence of title. And in *Turner v. Williams*, 76 Mo. 617, where title was involved, it is held that title to land cannot be established by mere oral statements of witnesses. It cannot be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

doubted but such is the universal rule in such cases. But "possession of land under claim of title is, as against a stranger, prima facie evidence of title." *Kansas City Suburban Belt Railway Co. v. Norcross*, 137 Mo. 415, 38 S. W. 299.

The plaintiff admitted that her property had been insured, and that the insurance company had paid her \$1,011 for her loss, \$11 of which was for goods destroyed. The defendant contends that the estimated value of the building at \$1,600, less depreciation of 5 per cent. a year, would fix its value at the time of the fire at \$960, an amount less than the insurance received by plaintiff. But defendant has misconstrued the evidence. The witness who estimated the value of the building placed it at \$1,600 after allowing for the depreciation. However, as to that matter, it could make no difference how much or how little the plaintiff received by way of indemnity from the insurance company for her loss. Her damages cannot be reduced thereby; the defendant not being a party to the insurance contract and having no interest therein. *Matthews v. Mo. Pac. Ry. Co.*, 142 Mo. 645, 44 S. W. 802.

We believe every point raised by the defendant on the appeal has been determined. The case was well tried, and, finding no error, it is affirmed. All concur.

STATE v. WILKSON.

(St. Louis Court of Appeals. Missouri. April 20, 1909.)

CRIMINAL LAW (§ 1024*)—APPEAL—DECISIONS REVIEWABLE.

A writ of error will not lie from an order quashing an information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2602; Dec. Dig. § 1024.*]

Error to Circuit Court, St. Francois County; Chas. A. Killian, Judge.

John Wilkson was prosecuted for a violation of the local option law. The information was quashed, and the State brings error. Writ dismissed.

R. C. Tucker, for the State. E. A. Rozler and W. L. Hensley, for defendant in error.

GOODER, J. This is a writ of error from a judgment of the circuit court quashing an information against defendant, wherein he was charged with selling intoxicating liquors, to wit, two kegs of beer and a half gallon of whisky, in St. Francois county, contrary to the statutes against the sale of intoxicating liquors, which had been adopted in said county, being commonly known as the "local option law," and consisting of article 3, c. 22, §§ 3027-3035, of the Revised Statutes of 1899 (Ann. St. 1906, pp. 1733-1740).

The writ must be dismissed, because a

writ of error will not lie from an order quashing an information. *State v. Rozelle*, 174 Mo. 632, 74 S. W. 852; *State v. Adams*, 193 Mo. 200, 91 S. W. 946; *State v. Ross*, 119 Mo. App. 401, 403, 94 S. W. 842. All concur.

JACKSON v. SMITH.

(Kansas City Court of Appeals. Missouri. April 19, 1909.)

WITNESSES (§ 146*)—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED.

Under Rev. St. 1899, § 4652 (Ann. St. 1906, p. 2520), providing that, where one of the parties to an action is dead, the other party cannot testify, plaintiff's husband cannot testify to a contract with deceased, made by him as plaintiff's agent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 644-649; Dec. Dig. § 146.*]

Appeal from Circuit Court, Atchison County; Wm. C. Ellison, Judge.

Action by Isadora Jackson against Tully Smith, executrix of the estate of Abner Smith, deceased. From a judgment for plaintiff, defendant appeals. Reversed.

L. J. Miles and W. R. Littell, for appellant. L. D. Ramsay, for respondent.

BROADBUSH, P. J. The plaintiff, a married woman, is the daughter of Abner Smith, deceased. She asserts a claim against her father's estate for services which she alleges she rendered in behalf of her sister, Ellen Jackson, who was at the time a married woman, in taking care of and providing for her under a contract she had with the deceased. The contract was made for her by her agent, her husband. The defendant objected to the competency of the husband as a witness, on the ground that the other contracting party was dead, and that therefore he was incompetent to prove the contract. The objection was overruled, and the witness was allowed to testify to the contract. The verdict was for plaintiff, and the administrator appealed.

The statute removes the disabilities of a party to a suit as a witness by reason of his interest as a party or otherwise, "provided, that in an action where one of the original parties to the contract or cause of action in issue and on trial is dead * * * the other party to such contract or cause of action shall not be admitted to testify." Section 4652, Rev. St. 1899 (Ann. St. 1906, p. 2520). The Supreme Court, after a review of the cases on the question, holds: "Hence an examination of the cases will show that a party to the contract has been construed to mean the person who negotiated the contract, rather than the person in whose name and interest it was made. Thus, though one party in interest be dead, the other party

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

will be a competent witness, if the contract in issue was negotiated by an agent of deceased who is living at the time of the trial." *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816; *Miller v. Wilson*, 126 Mo. 48, 28 S. W. 640. And it is held: "If both parties to a contract be living, one of them will not be permitted to testify, if the agent who acted for the other be dead. *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429. And so it is held in *First Nat. Bank v. Payne*, 111 Mo. 291, 20 S. W. 41, 33 Am. St. Rep. 520, *Waltermar v. Schnick's Estate*, 102 Mo. App. 133, 76 S. W. 1053, and *Edwards v. Warner*, 84 Mo. App. 200. Although there has been much confusion in the decisions of the Supreme Court of the state in construing the statute on this phase of the question, they seem to be uniform; and we do not see how it could be otherwise.

As the evidence of the husband to prove the contract was all the evidence that was offered as to that matter, the cause is reversed without remanding. All concur.

CAMPBELL et al. v. TINKER.

(St. Louis Court of Appeals. Missouri. April 20, 1906.)

1. SALES (§ 179*)—REMEDY OF BUYER—OPTION TO RETURN.

Where horses were sold on an understanding that if not satisfactory they might be returned, and the buyer accepted and paid for them, he was precluded from any redress, except for fraud, or on a warranty, if one was given.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 456-468; Dec. Dig. § 179.*]

2. APPEAL AND ERROR (§ 882*)—INVITED ERROR.

Though requested declaration of law, as given, with modifications, widened the issues, the request having invited the error, it was not available on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3602; Dec. Dig. § 882.*]

3. SALES (§ 168*)—RIGHT TO RETURN.

Where a horse is sold on trial, and injured while in the purchaser's possession, but without his fault, he is not thereby deprived of the right of rejection.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 417; Dec. Dig. § 168.*]

4. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—DECLARATION OF LAW.

Where, in an action for the price of a horse, defendant claimed that under the contract he was entitled to return the horse if unsatisfactory, and a return was shown, declaration of law, requiring the court to find, not only that a reasonable time for return had expired, but also that the horse had been injured after the expiration of such time, was not prejudicial to defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4056; Dec. Dig. § 1033.*]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action by John A. Campbell and others against Zach W. Tinker. From a judgment

in favor of plaintiffs, defendant appeals. Affirmed.

Plaintiffs are partners under the style of the Campbell Horse Company, and are engaged in the business of buying and selling horses in East St. Louis, Ill. On December 10, 1904, defendant purchased a pair of horses from them for \$700, and the present action is to recover said sum, less a credit of \$118, allowed for reasons which will appear in the course of the statement. The answer says defendant bought two horses from plaintiffs in 1902 on condition he should have a reasonable time in which to try them, and, if they were found not sound, docile, or satisfactory, might return them, in which event plaintiffs were to furnish other horses on the same condition, and so on, until they satisfied defendant, when the purchase price of \$450 paid for the first pair should be credited on the price of the horses that were accepted as satisfactory; that the pair of horses first delivered proved unsatisfactory to defendant, were returned to plaintiffs, and thereafter, from time to time, plaintiffs furnished, and defendant tried, other horses in accordance with the agreement, and finally received and accepted a pair at the price of \$700; that thereupon defendant tendered and offered to pay plaintiffs the difference between said sum and \$450 theretofore paid for the horses furnished in 1902, and afterwards returned, which difference of \$250 defendant had been at all times ready and willing to pay, but plaintiffs had refused to accept. For reply plaintiffs said it was true they had sold defendant a pair of horses in 1902, and defendant had paid for them, but that said sale was absolute, and without any agreement or guaranty from plaintiffs to defendant. That defendant took possession of said horses. Afterwards one of them was hurt or injured, whereupon defendant sent them to plaintiffs' stable, requesting the latter to sell them for the account of defendant and give him credit for the net proceeds of the sale. That plaintiffs sold them as requested, and gave him credit for \$118 as the net proceeds. That with this credit he was left indebted to plaintiffs in the sum of \$582 on the price of the horses bought in December, 1904.

The testimony was conflicting regarding the terms of the first sale, which occurred in March, 1902; that for defendant tending to prove the horses were returned to plaintiffs on May 4th because they turned out to be skittish and unsatisfactory, and were accepted by plaintiffs pursuant to an agreement to supply another pair, and on the understanding this would be done. Testimony for plaintiffs was to this effect: They never sold horses on trial. Defendant and his coachman tried the pair in controversy twice before taking them from plaintiffs' stable, and a day or two afterward telephoned plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiffs to come over and get their money, as defendant could not want a better team. One of the plaintiffs went over, and was paid in full, by check dated March 22d. Thereafter defendant sent word one of the horses had fallen lame, and to accommodate him plaintiffs furnished first one horse and then another to use in lieu of the lame horse. Later defendant said he was going to Europe, and would send the team back to be sold, and the money put to his credit, to be applied on a pair of horses he would purchase on his return. A man of plaintiffs went to defendant's stable to get the horses pursuant to this request, and found one of them so lame he could hardly walk; in fact was unable to travel the distance to plaintiffs' stable. Defendant's coachman said plaintiffs understood about this, and the team was to be taken back and sold for defendant's account. Meanwhile the tails of the horses had been docked, which would diminish their value, and it turned out one of them had broken a bone in its ankle. This fracture was five or six months in healing. In September, 1902, the team was sold for \$250, and defendant credited with the sum of \$118, which was left after paying for feed and veterinary services. Defendant explained why he paid for the team while he had it on trial, by saying he expostulated when asked to pay, but one of the plaintiffs said they needed the money, and assured him if the horses were not satisfactory, others would be sent. The case was tried without a jury, and judgment given for plaintiffs for their demand, wherefore the appeal calls into question the declarations of law, two of which were given of the court's own motion, and the others were requested by defendant, and given with changes made by the court. We transcribe most of the declarations, omitting two or three which express the same theories of the case, and are either uncriticised, or criticised for the same reasons as those copied. The court's modifications in declarations asked by defendant are in italics. The following were given of the court's own motion:

"(1) If the court sitting as a jury finds and believes from the evidence that the team first delivered to the defendant was delivered on trial, and that thereafter plaintiffs were notified by defendant, or any one of the employes of defendant having charge of said horses, that the team was satisfactory, and that thereafter plaintiffs through their authorized agent called upon defendant and received payment for said horses, and gave a bill of sale thereof, or a warranty as to said horses, then plaintiffs are entitled to recover in this action.

"(2) In determining whether said sale was conditional, as contended for by defendant, the court will take into consideration all the facts and circumstances in evidence; and, although the court may find and believe said sale was conditional, yet it was the duty of the defendant to accept or reject said horses

in a reasonable time, and, if not accepted, to return them to plaintiffs, and if the court sitting as a jury further finds and believes from the evidence that defendant did not notify plaintiff of his acceptance of said team of horses, and did not return the same to plaintiff, within a reasonable time, but continued to use said horses, and that during said use the horses became crippled, lamed, and otherwise injured in value and usefulness, then plaintiffs are entitled to treat said sale as absolute, and entitled to recover in this action."

The following, asked by defendant, were given as modified:

"(1) The court instructs (declares) that if from the evidence it believes that defendant purchased the first team of horses upon approval, that defendant was to have a reasonable time to try said horses, and that if upon trial said horses did not prove sound, docile, and satisfactory to defendant, defendant might return said horses to plaintiffs, then there was no absolute sale of said first team, unless defendant notified plaintiffs, after said trial, that said horses were approved by him, and were docile, sound, and satisfactory to him, or unless defendant, within a reasonable time after said purchase, failed to notify the plaintiffs that said horses were not approved by him, and were not docile, sound, and satisfactory to him, and failed to return said horses in a reasonable time.

"(2) The court declares that, if from the evidence it believes that defendant purchased said first team of horses subject to his approval, and subject to said team being satisfactory to him, and that defendant returned said first team to plaintiffs because he did not approve of the same, or because said team was not satisfactory to him, then there was no absolute sale of said team, and defendant is entitled to a credit from plaintiffs of \$450 upon the purchase price of the second team of horses, even though the court may believe that said first team was sound and docile, and that defendant ought to have approved of said first team, and even though the court may believe that defendant ought to have been satisfied with said first team, the grounds of approval or disapproval, and of satisfaction or dissatisfaction, being for defendant alone to determine, and provided that option was exercised in a reasonable time, and plaintiffs notified thereof.

"(3) The court declares that, even if one or both of the horses in said first team were injured while said horses were in defendant's possession, still defendant did not, because of said injuries, lose the right to return said first team to plaintiffs, and to receive from plaintiffs credit for the sum of \$450, provided that by the terms of the purchase of said first team of horses defendant reserved the right to return said horses if they were not sound and docile, and were not satisfactory to defendant, and provided, further, that said injuries befell said horse, or horses, in

the course of the exercise by defendant of the right of trying said horses which the contract gave to defendant, and provided further that the injuries were received only during their trial, and within a reasonable time after their receipt by defendant. If the court sitting as a jury believes from the evidence that the defendant did not accept or return said horses within a reasonable time, and after such reasonable time said horses were injured, crippled, and rendered less valuable and useless (sic), then defendant had no right to return them under his alleged conditional purchase."

John T. Fitzsimmons, for appellant. E. W. Banister, for respondents.

GOODE, J. (after stating the facts as above). The first declaration in the present case merely said, if the court found the team first purchased was delivered to defendant for trial, thereafter plaintiffs were notified by him it was satisfactory, were paid, and gave defendant a bill of sale, or a warranty, plaintiffs were entitled to recover. That declaration was sound; for certainly if the horses were accepted and paid for by defendant as satisfactory, he had exercised his option to keep or return them, and thereafter he could have no redress, except for fraud, or on a warranty, if one was given. Execution of a bill of sale by plaintiffs, and acceptance of it by defendant, was not essential to an election by him to keep the horses, but might be regarded as a circumstance which favored the conclusion that he had elected to keep them. It was not more necessary to refer to said circumstance in the declaration than to refer to any other fact conducing to prove the ultimate fact of a decision by defendant to accept the team, but reference to it was not prejudicial to defendant; for the declaration required the court to find for plaintiffs on the essential fact of whether defendant notified them he would accept the team, and the inclusion of certain circumstances which helped to induce the finding was immaterial.

Counsel for defendant excepted to changes made by the court in other declarations, and insists these changes drew into the case for decision issues not joined in the pleadings, to wit, whether defendant ought to be regarded as having accepted the horses first purchased if he did not return them to plaintiffs in a reasonable time, or if one of them was injured or crippled while in his possession. The argument runs thus: In replying to defendant's averment of a purchase of the first pair of horses with the privilege to return them if they proved unsatisfactory, plaintiffs alleged the sale was absolute and unconditional. Further, according to all the testimony, the horses were returned to, and received by, plaintiffs. Under such pleadings and evidence, whether or not they were returned in a reasonable time was an irrelevant inquiry; the real question being wheth-

er this was done pursuant to an option accorded to defendant in the contract of sale, as he alleged, or merely in compliance with his request to sell them for him, as plaintiffs alleged. Defendant's view of the pleadings is substantially correct. The replication mentions the occurrence of injury to one of the horses while defendant had it, but does not put the fact forward in a definite manner as a reason why defendant could not exercise his option to reject them if such an option had been given. Hence it may be allowed the declarations of law widened the issues; but scrutiny of the declarations requested by defendant shows this course was invited, and hence is not available for reversal. *Christian v. Ins. Co.*, 143 Mo. 460, 45 S. W. 268; *Sowden v. Kessler*, 76 Mo. App. 581; *Plummer v. Milan*, 79 Mo. App. 439. Take the first modified declaration, and compare the italicised part inserted by the court with the remainder, and it will be seen the theory of law propounded in the declaration as requested was not changed. The theory was that, if the first team was sold on approval, and defendant was to have a reasonable time to try it and return it if unsatisfactory, there was no absolute sale, unless, after trial, he approved the horses, or failed within a reasonable time to notify plaintiffs they were not approved. The insertion made by the court required defendant to return the horses within a reasonable time, as well as give notice of rejection. But defendant's supposed right to return them if they were unsatisfactory was mentioned in the requested part of the declaration, in a connection that implied return in a reasonable time, which, of course, would be a necessary incident of refusal to accept them. The amendment of the second requested declaration merely required defendant to exercise his option to reject, and follow up his decision with reasonable notice to plaintiffs. In the third declaration the amendment was more elaborate, but of the same legal effect. It said if the court did not believe defendant accepted or returned the horses within a reasonable time and after such time they were injured, crippled or rendered less valuable, defendant had no right to return them. According to defendant's own theory he was bound to keep them unless he gave timely notice to the contrary. In default of such notice the sale would become absolute (1 *Mechem*, Sales, §§ 681, 682), and a subsequent injury would not affect the matter one way or the other, and hence need not have been referred to in the declaration; but the reference was not unfavorable to defendant, inasmuch as the court was required to find the main fact: Retention of the horses an unreasonable time without notice of disapproval.

We have been cited to *Head v. Tattersall*, L. R. Exchr. 7, and agree with the doctrine of the case, namely, that if a horse is sold on trial, and is injured while in the purchas-

er's possession, but without his fault, he will not be deprived thereby of the right of rejection. The decision was based on the concession that the injury occurred in the period allowed for trial. If no definite period is arranged, a reasonable one is implied, and so defendant concedes in the present case. Now it will be observed the reference to the injury in the declarations was in terms which showed the court meant an injury after lapse of reasonable time for trial. As said, we do not see how an injury then occurring could have any effect on the rights of the parties, which would have been fixed by the expiration of the time in which defendant might decline the horses; but neither do we see how requiring the court to find, not only that the time had expired, but also that one of the horses had been hurt after its expiration, could be prejudicial to defendant. Such an accident would not enlarge his right of rejection, but rather would lend emphasis to plaintiffs' right to treat the sale as absolute. *Strauss v. Kingman*, 42 Mo. App. 208; *Carter v. Wallace*, 82 Hun (N. Y.) 384. What we have said in this connection applies to the second declaration, given by the court of its own motion. The injury to the horses by use, referred to in said declaration, clearly means an injury after the end of the period of trial and in which defendant might have returned them as unsatisfactory. The declarations are verbally inexact, but they show the court tried this case on correct legal theories, considering the fact that defendant himself introduced by his requests the question of whether his alleged election to disapprove was timely.

The judgment is affirmed. All concur.

WASSON v. BOLAND et al.

(Kansas City Court of Appeals. Missouri.
April 19, 1909. Rehearing Denied
May 3, 1909.)

1. LIMITATION OF ACTIONS (§ 127*)—AMENDMENT OF PLEADINGS—NEW CAUSE OF ACTION.

Though an action be brought before the period of limitation has expired, if an amended petition be filed after the period, changing the cause of action, it will be barred.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

2. LIMITATION OF ACTIONS (§ 127*)—AMENDMENT OF PLEADINGS—WAIVER BY FAILURE TO OBJECT.

Failure to object to amendment of a petition is a waiver of the question of plaintiff's right to amend and does not affect the running of the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

3. LIMITATION OF ACTIONS (§ 127*)—AMENDMENT OF PLEADINGS—NEW CAUSE OF ACTION.

An original claim filed by plaintiff in the probate court against the estate of B., deceased,

was for "Balance on certificate of deposit of Bank of L., Iowa, a copartnership doing business under the firm name and style of the Bank of L.," and the certificate was attached as an exhibit. An amendment pleaded various statutes of Iowa, limiting the life of banking corporations to 20 years and for enforcement of claims against partnerships and proceeded on the theory that the corporate life of the Bank of L. had expired before the bank received plaintiff's money, that it was then acting as a partnership, and that the claim survived to plaintiff as against decedent's estate on his liability as a partner. *Held*, that the amendment was the statement of a new cause of action and was within the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

4. LIMITATION OF ACTIONS (§ 127*)—AMENDMENT OF PLEADINGS—NEW CAUSE OF ACTION.

A test as to whether an amendment states a new cause of action within the statute of limitations is whether evidence to prove the one will support the other.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

5. LIMITATION OF ACTIONS (§ 127*)—AMENDMENT OF PLEADINGS—NEW CAUSE OF ACTION.

That the cause of action set up in an amendment might have been joined in the same petition in a separate count, or that the subject-matter of each is the same, does not determine that the cause of action in the amendment is not new within the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

6. PARTNERSHIP (§ 41*)—CORPORATIONS—EXPIRATION—LIABILITY OF STOCKHOLDERS AS PARTNERS.

By the laws of Iowa the stockholders of a corporation which continues to do business after its charter has expired cannot be held as partners in the absence of a statute imposing such liability.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 56-59; Dec. Dig. § 41.*]

Appeal from Circuit Court, Putnam County; Geo. W. Wanamaker, Judge.

Proceeding by Mary A. Wasson against John S. Boland and another, administrators of the estate of John Boland, deceased. From a judgment for plaintiff, defendants appeal. Reversed.

N. A. Franklin and Thos. B. Davis, for appellants. B. L. Robison, Ira B. Hyde, and Arthur M. Hyde, for respondent.

ELLISON, J. Plaintiff filed a demand against the estate of John Boland, deceased, in the probate court of Putnam county, based on a bank certificate of deposit. The case was appealed to the circuit court, where the plaintiff had judgment for the amount, less credits.

It appears: That the Bank of Lineville did business as a corporation in Iowa until, at the expiration of 20 years, its franchise expired under the terms of the statute of

that state. That after the expiration of the life of the charter the bank continued business, as before, for several years, when it became insolvent and was placed in charge of a receiver, who paid a portion of the sum due on the certificate. It was during the period after the expiration of the charter and before the insolvency, while doing business as it had always done, the deposit was made and the certificate issued which is the basis of this controversy. The certificate was issued to Francis Walker and by him assigned to this plaintiff. It appeared in evidence that certain of the officers and stockholders of the bank stated themselves to be partners, and that a suit was instituted in this state on a claim of the bank, in which it was alleged that it was a partnership. It also appeared that the application for a receiver stated the bank to be a partnership. But it further appears that to meet the demands of creditors the receiver made assessments against the stockholders under the banking law of Iowa. It does not appear that Boland knew of any claim or admission of partnership.

The demand, when presented or filed by plaintiff in the probate court, only lacked four days of being barred by the statute of limitations for the presentation of claims against estates of deceased persons. After the limitation period expired, plaintiff filed an amended petition. The law in this state is that, though an action be brought before the period of limitation has expired, if an amended petition be filed after the period, changing the cause of action, it will be regarded as "a fresh suit upon a new cause of action," and will be barred. *Buel v. Transfer Co.*, 45 Mo. 562; *Fields v. Maloney*, 78 Mo. 172; *Scovill v. Glasner*, 79 Mo. 449; *Sims v. Field*, 24 Mo. App. 557. It is held that a failure to object to the amendment will be a waiver. There was no objection in this case. But that relates merely to the question of waiver of right to make the amendment. It does not affect the matter of the running of the statute of limitations, as will be seen from the opinion of Judge Hall in *Sims v. Field*, supra. So the question is whether the amendment changed the cause of action. The object of both the original and amended petition was to hold the estate on the ground of partnership. The original claim was as follows: "The estate of John Boland, deceased, to Mary A. Wasson, Dr. Balance on certificate of deposit of Bank of Lineville, Iowa, No. 18,248, a copy of which is hereto attached marked 'Exhibit A' and made a part thereof, \$2,800.00. The said John Boland was the owner of 20 shares of stock in said Bank of Lineville, a copartnership doing business under the firm name and style of the Bank of Lineville. The said certificate marked 'Exhibit A' was issued to Frances M. Walker and by her assigned to claimant Mary A. Wasson.

"Exhibit A.

"\$5,277.62. No. 18,248. Not subject to check. Bank of Lineville. Lineville, Iowa, April 14, 1904. Francis M. Walker has deposited in this bank fifty-two hundred seventy-seven and $\frac{2}{100}$ dollars payable to the order of self six months after date at 6 per cent. in current funds, on return of this certificate properly indorsed. If duplicate unpaid. Certificate of deposit. A. L. Rockhold, Cashier."

The amendment is a lengthy pleading, but the substance of it is: That the contract evidenced by the certificate of deposit was made in Iowa and was governed by the laws of that state. The various statutes of that state are then pleaded, among others, section 1069, Code 1873, providing that corporations for banking could not be organized for a longer period than 20 years, and that by section 1629, Code 1897, if one continued after that period, it could only be for the purpose of winding up its affairs and not to take new business. That by section 1863, Code 1897, a banking corporation could only be organized in the manner therein stated, which is set out in the petition. That by section 1842 of such Code it was provided that certain notice, etc., of the organization of the corporation should be given. That by section 1864 the officers of the corporation should not commence business until they had made certain sworn statements to the state auditor of Iowa. That by section 3468 an action on a claim or demand against a partnership may be brought against any one of the members thereof as an individual liability. And, finally, it was pleaded that, according to the provisions of section 3443 of such statutes, all actions survive, "under which provision plaintiff alleges that his said claim survives and may be brought against the representatives of said John Boland, deceased." It was also appropriately pleaded that the corporate life of 20 years allowed by the statute aforesaid for the Bank of Lineville had expired, and that its officers and stockholders did not reorganize, nor did they attempt to wind up the affairs of the bank, but continued to do a banking business as before and under the same name, and that, during this time after the expiration of its charter, it received the deposit in controversy. The purpose of the petition was to set forth that the corporate life of the Bank of Lineville had ceased when it received the deposit, and that it received such deposit while conducting the bank as a going concern, as had been done for several years, without any intention to wind up its affairs, and that by reason thereof the stockholders became merely partners doing a banking business as a partnership, and that deceased was liable as one of such partners.

In our opinion the amendment was the substitution of a new action. One test constantly made is whether evidence to prove

one will support the other. *Ross v. Mineral Land Co.*, 162 Mo. 317, 82 S. W. 984; *Heman v. Glann*, 129 Mo. 325, 81 S. W. 589; *Lumpkin v. Collier*, 69 Mo. 170; *Scovill v. Glasner*, 79 Mo. 449. The rule is clearly illustrated by the decision in *McHugh v. Transit Co.*, 190 Mo. 85, 88 S. W. 853, where it is held that a complaint for damages for common-law negligence and one for statutory negligence are two different causes of action and cannot be joined in the same count, though they relate to the same injury. It can be said of this amendment, as was said by Hall, J., in *Sims v. Field*, supra, that: "The proof required by one petition was entirely different from the proof required by the other, and this difference was as to the character of the proof, and not as to the quantity of proof only. The entire proof required by the original petition would not have been sufficient under the amended petition." The mere fact that the action stated in the amendment might have been joined in the same petition, in a separate count, with that stated in the original, or that the subject-matter of each may be the same, does not determine whether the cause of action has been changed, from which it follows that, though the original and the amendment are actions on the same certificate, that fact does not prevent application of the rule. It needs but the suggestion to show that the cause shown in the original and that set up in the amendment, though relating to the same subject, are altogether different, and that proof of the original would fall far short of supporting the amendment. We are of the opinion that the statute of limitations bars the claim.

There is another reason urged by counsel in behalf of defendant why plaintiff cannot recover, which we think to be sound; that is, that by the law, as administered in Iowa, the stockholders of a corporation which continues to do business after its charter has expired cannot be held as partners in the absence of a statute imposing such liability. *Seaton v. Grimm*, 110 Iowa, 145, 81 N. W. 225. It is said in that case that: "The great weight of authority, in the absence of a statute, is that, where a supposed corporation is doing business as a de facto corporation, the stockholders cannot be held liable as partners, although there may have been irregularities, omissions, or mistakes in incorporating or organizing the corporation." And the same is held in *Clausen v. Head*, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933, a case much like the case at bar, where it was undertaken to hold stockholders of an insolvent bank as partners. See, also, 1 Cook on Corp. § 234. We do not consider that *Elson v. Wright*, 184 Iowa, 634, 112 N. W. 105, cited by plaintiff, in any way qualifies those cases. But, as will be noticed in the statement of the case, it was attempted to be shown that the stockholders considered them-

selves to be partners and so conducted the business. We do not think there was sufficient in the evidence to justify a finding that deceased was knowingly a party to any change in the mode of operating the bank, or any change in the relationship of the stockholders. To him the bank was continued as a de facto corporation.

The judgment will therefore be reversed. All concur.

CHAPLINE REALTY & CONSTRUCTION CO. v. PHILIP GRUNER & BROS. LUMBER CO.

(St. Louis Court of Appeals. Missouri. April 20, 1909.)

SALES (§ 36*)—CONTRACT—VALIDITY—MISTAKE.

Plaintiff, who contemplated bidding on a building contract, invited defendant, a lumber dealer, to bid on the necessary lumber. Defendant's bid was on a printed form, which bore at the top a request that persons receiving the estimate would examine the same, as defendant agreed to furnish only the articles named in the estimate; "errors in extensions and footing subject to correction." The bid showed the number of pieces of each description of lumber, and in an extended column the number of feet in each description. Plaintiff accepted the bid on the total price given, paying no attention to the number of feet. Defendant, in calculating the number of feet in one description, made a mistake, whereby his bid was less than it otherwise would have been. Defendant refused to perform, and plaintiff, who had contracted to build in reliance on the bid, was compelled to buy elsewhere. Held, that defendant was liable in an action for damages.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 36.*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by the Chapline Realty & Construction Company against Philip Gruner & Bros. Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff company was engaged in the year 1907 in taking and executing contracts to build houses, and defendant company was a dealer in lumber in the city of St. Louis. Plaintiff contemplated submitting a competitive bid to the Brown Shoe Company for a contract to build a house for the latter, and, in advance of and as a basis for the bid to do the work and furnish the materials for the house, plaintiff was taking underbids from several lumber dealers in the city to furnish plaintiff the lumber which would be needed. The method of procuring these bids from dealers in lumber was to submit to them a list of the number of pieces of lumber of different kinds and dimensions plaintiff would require, and request competitive proposals to furnish said pieces at prices to be stated by the dealers. Plaintiff knew lumber was sold on the St. Louis market by the foot, but

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

in passing on bids was accustomed to pay no attention to the number of feet in the pieces of each kind of lumber mentioned in the offers of the dealers, and to attend only to the amounts of money for which the latter proposed to furnish the lumber. Three bids were submitted by as many dealers to supply plaintiff with the lumber called for in the list plaintiff had submitted, defendant's bid being as follows:

per foot or thousand feet of each kind of lumber was set down, and in the second column the extensions in dollars and cents of the total price of the lumber of each kind proposed to be furnished. The extensions on this detached slip were not turned over or shown to plaintiff. It will be perceived defendant's bid contained three totals of \$2,200; \$96, and \$76 respectively. A mistake occurred in the tenth item of the bid, which

Bid Subject to Change Unless Ordered Within 10 Days From Date.

St. Louis, Mo., March 15, 1907.

Philip Gruner & Bros. Lumber Company;

Main Office: 4006 N. Broadway, Branch Office, S. E. Cor. 9th & Cass Ave.

To Chaplaine Realty & Const. Co.

Please find below our Estimate for Lumber to be delivered.

To Jefferson Av. & Mullanphy.

For

Parties receiving this estimate will please examine the same with care, as we agree to furnish only the articles named herein. Errors in Extension and Footing subject to correction. We are not responsible for delays caused by strikes or other unavoidable circumstances.

10-14x14-12 No. 1 rgh. Bored 1½ "	1960
10-12x12-14 No. 1 rgh. Bored 1½ "	1690
10-10x10-14 No. 1 rgh. Bored 1½ "	1167
8-8x8-16 No. 1 rgh. Bored 1½ "	683
8-6x8-14 No. 1 rgh. Bored 1½ "	149
12-12x14-16 No. 1 rgh.....	2612
12-10x16-16 No. 1 rgh.....	2774
12-8x16-16 No. 1 rgh.....	2218
12-8x10-16 No. 1 rgh.....	1287
495-8x14-18 No. 1 rgh.....	1732
140-2x10-10 No. 1 rgh.....	4300
4600 ft. lin. 1½x2½ Brdg.....	4600 lin.
2200 ft. lin. 4x4 Cedar.....	2394
20-4x8-16 No. 1 rgh.....	960
18-4x8-12 No. 1 rgh.....	576
8-4x8-10 No. 1 rgh.....	60
8-4x6-10 No. 1 rgh.....	120
14-4x6-12 No. 1 rgh.....	504
20-4x6-16 No. 1 rgh.....	640
20-2x6-18 No. 1 rgh.....	320
6500 ft. No. 2 Y. P. Bds.....	6500
2960 pcs. 2x6-12 No. 1 Y. P. dg.....	3530
19200 ft. 1x4 No. 2 Maple factory dg	
1100 ft. lin. ¾x1½ toe strip.....	1100
\$2200.00	

12-6x6-12 No. 1 Y. P.....	432
8-8x10-16 No. 1 Y. P.....	320
60-2x4-16 No. 1 Y. P. Bds.....	640
2400 ft. No. 2 Y. P. Bds.....	2400
800 ft. No. 2 Y. P. Bds.....	800
\$96.00	

8-8x10-16 No. 1 Y. P.....	314
4-8x8-10 No. 1 Y. P.....	214
8-6x6-10 No. 1 Y. P.....	240
26-4x6-10 No. 1 Y. P.....	720
24-4x6-16 No. 1 Y. P.....	768
12-8x6-16 No. 1 Y. P.....	288
20-2x4-16 No. 1 Y. P.....	214
6-2x10-18 No. 1 Y. P.....	180
900 ft. No. 2 Y. P. Bds.....	900
100 ft. lin. 1½x2½ Brdg.....	100 lin.
\$76.00	

Philip Gruner & Bros. Lumber Co.
Per Schroeder.

Boring	558 ft. 7c	33.92
	30	53.80
	28	43.34
	26	30.34
	24	19.96
	20	87.36
6882	22½	151.94
	26	34.05
	28	43.49
	26	105.-
	8	24.80
	40	117.86
2920	24	70.08
	21	
6228	21	143.22
	21	745.92
	26	480.-
	40c	4.40
		\$2228.79
1282	22	30.62
2300	21	67.30
	26½	5.67
454	26	11.35
1488	26	37.20
	23	5.62
	22	4.70
	24	4.22
	21	5.39
	1c	1.00
		77.16

That proposal was on a printed blank, with a perforated line running down the side of it. The part of the paper to the right of the perforated line was detached and retained by defendant, and will be seen to have contained, opposite the number of feet shown in the right-hand column, supra, two other columns, in the first of which the price

we have italicized, in computing the whole number of feet in that item as 1,732 instead of 20,790. This mistake was made by the employé of defendant who calculated the estimate, and in consequence of it defendant offered to furnish the lumber in the first division of its bid for \$2,200; whereas, but for the mistake, it would have asked \$500

more, or \$2,700 for the lumber in that division. Bids were received by plaintiff from two other lumber companies; one of which offered to furnish the lumber called for in the first division of the list for \$2,816 and the other for \$2,720. Defendant refused to deliver the lumber for the amounts mentioned in its offer as written. Plaintiff was compelled to buy elsewhere, and brought this action for damages, alleging a breach of contract. Plaintiff's employé who passed on the proposals testified he would have known there were more than 1,732 feet of lumber in the tenth item if he had noticed the extensions, but it was not his practice to pay any attention to extensions in feet, and he accepted defendant's bid without detecting the error. The evidence is somewhat contradictory as to whether plaintiff's attention was called to the mistake before it had accepted and acted on the bid, and an issue upon the point was submitted to the jury. Substantial testimony was adduced in plaintiff's behalf to prove it had notified defendant of its acceptance, had sent in its own bid to the Brown Shoe Company for the contract to erect the building, this bid had been accepted by the shoe company, and plaintiff had signed a contract for the erection of the house before defendant gave notice of the mistake in the bid to furnish the lumber; that plaintiff's proposal to supply the material and labor for the building was based, among other things, on defendant's offer to supply the required lumber at the prices shown in defendant's proposal. The court found a verdict and entered judgment for plaintiff in the sum of \$500, and this appeal was taken.

Walther & Muench, for appellant. Carl Otto, for respondent.

GOODE, J. (after stating the facts as above). The rulings on requests for declarations of law indicate the court below thought the case ought to be decided according to legal propositions which may be stated as follows: First, if a mistake occurred in making up defendant's bid, but, before the latter had withdrawn or offered to correct it, plaintiff accepted and acted on it, and under such circumstances as would have induced a business man of ordinary prudence to do so, then defendant was bound to comply with its offer; second, if before the bid was accepted plaintiff either knew, or had information to cause an ordinarily prudent man to believe, a mistake had been made in the tenth item, the judgment must be for defendant; third, defendant had the right to withdraw its bid any time before acceptance, and the burden was on plaintiff to prove it had accepted defendant's offer and communicated with the latter to that effect before the offer was withdrawn, and, if the court found the bid had not been accepted before plaintiff was notified there was an

error in it, the judgment must be for defendant; fourth, if there was a mutual mistake on the part of plaintiff and defendant about the quantity of lumber intended to be embraced in the bid, the judgment must be for defendant; fifth, the clause in the proposal which said errors in footings and extensions were subject to correction constituted a condition in the contract and entitled defendant to correct the alleged mistake, if it occurred, provided defendant offered to do so before plaintiff had given notice of acceptance and acted on the bid. There was evidence favorable to plaintiff on the several issues of fact, and the above findings exclude from the appeal certain contentions—that defendant withdrew its bid, or notified plaintiff of error in it before the latter accepted and acted on it; also that, if the miscalculation was due to carelessness on the part of defendant in not verifying the extensions, plaintiff's own negligence contributed to the loss. The testimony was inconsistent on the first of those issues, and on the second the opinion that plaintiff's negligence contributed to its loss is not irresistible. There was room for the court, as trier of the facts, to find defendant exercised less than ordinary business care in framing its proposal, but that, the circumstances considered, plaintiff's acceptance without recalculating the extensions did not fall below said standard. Defendant's employé made the mistake, and the proposal passed through the hands of an officer of defendant before it was submitted to plaintiff. The man who attended to the affair for plaintiff knew lumber was estimated and sold by feet, but, in passing on proposals in the form of the one in question, paid attention only to the total amounts and not to the extensions in feet opposite the items, as plaintiff based its own proposals for construction work on the lowest prices offered in the subbids submitted to it. What plaintiff wanted to learn from lumber dealers, and what it asked for, was the total price for which they would furnish a certain number of pieces of lumber; and naturally it would attend to the amounts and not to the number of feet in the items. Moreover, defendant had the benefit of the slip on which were set down the prices per foot and the total prices of the different items of lumber, and those data were not before plaintiff. Hence it is obvious more means of detecting the mistake were available to defendant than to plaintiff, wherefore it does not follow that plaintiff was remiss if defendant was.

It is insisted the proviso that errors in extensions and footings were subject to correction was as much a term of the contract as any other clause, made the sale one of lumber by the foot, and bound plaintiff at its peril to ascertain whether the true number of feet in each item was given. At this point, and generally, the case is identical with *Boeckeler Lumber Co. v. Cherokee Realty Co.* (recently decided by us) 116 S. W. 452.

Out of deference to the earnest brief for defendant, we have gone over the question involved again, but without seeing reason to change our opinion. In the present case, as in that one, plaintiff had asked for a round bid for various pieces of lumber of different kinds, and not for a bid by feet, and, on the strength of defendant's offer, had changed its position by entering into a binding contract with the Brown Shoe Company at a figure which was lower than it otherwise would have accepted. Upon requesting and receiving a lump offer like the one in hand, the offeree would have before him neither separate nor total prices whereby to correct the bid if an error was detected in the extensions, and could do nothing but notify defendant of the mistake. It is not a reasonable interpretation, or one compelled by the language of the proposal considered in its entirety, to say defendant meant to impose this gratuitous task on a customer who was interested only in total prices, or the latter meant to assume it. That the proviso is not intended to apply to such a bid is indicated further by the word "footings"; for bids in the form of the one in hand contain no footings, but those in which the prices of lumber per foot and total prices are stated would contain them, and we think the words in question were intended to be part of a bid of the latter kind. This view is reinforced by the sentence immediately preceding, wherein parties receiving the estimates were warned to examine it with care, as defendant agreed "to furnish only the articles named therein." This remark tended to draw attention to the articles, and not to the feet, and shows defendant was proposing to furnish the listed articles, not a certain quantity of feet of each. The argument that the clause in question accorded defendant the right to have the mistake corrected at plaintiff's expense, after it had changed its attitude by binding itself in a contract with the shoe company, implies that, however negligent defendant may have been as compared with plaintiff, the latter must bear the consequent loss. Possibly defendant might have been released from its offer, even if plaintiff had become apprised of the mistake after acceptance, but before so far changing its position that it would have to stand a loss unless defendant was held bound. As to that we do not say, for the case is presented in a different phase. Counsel for defendant have directed us to some opinions which we will cite, with the remark that they were given on facts unlike those at bar, either in that the party seeking to take advantage of the mistake had not acted in good faith, the mistake was called to his attention before he had altered his position, or to correct it would not put him in a less favorable situation than otherwise he would have occupied. *Hartford, etc., R. R. Company v. Jackson*, 24

Conn. 514, 63 Am. Dec. 177; *Rowland v. Railroad*, 61 *Conn.* 103, 23 *Atl.* 755, 29 *Am. St. Rep.* 175; *Gulf, etc., Railroad Company v. Dawson* (Tex. Civ. App.) 24 *S. W.* 566; *Butler v. Moses*, 43 *Ohio St.* 166, 1 *N. E.* 316; *Mummenhoff v. Randall*, 19 *Ind. App.* 44, 49 *N. E.* 40; *Cunningham Mfg. Co. v. Rotograph Company*, 30 *App. Cas. (D. C.)* 524, 15 *L. R. A. (N. S.)* 368; *Moffett v. Rochester*, 178 *U. S.* 373, 20 *Sup. Ct.* 957, 44 *L. Ed.* 1108. Those cases, except possibly the first three, are squarely against defendant's contentions, and in those three it did not appear the party against whom the mistake was corrected was left any worse off than he would have been had it not occurred. The following authorities are in point for plaintiff, and some of them rest on facts practically identical with those before us: *Griffin v. O'Neill*, 48 *Kan.* 117, 29 *Pac.* 143; *Coates v. Early*, 46 *S. C.* 220, 24 *S. E.* 305; *Borden v. Railroad*, 113 *N. C.* 570, 18 *S. E.* 392, 37 *Am. St. Rep.* 632; *Brown v. Levy*, 29 *Tex. Civ. App.* 389, 69 *S. W.* 255; *Pond-Decker Lumber Co. v. Spencer*, 86 *Fed.* 846, 30 *C. C. A.* 430; *Durgin v. Smith*, 133 *Mich.* 331, 94 *N. W.* 1044; *Western, etc., R. Corp. v. Babcock*, 6 *Metc. (Mass.)* 346; *Crilly v. Board of Education*, 54 *Ill. App.* 371; *Putnam's Sons v. MacLeod*, 23 *R. I.* 373, 377, 50 *Atl.* 646; *Smith v. Hughes*, *L. R.* 6 *Q. B.* 597; *McGuire v. De Freese*, 77 *Mo. App.* 683; 1 *Wharton, Contracts*, § 202; 1 *Page, Contracts*, § 79.

The judgment is affirmed. All concur.

COMMERCIAL CLUB OF JOPLIN v. DAVIS et al.

(Kansas City Court of Appeals. Missouri.
April 19, 1909. Rehearing Denied
May 3, 1909.)

1. CONTRACTS (§ 136*)—LIABILITY OF AGENT TO PRINCIPAL.

An agent employed to purchase real estate, who received a commission from the vendor, pursuant to a secret agreement, whereby he was to receive a commission on the completion of the purchase, must pay the commission to the purchaser, though the latter formed, after the purchase and before the payment of the commission by the vendor, an unlawful purpose to dispose of the property through a lottery; the agent's obligation to pay arising at the time he increased the price to the purchaser by the amount of his secret commission.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 681-700; Dec. Dig. § 136.*]

2. CONTRACTS (§ 136*)—LIABILITY OF AGENT TO PRINCIPAL.

One employing an agent to purchase real estate may recover from the agent the commission received by him from the vendor pursuant to a secret agreement whereby the vendor should pay a commission on the consummation of the purchase, though the purchaser, vendor, and agent each knew that the property was purchased for a lottery; the illegality not attaching to the purchaser's cause of action.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 681-700; Dec. Dig. § 136.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by the Commercial Club of Joplin against Fred M. Davis and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

J. W. McAntire, for appellant. A. E. Spencer, for respondents.

ELLISON, J. This action may be said to be founded on the misconduct of an agent amounting to a breach of trust. The judgment was for the defendant in the trial court. It appears that plaintiff is a duly organized corporation under article 11, c. 12, Rev. St. 1899 (Ann. St. 1906, pp. 1103-1119), and that it is managed by a board of 10 trustees. Defendant was a member of the corporation, and one of the trustees. The board appointed him, with others, as a committee to purchase for the organization a certain tract of land in Jasper county. The purchase price was finally agreed upon at \$45,000; but defendant, without plaintiff's knowledge, in breach of good faith with it, as its agent, had a secret understanding with the seller of the land that he was to be paid or allowed by such seller a commission of \$1,125, which sum was paid to him on the consummation of the purchase by deed. On discovering this secret relation between these parties, plaintiff demanded the money so received, and, upon defendant's refusal to pay, this action was brought.

The evidence showed that there was a written contract for the land set forth in a receipt dated April 27, 1907, for the first part of purchase money, which was \$1,000, and that two days before that, when defendant was negotiating with the seller, he made the arrangement that he was to receive a commission of $2\frac{1}{2}$ per cent. The deed was made in June thereafter, and that was the date when the seller actually paid such commission to defendant, amounting to \$1,125. It further appears that a few days after the purchase, viz., on the evening of May 1st, plaintiff's trustees adopted a plan whereby the lots into which a part of the land was to be divided should be disposed of by a lottery. The defense is that the land was purchased for an unlawful purpose. It can be better understood by being set out in full. After a formal general denial it proceeds: "Further answering, defendants state that the plaintiff unlawfully undertook to raise a fund of money by means of a lottery, and that said transaction, as hereafter stated, was unlawful and against public policy; that, in pursuance of said unlawful scheme, the plaintiff secured an option on the land mentioned in the petition and caused a portion thereof to be subdivided in lots, streets, and alleys; that said lots were of various values, ranging from one hundred and fifty dollars (\$150) to five hundred dollars (\$500) each, and that in carrying out said lottery

the plaintiff sold said lots for the fixed price of three hundred dollars (\$300) each, with the agreement then and there designed, and proposed by the plaintiff and against the objection of these defendants that the said lots should be allotted to the several purchasers, who had no right or opportunity to select the lots they or any one of them would purchase, but same were in fact allotted to them by means of a lottery—that is to say, the numbers of the lots were written on separate sheets of paper inclosed in envelopes and placed in a hat, while a similar process was followed with the names of the several purchasers for lots, which were placed in another hat, and then, as an envelope was drawn from one hat, there was also one drawn from the other hat, and the number of the lot so drawn was taken as the number of the lot to be awarded to the person whose name was drawn from the envelope from the other hat at that time—that the said transaction constituted an unlawful lottery, and is the same transaction mentioned in the petition, and that same and every part thereof, was and is wholly void and against public policy, and gives the plaintiff no rights in the premises. Wherefore, having fully answered, defendants ask for judgment in their favor with costs." We may concede that the lottery plan of disposing of the land adopted by plaintiff was unlawful, yet in the light of the evidence we do not understand how that can protect defendant from the demand plaintiff makes on him. The evidence shows that when plaintiff purchased the land through the agency of defendant, and when defendant entered into the agreement with the seller for a commission, the lottery plan was not in contemplation. In other words, when defendant committed the injury upon plaintiff by his breach of trust, he was not engaged in buying for plaintiff land which was to be used for an unlawful purpose. The evidence shows that such purpose was not formed by plaintiff until after the purchase, and after other methods of getting the money needed had failed. It is true the money was not paid to defendant by the seller until after the unlawful plan of disposing of the property had been formed, but that should not affect a decision of the question, for defendant's obligation to pay plaintiff the amount he was secretly getting from the seller arose at the time that he increased the price of the land to plaintiff by the amount of his secret commission, for that was the effect of his conduct. If he had not exacted the commission, the seller, of course, would have sold the land to plaintiff for that much less, and plaintiff would not have contracted to pay as much, by that amount, as it did. Furthermore, it may be said in this connection that this action against defendant may be sustained by evidence in no way relating to the unlawful purpose in the plan of disposing of it. It is disconnected from that plan. When that is the case, the taint of illegality does

not attach to plaintiff's action. *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138; *McDermott v. Sedgwick*, 140 Mo. 172, 39 S. W. 776; *St. Louis Ass'n v. Delano*, 108 Mo. 217, 18 S. W. 1101; *Hall v. Corcoran*, 107 Mass., loc. cit. 256, 9 Am. Rep. 30.

So it may also be said that, though plaintiff and the seller and the defendant had each known the land was being purchased for a lottery, yet that matter is at an end, and it has no direct connection with the present action. It is not an action to enforce an unlawful contract or for damages for a breach of such a contract. Defendant has plaintiff's money in his possession, and no reason can exist why he should not be compelled to return it. *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Portsmouth Brewing Co. v. Mudge*, 68 N. H. 462, 44 Atl. 600; 1 *Pomeroy's Eq. Jur.* § 403. If it be suggested that we are going too far in saying that the money of one of the parties is found in defendant's possession, we answer that in legal and actual effect defendant's conduct amounted to this: That he received of plaintiff money which he represented the seller asked for the property, and which he was to pay to the seller. He went to the seller with the money, but paid him \$1.125 less than he got of plaintiff, and kept that sum himself. While the transaction did not occur in that way, yet that was the effect of it, and it justifies us in saying that defendant had plaintiff's money. He should not be permitted to keep it.

The judgment is reversed, and the cause remanded, with directions to enter judgment for the plaintiff. All concur.

STATE v. BUSH.

(Kansas City Court of Appeals. Missouri.
April 19, 1906. Opinion modified May
3, 1909.)

1. COURTS (§ 114*)—ADJOURNMENT OF SESSIONS—ENTRY OF ORDERS NUNC PRO TUNC.

Where the record of the county court contained a recital at the beginning of each session that the court met pursuant to adjournment, and the final order of adjournment showed a continued session from the first regular meeting until the final adjournment, it was proper for the court to enter nunc pro tunc orders of adjournment on each day the court was in session during the term, thus correcting the record of the court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 368; Dec. Dig. § 114.*]

2. COURTS (§ 35*)—REGULARITY OF SESSIONS—PRESUMPTIONS.

The presumption is that a court of record, while sitting as such and performing its functions, is lawfully assembled.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 140; Dec. Dig. § 35.*]

3. COURTS (§ 35*)—REGULARITY OF SESSIONS—PRESUMPTIONS.

The fact that the several judges of the county court met at adjourned sessions is con-

clusive evidence that the regular term of court had not expired, and the presumption is that they would not have assembled as a court unless there had been an adjourned session, or on statutory notice.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 140; Dec. Dig. § 35.*]

4. INTOXICATING LIQUORS (§ 36*)—LOCAL OPTION—PUBLISHING RESULT OF ELECTION.

Rev. St. 1899, § 3031 (Ann. St. 1906, p. 1737), provides that, if a majority of the votes cast at a local option election be against the sale of intoxicating liquors, the county court shall publish the result once a week for four successive weeks in the newspaper in which the notice of election was published. *Held*, that the record of the county court relating to the adoption of the local option law need not show a return of the publication of the result, where it shows the publication was ordered.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 43, 44; Dec. Dig. § 36.*]

5. CRIMINAL LAW (§ 564*)—PROOF OF VENUE—SUFFICIENCY.

In a prosecution for violation of the local option law, evidence of a sale of liquor at a certain unincorporated town, without showing in what county such town is located, is insufficient to fix the venue, and therefore fails to show any offense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1277-1284; Dec. Dig. § 564.*]

6. CRIMINAL LAW (§ 804*)—JUDICIAL NOTICE—BOUNDARIES OF COUNTIES AND TOWNS.

Though the court takes judicial notice of the boundaries of a county in the state, it does not take judicial notice of the county in which an unincorporated town is situated.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 705; Dec. Dig. § 304.*]

Appeal from Circuit Court, Gentry County; William C. Ellison, Judge.

Preston W. Bush was convicted of violating the local option law, and appeals. Reversed and remanded.

J. W. Peery, for appellant. C. H. S. Goodman and Kelso & Kelso, for the State.

BROADDUS, P. J. The defendant was indicted, tried, and convicted in the Gentry county circuit court for the illegal sale of intoxicating liquor in violation of the local option law. From the judgment of conviction, he appealed.

The indictment averred that the local option law was adopted within all that portion of Gentry county outside of the limits of the city of Stanberry, a city of more than 2,500 inhabitants, and that the defendant unlawfully sold certain intoxicating liquors outside of said city limits in said county.

The state introduced in evidence a certified copy of the record of the county court of date of August 20, 1906, showing the declaration of the result of an election held on the 17th day of August, 1906, in the county, to determine whether or not intoxicating liquors should be sold in the county outside of the city of Stanberry; and proved a sale of liquor by defendant in November following, and rested its case. Whereupon defendant

asked a peremptory instruction to the jury to find defendant not guilty, which the court refused.

For the purpose of attacking the validity of the proceedings, certain records of the county court were introduced by the defendant. The record shows that the county court met on Monday, May 7, 1906, in regular session, and was in session on May 9th, June 4th, June 6th, July 2d, and July 18th. At all these different meetings, except the first and last, the record recites that the "court met pursuant to adjournment, all the members being present." There was no order of adjournment entered upon the court's minutes at the close of the day of 7th of May, the first day of its regular session. And no such entries were made when the court adjourned on May 9th, June 4th, and July 2d, but a final entry of adjournment was made on the 18th of July. It was on the last-named date that the order for the election was made.

At the regular January term of the court for 1907, the court made the following entry of record: "Whereas, it appearing to the court by an inspection of its records and the judges' notes that this court has inadvertently failed to enter upon its records its order of adjournment made by this court on the 7th day of May, 1906, whereby this court ordered its adjournment to meet on the 9th day of May, 1906: Now, therefore, it is ordered by this court that said order of adjournment be entered upon the records of this court, now for then, in the following words and figures, to wit: It is ordered that this court do now adjourn to meet on the 9th day of May, 1906." A similar entry was made as to the sessions of the court of June 4 and July 2, 1906.

The evidence showed that these nunc pro tunc orders were made without there being any contemporaneous entry or memorandum, or writing upon the minute book, or any docket, or any other record of the court. The validity of the election turns upon the question whether the court that made the order for such election was properly convened on July 18th, when the order was made for holding it.

It may be conceded that: "A court may, in the exercise of its common-law power, when the state of the records kept by the court or the clerk show that a suitor was entitled to a particular judgment, but that the judgment was not entered at the term when it should or might have been entered, at a subsequent term cause the proper judgment to be entered to relate back to the term when it should have been entered." *Dawson v. Waldheim*, 89 Mo. App. 245.

It is held that: "It is not necessary that the records of the court show, in order to enable it to direct a judgment nunc pro tunc, in express terms that such judgment had been rendered; it is sufficient if the facts shown by the records are such as to reason-

ably carry conviction that the judgment was in fact rendered." *Witten v. Robison*, 31 Mo. App. 525. "A nunc pro tunc entry must be treated as erroneous and void unless it contains the identical judgment of the court at a former term and conforms to the record memorandum of the judges and the clerk's minutes or other papers in the case existing or made at the time at which the case was decided." *State ex rel. Davis v. Baldwin*, 109 Mo. App. 573, 83 S. W. 266; *Page v. Chapin*, 80 Mo. App. 159; *Wilcox v. Ry. Co.* (Mo. App.) 115 S. W. 1061. The law in this respect is well settled in this state.

But we believe, under the facts in this case, the rule is not applicable because the subject-matter is different. It is evident, taking into consideration the whole record, that all the different sessions of the court alluded to were adjourned terms of the regular May term for 1906. The recitation in the record at the beginning of each session that the court met pursuant to adjournment of the one last preceding and the final order of adjournment made on the 18th of July seem to us ought to be construed as showing a continued session of the court from its first regular meeting until the order was made for its final adjournment. Such being the case, it was competent for the court to enter the said nunc pro tunc orders. And, as the court had not finally adjourned when the entries referred to in the first instance were made, that the court met pursuant to adjournment, it had ample evidence of record for the nunc pro tunc orders.

And this view of the question is fortified when it is considered that the presumption of law is that a court of record, while sitting as such and performing its functions, is lawfully assembled. And the evidence offered here does not tend to rebut the presumption that the court, consisting of the regular judges constituting that body in connection with the acknowledged county clerk, was lawfully assembled, but, on the contrary, supports it. The fact that the several judges met at these adjourned sessions is conclusive evidence that the regular term had not expired, and the presumption is that they would not have assembled as a court unless there had been an adjourned session or upon statutory notice. Every presumption is indulged in favor of the legality of the sittings of the court. To look at the matter as we would any other, can there be any doubt of the fact itself that the sessions in question were adjourned sessions?

It is claimed that there was no publication of the result of the election as the law requires; therefore, the local option statute was not in force in the county of Gentry Section 3031, Rev. St. 1899 (Ann. St. 1906, p. 1737), provides that "If a majority of the votes cast at such election be against the sale of intoxicating liquors, the county court or municipal body ordering such election

shall publish the result of such election once a week for four consecutive weeks in some newspaper in which the notice of election was published; and the provisions of this article shall take effect and be in force from and after the date of the last insertion of the publication last above referred to." The county court, after ascertaining and declaring the result of the election, ordered the same to be spread upon the records, and then caused the following entry to be made: "And it is further ordered that the result of said election be published for four consecutive weeks in the Albany Capitol, the same newspaper in which notice of said election was published." There was no proof that the publication had or had not been made.

The defendant, in support of the view that proof of such publication should be made, relies upon the case, among others, of *State v. Searcy*, 39 Mo. App. 393. The court did not hold that it was necessary for the state to make out a prima facie case to show that the result of election had been published. The syllabus is misleading in that respect. On the contrary, the proper inference to be drawn from the language of the court is that an order for such publication was sufficient. In *State v. Hutton*, 39 Mo. App. 410, the publication had been made, and it was a question in the case whether it was necessary for the county court to have found that it had been and entered its finding in the records. It was held that it was not necessary. In *State v. Dugan*, 110 Mo. 138, 19 S. W. 195, the court merely held that notice given of the result of the election was sufficient, not that it must be proved to have been given.

This court has recently passed on a similar question, where it is held that: "In a prosecution for the sale of liquor in violation of the local option law, the state does not have to show as a part of its case that a notice of the election was given, though without such notice the election would be void." *State v. Foreman*, 121 Mo. App. 502, 97 S. W. 269. And in a more recent case, where the precise question was raised, we hold that: "The record of the county court relating to the adoption of the local option law need not show a return of the publication of the result, where it shows the publication was ordered, and the burden to show a failure of such publication is upon the defendant." *State v. Oliphant*, 128 Mo. App. 252, 107 S. W. 32.

Lastly, it is contended that the state failed to prove that the offense was committed in Gentry county outside of the limits of the city of Stanberry. A witness for the state testified that the defendant sold him intoxicating liquor, but did not state in what place or in what county the sale was made. Another witness testified that defendant's place of business was in Whitton, and that

Whitton was about 12 miles from Stanberry. This was all the evidence upon the question as to where defendant made the sale. There was a failure to prove the venue of the offense. It nowhere appears that the sale alleged to have been made was in the county of Gentry. Proof that defendant's place of business was in Whitton, 12 miles distant from Stanberry, was sufficient, of course, to show that it was not made within the corporate limits of that city. The court takes judicial notice of the boundaries of Gentry county, but we cannot take judicial notice that Whitton is in that county, and for aught we may know, except by inquiry, it may be in Nodaway county, as the boundary line between that county and Gentry county is not distant from Stanberry 12 miles. It is not claimed that Whitton is an incorporated municipality; we cannot, therefore, take judicial notice of its existence or location.

It follows, therefore, that the state did not make sufficient proof of venue, for failure of which the cause is reversed and remanded. All concur.

AVERY v. TUCKER.

(St. Louis Court of Appeals. Missouri. April 20, 1909. Rehearing Denied May 11, 1909.)

1. EVIDENCE (§ 354*) — ADMISSIBILITY OF BOOKS OF ACCOUNT.

Original entries in account books made in the course of business are competent evidence in themselves.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

2. BILLS AND NOTES (§ 489*)—ACTION ON NOTE—ISSUES AND PROOF.

In an action on a note, issue was joined as to whether plaintiff was an innocent indorsee for value before maturity; but aside from this defendant claimed that the nominal payee and indorser of the note, a milling company, and plaintiff, were identical, and the amount due should be reduced by payments, not indorsed on the note, made by third persons on a bill against him for flour which they agreed to pay, and which he claimed the note was intended to cover, whereas plaintiff claimed the note embraced only the amounts of other purchases by defendant which the latter claimed to have paid, and issue was also joined as to whether such payments were made on the note. *Held*, that the answer to this last question depended on whether the note was given to cover the cost of the flour bought by defendant and for which such third persons agreed to pay, and hence it was proper on this last issue to receive evidence of account books of the milling company and other testimony to show on what transactions the note indebtedness accrued, though it was objected to by defendant on the ground that plaintiffs' cause of action was as an innocent holder, and that his right to recover, according to the face of the instrument, could not be impaired by payments made to the payee not entered as credits.

[Ed. Note.—For other cases, see *Bills and Notes*, Dec. Dig. § 489.*]

3. APPEAL AND ERROR (§ 197*)—OBJECTIONS BELOW—SUFFICIENCY—VARIANCE.

If there is but a variance at the trial in plaintiffs' proof, and not a failure of proof, de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant is bound to proceed in the statutory mode by filing an affidavit of surprise.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197; * Pleading, Cent. Dig. § 1439.]

Appeal from Circuit Court, Knox County; Chas. D. Stewart, Judge.

Action by George L. Avery against Henry D. Tucker. From a judgment for plaintiff, defendant appeals. Affirmed.

O. D. Jones, for appellant. L. F. Cottey, for respondent.

GOODE, J. Action on a negotiable promissory note dated May 19, 1906, at Edina, Mo., executed by defendant, and whereby he promised to pay to the order of the Knox Milling Company \$320.06 for value received, with interest at 6 per cent. from date, and indorsed on the back under date of July 18, 1906: "Pay to the order of George L. Avery." In the petition it is alleged the note was assigned by the payee, the Knox Milling Company, to plaintiff in accordance with the indorsement. The answer admitted execution by defendant, denied the other allegations of the petition, and said that defendant caused the original payee, the Knox Milling Company, to be paid by Mary E. and C. A. Uhl the sum of \$220 on the note on January 31, 1906, alleged the note was executed on September 16, 1905, instead of the day it was dated, and that said payment was made by the Uhls after execution and delivery, but prior to said date. The answer further alleged plaintiff was not a holder or purchaser in good faith, for the reason the note was assigned to him without recourse, after due and after said payment had been made, but without a credit being entered on the back of the note. The genuineness of the indorsement to plaintiff was denied, and it was alleged there was no such company or corporation as the Knox Milling Company. Defendant admitted owing \$100, principal and interest, and offered to permit plaintiff to take judgment for said amount. The reply denied allegations of new matter in the answer, averred the note was assigned to plaintiff before maturity, and he was a holder for value without any notice regarding its consideration. Previous to December 16, 1905, defendant had been engaged in the grocery business in Edina, Mo., but about said date sold his stock of merchandise to Mary E. and C. A. Uhl. Just before the sale he had ordered a bill of flour to cost \$220 from the Knox Milling Company, a concern of Galesburg, Ill. Part of the consideration of the deal between defendant and the Uhls was an agreement by the latter to pay for the flour, which had not yet arrived, but when it did would go into the stock of merchandise; and so they remitted for it when due. Defendant says the note in suit, though dated May 19,

1906, was executed on or about the 1st of January of said year, covered the price of the flour, and the payments by the Uhls ought to have been credited on it. The Knox Milling & Exchange Company was a corporation in which plaintiff Avery was interested and whose assets he purchased May 11, 1906, thereafter carrying on the business in the name of the Knox Milling Company, named as the payee of the note. The Knox Milling Company, therefore, was not a corporation, but simply plaintiff's business name or style, and the note was really made payable to him. The action was brought under said style because the attorney to whom the note was sent for collection did not know the facts, but supposed the Knox Milling Company was a corporation and owned the instrument. Plaintiff's contention, which is supported by testimony, was that the amount of the note did not include the price of the flour; that, though given after defendant had sold out to the Uhls, it was meant to settle an indebtedness which had accrued from various other purchases made by defendant of the Knox Milling & Exchange Company prior to said sale, and running from some time in 1904 to near the close of 1905. It would be useless to recite the testimony pro and con on this question, and we will only say defendant's was quite positive that part of the consideration for the note was the \$220 to be paid for the flour, and that he had fully settled with the Knox Milling Company for all indebtedness growing out of earlier transactions between him and the milling company; whereas the evidence for plaintiff was very cogent to the contrary, and tended to prove defendant owed the full amount of the note without reference to the bill of flour.

One item of evidence should be adverted to because error is assigned regarding it. This is a bill or statement of transactions between defendant and the Knox Milling & Exchange Company which purported to have been receipted as paid by a memorandum written across its face, signed by F. A. Green. Defendant testified that he paid one Green the amount of the bill (\$268) in cash, thereby clearing up what he owed for previous purchases of merchandise, and leaving no debts which would be full consideration for the note in suit if the cost of the flour was excluded. Defendant testified the man he paid was a traveling salesman of the Milling & Exchange Company, but it turned out the only man by the name of Green who traveled for the company was Horton B. Green, not F. A. Green. Horton B. Green testified the signature to the receipt was not his, and that signature and several genuine signatures of said Green were put in evidence and submitted to this court for comparison. They look to be in different hand-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

writings. But defendant testified Horton B. Green was the very man to whom he paid the money, and who signed the name "F. A. Green" to the receipt. Various entries in the books of account of the milling company were introduced to show purchases and payments made by defendant through 1904 and 1905, and prove he owed the amount of the note regardless of the flour purchased. Defendant objected to this evidence on the score that Avery, who testified the entries were original ones in the books of the company, could not refresh or revive his recollection, because he did not make them or see them made; but the entries were admitted in evidence as having been made in the course of business, and were competent. *Anchor Milling Co. v. Walsh*, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600. The rule of law regarding what memorandum a witness may use to refresh or revive his memory is not in point.

Another assignment of error is that the case was tried outside the issues joined in the pleadings, wherefore irrelevant evidence was admitted, and the allegations of the petition remained unproved. The supposed irrelevant evidence consisted of account books of the milling company and some other testimony, all of which was received to show from what transactions the indebtedness covered by the note accrued. This evidence was objected to because the cause of action stated in the petition was that plaintiff was an innocent holder of a negotiable instrument obtained by him for value before maturity, and his right to recover, according to the face of the instrument, could not be impaired by payments made to the payee named in it which had not been entered on it as credits. It is true issues are joined in the pleadings, particularly in the answer and reply, as to those matters; but issue was joined, too, and necessarily, regarding whether the \$220 paid by the Uhls was paid on the note—whether it should be treated as a payment on that obligation; and the answer to this question depended on whether the note was given to cover the cost of the flour bought by defendant of the milling company, and for which the Uhls had agreed to pay, or embraced only the amounts of other purchases. The evidence supposed to be incompetent was relevant to this issue alike if plaintiff was an indorsee or if he was the original payee; for, unless the note included the price of the flour, defendant was not entitled to have it credited in either contingency with the Uhls' remittances. The only difference in the result would be that, if plaintiff was an innocent indorsee, no credit could be allowed as against him, even though the price of the

flour was embraced in the note. This assignment of error will be overruled.

It is further contended the evidence for plaintiff failed to prove the allegations of the petition in their entire scope and meaning. The point for decision as regards plaintiff's right to recover in the capacity of payee, on pleadings demanding a recovery as an innocent indorsee, calls into the discussion section 798, Rev. St. 1899 (Ann. St. 1906, p. 760), which reads: "Where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof." No point was raised about the supposed failure of proof or variance at the trial or in the motion for new trial, and, if it was but a variance, defendant was bound to proceed in the statutory mode by filing an affidavit of surprise. Instead of doing this, his efforts, from the first, were directed solely toward proving the payments were made on the note. The questions of whether or not plaintiff was the owner and holder of the note, and whether the credits claimed by defendant had been paid on it, were as much within the scope of the pleadings as the question whether plaintiff was an innocent indorsee for value, and the evidence for both parties was directed almost exclusively to the former issues, and in the requested instructions of both they only were submitted to the jury. Indeed, in objecting to evidence offered by plaintiff to show defendant owed the milling company the amount of the note with the price of the flour left out, defendant's counsel said: "The only question under the pleadings in this case is whether the credit of \$220 was paid and should be indorsed on this note; that is the point in issue." We examined the decisions in this state regarding what is a variance between the pleadings and the evidence and what a total failure of proof, in *Litton v. Railroad*, 111 Mo. App. 140, 85 S. W. 978, and found them inconsistent and even capricious. As the issues to which the evidence was directed were joined in the pleadings, we incline to the opinion there was at most but a variance in the present case, and cite as authorities *Pomeroy*, Code Rem. (4th Ed.) 449, 558, and cases cited in notes, particularly *Mercier v. Ins. Co.*, 24 Wash. 147, 64 Pac. 158, and *N. Y. News Pub. Co. v. Steamship Co.*, 143 N. Y. 89, 42 N. E. 514. Without going over the instructions seriatim, we will say those issues were presented to the jury in a manner fair to both parties, and, as the evidence amply justified the judgment entered on the verdict in plaintiff's favor, it must be affirmed. All concur.

JONES v. SPRINGFIELD TRACTION CO.
(St. Louis Court of Appeals. Missouri. April 20, 1909. Rehearing Denied May 11, 1909.)

1. JURY (§ 116*) — CHALLENGE TO PANEL — GROUNDS — BIAS OF OFFICER.

A challenge to the entire panel will lie for bias or partiality on the part of the officer who summoned the jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 543; Dec. Dig. § 116.*]

2. APPEAL AND ERROR (§ 945*)—REVIEW—DISCRETION OF LOWER COURT—PREJUDICE.

An appellate court will not review the rulings of the trial court in matters of discretion, unless prejudice appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3811; Dec. Dig. § 945.*]

3. PLEADING (§ 420*)—WAIVER OF OBJECTIONS—PLEADING AND PROCEEDING WITH TRIAL.

Where a motion to strike out an amended petition on the ground that it changes the cause of action declared upon in the original petition is overruled, and defendant excepts thereto, but files its answer and proceeds with the trial, the objection to the petition is waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1411; Dec. Dig. § 420.*]

4. PLEADING (§ 433*)—OBJECTION TO PETITION—SUFFICIENCY AFTER VERDICT.

Where defendant files an answer and participates in the trial, the objection that the petition fails to state a cause of action relates to the sufficiency of the petition after verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1451; Dec. Dig. § 433.*]

5. PLEADING (§ 433*)—OBJECTIONS TO PETITION—SUFFICIENCY AFTER VERDICT.

In an action for injuries received while alighting from defendant's car, plaintiff alleged that she notified the conductor to stop at her destination, that the train stopped in obedience to her request, and while she was alighting the employés of defendant negligently started the train with a sudden jerk, thereby causing her to fall. *Held*, as against an objection made after verdict, that the petition was not defective in omitting to formally allege that defendant's servants knew that plaintiff was in the act of alighting.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1473; Dec. Dig. § 433.*]

6. CARRIERS (§ 303*)—PASSENGERS—PERSONAL INJURIES—SETTING DOWN PASSENGERS.

A carrier's liability for injuries to a passenger caused by starting the car while she is alighting with care does not depend on the knowledge of its servants that she is in the act of alighting, where the car has been stopped in response to her request at a usual stopping place.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1228; Dec. Dig. § 303.*]

7. CARRIERS (§ 303*)—PERSONAL INJURIES TO PASSENGERS—TIME ALLOWED FOR PASSENGERS TO ALIGHT.

Where a car is stopped for the purpose of allowing passengers to alight, it is the duty of the carrier to allow the passengers a reasonable time to alight in safety by exercising ordinary care.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1228; Dec. Dig. § 303.*]

8. EVIDENCE (§ 549*) — EXPERT TESTIMONY — ANSWERS BASED ON FACTS TESTIFIED TO BY EXPERT.

An answer of a physician, called as an expert, to a hypothetical question, is not rendered

inadmissible because of his testimony in the case as a physician as to the condition of the person injured, where nothing appears to show that his expert opinion is based on his knowledge of such injuries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. § 549.*]

9. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

In an action against a carrier for injuries to a passenger, the court instructed that the jury should weigh the evidence by the same rules it would weigh it if the contest were between individuals, and should not give greater weight to the testimony of the witnesses for plaintiff "merely" because she is a girl and the defendant is a corporation. *Held*, that if it was error for the court to use the word "merely," because it would imply that otherwise it was proper to give greater weight to the testimony of plaintiff's witnesses than to those of defendant, the error was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

10. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—ACTIONS—INSTRUCTIONS.

An instruction, in an action against a carrier for injuries received while alighting from a car, that, if defendant's servants stopped the car to let plaintiff alight, it was defendant's duty to hold the car a reasonable length of time to permit her to alight, and that if, on the car stopping, plaintiff immediately started to alight and acted with reasonable care and diligence, and defendant suddenly caused the car to start, thereby inflicting the injury, plaintiff should recover, is not erroneous for failure to submit the question whether the car was stopped a reasonable time and as ignoring the question of knowledge on the part of defendant that plaintiff was alighting.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1332; Dec. Dig. § 321.*]

Appeal from Circuit Court, Webster County; Argus Cox, Judge.

Action by Ollie Jones against the Springfield Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Dickey, Delaney & Delaney, for appellant. O. T. Hamlin, for respondent.

NORTONI, J. The plaintiff is a minor. She sues by her next friend, duly appointed and qualified. The action is for damages alleged to have accrued to the plaintiff through personal injuries received while in the act of alighting from defendant's street car. Plaintiff recovered, and the defendant appeals. The case originated in the circuit court of Greene county. It was afterwards transferred by change of venue to the circuit court of Webster county, where the trial was had.

The first complaint on appeal relates to the action of the court in discharging the jury after it was impeached to try the cause. The case coming on for trial, a jury was assembled and duly examined upon the voir dire, the respective parties made their challenges, and it was sworn to try the cause. The hour for the noon recess having arrived, the court thereupon took a recess until 2 o'clock. Immediately upon the reconvening of court in the afternoon, the plaintiff filed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a motion to discharge the jury theretofore impaneled for the reason the deputy sheriff who selected the entire panel was biased and prejudiced against the plaintiff and was, moreover, under the influence of the defendant. This motion the court sustained and discharged the jury. There is no doubt that a challenge to the entire panel will lie for bias or partiality on the part of the officer who summoned the jury. 17 Amer. & Eng. Ency. Law (2d Ed.) 1112. The grounds, therefore, upon which the court proceeded in discharging the panel, were entirely proper, and, unless it appears the court abused its discretion in the matter, its action should be sustained. It is the rule that appellate courts will not review the rulings of the trial court in matters of discretion unless prejudice appears. *Vojta v. Pelikan*, 15 Mo. App. 471, 478. There is naught in the record indicating prejudice to the defendant. On questions of this nature, there are matters and things which frequently appeal to and properly influence the judgment of the trial court in the exercise of a sound discretion that may not appear in the record on appeal. On a charge so serious as that involved in the present instance, an appellate court should hesitate indeed before entering upon a review of a discretionary matter. From aught that appears, it may have been obvious to the court that the jury was unduly friendly to the defendant. The assignment will be overruled.

There are several amended petitions filed in the cause. The defendant moved to strike out the last-amended petition for the reason it changed the cause of action declared upon in the original petition. This motion was overruled, and defendant excepted thereto. It is now urged that the court erred in not striking out the last-amended petition. It will be unnecessary to examine minutely the question whether or not the last-amended petition stated a cause of action other than and different from that declared upon in the original. It appears in the original, and all of the amended petitions thereafter, that plaintiff alleged she was injured while alighting as a passenger from defendant's street car. The negligent act relied upon is that the car was started forward by a sudden jerk while she was in the act of alighting, thus precipitating her to the street and causing her injury. After defendant's motion to strike out the last-amended petition was overruled, it filed its answer thereto and proceeded with the trial. This action on its part operated to waive its right to have the ruling of the court on the motion to strike out reviewed, and this is true notwithstanding the fact that it had properly saved its exceptions to the ruling of the court on the motion. Were the defendant sincere in its motion to strike out the last-amended petition, it should have stood thereon, and not participated in the trial on the amended pleading. Having chosen to join issues

thereon, it ought now to be precluded from making the trial court a place of chance and seek to have the trial on the merits, to which it had voluntarily joined issue, set aside for error committed, if at all, in the ruling on the motion. *Scovill v. Glasner*, 79 Mo. 449; *Liese v. Meyer*, 143 Mo. 547, 45 S. W. 282.

It is next argued that the judgment should be reversed for the reason the petition fails to state a cause of action. Having answered to the petition and participated in the trial, the question for decision relates to the sufficiency of the petition after verdict. The petition alleges, substantially: That the plaintiff became a passenger upon defendant's street car at Doling Park, destined to a point on Commercial street, near the intersection of Grant and Commercial streets, and paid her fare to the conductor for the transportation; that, when the car was within a reasonable distance of the point mentioned, plaintiff notified the conductor of her desire to alight at the intersection of said streets. It is averred that before the car reached there, and while it was still west of the point mentioned about 100 feet, in obedience to her request, it stopped for the purpose of allowing the plaintiff to alight therefrom, and while she was, with due care, in the act of alighting, after the car had come to a full stop at the point aforesaid, the employes of the defendant negligently caused the same to start with a sudden jerk, thereby causing her to fall violently to the ground, in consequence of which she was seriously injured, etc. It is urged that the petition is fatally defective, in that it omits to formally aver that the defendant's servants knew the plaintiff was in the act of alighting at the time she was injured. Now it appears from the allegations that the plaintiff, when within a reasonable distance therefrom, requested the conductor to stop at the point mentioned, and that the car stopped thereat for the purpose of allowing her to alight therefrom. These averments, besides expressly stating that the car was stopped for the purpose of allowing the plaintiff to alight, essentially imply that it was stopped in obedience to her request. When dealing, then, with the reasonable inferences and implications arising from the facts averred, it is obvious the defendant's servants on the car either knew, or by the exercise of care might have known, that plaintiff was in the act of alighting at the time the car was started forward. This is clear for the reason the car was stopped at her request for the purpose of allowing her to alight therefrom. After answer and verdict, the petition is to be construed by allowing all reasonable intendments and inferences of fact in aid of the verdict. When these are allowed, the petition is certainly sufficient, for though it fails to allege that the car did not stop a reasonable time to allow the plaintiff to alight, or that the servants of the defendant knew, or should have known, that

she was in the act of alighting, these facts are clearly implied from those averred.

If the car was stopped by the employés for plaintiff to alight, and she proceeded immediately to do so, as alleged, it is a reasonable inference that those operating the car knew the fact. *McKinstry v. St. Louis Transit Co.*, 108 Mo. App. 12, 82 S. W. 1108. However, we do not understand that it is relevant to the defendant's liability that its servants should either have known, or by the exercise of ordinary care might have known, that the plaintiff was in the act of alighting from the car under the circumstances of this case; that is, if the car, after having been stopped for the purpose, was not held a reasonable length of time for plaintiff to alight. Of course, if a car is stopped at a place other than the usual stopping place, or if it remains stationary for more than a reasonable length of time for a person to alight, then it might be essential for the plaintiff to show that those in charge of the car knew that he or she was in the act of alighting before liability could attach, for those in charge of the car are not presumed to be on the lookout for passengers alighting without their knowledge at a point other than the usual stopping places, nor are they presumed to be in the exercise of a high degree of care for the safety of a passenger after a reasonable length of time for alighting has transpired at a regular stopping place, unless they know that the passenger is preparing to alight. Be this as it may, when the car is stopped at a usual place for passengers to alight, this operates as an invitation to those on board to alight therefrom if they desire to do so, and the law imposes the duty upon the carrier to hold the car a reasonable length of time for passengers to alight. The same duty obtains with respect to holding a car a reasonable length of time for passengers to alight at any place along the line if the defendant's agents in charge stop the car in response to a request for the purpose of permitting a passenger to alight therefrom. Having stopped the car for that purpose, the law devolves the duty that it shall so remain a reasonable time to the end that the passengers may alight in safety, by exercising ordinary care on their part. *Oullar v. M., K. & T. Ry. Co.*, 84 Mo. App. 340; *Cramer v. Springfield Traction Co.*, 112 Mo. App. 350, 87 S. W. 24.

It appears in the fall which plaintiff received, the side of her head, or rather her temple, came in contact with the pavement. From this she was rendered unconscious and so remained for a considerable time. Among other things, the evidence tends to prove her sight was afterwards impaired as a result of this injury. She was treated by Dr. Coffelt, an eye specialist. His testimony tended to prove that several months after her injury she was suffering from hyperopia, or farsightedness. The doctor testified this defect of vision would be permanent. There

was also testimony in the case tending to prove that the plaintiff suffered slightly since her injury from a paralytic condition. Dr. Coffelt, in his evidence, related some facts pertaining to the history of the case which he received from the plaintiff during the period he treated her. He also gave his opinion as an expert which tended to prove disabilities from the plaintiff's standpoint. It is now urged that this opinion was based largely upon the history of the case which he had received from the plaintiff, and was therefore incompetent within the ruling of *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. 89. Upon a careful consideration of this testimony, we are persuaded that the examination did not infringe upon the doctrine of that case. There is no word to be found in the hypothetical questions propounded to the doctor touching the history of the case. In other words, they seem to be based entirely upon facts theretofore developed in the proof. A fair example of the hypothesis submitted is the following question: "Q. Now I will ask you, in your opinion as a physician, if a person were thrown from a street car to the hard pavement and should strike on the side of the head, near the temple, with sufficient force to render them unconscious for a time, would that affect the nervous system and bring about these troubles mentioned?" To which, over the objection of the defendant, witness answered: "It is possible." While it is true in other portions of his testimony the doctor related some of the history of the case as revealed to him by his patient during treatment, nothing appears to the effect that his expert opinion, communicated to the jury, was based thereon. The evidence as given was entirely competent. *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. 89.

The defendant requested the court to instruct the jury that in this case the jury should weigh the evidence by the same rules it would weigh it if the contest were between two individuals, and should not give greater weight to the testimony of the witnesses for plaintiff because she is a girl and the defendant is a corporation. The court modified this request by inserting the word "merely" between the words "plaintiff" and "because." As thus modified, the jury were told that they should weigh the evidence by the same rules it should be weighed if the case were a contest between individuals, and that greater weight should not be given to the testimony of the witnesses for the plaintiff "merely because she is a girl and the defendant is a corporation." It is said the court erred by inserting the word "merely" in this instruction, for the reason it implies that otherwise it was proper to give greater weight to the testimony of the plaintiff's witnesses than to those of the defendant. This criticism is indeed minute, and the reasoning thereon is much attenuated.

In view of our statute commanding that a judgment should be affirmed in all cases unless it appears error was committed materially affecting the merits of the controversy, the court is certainly precluded from overturning the judgment on this score.

The testimony of several witnesses on the part of plaintiff tended to prove that she was a girl about 14 years of age. At the time plaintiff was employed as a nurse girl and had in keeping an infant child of her employer. The street car on which she was a passenger was what is known as a summer car, open at the sides, with seats lengthwise across the same. A footboard extends along the full length on either side of the car, and passengers pass out by stepping upon this footboard through the side of the car to the street. Several witnesses testified on behalf of the plaintiff to the effect that she notified the conductor when nearing the intersection of Grant and Commercial streets of her desire to alight therefrom. In response to her request, the conductor notified the motorman. It was after dark. As the car slowed down for the stop, the plaintiff took up the baby and slid across the seat to the side of the car. When the car came to a stop, plaintiff, with the baby in her arms, stepped upon the footboard in the act of alighting, when it was suddenly started forward by the act of the motorman in turning on the electric current. This sudden start precipitated her to the pavement, which resulted in her injuries. The same witnesses testified that the point in question was a regular place for the car to stop to receive and deposit passengers. On these facts the court instructed, on the theory of the plaintiff, that if the jury believed from the evidence that plaintiff was a passenger on the car, and that defendant's agents or servants knew that fact, then the defendant owed to plaintiff the highest degree of care, and if the jury found that, in response to plaintiff's request, the defendant's servants stopped the car for the purpose of letting her alight therefrom, then it was defendant's duty to hold the car a reasonable length of time to permit her to alight, and if they found that, immediately upon stopping the car, plaintiff started to alight, and while in the act of so doing she acted with reasonable care and diligence, and the agents or servants of the defendant suddenly caused the car to jerk or start, thereby throwing her violently to the ground, inflicting injury, the verdict should be in favor of the plaintiff. This instruction is criticised for the reason it fails to submit to the jury the question as to whether or not the car was stopped a reasonable time for the plaintiff to alight, and it is said it entirely ignores the question of knowledge on the part of the defendant that the plaintiff was alighting therefrom.

Now, as to the question of knowledge on

the part of the defendant's servants, we believe this criticism is unfounded, for although the instruction does not submit that question in precise terms—that is, that the defendant's servants knew the plaintiff was then and there in the act of alighting, or by reasonable care might have known such fact, etc.—it does require the jury to find that those in charge of the car knew she was a passenger thereon, that they knew she had requested a stop for her to alight, and that, in response to that request, they stopped the car for that purpose. Now there can be no question as to the law, whether it was a regular stopping place or otherwise. If defendant's servants knew the plaintiff was a passenger, and that she desired to alight at the point mentioned, and they stopped the car for the purpose of permitting her to alight, the law enjoins upon the defendant the obligation to hold the car for a reasonable length of time that she might alight in safety. That under these circumstances it was the defendant's duty to hold the car a reasonable length of time for the plaintiff to alight, the instruction told the jury in plain terms. As to whether plaintiff did proceed to alight within a reasonable time, the instruction required the jury to find that, immediately upon stopping the car, plaintiff started to alight, and that she proceeded with diligence and care in that behalf. Certainly she was not required to move forward to that end until the car had stopped, and if she immediately started to alight upon the stopping of the car, and proceeded with diligence and care to that end, then she proceeded to alight within a reasonable time, and if the car was started, causing her injury, while thus alighting, the obligation of defendant to hold it for a reasonable time was thereby breached. The instruction is not open to the criticism leveled against it. See *Cobb v. Lindell Ry. Co.*, 149 Mo. 135, 50 S. W. 310.

The testimony on the part of defendant tended to prove that the plaintiff slid across the seat, took her position upon the footboard of the car, with the baby in her arms, and stepped off the car while it was still in motion. In several instructions the court submitted these facts to the jury with the direction that, if it found plaintiff so conducted herself, she was guilty of such contributory negligence as precluded her right to recover, and the verdict should be for the defendant. The jury found the issues for the plaintiff, however. That is, the jury found the car did stop for her to alight, as was detailed by herself and several witnesses; that she immediately undertook to alight therefrom, and, while exercising due diligence and care in that behalf, the car was started forward by the motorman turning on the electric current, which precipitated her to the street and inflicted the injuries complained of. There is substantial evi-

dence to support this finding, and with it we are therefore not concerned.

We have examined all of the questions presented by appellant in the brief and find them to be without merit. All of the issues in the case were submitted to the jury by the instructions given. The trial seems to have been fair and impartial. It is unnecessary to prolong the opinion with a discussion of questions which we regard unimportant.

The judgment will be affirmed.

It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

GOODHART, HARTMAN CO. v. KINNEY,
Constable.

(St. Louis Court of Appeals. Missouri. April 20, 1909.)

1. APPEAL AND ERROR (§ 938*) — PRESUMPTIONS — MAKING OF BILL OF EXCEPTIONS.

Where the abstract of the record recites that on a certain date before the expiration of the time originally given plaintiff to file a bill of exceptions, the time was, by the judge in vacation, extended until a specified date, and that the bill of exceptions was filed thereafter within the time said to be extended by the judge in vacation, but there is no recital in the abstract that leave was granted beyond the term at which the appeal was perfected for the filing of the bill, the court will not review matters of exception, as it must appear in the abstract that the court entered an order during the term extending the time for filing the bill, before further extensions of time will be valid, and, unless it affirmatively appears in the abstract that the court extended the time during the term, the presumption obtains that the time was not extended, and therefore the judge in vacation cannot grant leave for filing the bill after the term has adjourned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3795-3798; Dec. Dig. § 938.*]

2. APPEAL AND ERROR (§ 544*)—BILL OF EXCEPTIONS—EFFECT OF FAILURE TO FILE BILL OF EXCEPTIONS.

Where there is no bill of exceptions filed by authority of the court, the record proper only is open to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2426, 2478, 2479; Dec. Dig. § 544.*]

3. APPEAL AND ERROR (§ 939*) — REVIEW — PRESUMPTIONS.

Where the only part of the record proper that is brought up on appeal is a certified copy of the judgment, which is regular on its face, the court will presume that the record proper is sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3804; Dec. Dig. § 939.*]

4. APPEAL AND ERROR (§ 679*) — RECORD — QUESTIONS FOR REVIEW.

The sufficiency of pleadings to support a judgment will not be reviewed on appeal, where neither the pleadings nor a statement of their substance is contained in the abstract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2878, 2879; Dec. Dig. § 679.*]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by Michael Kinney, Constable, against Goodhart, Hartman Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Felix O. Poston, for appellant. Clarence Ward and H. H. Willoughby, for respondent.

NORTONI, J. It is said in appellant's brief that this is an action of replevin for three barrels of whisky which the defendant constable held under a writ of attachment. We are not otherwise advised touching the nature of the action, as the pleadings are not before us. It appears plaintiff recovered, and the defendant prosecutes the appeal on the short form provided for in section 813, Rev. St. 1899 (Ann. St. 1906, p. 783).

All of the arguments advanced for a reversal of the judgment go to matters of exception on the trial. From what appears in the transcript and abstract, we ascertain the judgment was given at the February term of court. Motion for new trial was filed in due time and continued to the April term, at which it was overruled. On June 2d, during the April term, an appeal was allowed to this court and duly perfected. It affirmatively appears that the bill of exceptions in the case was not filed during the term at which the appeal was allowed, and there is no entry found in the transcript nor a recital in the abstract that time for filing the bill of exceptions was extended thereafter. It is recited in the abstract, however, that on August 30, 1906, and before the expiration of the 90 days originally given plaintiff to file his bill of exceptions, said time was by the judge in vacation extended until October 1, 1906, and that the bill of exceptions was filed thereafter, within the time said to be extended by the judge in vacation. However this may be, there is no recital whatever in the abstract that leave was granted beyond the term at which the appeal was perfected for the filing of the bill. In such circumstances we are not permitted to review matters of exception. It has been frequently decided that it must appear in the abstract the court entered an order during the term extending the time for filing the bill before further extensions of time therefor will be valid; that is to say, unless it affirmatively appears in the abstract that the court extended the time during the term, the presumption obtains that the time was not extended, and therefore the court or judge in vacation is without authority to grant leave for filing the bill after the term has adjourned. *State v. Ryan*, 120 Mo. 88, 22 S. W. 486, 25 S. W. 351; *Webster County v. Cunningham*, 101 Mo. 642, 14 S. W. 625; *Greenwood v. Parlin & Orgendorff Co.*, 98 Mo. App. 407, 72 S. W. 138. There being no bill of exceptions in the case by authority

of the court, the record proper only is open to review here. *Graham v. Deguire*, 154 Mo. 88, 55 S. W. 151. There is no part of the record proper before us other than a certified copy of the judgment, which appears to be regular on its face. Appellant has wholly failed to set forth either the pleadings or a statement of their substance in the abstract, and we are therefore precluded from examining as to their sufficiency to support the judgment. In these circumstances the presumption obtains to the effect that the record proper is sufficient.

The judgment will be affirmed.

REYNOLDS, P. J., and GOODE, J., concur.

MOSSOP v. CONTINENTAL CASUALTY CO.

(St. Louis Court of Appeals. Missouri. April 20, 1909. Rehearing Denied May 11, 1909.)

1. INSURANCE (§ 539*)—ACCIDENT INSURANCE—AFFIRMATIVE PROOF OF LOSS—TIME.

Provision in an accident policy that, in case of loss of time, affirmative proof be furnished within 30 days from termination of the period for which the insurer is liable, does not necessarily mean that the proof cannot be furnished before recovery of insured, as would appear proper if the indemnity be payable weekly.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 539.*]

2. INSURANCE (§ 460*)—ACCIDENT INSURANCE—PROVISIONS AGAINST LIABILITY—INTOXICATION.

Provision of an accident policy that, if injury is sustained while insured is intoxicated, his recovery shall be one-eighth what it otherwise would be, applies without regard to whether the intoxication causes the injury, though another clause provides for the same result where the injury is caused by intoxication.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1179; Dec. Dig. § 460.*]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action by Joseph E. Mossop against the Continental Casualty Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Action on an accident insurance policy for 21 weeks' indemnity at \$15 a week, or \$315; plaintiff alleging he was totally disabled during that period by an accidental injury. This fact is not contested—the defenses being, first, failure to furnish proof of loss as required by the policy; second, intentional infliction of the injury by another person; third, that it was received while plaintiff was quarreling, fighting, and violating the law; fourth, while he was intoxicated; fifth, was the result of intoxication. It is alleged any or all of those facts would excuse defendant from liability. The injury was received in the afternoon of December 17, 1906, and about the premises of a saloon kept by George Mills. According to plaintiff's version of the

occurrence, he went into the saloon and asked for a drink of liquor. Mills refused him because of a dispute in the saloon two or three weeks before, ordered him out, and just as he passed through the door slapped him on the back, but in a friendly way, and without force enough to hurt or cause a fall. The saloon stood at the intersection of two streets, and the walls did not join at right angles, but at the corner was a narrow wall set diagonally to the street, and in it was the entrance to the saloon. A porch projected from the second story, and was supported by a post located where the front and side walls of the building would have joined if they had met. The entrance of the saloon was set back some feet from this post, and was elevated about a foot above the sidewalk; the triangular space between the entrance and the post being a raised platform. Plaintiff said in stepping off this platform he slipped, and in falling struck his knee against the iron post, thereby causing the injury, which was a fracture of the kneecap or patella. He testified he was perfectly sober, but there was evidence to prove he was intoxicated, had been in a quarrel with the saloon keeper, and was ejected by the latter with a shove which might have caused him to fall. The policy provided for the payment of an indemnity to the plaintiff or his wife, and the material parts said the indemnity would be paid on the conditions following:

"In the event the insured, while his policy is in force, shall receive personal, bodily injury, which is effected directly and independently of all other causes through external, violent and purely accidental means (suicide, sane or insane, not included) and which causes at once total and continuous inability to engage in any labor or occupation, and provided that neither such injury nor inability is in consequence of nor contributed to by any bodily or mental defect, disease, or infirmity of the insured.

"Part I. * * *

"Part II. Weekly Indemnity. If such injury shall not result in any of the losses scheduled in part I, the company will pay said weekly indemnity for total loss of time necessarily resulting from injury as before described, for such period, not exceeding one hundred and four consecutive weeks, as the insured shall be under the treatment of a legally qualified physician or surgeon by reason of such injury.

"Part III. Special Indemnities. (A) In any of the losses covered by this policy and specified in parts I or II (1) where the accidental injury results from the intentional act of the insured or of any other person while the insured is not engaged in his occupation (assaults committed upon the insured for the sole purpose of burglary or robbery excepted); or (2) where the accidental injury results from or is received while quarreling,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fighting or violating the law; or (3) where either the accidental injury or the loss results from any poison, asphyxiation or gas, or from fits, vertigo, somnambulism or intoxication, or from sunstroke or freezing sustained by the insured while not engaged in his occupation; or (4) where the accidental injury is sustained while the insured is insane, delirious or under the influence of any intoxicant or narcotic or while the insured is undergoing any surgical operation or treatment (except such as is made necessary solely by injury covered by this policy and performed within ninety days thereof) then and in all cases referred to in this paragraph A of part III, the amount payable shall be one-eighth of the amount which otherwise would be payable under this policy, anything in this policy to the contrary notwithstanding, and subject otherwise to all the conditions in this policy contained. (B) * * *

Another paragraph required notice of a claim to be given by the insured or beneficiary to the company within 15 days of an accident causing the loss for which claim was made, and "affirmative proof" to be furnished in case of loss of time within 30 days from the termination of the period for which the company was liable, and declared no proceedings in law or equity should be brought to recover the indemnity until after the expiration of the time for filing proofs, or, in case the claim was for weekly indemnity, within one year from the termination of the period for which the company was liable. The policy as a whole is not preserved in the record. The answer denied either first notice or "affirmative proof" was given, but it was proved defendant received a card from plaintiff on December 28th, which appears to have been furnished by defendant, and contained blanks to be filled to state the date and hour of the accident, when plaintiff quit work, what he was doing when injured, what injuries he received, about how long he would be disabled, his occupation, address, doctor's name, number of the policy, and some other matters. It was proved, too, defendant received January 2, 1907, what is entitled "Claimant's Preliminary Notice of Injury," a document containing questions with blanks for answers, as did the card, but calling for more particulars than the latter; in truth, for all the details of the accident, and the kind, gravity, and consequences of the injury. On the back were questions and blanks for the report of a surgeon, which were expected to be and were filled in by the surgeon then in attendance, in the hospital of the Missouri Pacific Railway Company where plaintiff lay, on 35 or 40 patients who were suffering from injuries for which defendant might be liable. The surgeon's report stated the nature of plaintiff's injury and that it alone totally disabled him from attending to every part of his work, how the accident occurred according to plaintiff's statement, that his dis-

ability would continue for six or eight months, that the injury was not aggravated by any prior disease, and he had no other chronic ailment, defect, or deformity. This document was stamped by defendant: "Received April 10, 1907." The court left it to the jury to say whether defendant had been given notice of the injury within 15 days after it happened, and thereafter and before filing suit had furnished "affirmative proof" on one of defendant's forms; or, if this had not been done, whether defendant had waived notice. There was a verdict for plaintiff for full indemnity, and defendant appealed.

E. S. Puller and Manton Maverick, for appellant. Grimm & Haas and F. A. & L. A. Wind, for respondent.

GOODE, J. (after stating the facts as above). It is insisted the verdict cannot stand because no affirmative proof in the meaning of the policy was furnished, and there was no evidence the company waived this proof. Defendant argues the whole indemnity for lost time was payable at the end of treatment, instead of weekly, and that the policy required proof of loss to be prepared and transmitted to the company after treatment had terminated, or after the expiration of 104 weeks or 2 years, which was the maximum period of liability for loss of time. We will not decide when indemnity for such loss was payable, because part of the policy was omitted from the record, and the part presented suggests the omitted portion would bear on the question. That sufficient notice of the loss was given in 15 days is conceded; but it is contended "affirmative proof" of loss was not made. The document received by the company April 10th stated every particular of plaintiff's accident and consequent disability, and was an adequate "affirmative proof," if not prematurely delivered. The policy is rather vague about what would be timely delivery, being precise only in requiring the proof to be furnished within 30 days after the end of the liability period. This condition means it cannot be furnished after said 30 days, but not necessarily that it cannot be furnished before. If no indemnity was payable until the patient recovered, proof made 30 days after recovery would be in time; but proof made sooner in a complete form and forecasting accurately what future time the insured would lose might satisfy a condition expressed as this one is. The natural construction of the contract is that indemnity was payable weekly, and, if so, proof of loss of time ought to precede the demand for payment. So far as we can determine from the portion of the policy in the record, it is our opinion the company received good and timely proof of loss.

The effect of the instructions on the issue of intoxication was to hold the company li-

able for indemnity at \$15 a week, even though plaintiff was hurt while under the influence of intoxicating liquor, unless the injury was the result of his condition. This construction of the contract expunges an express proviso against liability for an injury received by the insured while under the influence of an intoxicant or narcotic. By virtue of said proviso, the company was as much exempt from liability for plaintiff's loss of time, if the loss was due to an injury received while he was intoxicated, but not in consequence of intoxication, as if the latter brought about the injury. Counsel argue that, if the intention was to exclude liability for an injury received while plaintiff was intoxicated, regardless of a causal connection between his state and the injury, it was useless to insert the exemption for an injury resulting from intoxication, as the first proviso would embrace the latter. So it would; but we take the purpose to have been to word the contract so no doubt could arise about the nonliability of defendant in either event. Again, it is said to be unreasonable to excuse defendant merely because plaintiff was intoxicated, if the accident would have happened anyhow. An illustration is brought forward of this kind: Suppose he had been hurt while intoxicated and on a street car in a collision of the car with another, would defendant be exempt? We answer that any insurance company has the

right to refuse to insure men against accidental injury while they are intoxicated, and there are good reasons why they should refuse to do so, to wit, when a man is drunk, he is less able to take care of himself, is more quarrelsome, and hence more likely to get hurt than when he is sober, and, if hurt, he may believe and testify his conduct had nothing to do with the accident, and obtain a verdict on that theory, when, in truth, intoxication led to the injury. Instances will occur where it is extremely difficult to determine what influence a state of intoxication had in bringing about an accident. We need not speculate on the reasons for the terms of this contract. Suffice to say they are not against public policy, must be supported according to their reasonable meaning, and there is no doubt cast on their meaning by the language used or pertinent authorities. The courts uniformly hold in construing a policy like the one in suit that if the insured is injured while in an excepted state, or doing an excepted act, the company is not liable. *Shader v. Railroad, etc., Co.*, 66 N. Y. 441, 23 Am. Rep. 65; *Standard, etc., Co. v. Jones*, 94 Ala. 434, 10 South. 530; *Cilley v. Acc. Ins. Co.*, 109 App. Div. 394, 96 N. Y. Supp. 282; *Campbell v. Ins. Co.*, 109 Ky. 661, 60 S. W. 492; 3 *Joyce, Insurance*, § 2612; 2 *May, Insurance*, § 531.

The judgment is reversed and the cause remanded. All concur.

McKINNEY v. DUNCAN et al.

(Supreme Court of Tennessee. April 29, 1909.)

1. EASEMENTS (§ 5*)—PRESCRIPTION.

To acquire an easement by prescription, there must be an uninterrupted user in the land of another for at least 20 years under an adverse claim of right, while all persons concerned in the estate in or out of which it is derived are free from disability to resist it and are seised of the estate in fee and in possession during the requisite period.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 13; Dec. Dig. § 5.*]

2. EASEMENTS (§ 10*)—PRESCRIPTION—RIGHT OF WAY.

Where complainant's only claim to a right of way over land was based on the fact that he had used the way continually for 30 years without objection from any one, and that he had obtained leave from the husband of a life tenant, who was in possession of the land, to repair the road in 1874, but he did not claim an express grant of the road, and there was no proof that he had ever asserted an adverse claim to it until shortly before it was closed, and it appeared that the land was in the possession of a life tenant from 1870 to 1900, after which others were in possession for only 8 years before suit was brought, he had no easement by prescription.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 27-32; Dec. Dig. § 10.*]

3. DEDICATION (§ 1*)—NATURE.

Dedication is the appropriation or gift by the owner of land or an easement therein for the use of the public, and it may be express, where the appropriation is formally declared, or by implication arising by operation of law from the owner's conduct and the facts and circumstances of the case.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 12; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1908-1917; vol. 8, pp. 7629-7630.]

4. DEDICATION (§ 15*)—IMPLIED DEDICATION—INTENT OF OWNER.

To establish dedication by implication there must be proof of facts from which it positively and unequivocally appears that the owner intended to permanently part with his property and vest it in the public, and that there is no other reasonable explanation of his conduct; the question being one of the owner's intent.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13; Dec. Dig. § 15.*]

5. DEDICATION (§ 15*)—IMPLIED DEDICATION.

The mere fact that persons living in the neighborhood of a tract of uninclosed and unimproved woodland had been allowed to use a pass-way across it, repairing it from time to time, without interruption for 30 years, does not show an intention of the owners to dedicate the way to the public use.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13; Dec. Dig. § 15.*]

6. DEDICATION (§ 13*)—IMPLIED DEDICATION—ACTS OF LIFE TENANT—EFFECT ON REMAINDERMEN.

Any acts of a life tenant of land respecting a dedication thereof would not affect the remaindermen, as the life tenant could not dedicate any interest in the fee.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 18.*]

7. EASEMENTS (§ 18*)—RIGHT OF WAY—WAY OF NECESSITY.

The fact that the only means of exit from a person's land to a public highway is over the

land of another would give him no right to use the other's land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 50; Dec. Dig. § 18.*]

Certiorari to Court of Civil Appeals.

Bill by Samuel C. McKinney against Cannon Duncan and others. From a judgment of the Court of Civil Appeals, affirming a decree of the chancery court of Knox county for complainant, defendants bring certiorari. Reversed, and bill dismissed.

J. C. Ford, for plaintiff. John W. Green and Pickle, Turner & Kennerly, for defendant Duncan.

SHIELDS, J. This bill was brought by complainant, McKinney, asserting the right to use and enjoy a right of way and road over a tract of land belonging to the defendants Duncan and Shipe, and to enjoin them from obstructing it. The chancellor sustained the bill and granted the relief prayed, and on appeal the decree pronounced by him was affirmed by the Court of Civil Appeals. The defendants have brought the cause to this court by certiorari and assigned errors.

Complainant claims the right to use the road in question upon two distinct grounds: Prescription, arising from continuous user for more than 20 years; and dedication by the owners of the property to the public—claims somewhat inconsistent in their nature. The facts disclosed by the record are substantially as follows:

Complainant owns a tract of land in Knox county upon which he has resided for some 30 years. The defendants' land, upon which the road is claimed, is situated between that of complainant and the public road known as the "Nance's Ferry road." It is open woodland, which has never been improved or inclosed, and was formerly a part of a larger tract in which Mrs. Crawford, wife of C. Y. Crawford, had an estate for her life; the fee belonging to her children. Mrs. Crawford was married previous to 1870, and continued under coverture to her death, about 8 years since. Partition of the land was then had among the remaindermen, and the part now owned by the defendants was decreed to the heirs at law of Mrs. Gill, a daughter of Mrs. Crawford, who died covert before her mother. The record does not show how the defendants acquired title, or the ages of the children of Mrs. Gill.

The road in controversy is the only one open to complainant and those living near him from their lands to the Nance's Ferry road. They have used it in going to church, school, and other places in the neighborhood in that direction, and the city of Knoxville, continuously, for some 30 years, repairing it from time to time, for their own convenience, without objection from any one, until the defendants inclosed the land, about the time this suit was brought. Complainant says he

obtained permission from C. Y. Crawford, in 1874, to repair this road, and this seems to be about all that ever passed in relation to it between the owners of the land and those using it. Complainant does not claim an express grant of the road claimed by him, and there is no proof that he ever asserted a right to it, adverse to the owners, until shortly before it was closed; nor is there any proof of an express dedication to the public. The road was not opened by the county authorities, and they have never repaired or exercised any authority over it.

We think that these facts are insufficient to support complainant's claim to an easement of a right of way by prescription.

The doctrine of prescription is clearly stated in the case of *Saunders v. Simpson*, 97 Tenn. 385, 37 S. W. 196, in these words:

"To give user this effect [prescriptive right] it must be uninterrupted in the land of another by the acquiescence of the owner for a period of at least 20 years under an adverse claim of right, while all persons concerned in the estate in or out of which it is derived are free from disability to resist it and are seized of the same in fee and in possession during the requisite period. Where all these circumstances concur, it raises prima facie evidence of a right to such easement acquired by a grant which is now lost. Thus there may be two distinct estates, and the owner of the one may have claimed and exercised the right of passing over the other for a period of time ordinarily requisite to give a right of way, but would fail thereby to create a presumption of a grant, if the servient estate during that period, or any considerable part of it, had belonged to a minor, or was in possession of a lessee, or one under a disability, like a married woman. The law would never presume a grant from the apparent acquiescence of one who could not have made it, or had no right to oppose the user from which it was sought to be inferred."

Complainant, therefore, to establish a prescriptive right to the easement claimed, must show that, during the 20 years he used the road, the owners of the land were capable of contracting and granting the easement, that they had the estate in the land which he claims to have acquired, and that his use of the road was under a claim of right in himself and adverse to the true owners of the property. This he has not done.

Mrs. Crawford, who was in possession of the land from 1870 to 1900, was during all that time under the disability of coverture. She only had a life estate, and could not have conveyed the land, or an interest therein, for a longer period, and, of course, complainant, by prescription against her, could not have acquired more than she could expressly grant. The heirs of Mrs. Gill are not proven to have arrived at their majority, and capable of contracting and conveying an interest in the land. Aside from this, they,

and the defendants, had been in possession only 8 years before this suit was brought, a period insufficient to raise a presumption of a grant.

Complainant has also failed to show that his use of the road was under a claim of right, hostile and adverse to Mrs. Crawford, the Gill heirs, or the defendants. This, of itself, is fatal to his claim of title by prescription. *Sharp v. Mynatt*, 1 Lea, 375.

We are also of the opinion that the complainant has not made out a case of dedication of the road to the public. Dedication is the appropriation or gift by the owner of land, or an easement therein, for the use of the public. It may be express, where the appropriation is formally declared, or by implication arising by operation of law from the conduct of the owner and the facts and circumstances of the case. To establish it by implication, there must be proof of facts from which it positively and unequivocally appears that the owner intended to permanently part with his property and vest it in the public, and that there can be no other reasonable explanation of his conduct. In other words, dedication is a question of intention, and the intent must be clearly and satisfactorily proven.

In the case of *Jackson v. State*, 6 Cold. 532, it is said:

"Dedication of a road to the public use over the waste and unclosed lands of an individual ought not to be inferred from bare use alone. Thus, where a road has been in existence for more than 50 years, and had originally passed entirely through woodland the jury were instructed that the mere use by the public, however uninterrupted and long-continued, would be insufficient to constitute it a public road, but must be accompanied by facts which show the use to have been claimed as a right, and not by permission of the owner, such as working on it, keeping it in repair, and requiring the removal of obstructions. Thus it has been held that the fact that a farmer leaves a lane through his farm for his own convenience, and permits the public to use it as a highway for 15 years, does not warrant the inference of dedication. An intention to dedicate must be obvious, and the same act which would warrant the inference in cities and towns would be quite insufficient in sparsely agricultural districts."

The case of *Worth v. Dawson*, 1 Sneed, 59, is to the same effect. It is there said:

"There is no evidence in this record showing a dedication by the owner of the way in question to the use of the public, or of any such intention on his part. The proof establishes nothing more than a mere license or permission of the owner to the inhabitants of a local neighborhood to use the pathway as a matter of favor and convenience; and such use being only by sufferance, during the pleasure of the owner, he had a right to put an end to it at any moment. No use or ac-

ceptance of the way by the public is shown, nor any recognition of it by the county court. That a right of way may be claimed by a dedication to the public use by the owner of the soil is not denied, but with us this doctrine must be cautiously admitted. Its too easy application would defeat the right of the owner of the soil to have compensation for the damages sustained by laying out a road over his land, to which he is entitled when such road is laid out by the proper authorities."

Complainant does not claim an express dedication from any of the successive owners of the land, but an implied one, because he and others living in the neighborhood were allowed to use this passway, repairing it from time to time for this purpose, without interruption, for 30 years. This is all of their case. The strip of land over which the road runs was uninclosed and in woods, and the most that can be said is that while in that condition the owners did not object to the use of it by the public. They merely permitted the use of it temporarily as a matter of favor. This is common in every part of this state, where there are uninclosed lands, and no intention upon the part of the owners to appropriate them to the public use can be implied from such conduct. They have the right at any time to inclose them and forbid further use by the public.

The use of this road was also, for the most part, during the existence of the life estate of Mrs. Crawford, and what occurred during that time cannot in any way affect the remaindermen, or those holding under them. A tenant for life cannot dedicate any interest in the fee.

It is immaterial that the road is the only one that the complainant has to the public highway or other places in that neighborhood. This gives him no right to use the property of the defendants. Private property cannot be taken and appropriated to the use of another, however convenient and necessary it may be to him. It cannot be taken for public use without proper proceedings for condemnation, and compensation made.

The decree of the chancellor and that of the Court of Civil Appeals are therefore reversed, and the bill dismissed, with costs.

EMERT et al. v. BLAIR et al.

(Supreme Court of Tennessee. Dec. 12, 1908.)

1. WILLS (§ 616*)—CONSTRUCTION—LIFE ESTATE—POWER OF DISPOSITION—EFFECT.

Testator, to afford his wife a "suitable and secure support" during her life, devised to her for her natural life all his property, to manage and use for her support, and at her death to be divided among testator's lawful heirs, and gave his wife power to sell any of the property for the "aforesaid use," but restricted her from selling realty in S. unless in her judgment her

support absolutely required it. It also declared that, if the profits in her judgment were insufficient, then she could convert to her use so much of the estate as would be sufficient for her support, the balance to belong to testator's estate at her death. *Held*, that the widow took a life estate, with a limited power of disposition, and not a fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1423; Dec. Dig. § 616.*]

2. LIFE ESTATES (§ 11*)—RIGHTS OF LIFE TENANT—REMAINDERMEN.

Testator, to afford his wife a suitable support for life, devised to her for her life all his property, to use "for her support during such time," and at her death directed that the property should be divided among his heirs. *Held*, that the widow held the property during her life in trust to use for her support, and was bound to preserve that portion of the estate which she did not require for her support for testator's heirs.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 29, 30, 42; Dec. Dig. § 11.*]

3. WILLS (§ 707*)—CONSTRUCTION—COSTS.

Where a suit between the heirs of a life tenant and the remaindermen, as the heirs of the testator presented a proper case for the construction of a will, the costs should be paid out of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1684-1686; Dec. Dig. § 707.*]

Appeal from Chancery Court, Knox County; Joseph W. Sneed, Chancellor.

Suit by W. B. Emert and others against Hugh G. Blair and others. Judgment for complainants, and defendants appeal. Affirmed.

Pickle, Turner & Kennerly, for appellants. Jerome Templeton and W. G. Caton, for appellees.

McALISTER, J. Complainants, who are the heirs at law of John B. Emert, deceased, bring this bill against the heirs at law of his widow, Martha J. Emert, to recover certain property alleged to belong to the estate of the said John B. Emert, deceased. Complainants claim the property under the will of the said John B. Emert, while the defendants claim the property as the heirs at law and distributees of Martha J. Emert, deceased, widow of John B. Emert. The deceased, John B. Emert, left a widow surviving him, viz., Martha J. Emert, but no surviving children. The complainants are F. L. Emert, Sr., a surviving brother of John B. Emert, deceased, and certain children and descendants of children of brothers and sisters of the said John B. Emert.

As already stated, the defendants to this bill are the only heirs at law of the said Martha J. Emert, deceased. The contention of complainants is that under the will of John B. Emert, deceased, the widow, Martha J. Emert, only took a life estate in his property, and upon her death the estate was to be divided among his heirs at law and distributees, according to the laws of descent and distribution.

The contention on behalf of the defend-

ants is that under the proper construction of the will of John B. Emert, deceased, his widow, Martha J. Emert, deceased, took an absolute title to all of the property therein devised, and that upon her death it descended to her distributees and heirs at law, under the laws of Tennessee.

It is obvious, therefore, that the questions presented must be determined upon the proper construction of the last will and testament of said John B. Emert, deceased, which is in the words and figures following, to wit:

"First. All my just debts shall be paid.

"Second. In order to afford my wife, Mrs. Martha J. Emert, a comfortable and secure support during her life out of my estate, I hereby devise and bequeath to her, for the term of her natural life, all my property, real, personal and mixed, to have, manage and use for her support during said time. At her death said property shall be divided among my lawful heirs and distributees, according to the laws of inheritance and distribution in Tennessee.

"Third. To more effectually provide for my said wife, I hereby invest her with power to sell and convey any of said property for the use aforesaid. This power is given because some of said realty consists of mountain farms which may fail to sufficiently contribute to my wife's support. My realty in Sevierville my wife shall not sell, unless, in her judgment, her support absolutely requires the same. Any of my other realty my wife may sell if in her judgment she can then make said property more conducive to her support. In case of sale of any of said realty, the proceeds shall be loaned out with good security or reinvested, the interest or income to be applied to her support, the principal or property so purchased to belong to my estate. But if my wife's comfortable support should in her judgment demand an appropriation by her of part or all of said principal or property, she is hereby vested with such power.

"Fourth. Only such of my personal property shall be sold by my executors in administering my estate as shall meet the approbation of my wife. She shall at once have the possession and use of the balance. Any money, after paying debts and expenses in administration, my wife may use as provided for as to proceeds of realty.

"Fifth. That there may be no mistake, I here again direct that, at my wife's death, the realty unsold of my estate or, in case my wife exercises the power of sale herein conferred, the proceeds of such sale or sales or the property purchased thereby in case of reinvestment or the remainder of the principal, if any, of the proceeds, in case the principal is diminished, shall belong to my estate, and shall be divided among my lawful heirs and distributees according to the

laws of inheritance and distribution in Tennessee.

"My intention is to give my wife the use of my entire estate for her support during her life, or if the profits of my estate are in her judgment insufficient, then to give her the right to convert to her own use so much of my estate as will be sufficient for that purpose, but the balance, if any, to belong to my estate at her death, in whatsoever shape it may be found.

"Sixth. I hereby nominate and appoint my said wife executrix and M. W. McCown executor of this my last will and testament. I specially request said McCown to give his attention to the management of said realty outside of Sevierville and to the protection of the same.

"After my debts have been paid, those due me collected, and the administration of the personality completed, and my entire estate is ready to be turned over to the quiet enjoyment of my said wife, the said M. W. McCown may in his discretion resign, and my wife thereafter exempted from settlements."

Now it is insisted on behalf of the heirs at law of Martha J. Emert, deceased, that while, in the first clause of the will, the testator devises all of his property, real and personal, to his wife, Martha J. Emert, for the term of her natural life, by the subsequent clauses of the will the power of absolute disposition of the entire property was conferred on the widow, and that thus her life estate was enlarged into a fee. The argument is that by the terms of the will she is authorized to sell and consume for her support, not only the income and profits of the estate, but, at her will and discretion, the entire corpus. It is said that she is made the exclusive and absolute judge of the advisability or necessity of converting the real estate and of using and consuming the personal assets and the proceeds of the realty. Especial attention is called to the following language of the will, wherein it is provided, after mentioning his realty in Sevierville, as follows:

"Any of my other realty my wife may sell if in her judgment she can then make said property more conducive to her support."

Again:

"But if my wife's comfortable support should in her judgment demand an appropriation by her of part or all of said principal or property, she is hereby vested with such power."

In the fourth clause power is conferred on his wife to make the same use of the personal estate.

Again in the fifth clause he says:

"My intention is to give my wife the use of my entire estate for her support during her life, or if the profits of my estate are in her judgment insufficient, then to give her the right to convert to her own use so much

of my estate as will be sufficient for that purpose, but the balance, if any, to belong to my estate at her death, in whatsoever shape it may be found."

Attention is called to the language of the sixth clause as follows:

"After my debts have been paid, those due me collected, and the administration of the personality completed, and my entire estate is ready to be turned over to the quiet enjoyment of my said wife, the said M. W. McCown may in his discretion resign, and my wife thereafter exempted from settlements."

Counsel cites in support of his contention *Bradley v. Carnes*, 94 Tenn. 27, 27 S. W. 1007, 45 Am. St. Rep. 696; *Brien v. Robinson*, 102 Tenn. 157, 52 S. W. 802; *Bean v. Myers*, 41 Tenn. 226; *Meacham v. Graham*, 98 Tenn. 190, 39 S. W. 12; *Clark v. Hill*, 98 Tenn. 300, 39 S. W. 339; *Hamilton v. Insurance Co.*, 74 Tenn. 402.

These cases settle the principle that, if the first taker is given an estate in fee or for life, coupled with an unlimited power of disposition, the fee or absolute estate vests in the first taker, and the limitation over is void. We are of opinion, however, that these cases are not applicable in the present instance, since the power of disposition conferred on the widow is restricted, and qualifies the right of sale to the express purpose of providing a support for the wife during her life. The rule is that, if the power is dependent upon a contingency, or if the power be definitely qualified, the estate of the first taker is limited to life, and the remainder over takes effect. *Bradley v. Carnes*, 94 Tenn. 36, 27 S. W. 1007, 45 Am. St. Rep. 696.

An analysis of the will of John B. Emert will show:

(1) The widow is given a life estate in all of his property.

(2) A limited power is conferred on her to sell to secure a support.

(3) A limitation over to the testator's heirs.

(4) An express power is conferred on the widow to sell for her own support or for reinvestment.

It will be observed that the second clause of the will contains this language:

"In order to afford my wife, Mrs. Martha J. Emert, a comfortable and secure support during her life out of my estate, I hereby devise and bequeath to her, for the time of her natural life, all my property, real, personal and mixed, to have, manage, and use for her support during said time. At her death said property shall be divided among my lawful heirs and distributees, according to the laws of inheritance and distribution in Tennessee."

It is shown by the next clause that a power of sale is conferred on the widow to pro-

vide funds for her support, and is therefore a restricted, and not unlimited, power of sale.

The third clause is:

"To more effectually provide for my said wife, I hereby invest her with power to sell and convey any of said property for the use aforesaid. This power is given because some of said realty consists of mountain farms which may fail to sufficiently contribute to my wife's support. My realty in Sevierville my wife shall not sell, unless, in her judgment, her support absolutely requires the same. Any of my other realty my wife may sell if in her judgment she can then make said property more conducive to her support. In case of sale of any of said realty, the proceeds shall be loaned out with good security or reinvested, the interest or income to be applied to her support, the principal or property so purchased to belong to my estate. But if my wife's comfortable support should in her judgment demand an appropriation by her of part or all of said principal or property, she is hereby vested with such power."

The fifth clause provides as follows:

"That there may be no mistake, I here again direct that, at my wife's death, the realty unsold of my estate or, in case my wife exercises the power of sale herein conferred, the proceeds of such sale or sales or the property purchased thereby in case of reinvestment or the remainder of the principal, if any, of the proceeds, in case the principal is diminished, shall belong to my estate, and shall be divided among my lawful heirs and distributees according to the laws of inheritance and distribution in Tennessee."

"My intention is to give my wife the use of my entire estate for her support during her life, or if the profits of my estate are in her judgment insufficient, then to give her the right to convert to her own use so much of my estate as will be sufficient for that purpose, but the balance, if any, to belong to my estate at her death, in whatsoever shape it may be found."

In *Pillow v. Rye*, 31 Tenn. 186, the will provided:

"It is my intention to provide for the comfort and independence of my daughter, Martha W. Keeble, during her natural life"—specifying the property and money which are bequeathed to her.

The will then proceeds:

"But it is my will and intention that said property and money shall be for her sole and separate use during her natural life, free from any debts and charges of any future husband she may have."

The will further provides:

"My object is to make provision for her, and not to postpone her interest to those of my remoter descendants, and if for any

cause it becomes necessary for her and her comfort to sell any portion of the principal it is my wish that it shall be done."

Notwithstanding the power of disposal contained in the will, it was held the daughter took only a life estate. Judge McKinney said:

"The assumption that the clause of the will under consideration confers any such unlimited power of disposal is wholly unfounded. The intention of Mrs. Cooke (the testatrix) is too obvious to admit of any doubt. Her purpose was to make a comfortable provision for her daughter during her life in every event that might happen.

* * * The power of sale conferred upon the life tenant is perfectly consistent with the general restriction upon the life owner, and equally consistent with the limitation over, which vests the remainder, subject to be divested as far forth as, upon the happening of the contingency, necessity may demand. This qualification or exception, so far from conferring an unlimited power of disposal, the more clearly excludes all idea of such intention. We hold, therefore, that under the foregoing clause of the will Mrs. Keeble takes only a life estate, with a limited power of disposal, upon the happening of the contingency referred to in the will."

In *Downing v. Johnson*, 45 Tenn. 230, the will provided:

"I will and bequeath to my beloved wife, Sallie Johnson, the whole of my estate, both real and personal, choses in action, etc., for and during her natural life, to be by her freely possessed and enjoyed."

Another clause provided:

"The balance of my property, money or other effects that may be on hand, at the death of my wife, I dispose of in the following manner"—making specific bequests.

Construing this will, this court said:

"We think it was most clearly the intention of the testator to provide for the support and maintenance of his wife out of his property, and to that end he gave her a life estate in it, and declared that it should be freely possessed and enjoyed by her; and, as if anticipating the corpus of a portion of it at least must be consumed by his wife in her support and maintenance in her declining years, he only gives such balance as may be on hand at the death of his wife in remainder. Therefore Sallie Johnson, the defendant, is, under the will of her deceased husband, entitled to the possession, use, and enjoyment, during her life, of all the property belonging to her husband at the time of his death, and if her support and maintenance, in her discretion, require it, she may consume the corpus of the entire estate, except the land; and, should there be any balance on hand at the death of the wife, it passes, under the will, to the remaindermen."

In *McGavock v. Pugsley*, 59 Tenn. 690, the will provided:

"To my beloved wife, Eliza Pugsley, I give and bequeath all the remainder of my estate, of whatsoever kind, real and personal, to be used and enjoyed by her during her natural life, hereby authorizing her to sell or dispose of the same in any way she may deem necessary for the convenience and support of herself and our two daughters; and if at the death of my said wife any part or portion of my said property or effects shall remain, the same to be equally divided between our said daughters or their representatives."

The court said:

"What is the proper construction of the will we have cited? Does the wife take an absolute estate in it by virtue of the power of disposal therein contained, or is it so qualified and limited that the remainder may take effect?"

It was held that the power of sale was to be exercised only when deemed necessary for the convenience and support of herself and the two children, and was not an unlimited power of disposal. The court sustained the validity of the gift over in remainder. *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322.

It is unnecessary to cite other cases, since we think the principles enunciated in the foregoing citations are conclusive on the questions presented on this will, and show that the widow had only a limited power of disposition for a definite and prescribed purpose, and that therefore the remainder over to the testator's heirs was good.

In order to understand and intelligently decide the questions raised on the assignments of error, it will be necessary to make a further statement of fact.

It appears that John B. Emert departed this life about the 10th day of April, 1884, leaving the will in question, wherein he appointed M. W. McCown executor and his widow, Martha J. Emert, executrix, but neither qualified as such, and one R. H. Andes qualified as administrator with the will annexed. It appears that he paid to the widow in various installments from time to time the sum of \$2,189.40 out of the personal assets of the estate. On the 8th day of April, 1884, a few days before his death, the testator entered into a partnership contract with two of his nephews, F. L. Emert, Jr., and W. W. Emert. The contract was in writing, and the salient features are:

(1) That the business was to continue for a term of five years, beginning May 1, 1884, under the firm name and style of Emert & Emert Bros.

(2) John B. Emert to furnish the capital of \$4,500 and storehouse and furniture rent free during the term of the partnership.

(3) F. L. and W. W. Emert were to conduct the business, devoting their entire time and attention to it.

(4) John B. Emert was permitted to with-

draw from the business per year \$600, while F. L. and W. W. Emert were limited to \$300 each.

(5) The death of John B. Emert before or during said term of partnership shall not terminate the business, but it shall be continued by John B. Emert's personal representative until the expiration of said term of five years, when the business shall be closed and wound up as speedily as practicable.

(6) From the net assets shall be paid, first, to John B. Emert or his personal representative said original capital of \$4,500, without interest, and the balance shall be distributed, one-half to said John B. Emert and one-fourth to F. L. and W. W. Emert each.

It appears the testator died before the partnership business was launched; but it was carried on under the terms of the partnership contract by the widow, Martha J. Emert, and the two nephews, for the period of five years, when it was closed and settled. The widow was paid the sum of \$4,500, the amount of the original capital put in by John B. Emert, and also her one-half of the profits of the business, estimated at \$3,200; but the exact amount of these profits does not definitely appear from the record.

It appears that during the continuation of this partnership the widow also engaged in a logging business as a separate and independent undertaking, and realized profits therefrom which are estimated at \$1,600. She also engaged in mercantile business on her own account with one of the nephews of J. B. Emert, and afterwards with one of her own nephews, in which it is claimed she made profits; but the exact amount does not appear.

It further appears that on June 6, 1889, the widow loaned to J. C. J. Williams \$6,000, evidenced by his note of \$6,480, maturing two years from date, with interest, which was secured by a deed of trust on certain lands in Knoxville, Tenn. It is a controverted question on the record whether this loan to Gen. Williams was made from money of the estate of John B. Emert or from the individual means of said widow. It is suggested by counsel for defendant that it is probable that it was derived from both sources. The loan was made in the widow's individual name, and the estate does not appear to be connected with it on the face of the papers. Gen. Williams made default in the payment of this loan, and there was a foreclosure of the deed of trust, and at the sale the property was bid in by Mrs. Emert for her own use for the sum of \$4,680. The sale was confirmed, and the title was regularly divested and vested in Mrs. Emert. It appears that Mrs. Emert afterwards sold off a portion of this Williams land, and received about \$7,000 in money and notes from the sales made, and at the time of her death she still owned portions of this land.

It also appears, from an exhibit to defend-

ant's answer, that at the date of her death the said widow had on hand in the shape of a certificate of deposit, representing money in bank, and also notes for money loaned out, about \$6,301.62.

It thus appears that when Mrs. Emert died she had on hand in money and in notes the total sum of \$12,525.62. It also appears that after the death of the testator the widow sold two pieces of unimproved land belonging to the estate—one for \$15, October 31, 1893, and the other for \$500, January 11, 1905. It does not appear what disposition was made of the proceeds of these sales, but they do not appear to have been reinvested. There is proof in the record tending to show that Mrs. Emert had been advised that she had title to the personal estate and to the proceeds of the real estate sold by her, and that she could make any disposition of it she saw proper.

On the final hearing the chancellor decreed as follows:

"(1) That under said will Mrs. Martha J. Emert took only a life estate in the property of her husband, John B. Emert, and that all of said estate, including all accretions and profits made thereon by her and all property acquired by her out of its assets, and said accretions and profits passed on her death to his heirs; that she only had the right to her support out of said estate; and that all property purchased by her became a part of said estate and passed under said will, together with all of its profits, income, and increase.

"(2) That the widow accepted the benefits of said will, and became thereby a trustee under it, and was bound to execute the trust on behalf of said testator's heirs.

"(3) That neither she nor her personal representative was bound to account for what she had used and consumed of said estate.

"(4) That said Williams land was purchased by her in trust for said estate, and that, in so far as the same had not been sold by her, she held it in trust for the complainants, and that said land, as well as the money and other property on hand at her death, passed to complainants.

"(5) That the suit brought by the defendants for the partition of said land among themselves as her heirs be enjoined.

"(6) That defendants be enjoined from setting up or claiming title to said Williams lands.

"(7) That a true statement of the property received by her administrator and her agent had been rendered, and that all of said property had been derived from the estate of John B. Emert and belonged to his heirs and distributees, and that, if the widow had a separate estate, the amount of it had not been shown, and that it had been mingled with the estate of John B. Emert, and could not now be separated, and the same would pass to complainants; that no account with

the defendants was necessary, but writ of possession was awarded of all property and assets in their hands."

It should have been stated that during the progress of the cause a receiver was appointed, and the administrator of Mrs. Emert and her agent and attorney in fact, who had possession of a part of her assets, were ordered to turn the same over to the receiver, which was done.

The defendants appealed from the decree of the chancellor, and have made 11 assignments of error.

We have already disposed of the first assignment of error, and held that Mrs. Emert, the widow, took only a life estate, and not the absolute fee in the property devised by her husband.

The next assignment is that the chancellor erred in holding that the widow was an active trustee for the management of said estate for the benefit of said remaindermen, and that all the income, interest, profits, and increase of said estate, together with all property which she purchased with its assets, and its proceeds, profits, income, and increase, inured to the benefit of and passed to said remaindermen. It is said there is nothing in the will indicating that the testator intended to impose upon his widow the burden of a trusteeship for his heirs, or any duty to increase and accumulate said estate for their benefit. It is claimed that, so far from this purpose being disclosed, it distinctly appears that the comfort and support of his widow was a matter of deep solicitude to the testator, and to that end he gave her the use of all of his property, and authorized her, if her necessities required, in the exercise of her own discretion, to use the corpus of said estate. As an evidence of the testator's intention to allow his wife to use all of his property, he speaks of the time when his entire estate is ready to be turned over to the quiet enjoyment of his said wife, and that thereafter his wife will be exempted from settlements.

In the case of *King v. Sharp*, 25 Tenn. 55, a tenant for life is held to be quasi trustee for the remaindermen, and that "he may dispose of the property at pleasure, so that he does not thereby injure the inheritance in the remainder. The tenant is to have this amount to be used for his benefit during life, but so to be used as that the property shall not be destroyed and the remainder defeated.

In *Vaden v. Vaden*, 38 Tenn. 450, in referring to *Bonner v. Bonner*, 26 Tenn. 436, the court said:

"It was argued by counsel in that case, as it is here, upon the authority of *King v. Sharp*, 25 Tenn. 55, and other authorities, that the tenant for life was entitled to have the original fund, or the property, or that in which it might be invested, or for which it was exchanged, at his election, upon the general principle on that subject applicable to trustees and beneficiaries. But that argu-

ment was considered unsound by the court.

* * *

"He [the life tenant] may use it, and make all the profit that he can, with due regard to its safety and protection. To that extent he may be called trustee; but he is not so in the sense of a pure trust, as a personal representative, guardian, etc. In cases of pure trusts, the fund is held solely for the benefit of the cestui que trust; but a tenant for life has a limited interest in the fund, with a right to use and enjoy the profits of it, without accounting for the same to any person. If a fund be given to a person for life, with remainder over to another, the tenant for life has the right to use and employ said fund in any way he chooses, if he does not endanger its safety. If the tenant for life invests the fund in the purchase of slaves or other property, the title vests absolutely in him. The remainderman has no right to or interest in the property, except so far as it may be held upon a bill for that purpose as a security for the fund."

In the *Vaden Case* it was held that in case of investment of money held for a party for life in slaves the remainderman had no right to the slaves so purchased, but only to the money so invested, at the termination of the life estate, that the holder of the life estate is not a trustee for the remaindermen as a guardian, personal representative, or pure trustee is, and the fund could not be followed in its new form.

In *Adylett v. Swope*, 1 Shan. Cas. 447, it was held:

"Where the life tenant of a fund invests the fund or exchanges the property which he holds subject to a remainder in other property, this property does not take the place of the funds so invested in it, and the remainderman is not entitled to elect whether he will take the fund or the property purchased with it. He is entitled only to the money invested in it at the termination of the life estate." *McHaney v. McNelly*, 57 Tenn. 539.

In *Swan v. Finney*, 63 Tenn. 30, it was held:

"On the first hypothesis—that is, investment by the life tenant of money, in which said party had only a life interest, in lands—it is settled by the authorities, and probably on sound principle, that no trust results or is allowable in favor of parties having remainder interest"—citing *Vaden v. Vaden*, 38 Tenn. 444.

It is further said that the tenant for life is entitled absolutely to the entire fruits of the life estate. *Forsey v. Luton*, 39 Tenn. 183; *Vancil v. Evans*, 44 Tenn. 345; *Hunt v. Watkins*, 20 Tenn. 498.

It is said, however, that the principle announced in these cases is not applicable in the present instance, since under the will of John B. Emert a life estate was given the widow in his property for a comfortable and secure support, and that the widow had no

right to use any part of the estate, except for this specific purpose.

We are constrained to hold that this is the proper construction of John B. Emert's will. This purpose is disclosed everywhere in the will, and we find no provision under which she can take any part of the estate, except for the purpose of a comfortable and secure support. This purpose is disclosed in the first item of the will, namely:

"In order to afford my wife, Mrs. Martha J. Emert, a comfortable and secure support during her life out of my estate, I hereby devise and bequeath to her, for the term of her natural life, all my property, real, personal and mixed, to have, manage and use for her support during said time."

He then proceeds to devise the remainder of his estate, after his wife's death, as follows, viz.:

"At her death said property shall be divided among my lawful heirs or distributees, according to the laws of inheritance and distribution in Tennessee."

The devise to the wife is coupled with the limitation that she is to "manage it and use it for her support" during said time, and no purpose is disclosed to give her any part of the estate absolutely for any other purpose. It is very clear, therefore, that all the personal property and proceeds from the sale of real estate held by her at her death, and which was necessary for her support, passed with the corpus of the estate to the remaindermen. The limited power of disposition of the estate conferred upon her was for the purpose of securing to her a comfortable and secure support during her life, and except for this purpose and for the purpose of reinvestment she had no power to convert the real estate or to appropriate the personal property.

An examination of the cases cited by counsel for defendant in support of the proposition that Martha J. Emert became the absolute owner of the rents, income, profits, and increase of the estate of her husband shows that they are cases where an absolute life estate had been given in specific property; but in the present case the property is devised to the wife for a specific purpose, and she is nowhere authorized to receive or use any part of the property except for this purpose. The widow, therefore, holds the property in trust "to have, manage and use for her support during her life."

Mrs. Emert, by accepting the benefits of the estate of her husband, was thereby constituted a trustee to manage said property, collect rents, sell property for reinvestment for the purpose of securing for herself a com-

fortable support out of the estate, and to preserve that portion of the estate which she did not require for herself for the heirs of John B. Emert. The fifth clause of the will clearly discloses the purpose for which his wife should hold his estate, as follows:

"That there may be no mistake, I here again direct that at my wife's death the realty unsold of my estate or, in case my wife exercises the power of sale herein conferred, the proceeds of such sale or sales or the property purchased thereby in case of reinvestment or the remainder of the principal, if any, in case the principal is diminished, shall belong to my estate, and shall be divided among my lawful heirs," etc.

The testator again discloses the twofold purpose for which his wife could hold his property, as follows:

"My intention is to give my wife the use of my entire estate for her support during her life, * * * to belong to my estate at her death, in whatsoever shape it may be found."

It is true that under this will the amount required for the support of the widow is left entirely to her judgment and discretion, but after she has been provided a comfortable support, all that remains on hand at her death under the express terms of the will, passes to the remaindermen.

It is suggested on the record that the widow had a separate estate of her own, independent of anything that she acquired from the estate of her husband; but there is no proof that will justify the court in holding that any of the funds on hand at the death of the widow or real estate held in her name was acquired by her as a separate estate. We are of opinion that the J. C. J. Williams tract of land was purchased with funds belonging to the estate of John B. Emert, and that the chancellor was correct in holding that the notes due from the purchasers of this land, and on hand at the death of Mrs. Emert, and also the unsold land on said tract, passed to the estate of John B. Emert. It is unnecessary to go into the details of the property on hand at the death of the widow, since our examination of it has satisfied us that it was all acquired from the estate of her husband, and that there is no provision in the will under which the widow could hold it, except for the purposes of support.

It results, in our opinion, the decree of the chancellor was correct, and it is in all respects affirmed. We think, however, this is a proper case for the construction of the will of John B. Emert, and that the costs should be paid out of the estate, and we so decree.

ST. LOUIS & S. F. R. CO. et al. v. FINLEY.
(Supreme Court of Tennessee. May 1, 1909.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTION—DIRECTION OF VERDICT.

Evidence in an action by a servant for personal injuries held to require a directed verdict for defendant, for failure to prove negligence by defendant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

2. EVIDENCE (§ 77*)—PRESUMPTIONS—FAILURE TO CALL WITNESSES.

Where plaintiff in an action for personal injuries fails to make out a case, it is not incumbent on defendant to introduce any evidence; and hence no presumption of fact arises from failure of defendant to call certain witnesses of the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. § 77.*]

3. MASTER AND SERVANT (§ 236*)—INJURIES TO SERVANT—OPERATION OF RAILROAD.

It is the duty of a brakeman, ordered to go forward and flag an expected train, to look and listen continuously so long as he is on the track, and his failure so to do is such contributory negligence as will defeat his action for negligence of the crew of the approaching train, unless they see him and can prevent the accident, but fail to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 739, 740; Dec. Dig. § 236.*]

4. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT—OPERATION OF RAILROAD.

The crew of the approaching train have the right to assume that the brakeman will be alert and watchful.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 137.*]

5. MASTER AND SERVANT (§ 202*)—INJURIES TO SERVANT—OPERATION OF RAILROAD—NEGLIGENCE OF FELLOW SERVANTS.

Where such brakeman falls asleep on the track, or so near thereto as to be within the sweep of the train, it is the duty of such train crew to make every effort in their power to stop the train and prevent the accident, if they discover his peril; and an avoidable injury inflicted after such discovery is wanton and inexcusable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 537; Dec. Dig. § 202.*]

6. MASTER AND SERVANT (§ 248*)—INJURIES TO SERVANT—OPERATION OF RAILROAD—LOOK-OUT—CONTRIBUTORY NEGLIGENCE.

Where such brakeman goes to sleep on the track, he cannot complain that such train crew were also negligent in failing to keep a proper lookout. He is bound to know that no one on the approaching train could contemplate him as having abandoned his duty and exposed himself to great and known danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 801-804; Dec. Dig. § 248.*]

Certiorari to review a judgment of the Court of Civil Appeals affirming judgment for plaintiff in an action by Jake Finley against the St. Louis & San Francisco Railroad Company and others. Reversed and dismissed.

C. H. Trimble, for plaintiff. Bell, Terry, Anderson & Bell, for defendants.

PER CURIAM. This action was brought in the circuit court of Shelby county to recover damages for an injury inflicted upon the defendant in error by plaintiff in error's railroad train, of which Forsyth was engineer, in the state of Mississippi. There was a demurrer, and judgment in the court below for \$2,500, from which the plaintiff in error appealed to the Court of Civil Appeals, and there the judgment was affirmed. A petition has been filed by the plaintiff in error in this court for the writ of certiorari to bring the case here for trial.

We have examined the case with care, and are convinced that both the circuit court and the Court of Civil Appeals committed error, and the judgment rendered by each of them must be reversed.

Only one witness testified, the defendant in error himself. He says that he had left Memphis on the previous night about 7:30 on one of plaintiff in error's trains, and had, with the train, reached, about daylight, or nearly daylight, a station known as Plantersville, in the state of Mississippi. There the train stopped for the purpose of meeting the north bound passenger train. He testified that his train was under orders to wait at that point for the passenger train, and that he was ordered by the conductor to go forward and notify the passenger train that the freight train was so heavy that it could not go in on the side track, which was down-grade, with any expectation of getting out again, and therefore that the passenger train must take the siding; that his duty under these orders was to go down with his red light, and his white light, and with torpedoes, and, after lining up the switch, to place torpedoes upon the track, and then retire further up the track, and, when he saw the passenger train coming, to signal to it with his red light, and then with his white light, and, when the train should be stopped, he was to go down and get on the engine, and let the engineer know what he was to do; that is, to go in upon the siding. He testified that he did line up the switch, and went some 10 or 12 telegraph poles down the track, and put out his torpedoes, and came back 2 or 3 telegraph poles to the switch, and set his red light and white light on the track. He says then: "I didn't feel sleepy. I sat on the end of the cross-ties and went to whittling with my knife, about 15 or 20 feet behind my lantern, and I dropped off to sleep, and that's the last I remember. * * * I was down on the end of the cross-ties, looking up the track the way the train was coming. * * * The next thing I remember after that, my arm was mashed up. Q. Where were you? A. I was at Plantersville. Q. Did anybody have you at the time you waked up? A. Mr. Forsyth had hold of me on one side, and I don't know who the other fellow was—a passenger off the train. Q. Is that the

first you remember, some men had you? A. Yes, sir. Q. What time, about, was it that these men had you there, and your arm was cut off, and you waked up? A. I don't know the exact hour, but just about sunrise, I suppose." Cross-examination: "You sat down on the tie? A. Yes, sir. Q. How did your arm happen to get run over? A. How did it happen to get run over? Q. Yes. A. I don't know, sir. All I know the engine run over it. I was setting down on the end of the tie with my head on my hand, and before I knew anything it was mashed. Q. You were on the north side of the track? A. On the north side of the track."

This was all of the evidence upon the subject of how the accident occurred. There was a motion entered in the court below for a peremptory instruction in favor of the defendant. We think it should have been granted. It is impossible to say from this evidence, or to conjecture, when the defendant in error's arm fell upon the track. It may have been lying upon the track some time before the passenger train approached, or it may have fallen across the track immediately in front of the passenger train, too late for the engineer to see it, or to do anything towards preventing the accident. It does not appear that the defendant in error's body was close enough to the train to be struck; only his arm was crushed. As stated, it is impossible to say from this evidence that the employes on the passenger train were guilty of any sort of negligence. It was not incumbent upon the railway company to introduce evidence to show anything upon the subject, since the defendant below stopped short of making a case. Therefore no presumption of fact could arise from the failure of the engineer to testify, or from the failure of any employes to testify.

In addition to the view just stated, if we could assume from this evidence that the defendant in error had his arm lying upon the track at the time, and before, the passenger train approached, still he would not be entitled to recover. There is no averment or proof of the existence of any statute in Mississippi, similar to our statute, upon the subject of obstructions upon railroad tracks. Our cases, however, hold that the statutory provisions above referred to are but declaratory of common-law duties, except in respect of the burden of proof and the absolute liability imposed for failure to use the precautions referred to. *Railroad v. Wilson*, 90 Tenn. 274, 275, 16 S. W. 613, 13 L. R. A. 364, 25 Am. St. Rep. 693; *Railroad v. Fleming*, 14 Lea, 139; *Railroad v. Humphreys*, 12 Lea, 206; *Chattanooga Rapid Transit Co. v. Walton*, 105 Tenn. 416, 422, 423, 58 S. W. 737; *Patton v. Railroad*, 89 Tenn. 370, 377, 378, 15 S. W. 919, 12 L. R. A. 184; *Railroad v. Pratt*, 85 Tenn. 9, 13, 14, 15, 1 S. W. 618; *Railroad v. Connor*, 9 Helsk. 19, 21, 22, 23; *Burke v. Railroad*, 7 Helsk. 451, 463, 19 Am.

Rep. 618; *Railroad v. Smith*, 6 Helsk. 174, 176; *Railroad v. Fugett*, 3 Cold. 402, 404; *Horne v. Railroad Co.*, 1 Cold. 72, 74-76. But it is also held that these requirements do not apply to the employes of the railroad company upon its track in the discharge of their duties. *Railroad v. Holland*, 117 Tenn. 257, 96 S. W. 758; *Taylor v. Railroad Co.*, 93 Tenn. 305, 27 S. W. 663; *Railroad v. Hicks*, 89 Tenn. 301, 17 S. W. 1036; *Railroad v. Rush*, 15 Lea, 145; *Railroad v. Robertson*, 9 Helsk. 276; *Haley v. M. & O. Railroad*, 7 Baxt. 239; *Railroad v. Burke*, 6 Cold. 45. It has been specifically held that they do not apply to the case of a brakeman, who, while under the duty to go forward and flag an expected train, after setting his white and red lights upon the track, sits down upon the end of a cross-tie and goes to sleep in such a position as to be struck by the train which he was sent out to warn. *Railroad v. Rush*, supra. It is the duty of an employe having such commission to discharge to look and listen continuously so long as he is upon the track, and his failure to do so would constitute such contributory negligence on his part as would defeat his action for any negligence of the crew of the approaching train, unless they saw him on the track, and could have prevented the accident, and failed to do so. *Taylor v. Railroad*, supra; *Railroad v. Hicks*, supra. These principles are applicable under the common law. The servants of the railroad company in the conduct of an approaching train have the right to assume that a brakeman sent out to warn and signal the train will not go to sleep upon the track, but, on the contrary, that he will be alert and watchful in the discharge of his duties. However, if he should fall asleep upon the track, or negligently sit so near the track as to be within the sweep of the passing train, and there go to sleep, it would be the duty of the company's servants upon the advancing train to make every effort in their power to stop the train and prevent the accident, if they should discover his peril. An injury inflicted after such discovery would be wanton and inexcusable. When an employe, however, sent out to warn and stop an expected train, so far forgets his duty as to go to sleep upon the track, he cannot justly complain that the servants of the company on the train referred to were also negligent in failing to keep a proper lookout. He is bound to know that no one upon the approaching train could contemplate him as having abandoned his duty, and exposed himself to imminent and known danger by going to sleep upon the track, or so near it as to be struck by the train. We do not think this case is one for the application of what is called the "last clear chance doctrine," discussed in the opinion of the Court of Civil Appeals, and we express no opinion upon the merits of that doctrine.

We have not in this case applied the rule

applicable to the negligence of fellow servants, since the declaration pleads and relies upon a statute of the state of Mississippi, where the accident occurred, which relieves the defendant in error of the disabilities arising out of such relation.

On the ground stated, the judgment of the circuit court and of the Court of Civil Appeals must be reversed, and the suit dismissed, with the costs of this court and of the court below.

McBURNY et al. v. GLENMARY COAL & COKE CO. et al.

(Supreme Court of Tennessee. May 10, 1909.)

1. MINES AND MINERALS (§ 55*)—CONVEYANCE—EFFECT.

While minerals may be by deed separated from the rest of the land, a conveyance of the minerals does not create a separate and distinct estate in the technical sense, but rather separates a part of the property from the remainder, and the right of ownership and control of the minerals is consistent with all other rights of ownership to the surface and other parts of the land.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

2. MINES AND MINERALS (§ 55*)—CONVEYANCE OF PARTICULAR MINERAL—EFFECT.

Where a particular mineral is conveyed by a specific term, and not by a general term, only that mineral will pass, and all other minerals will remain with the property of the owner of the fee.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 162; Dec. Dig. § 55.*]

3. MINES AND MINERALS (§ 55*)—CONVEYANCE—REMOVAL OF MINERAL—EFFECT.

Where a mineral which has been conveyed is removed from the land, the owner of such mineral ceases to have any other rights in the land, which then belongs to the owner of the fee and surface.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 55.*]

4. MINES AND MINERALS (§ 49*)—ADVERSE POSSESSION—POSSESSION BY GRANTOR—EFFECT AS TO GRANTEE.

The possession, by a grantor of a mineral interest and mining rights in property, of the surface, inures to the benefit of the grantee of such rights as against third parties.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 49.*]

5. EASEMENTS (§ 18*)—WAY OF NECESSITY.

A grantee of minerals has no way of necessity over land of a stranger to remove such minerals.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 50; Dec. Dig. § 18.*]

6. ADVERSE POSSESSION (§ 114*)—EVIDENCE.

Evidence held to show title in defendant by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 114.*]

7. ADVERSE POSSESSION (§ 68*)—DISCLAIMER—EFFECT.

Where, before the statutory period had run, one in possession of land disclaimed title,

his possession thereafter was not adverse or under color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 390; Dec. Dig. § 68.*]

8. APPEAL AND ERROR (§ 1151*)—DISPOSITION OF CASE—RELIEF GRANTED—CONDITIONS—PAYMENT OF COSTS.

Though defendant in ejectment denied complainant's ownership generally and described a number of tracts which it averred it owned, instead of disclaiming as to the part it did not claim, where complainant failed in the trial court to ask that decree be rendered for him as to the tracts outside those claimed, such relief will be granted on appeal only on payment of costs by complainant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1151.*]

Appeal from Chancery Court, Morgan County; D. L. Lansden, Chancellor.

Ejectment by Samuel McBurney and others against the Glenmary Coal & Coke Company and others. From a decree of the Court of Chancery Appeals, affirming a decree dismissing the bill as to part of defendants, and for complainants as to the others, complainants and the latter defendants appeal. Modified and affirmed.

James A. Monroe, Lucky, Sanford & Fowler, and Brown & Cassell, for complainants. Templeton, Lindsay & Templeton and James F. Baker, for defendants.

McALISTER, J. This is an action of ejectment to recover of the defendant the coal in certain lands described in the pleadings. Complainants do not claim the surface, but only the coal mineral in a certain tract of land covered by grant No. 21,879, and entry No. 1,935. Complainants claim that they acquired this mineral interest as owners of entry No. 1,935 and grant No. 21,879, issued to Thomas B. Eastland on the 29th of January, 1838.

Complainants show a perfect title under his entry and grant to the lands containing the minerals involved in this controversy. The theory of the bill is that there had been a severance or segregation of the stone minerals in said land, and that the possession of the defendants had not been extended to or covered the stone mineral interests therein. It was alleged that defendant Edward R. Diden in 1851-1856 purchased from Jas. S. Duncan four different tracts of land lying within the boundaries of complainants' entry No. 1,935. These deeds describe one tract of 470 acres of land, another tract of 500 acres, and a tract of 400 acres, and a tract of about 500 acres of land, only a portion of which is situated within the complainants' title. These deeds describe the lands by metes and bounds, and purport to convey the entire fee from Jas. S. Duncan and Edw. R. Diden. It appears that Jas. S. Duncan purchased this land from one Julian F. Scott, who by his deed reserved the stone coal. The theory of the bill, therefore, is that the reservation of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the stone coal in the deed from Julian F. Scott was a severance of the mineral estate from the surface right, and that therefore the person in possession under any of the deeds from John S. Diden only held the surface, and that his possession would not inure to the benefit of the mineral estate in the land. Complainants' original insistence in the present bill is that the possession of E. R. Diden of this land was a possession of the surface only, and not of the mineral, and that, since complainants' entry 1,935 and grant 21,879 constituted the oldest title appearing in the record, the mineral interest in said land was not barred by the adverse possession by Diden and his devisees.

This grant and the entry on which it is based include the lands in litigation. It appears that complainants have deraigned a perfect chain of title by connected mesne conveyances from the grantee to themselves.

Defendants, however, insist complainants are barred against a recovery of these lands because of defendant's possession under the statute of limitations.

It appears that in 1851-1856 Edward R. Diden purchased from one James S. Duncan four tracts of land lying within the boundaries of entry No. 1,935 and Eastland grant. Duncan, it appears, in 1851 obtained a deed for 2,000 acres from Julian F. Scott, to whom a grant for the same had been issued by the state on June 19, 1851. The four tracts of land purchased by Edward R. Diden from James S. Duncan comprised about 1,700 acres. The first of these tracts embraced 470 acres, and was acquired by E. R. Diden from J. S. Duncan on April 4, 1851. On May 7, 1852, Duncan executed to E. R. Diden a deed purporting to convey 500 acres. On March 1, 1855, Duncan executed to E. R. Diden a deed for a tract containing 400 acres. On February 13, 1856, Duncan executed a deed to E. R. Diden for three tracts, one of which lies outside the lands in controversy.

The Court of Chancery Appeals reports that James S. Duncan, from whom E. R. Diden had purchased these several tracts of land, is not affirmatively shown to have other title than the deed made by Julian F. Scott, which appears to be without date, but which is shown to have been acknowledged before the county court clerk of Morgan county on the 2d day of July, 1851.

It appears that the grant to Julian F. Scott was No. 27,992, based on entry 1,787. There was another grant, issued to Julian F. Scott, covering entry 2,281. The Court of Chancery Appeals was of opinion that it does not appear, by the description in Duncan's first deed to E. R. Diden, that the land conveyed was claimed under grant No. 27,992, the J. F. Scott grant; but, on the contrary, it is said to be a part of the grant No. 28,464 and a part of grant No. 27,739.

The deed made by Julian F. Scott to James S. Duncan, conveying lands estimated at 2,000 acres, appears to have been acknowl-

edged on the 2d day of July, 1851, or subsequent to the date of James S. Duncan's first deed to E. R. Diden, which was on the 4th day of April, 1851. This deed from James S. Duncan to E. R. Diden describes the land by specific boundaries, with covenants of seisin and general warranty, and containing this clause, "excluding all the stone coal in said bounds." It appears that in none of the deeds of Duncan to E. R. Diden, and in no deed subsequent to the deed of Julian F. Scott to James S. Duncan, was any exception made as to the stone coal.

The Court of Chancery Appeals finds, Judge Barton delivering the opinion of the court, that E. R. Diden in 1850 or 1851 moved upon the tract of 470 acres described in the deed of April 4, 1851, from J. S. Duncan to E. R. Diden; that E. R. Diden cleared from 40 to 50 acres on said tract, and occupied it as a residence from that time until his death in 1871, and that during that time he was in the open, notorious, continuous, and peaceable possession of this place, holding it adversely to all the world; and that no part of this possession was outside of the 470-acre tract. That court further reports that:

"After the death of E. R. Diden in 1871, his son John S. Diden lived upon this place with his mother, the widow of E. R. Diden, until 1879, and that the possessions were still kept up on this place until about 1894, and that from April 4, 1851, until 1894, a period of more than 40 years, there was a continuous adverse possession of 40 or 50 acres of cleared land and improvements, and this possession was under the color of title of the deed from Duncan to E. R. Diden, dated 4th of April, 1851, which purports to convey an estate in fee."

Defendants contended in the court below that by certain acts of E. R. Diden his possession was extended by construction to the entire boundaries claimed by him under all five of the deeds executed to him by J. S. Duncan, comprising altogether 1,700 acres. On this subject the Court of Chancery Appeals finds as follows:

It further appears, and we find, that shortly after Diden procured his last deed from Duncan, in 1857 or 1858, Diden had the lands run out, and went around the entire outside boundary of all of his lands, and marked the outside line, so as to have a clearly marked line between him and adjoining owners.

"It appears that he adopted a mark of his own; it being a cross-jack, or mark. It further appears that it was his custom, so long as he lived thereafter, to go around his lines at frequent intervals—the proof shows about once every year—and remark the lines, marking not only the line trees, but pointers, so as to clearly show the location of his lands. As we say, he is shown to have done this from probably 1857 or 1858 up to the time of his death, which occurred in 1871. It is also shown that in 1859 E. R. Diden made

a will, and treated his farm as one entire tract, and this will was acknowledged and registered, and it is shown that he thus consolidated all the tracts, and from that time on until his death in 1871 held them under the consolidations; and it is further said, which is true, that in 1866 he made the will, which was afterwards established, under which the defendant John S. Diden claims, in which he gives the boundaries of the tract as now claimed by John S. Diden, and it is said that he held under that until his death, and his son held it afterwards.

"While these are facts, we are of opinion that that treatment of the place by making a will, or by referring to it as his farm, or by marking the outside lines of all his tracts so to make it one tract, could not affect the rights of the parties under the statute of limitations. It must be remembered that the rights of defense and of title acquired under the statute of limitations are statutory rights, which can only be acquired on the terms and conditions prescribed by the statute, and under the limitations therein provided. The possession which becomes effective either in giving a defensive right or in procuring and tolling the title to land, is aside from actual inclosures purely a constructive one given by the statute.

"Now, the words of the statute are: 'That any person having had by himself or those under whom he claims seven years adverse possession, * * * holding by conveyance, devise, grant, or other assurance of title purporting to convey an estate in fee, * * * is vested with a good and indefeasible title in fee to the land described in his assurance of title.'

"And the holding has been, in accordance with this language, that the constructive possession herein provided for must extend to the bounds of the color of title under which a party claims the land on which his possession is located.

"Now, when we come to examine the facts in this case, we find that E. R. Diden's possession, except the occasional acts of possession we have referred to of the coal mines, was within the bounds of the 470-acre tract which was held under the deed of the 4th of April, 1851. If demand had been made upon him at the time he was holding the possession for a showing of title as to the land covered by his inclosures, he would simply have produced his deed of the 4th of April, 1851, and we are of opinion that the constructive effect cannot be extended beyond the bounds of that deed. To hold that, by marking lines covering other tracts, a man could consolidate the tracts or extend the effect of his possessions upon a single tract, would be in effect to hold that a man could by his own action amend and extend the effects of the statute of limitations. So we think the wills executed by E. R. Diden could have no effect, notwithstanding the

fact that they were acknowledged and recorded, because he was not claiming under his will, but simply preparing a paper for others to claim under him. We are therefore of opinion that the possession held by E. R. Diden himself of the inclosed lands did not in any of its effects go beyond the bounds of the deed of April 4, 1851. In this conclusion we concur.

"It further appears that on September 10, 1866, E. R. Diden made a will, revoking one made in 1859, wherein he described all of the lands comprised in the Duncan deeds as one tract. In this will he provided that upon his death it would all become the property of his son John S. Diden, provided his wife, Esther Diden, did not survive him, in which case, quoting from the will, 'she is to have dominion over this farm whereon we live and to be supported until her death, and at her death John Steven Diden, my youngest son, takes it for his own property for himself, heirs, and assigns, freehold, forever.' It appears that E. R. Diden died in 1871, and his widow, Esther Diden, survived him until 1888, during which time she and her son, John S. Diden, lived at the old home place on the 470-acre tract until 1879, when John moved away and took a possession outside the 470-acre tract, and at the place designated on the map as 'House John S. Diden.'

On the subject of this possession the Court of Chancery Appeals reports:

"The possession known as the 'John Diden possession,' and marked on the map as house and field, lying on both sides of the county road, and about the center of the property claimed by John S. Diden under his father's will.

"We find from the evidence," says the court, "that John S. Diden went to his place after his father's death, and after his marriage in the year 1879, cleared up the tract of land, and built a house. He cleared from 20 to 30 acres at this place, improved and inclosed the same, built a house, and has remained on it and in possession of the same continuously to this time, a period of some 28 years before the bill was filed in this case. His occupancy of this place had been peaceful, continuous, open, and notorious, and adverse to all, claiming under his father's will, which purports to convey a fee, and for a period of 28 years prior to the filing of the bill.

"On December 24, 1884, John S. Diden and wife conveyed to J. H. Parker & Co. the mineral interest in certain contracts designated on the maps as 'John S. Diden to Glenmary Coal & Coke Co.' extending to the W. L. Davis tract on the east. The conveying clause of that deed is as follows: 'The party of the first part has this day optioned and sold to John H. Parker & Co., the second named party, all of the minerals, etc., coal, iron, fire clay, gas, oil, lead, sulphur,

marble, rock, etc., in or under the certain tract of land herein set forth and described' (embracing 342 acres). The deed also contains the further provision: 'Now it is agreed that said party shall have the necessary timber off of said land for the purpose of carrying on any work or business they may engage in in the pursuit of mining, etc., and it is further agreed that they have the right to enter upon said land in search of coal, oil, etc., at any time they choose within the next two months.'

"On March 19, 1890, Parker & Co. executed a deed for the same mineral interest to G. W. Chandler, and on the same day Chandler deeded it to the Glenmary Coal & Coke Company."

As already observed, complainants seek by this bill to recover all the coal mineral in the lands lying within their Eastland grant and the tract described in the will of E. R. Diden, except the land covered by the 470-acre tract conveyed by James S. Duncan to E. R. Diden April 4, 1851. In his answer the defendant John S. Diden claims the land described in his father's will; but it is shown that he conveyed the W. L. Davis tract, with the minerals, and also the minerals in the tract comprising 242 acres, described and designated on the map as conveyed by John S. Diden to Glenmary Coal & Coke Company, and the Glenmary Coal & Coke Company, claims both of these tracts under John S. Diden.

The defense relied on is possession under the statute of limitations. The position relied on is that no one has the "Diden old home place," or has the "Diden old field" held by old man E. R. Diden. The Court of Chancery Appeals finds:

"There was some 40 or 50 acres cleared up at this place, and that E. R. Diden, the father of John S. Diden, moved upon this tract in 1850 or 1851, his deed from Duncan being dated April 4, 1851, and he then made these clearings and improvements, though the original clearings and improvements were doubtless extended, and he lived on this place until his death in 1871. During that time he was in open, notorious, peaceful possession of this place, holding it adversely to all the world.

"This possession was wholly within the boundaries of the 470-acre tract first purchased and covered by the deeds from Duncan to him, dated 4th of April, 1851. It is not denied that E. R. Diden and his son, John S. Diden, obtained a perfect and complete title to this tract of 470 acres, and as to this tract the complainant on the hearing dismissed his bill."

In respect of the possession of the coal mineral interest covered by John S. Diden to Parker & Co., December 24, 1884, and now held by the Glenmary Coal & Coke Company under mesne conveyances, the Court of Chancery Appeals report:

"That under this conveyance, made by Diden to Parker & Co., he (Diden) has remained in the actual adverse possession of this land, not claiming, however, the mineral interest as against his grantee and their successors; and the legal question presented is as to the effect of this holding of Diden as against the complainant. It is not claimed, as we understand, that Parker & Co., jointly, or the Glenmary Coal & Coke Company, have themselves, since the deed made to them by Diden, had any actual possession of the coal or any part of the land west of the W. L. Davis tract and within the bounds of the conveyance to them by the deed of Diden made the 24th of December, 1884."

However, the Court of Chancery Appeals held as a matter of law, although John S. Diden executed this deed to Parker & Company before he had acquired, by adverse possession or otherwise, any title to the minerals therein, yet his possession at the place designated "House John S. Diden" inured to the benefit of Parker & Co., vesting in them title to the minerals in the 242-acre tract at the expiration of 7 years from the establishment of that possession in 1879, and as to all these interests dismissed complainants' bill. A decree, however, was pronounced in favor of complainants against Young & Foster for the mineral interests on a tract comprising 400 acres, which will be noticed on their appeal.

Complainants appealed from so much of the decree as denied them any recovery of the mineral interest embraced in the other tracts, and their first assignment is that the Court of Chancery Appeals erred in not pronouncing a decree in favor of complainant Samuel McBurney, and against the Glenmary Coal & Coke Company, for the coal in the 342-acre tract, which is particularly described in the deed executed by John S. Diden to Parker & Co. on December 24, 1884. This tract lies in the northwestern portion of the Diden lands, and is described on the plat as "John S. Diden to Parker & Co., December 24, 1884," and lies between the north line of the Diden lands and the south line of the Glenmary Coal & Coke Company's lands, and extends on the east to the W. L. Davis tract.

The position of defendant is that after the execution of the deed to Parker & Co., on December 24, 1884, the possession of John S. Diden at his home place, which was begun in 1879, inured to the benefit of Parker & Co., and vested them with title to the mineral and mining rights therein described.

The question propounded on this assignment of error is *res integra* in this state, and presents a question of much difficulty and perplexity. The nature of the estate created by the severance and segregation of the mineral interests in a tract of land under a separate conveyance seems to be well established by the authorities. In Delaware &

Hudson River Co. v. Hughes, 183 Pa. 69, 38 Atl. 569, 38 L. R. A. 826, 63 Am. St. Rep. 743, it was said:

"The general principles regulating the titles to upper and lower estates in the earth's crust are pretty well settled by our own cases. The ownership of the surface carries with it, if there be no obstacle to the application of the general rule, title downwards to the center of the earth and upwards indefinitely. So long as mineral deposits remain in place, they are part of the freehold, and pass with it by deed, gift, or other form of conveyance; but, when the minerals are removed from their position or bed by mining, they become personal property, and are sold like other personal chattels. If the owner grants to another the right or privilege of taking coal from his lands, this grant, if not an exclusive one, is not the grant of an interest in land, but of an easement or incorporeal right, which leaves the title to the coal in place remaining in the grantor. But a grant of all the coal or of the exclusive right to mine the coal, is a sale of the coal in place. The conveyance of the coal creates in the vendee an interest in land. The deed or other conveyance is within the recording acts, and is subject to all the rules and regulations governing conveyances of the surface. It may convey an estate in fee simple in the coal or other mineral, or any lesser estate, in the same manner and by the same words of grant made use of in conveyance of the surface. When such a conveyance has been made of the coal or other mineral, it works a severance of the estate so conveyed from the surface, and, if the deed be recorded, it is constructive notice to all the world of the fact of severance. Thenceforward the owner of the soil may cultivate, inclose, and reside upon his estate for any length of time; but his possession will not extend below it. It will not grasp or affect in the slightest degree the estate below him which has been severed by the deed," etc.

In *Barringer & Adams on the Law of Mines and Mining*, p. 36, the rule is thus stated:

"A conveyance of all the minerals, or a defined part or kind thereof, in or under a tract of land, passes an estate therein in fee. If the description is sufficient to contain the whole of the minerals, it is unimportant whether they be described as such, or the conveyance be of the usufructuary rights to them, provided those rights are equivalent to the permanent or absolute ownership. Such an owner has all the rights of an owner of land in fee, with the same remedies to assert and defend those rights and to protect his title. The ownership of the mineral is vested immediately upon the delivery of the conveyance. The minerals in place, then, being land, are conveyed in the same manner and are subject to the same rules, as regards their transfer, as land is. The statute of

frauds and the law governing the transfer of interest in real estate are applicable to the transfer of such interest in the minerals. A separate estate in the minerals may be created, not only by an affirmative grant, but also by reservation or exception in a conveyance of the land."

In *Murray v. Allred*, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740, this court recognized this doctrine and quoted with approval from *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645, as follows:

"It often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another, giving each purchaser a deed or conveyance in fee simple for his particular deposit or stratum, while he retains the surface for cultivating purposes precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers or strata becomes a subject of taxation, of incumbrance, levy, and sale, precisely like the surface."

The next question presented is what constitutes an adverse possession of the mineral strata or deposit, after the title thereto has been separated from the title to the surface.

In *White on Mines & Mining*, p. 32, the principle is thus stated:

"But, where there has once been a severance of the title to the minerals from the title to the surface, the presumption of ownership in the minerals no longer exists in favor of the party in possession of the surface; but, on the contrary, the ownership of the minerals is supposed to follow the title to the same, and, in the absence of proof of the possession of the mineral strata, evidence of the possession of the surface will not avail to establish a title by adverse possession to the minerals."

Barringer & Adams thus state the rule at pages 59 and 69:

"Where the ownership of minerals in place is severed from the ownership of the soil or surface, the mere possession of the latter is not such a possession of the minerals beneath as to be adverse. Nor will the non-user of the minerals, or the right to dig them, by the mine owner, convert the possession of the surface owner into an adverse possession of the minerals. The latter must perform some act adverse, hostile to the rights of the mine owner, which prevents him from exercising his rights. The surface owner, setting up the statute, must establish a possession of the mine as such, independently of his possession of the surface. Such a possession must be actual, notorious, exclusive, continuous, peaceable, and hostile for the statutory period; and in these respects, the surface owner is in no better position than the stranger. No act or acts on his part will establish title in him which would not give title to a stranger. Actual

possession is taken by the opening of mines and carrying on of mining operations."

On this subject the exact findings of the Court of Chancery Appeals are as follows:

"Since the conveyance by John S. Diden to Parker & Co. he [John S. Diden] has remained in the actual adverse possession of the land, not claiming, however, the mineral interests, as against his grantees and their successors; and the legal question presented is as to the effect of this holding of Diden as against the complainant. It is not claimed, as we understand, that Parker & Co., Chandler, or the Glenmary Coal & Coke Company have themselves, since the deed made to them by Diden, had any actual possession of the coal or any part of the land west of the W. L. Davis tract, and within the bounds of the conveyance to them by the deed of Diden made the 24th of December, 1884.

"The claim on behalf of the complainants is that they are entitled to recover this mineral interest because, up to the time of Diden's conveyance to Parker & Co., Diden had been in actual, adverse possession of the land only about five years. And the insistence is that the effect of Diden's deed was to sever the coal in this tract from the rest of the estate, and that thereafter his possession (Diden's) did not protect the coal interests, and that, the Glenmary Coal & Coke Company and Parker & Chandler not having themselves had possession, they have acquired no defense to the complainants' older and better paper title."

Upon these facts that court held:

"In this case the conflict is not between parties claiming under the same chain of title, but between parties claiming under entirely separate and distinct chains of title. It appears to us that the better, safer, and most sensible rule would be to adopt the rule established in those cases where there is a joint or mixed possession by heirs and life tenants, or by mother and child, guardian and ward, etc., where the possessions are held to be consistent, and in harmony, and all under the same title. While it is true that coal, minerals, etc., may be by deed severed and separated from the rest of the land and become subject to the laws of devise, descent, and conveyance, as in their nature they are inseparably mixed and connected with the balance of the land, a conveyance of the minerals in a tract of land does not in the technical sense of the word create a separate and distinct estate; but it separates a part of the property from the balance, and the right of ownership and control of coal and other minerals may be, and usually is, in entire harmony and consistent with all other rights of ownership to the surface and any other parts of the land. Where a particular mineral, as oil, coal, iron, or marble, is conveyed by a specific term covering that particular mineral, and not by a general term, only that would pass, and all other minerals would remain with the prop-

erty of the owner of the fee; and, where a mineral which has been conveyed is taken or removed from the land, the owner of such a mineral ceases to have any other right or interest in the lands, and the land then all belongs to the owner of the fee and surface. The right to own and take a mineral upon a tract of land is confined to the ownership and taking alone, and cannot otherwise interfere with the rights of dominion and possession of the owner of the balance of the land. It is in reality simply a right to enter and go upon the land and take therefrom the particular mineral conveyed, and when that is done the right is exhausted.

"Under such a right, a possession can only be to the extent of occupying so much of the land as may be necessary and proper for such taking, and it is not at all inconsistent with the other rights of possession and ownership by the owner of the balance of the estate or land.

"The situation we have presented here is that the complainants and others under whom they claim were claiming under a title entirely different and distinct from that under which the defendants claimed, and they were claiming the entire interest in the land, the surface as well as the minerals. They have only abated part of the claim—that is, the right to the possession of the surface, timber, etc.—because they have discovered that their rights to these interests at least are barred by reason of a possession held by the defendant Diden for a period of more than a quarter of a century, during which time they have left him undisturbed. It is true that in the meantime he has conveyed to another the right to the minerals that are upon this land, and the right to go upon the land and take therefrom these minerals, including the usual mining rights.

"We think the better rule and principle is to hold that such possession by a man who has conveyed the mineral rights to others is a possession in their interest, and in harmony with them, as well as for himself. If it be not so held in this case, we have this peculiar condition of matters presented: Diden by his deed conveyed to Parker & Co., and through them to the defendant Glenmary Coal & Coke Company, the mineral rights and mining rights; that is, the rights to go upon this land and take out these minerals, and to use the necessary timber on the land for mining purposes. Now, these parties are claiming under him and under his warranty, and, if they be ousted therefrom, can hold him liable on his warranty, and the loss will be occasioned by the entry of a party against whom he has been asserting an adverse right for a period of more than a quarter of a century. In addition to that, Diden has certainly been holding the land for all purposes as against the complainants, and is entitled to hold all of it for all purposes, unless it be held that the coal has been severed, so as not to protect it; and if

it should be decided under this holding that the complainants have not lost their title to the coal, by what right or on what principle could it be held that they can enter upon the surface in order to reach the coal, and can it be held that they have the right to use the timber upon the land for mining purposes?

"We think, in a case of this kind, as heretofore said, the better holding would be that the possession of Diden inured to the benefit of his grantee, to whom the mineral and mining rights were transferred. Suppose Diden had held this tract of land for a period of six years, and then had conveyed to a neighbor the easement for a right of way for a private road over his land, and after that continued in possession for a period of a quarter of a century; could the complainants have come in and recovered possession of the land covered by this road, on the ground that there had been a severance? We think not. We are of opinion, as stated, that the better and more sensible rule, and the rule which will best promote and carry out the purpose and policy of the statute of limitations, by quieting titles, etc., will be to hold that the possession by a grantor (of a mineral interest and mining rights in property) of the surface will inure to the benefit of the grantee of such rights as against third parties; and such is our holding."

We are of opinion that the Court of Chancery Appeals announces a better rule than that indicated in the authorities we have cited from other states. We are the better contented with this rule in view of the fact that there would be no way of putting complainant in possession of these minerals if his title thereto should be established. The adverse possession of the defendants has deprived the complainant of an easement to remove this coal from defendant's premises, even if it belonged to complainant. Complainant could not assert a way of necessity over the land of defendant Diden to remove the minerals. The case of *Pearne v. Coal Creek Mining & Mfg. Co.*, 90 Tenn. 627, 18 S. W. 402, was a case wherein a way of necessity was declared in a suit between parties and their privies, and it was not a case in which a way of necessity was asserted over the land of a stranger. In *Logan v. Stogdale*, 123 Ind. 376, 24 N. E. 135, 8 L. R. A. 60, the Supreme Court of Indiana, through Elliott, J., said:

"The theory is that, where land is sold that has no outlet, the vendor grants one over the parcel of which he retains the ownership. It results from this that a way of necessity cannot be successfully claimed over the land of a stranger, and, if the appellant here were asserting a right of way over a stranger's land, she could not succeed."

See, also, *Ritchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 106.

It is conceded that, as against the defendants, the complainant McBurney has no title or right of possession in the part of the land

embraced in defendant's possession. There is no privity of contract in the estate between the complainants and defendants, but as to each other they are as strangers, and under well-settled principles there can be no way of necessity or right of easement over the defendant's land to remove minerals which may belong to complainants.

Complainants also assign as error the refusal of the Court of Chancery Appeals to pronounce a decree in their favor for the coal in so much of the homestead tract as lies between the 470-acre tract and the 342-acre tract.

The Court of Chancery Appeals held that complainants' title to the coal in this tract was divested by virtue of either the possession of the widow Diden after the homestead was laid off in 1880 or by John Diden's possession at his home place. It is insisted on behalf of complainant that his right of recovery is not defeated by either of these possessions for the following reasons:

(1) The Court of Chancery Appeals, in its additional findings, expressly found that the possession held by Mrs. Diden was the old E. R. Diden home place possession, and was never extended outside the boundaries of the 470-acre tract. That court also found that E. R. Diden held possession of the 470-acre tract from 1851 until his death in 1871, and that prior to his death he had acquired title to that tract.

(2) With reference to the John S. Diden home place possession, in its first opinion, the Court of Chancery Appeals found that he (Diden) had a possession for more than seven years before this suit was brought, after the death of his mother, within the tract now in question.

In its additional findings that court reported upon this subject as follows:

"The proof shows, and we find, that John Diden first cleared six acres in 1879 at the point where he now lives, but that very soon after that he extended his inclosures so as to cover 40 or more acres, and that these extensions and inclosures have been there from shortly after he cleared the land until now, and we understand the effect of the proof is to show that these improvements made by John Diden were partly and for a considerable part within the lines of the homestead tract assigned to his mother, and part of his lines were outside of that tract."

It is insisted on behalf of complainants that this small possession across the homestead line, which was held by John Diden, could not, by construction, extend beyond the actual inclosures previous to the widow's death, because the right of possession had been vested by the court in the widow, nor could it extend by construction after her death, and the life estate had fallen in, because Diden had the acquired title to the small boundary thus inclosed, and there were no extensions of the actual clearings or inclosures thereafter.

The substance of the finding of the Court of Chancery Appeals is that the possession of John S. Diden, embracing that part of the possession which was included in the widow's assignment of dower, was kept up by John S. Diden all the time. His mother died in 1888, and John S. Diden continued his possession from 1888 until the bringing of this suit, a period of 14 years, and he had a possession of 1 or 2 years outside of some 470-acre tract, when dower and homestead were assigned to his mother. It thus appears that he had possession 7 years when dower was assigned to his mother. But John S. Diden had had his own new possession under his father's will on these lands for 1 year and more when dower and homestead were assigned to his mother. He continued these possessions 14 years after his mother's death. We think, therefore, the title of John S. Diden is perfected by the statute of limitation as to all lands claimed by him, including this particular portion of his land embraced within the assignment of homestead and dower, and outside of the 470-acre tract, and south of the lands in which he had sold the mineral to the Glenmary Coal & Coke Company.

We therefore are of opinion that this assignment of error should be overruled.

In conclusion, we find no error in the decree of the Court of Chancery Appeals in its disposition of the alleged claim of Young & Foster to the minerals in the 397 acres. The Court of Chancery Appeals properly held that John S. Diden had not acquired title to this 400-acre tract after the decree of 1884 by adverse possession. That court finds that in 1884, in the McBurney suit, John S. Diden did disclaim title to this 400-acre tract, and we concur with that court in holding that thereafter his possession was not adverse or under any color of title. It appears that in 1884 his title had not been perfected to this 400-acre tract by any continuous possession for 7 years, and his possession after his disclaimer of title could not have that effect.

This disposes of this interest, and affirms the decree of the court of Chancery Appeals in adjudging that complainants are entitled to recover the coal interests in this tract.

In conclusion, we notice an additional assignment of error filed by complainant by leave of the court at the present term as follows:

"The Court of Chancery Appeals erred in not pronouncing a decree in favor of complainant Samuel McBurney and against the Glenmary Coal & Coke Company and Jas. S. Duncan for all the coal left within the lands described in the original bill as amended, and outside of the tracts described in the answers of defendants Duncan and Glenmary Coal & Coke Company."

It will be observed complainants sought in their original bill to recover of defendants all the coal contained in the Eastland grant, No. 21,879, except the tract known as the "Elisha Chaney lands." At a later date com-

plainants dismissed the bill as to four small tracts and the 470-acre tract deeded by James S. Duncan to E. R. Diden on April 24, 1851. In his answer John S. Diden disclaims title to all the lands described in the bill, except the 1,700-acre tract described in E. R. Diden's will. Diden's answer expressly denies possession of claim to any of the land sued for, except that described in the answer. In its answer the Glenmary Coal & Coke Company denies generally that complainants are the owners of the coal sued for, but describes a number of tracts which it avers it owns. It is said some of these tracts lie outside of the land sued for.

The second and third tracts described in the answer are the two tracts that are designated on the map as the "Jno. Griffith tract" and the "J. C. Hamby tract," and the seventh and eighth tracts therein described, and the two tracts of land which lie inside of the boundary embraced in the Diden will, and known as the "W. L. Davis 157-acre tract," and the 342-acre tract lying west of the Davis tract. The Glenmary Coal & Coke Company has only set up title to these four tracts, and has disclaimed any interest in the balance of the land embraced in the description in the original bill.

The Court of Chancery Appeals held that complainants had deraigned a good title from the Eastland grant and were entitled to recover the coal in the land sued for, except the lands held by adverse possession under the statute of limitations, located inside the land embraced under the Diden will and the John Griffith and J. C. Hamby tracts. Now it claimed that the maps sent up with the transcript and made a part of the findings of fact of the Court of Chancery Appeals show a large boundary of land sued for which is not covered by any deed or title papers filed in the record by either of the various defendants, and to which, under the findings of the Court of Chancery Appeals, complainant Samuel McBurney has an absolute and undisputed title. The chancellor, however, dismissed complainants' bill as to the coal in all of the land sued for in said Eastland grant as against all of the defendants except Young & Foster, and this decree was affirmed by the Court of Chancery Appeals. This statement of fact made by counsel for complainants in support of his additional assignment of error, we think, is established by the record.

Now, it is said under these facts complainant Samuel McBurney is entitled to a decree for all lands embraced in the original bill as amended, and not described in the answers of John S. Diden and the Glenmary Coal & Coke Company, and the failure of the chancellor and the Court of Chancery Appeals to pronounce such a decree was a mere oversight; the attention of both court and counsel having been absorbed in the contest over the controverted questions.

As already seen, the answer of John S.

Diden embraced a distinct disclaimer, while the answer filed on behalf of the Glenmary Coal & Coke Company only denied generally that complainants were the owners of the coal sued for, and then proceeded to describe a number of tracts which it claimed to own. This disclaimer on the part of the Glenmary Coal & Coke Company was not in exact accord with the rule. Says Gibson in *Chancery*, § 395:

"So if the bill seeks to recover more land than the defendant is in possession of, or is exercising acts of ownership over, he must disclaim as to so much of the land as he does not claim, or is not in possession of, or is not exercising acts of ownership over, and as to the part he does claim he must plead or answer. * * * Hence it is of great importance to the defendant to show distinctly in his answer by metes and bounds, or other definite description, the extent of his possession or claim, and to enter a full and absolute disclaimer as to the balance of the land sued for; otherwise, although he may defeat a recovery as to that part of the land which, outside of his answer, he really claims, he will be liable for the costs of the cause for contesting the complainant's right to all the lands sued for."

This is a clear statement of a familiar rule of pleading, and the answer of the Glenmary Coal & Coke Company, when tested by this rule, does not show a technical disclaimer. However, it appears that throughout this entire litigation all parties have treated the answer of the Glenmary Coal & Coke Company as a disclaimer of all lands sued for, excepting those specifically described in this answer. The complainant, however, failed in the chancery court, and also in the Court of Chancery Appeals, to ask for the relief which he seeks by the assignment of error filed in this court. The complainant has certainly established an undisputed title to the lands outside of the boundaries claimed by the defendants, and was entitled, as a matter of course, to a decree for the minerals in all the lands embraced in his title papers which were not contested by the defendants; but, since complainant has been at fault in not embracing these matters in his decree, he must be operated with the costs as a condition of permitting this relief.

The decree of the Court of Chancery Appeals will be affirmed, as modified. Complainant will pay nine-tenths of the cost of appeal, and the defendants Young & Foster one-tenth.

MISSOURI & N. A. R. CO. v. PULLEN.

(Supreme Court of Arkansas. April 19, 1909.)

1. CARRIERS (§ 227*) — INJURIES TO LIVE STOCK—LIMITATION OF LIABILITY—ACTION—PLEADING.

Where, in an action against a carrier of live stock for negligent failure to provide water-

ing and feeding facilities, the carrier claims that the contract of carriage exempted it from such duty, it should not only refer to the contract, but specifically set forth the terms thereof limiting its liability.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 227.*]

2. CARRIERS (§ 211*) — INJURIES TO LIVE STOCK—LIMITATION OF LIABILITY—DUTY OF CARRIER.

The mere fact that a shipper of stock accompanied and agreed to water and feed the same did not absolve the carrier from the duty to furnish him ways and means to feed and water the stock, and, on failure to do so, it is liable for injury thereby sustained.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 928; Dec. Dig. § 211.*]

3. CARRIERS (§ 84*)—CARRIAGE OF PROPERTY—PLACE OF DELIVERY.

The place where property is to be delivered by a carrier is at the usual place for making such delivery at the point of destination, unless the specific place is named in the contract of shipment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 290; Dec. Dig. § 84.*]

4. CARRIERS (§ 218*) — INJURIES TO LIVE STOCK—LIMITATION OF LIABILITY—NOTICE OF CLAIM FOR DAMAGES.

Where no place for delivery was named in the contract, a shipper of stock has the right in course of unloading the same to take it to some place for its care, which is within a reasonable distance of the car, before it can be said that there is a completed removal, within the provision of the contract, reciting that as a condition precedent to recovery for damage for delay, loss, or injury, the shipper should give notice in writing of the claim therefor to the agent at destination, before such stock is removed from the point of shipment or from the place of destination, etc.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 218.*]

5. CARRIERS (§ 218*) — INJURIES TO LIVE STOCK—LIMITATION OF LIABILITY—NOTICE OF CLAIM FOR DAMAGES.

The removal of stock to the shipper's farm, 1½ miles from the car, was not an unreasonable distance.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 218.*]

6. CARRIERS (§ 218*)—CARRIAGE OF PROPERTY—TIME FOR UNLOADING.

A shipper of household goods and live stock is entitled to a reasonable time in which to remove the same.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 218.*]

7. CARRIERS (§ 218*)—CARRIAGE OF PROPERTY—TIME FOR UNLOADING.

Where a shipper was compelled to take his goods and stock 1½ miles from the car for care and protection, a day and a half was not an unreasonable time for removal of the same.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 218.*]

8. CARRIERS (§ 218*)—CARRIAGE OF PROPERTY—DELIVERY—INDIVISIBLE SHIPMENT.

Where a shipment of household goods and live stock was made in one car, the carriage of the same was indivisible and was not completed until there was a delivery at the destination, so that the delivery of no part was completed until delivery of the entire shipment was made, provided the same was removed within a reasonable time.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 218.*]

Appeal from Circuit Court, Boone County; Brice B. Hudgins, Judge.

Action by B. B. Pullen against the Missouri & North Arkansas Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. B. Smith and J. Merrick Moore, for appellant. J. W. Story (J. Sam Rowland, of counsel), for appellee.

FRAUENTHAL, J. On February 15, 1907, the plaintiff, B. B. Pullen, delivered for carriage at Mayfield, Ky., to the Illinois Central Railroad Company household goods and a number of head of live stock, and on that day that company, in consideration of \$100, then paid to it by plaintiff, executed to him a written contract by which it agreed to carry said goods and stock from Mayfield, Ky., to Harrison, Ark. The goods and stock were shipped in one car and were transported to Memphis, Tenn., by the Illinois Central Railroad Company, and thence to Seligman, Mo., by the St. Louis & San Francisco Railroad Company, and from that point they were carried by the defendant, the Missouri & North Arkansas Railroad Company, to Harrison, Ark., the place of destination. The plaintiff in his complaint alleged that the defendant on its line of railroad unnecessarily and unreasonably delayed the carriage of said stock and negligently failed to provide facilities for watering and feeding same, from which causes the stock was greatly damaged, and for these damages he seeks a recovery. The defendant, in its answer, alleged that the plaintiff had an agent in charge of the stock whose duty it was to feed and water the same. It further alleged that the plaintiff shipped the stock under a contract limiting the liability of the defendant in this: That in consideration of reduced rates, the plaintiff agreed that as a condition precedent for any damages for delay, loss, or injury to the live stock, he would give a notice in writing of his claim in the manner as will hereinafter be more specifically set out, and on failure to comply with said condition of the agreement he should be barred from a recovery of any such claim; and defendant charged that he did not give such notice as he had contracted to do. The case was tried by the court sitting as a jury upon an agreed statement of facts, and a finding was made and judgment was given in favor of plaintiff for \$125. From this agreed statement of facts it appears that the stock was damaged in the sum of \$125 by reason of the delay in shipping which occurred on the line of defendant's railroad. The answer of the defendant presents two propositions, the determination of which will decide whether there is any valid defense to a recovery for these damages.

1. The defendant urges: That the plaintiff or his agent was by the terms of the contract given free transportation and under the testimony did accompany the stock; that

by one of the provisions of the contract, in consideration of such free transportation, it was the duty of the plaintiff to feed and water the stock; and that thereby the defendant was exempted from liability for failure to water and feed the stock. But in its answer the defendant did not set forth the alleged provision of the contract exempting it from liability in this regard, and did not specifically plead such provision. "If the company held a contract limiting its liability and relied as a defense upon the failure of the plaintiff to comply with the contract, it should not only have set up the contract, but should have stated the particulars in which plaintiff had thus failed." *Kansas City, Pittsburg & Gulf Railroad Company v. Pace*, 69 Ark. 256, 68 S. W. 62. It should in its pleadings not only refer to the contract, but also set forth the terms thereof specifically whereby its liability is limited. And in its answer the defendant has not set forth any provision of the contract that exempted it from liability by reason of the plaintiff or his agent accompanying the stock, and in its abstract it has not set forth any such provision. *St. L., I. M. & Sou. R. Co. v. Randle*, 85 Ark. 127, 107 S. W. 669; *St. L. & N. Ark. Rd. Co. v. Wilson*, 85 Ark. 257, 107 S. W. 978; 1 *Hutchinson on Carriers* (3d Ed.) § 444. But even though this defense had been properly pleaded, it is not sustained by the evidence. The agreed statement shows that the car was delayed and held at Eureka Springs, Ark., by the defendant for an unreasonable time, and that plaintiff requested defendant to give him permission to unload his stock so as to attend to their wants and save them from injury on account of the delay, and the defendant would not give him that permission. The plaintiff attempted to and did all he could to give the stock the attention that was necessary and which the stock required, and the defendant failed and refused to furnish him the opportunity and facilities for the performance of that duty. The defendant thereby became liable for the injury which thus resulted to the stock, and it was agreed in the statement of facts that the stock was damaged by reason of the delay that occurred on defendant's line at that place. The mere fact that plaintiff accompanied the stock and agreed to water and feed same did not absolve defendant from all responsibility. The defendant owed to plaintiff the duty to furnish him the ways and means to water and feed the stock. In 2 *Hutchinson on Carriers* (3d Ed.) § 641, it is said: "But even though, by virtue of the contract under which the animals are carried, it is the duty of the shipper to attend the animals, provide for their wants, and protect them from injury to themselves, yet if the carrier fails or refuses to furnish the shipper reasonable opportunities and facilities for performing the duties which he has undertaken, the carrier will be liable for the injury thereby sustained." 6 *Cyc.* 439. The

defendant is therefore liable for the damages to the live stock thus caused by the unnecessary and unreasonable delay in their carriage and the negligent failure to furnish facilities for watering and feeding said stock while same was being transported by the defendant on its line of railroad.

2. It is urged by the defendant that by the contract of shipment it was provided: "That as a condition precedent to a recovery for any damage for delay, loss, or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment, or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims." The defendant contends that this provision of the contract was made upon sufficient consideration and was therefore valid, and that the plaintiff did not give the above notice and is therefore barred from a recovery herein. From the agreed statement of facts it appears that when the plaintiff delivered his property for carriage at Mayfield, Ky., he received from the carrier at that point a contract for through shipment to Harrison, Ark., for which he paid the full rate that was required, and that in that contract the above provision as to notice did not appear; but, on the contrary, that contract provided that the claim for damages should be made to the agent of the company at the point of destination within 10 days from the time said stock was removed from the cars. When the car arrived at Memphis, Tenn., it was turned over to the St. Louis & San Francisco Railroad Company for further transportation, and that company, without taking up the original contract of shipment entered into by plaintiff with the Illinois Central Railroad Company, thereupon entered into a second written contract with plaintiff for the further carriage to the same destination, in which contract is the above provision of limitation of liability for failure to give notice within the reduced time. There was no further consideration given upon the execution of this last contract, other than the carriage by the St. Louis & San Francisco Railroad Company as the connecting carrier. The original contract of shipment was still retained by plaintiff. In the determination of this case it is not necessary to pass upon the question as to whether there was any consideration for the execution by plaintiff of this second contract of shipment, so as to make its clauses of limitation of liability

binding and valid, because we think that there was a sufficient compliance with the provisions of the second contract as well as the provisions of the first contract of shipment relative to the giving of notice of claim of damages.

The agreed statement of facts shows that the car with its goods and live stock arrived at Harrison, Ark., on February 19, 1907, at 4 o'clock p. m., and that the entire shipment in the car was not unloaded until the morning of February 21, 1907, so that the entire shipment was not delivered until that time. The plaintiff began unloading the car late in the evening of February 19th, and the taking of the live stock out to his farm, a distance of $1\frac{1}{2}$ miles, where they were not mingled with other stock before the hereinafter mentioned notice was given. Upon the morning of February 21st, the entire shipment was unloaded and delivered, and on the same morning, about 8 o'clock a. m., the plaintiff told the agent of defendant at Harrison, Ark., of his claim of damages. The agent then told plaintiff that he had better make out his claim, and plaintiff then asked him if it was necessary to make it out in writing, and the agent then said "he would guess so." The plaintiff at once made out a written claim for damages, to which he called the attention of defendant's agent, to which the agent offered no objection or protest. Now, the place where property is to be delivered by the carrier is at the usual place for making such delivery at the point of destination, unless the specific place is named in the contract of shipment. In this case there was no evidence which indicated where the usual place of delivery was at the point of destination, and no place was named in the contract. In the absence of such proof, the plaintiff had the right in the course of unloading this property and stock to take the same to some place for care and protection, which was within a reasonable distance of the car, before it can be said that there was a completed removal of same within the meaning of this provision of the contract, and under the above provision of the contract and the circumstances of this case we do not think that a removal of the stock to the farm of plaintiff, $1\frac{1}{2}$ miles from the car, was an unreasonable distance. 6 Cyc. 467.

The plaintiff was entitled to a reasonable time in which to remove his property and stock, and we cannot say that the time required by plaintiff for such removal in this case was unreasonable. 2 Hutchinson on Carriers (3d Ed.) § 712. The shipment was made in one car, and the carriage of same was indivisible. The carriage was not completed until there was a delivery at the destination. So that the delivery of the shipment was indivisible, and the delivery of no part of the shipment was completed until the delivery of the entire shipment was

made, provided same was removed within a reasonable time. 6 Cyc. 465. Under the agreed statement of facts therefore we find that within one day after the removal and delivery of the stock and shipment the plaintiff gave notice in writing of his claim for damages to the agent of defendant at destination and before the stock was mingled with other stock. This was a sufficient compliance with the terms of the contract of shipment relative to the giving of notice of claim of damages.

We are of the opinion therefore that there is sufficient evidence to sustain the finding of the court, and that its judgment based thereon is correct. *

The judgment is affirmed.

ST. LOUIS & S. F. R. CO. v. RUTTAN.

(Supreme Court of Arkansas. April 19, 1909.)

1. ADVERSE POSSESSION (§ 8*) — PROPERTY SUBJECT TO PRESCRIPTION — RAILROAD RIGHT OF WAY.

The statute of limitation operates against the right of way of a railroad which is held adversely, as well as against lands of individuals.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 14; Dec. Dig. § 8.*]

2. ADVERSE POSSESSION (§ 31*) — NOTORIOUS POSSESSION—NOTICE.

Where a grant to a railroad conveyed a strip 100 feet wide through certain lots, a deed thereafter executed by the grantors to such lots, "except that part upon which the track of the * * * railroad is laid," constitutes notice of a claim of ownership of all that part except that covered by the track.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 130; Dec. Dig. § 31.*]

Appeal from Circuit Court, Crawford County; J. H. Evans, Judge.

Action by the St. Louis & San Francisco Railroad Company against J. M. Ruttan. From a judgment for defendant, plaintiff appeals. Affirmed.

W. F. Evans and B. R. Davidson, for appellant. Sam R. Chew, for appellee.

MCCULLOCH, C. J. This is an action instituted by appellant railroad company against appellee to recover possession of a strip of land in the city of Van Buren, Ark., originally embraced in the right of way conveyed to the company in the year 1882 by the then owners of the land, Cyrus Lomax and Oliver Maxey. The grant to the railroad company conveyed a strip 100 feet wide through lots 1, 2, and 3 of block 20 in the city of Van Buren, and the company proceeded to lay the main track of its railroad in the center of the right of way thus granted. Lomax and Maxey thereafter executed to one Miller deeds conveying said lots, "except that part upon which the track of the St. Louis & San Francisco Railroad Com-

pany is laid," and in 1893 Miller took possession of the land in controversy and held it until he conveyed it to Mary Carter, who in turn conveyed it, in 1896, to appellee. It is agreed that appellee and his grantors Miller and Mary Carter before him have held actual, open, and continuous possession of the strip of land in controversy, claiming to be the owners thereof, since the year 1893. The strip in controversy is inclosed, with the remainder of appellee's premises, by a fence running parallel with the railroad track, and this particular part has, during the period of time described above, been cultivated as a garden. It is also agreed that the officials and employees of the railroad company knew that the strip in controversy was fenced and in the actual occupancy of appellee and his grantors, but had no actual notice that they claimed ownership. On these facts the trial court, sitting as a jury, rendered judgment for appellee on his plea of the statute of limitations, and the company appealed.

It is contended that the right of way of a railroad company rests upon a different principle from real estate in general, and that, inasmuch as the company is not compelled to actually use the full width of its right of way until the needs thereof should demand, the statute of limitations will not commence running unless there be actual, adverse occupancy and actual notice of the hostile claim be given to the company. The statute of limitations operates against railroad corporations whose lands are held adversely as well as against individuals, and this applies to the right of way. *Graham v. St. L., I. M. & S. Ry. Co.*, 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344; *Ill. Cent. Ry. Co. v. Houghton*, 126 Ill. 233, 18 N. E. 301, 1 L. R. A. 213, 9 Am. St. Rep. 581; *Paxton v. Y. & M. V. Ry. Co.*, 76 Miss. 536, 24 South. 538.

The fact that the company is not compelled to use the full width of its right of way within a particular time, and that nonuser of the entire right of way is not conclusive evidence of its abandonment of the unused portion, may alter the character of proof upon which adverse possession is to be determined; but after all, as in other cases wherein the question arises, it becomes purely a question whether or not the possession is adverse and has, either actually or by necessary implication, been brought to the attention of the company. This court, in *Little Rock v. Wright*, 58 Ark. 142, 23 S. W. 876, speaking of the application of the doctrine of adverse possession against a city, said: "What is adverse possession? No possession consistent with the right of the true owner can be adverse to him. In this case the land was dedicated to public use for streets, but it remained inclosed and ob-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

structed after the dedication. The city had the right to postpone the removal of the obstructions and the opening of the streets until such time as its resources permitted, and the public necessities demanded." In that case the adverse possession was asserted against the city by the heirs of the dedicant, and the court held that the occupancy was not inconsistent with the rights of the city, and did not become hostile until actual notice of the hostility of the claim was brought to the attention of the city.

The doctrine of that case has been recognized in many subsequent decisions of this court. In *Graham v. St. L., I. M. & S. Ry. Co.*, 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344, which was a controversy between the railroad company and the devisee of the original grantor of the right of way, in which the statute of limitations was pleaded by the latter, Mr. Justice Riddick, speaking for the court, said: "Though the continued possession of the land by the vendor after conveyance executed is not, of itself, sufficient to show a holding adverse to the vendee, yet there is nothing in their relations which will prevent the vendor from acquiring a title by adverse possession; but, before the vendor or those claiming under him can acquire title in that way against the vendee, the intention to hold adversely must be manifested by some unequivocal act of hostility, such as to give notice to the vendee of the intention of the vendor to deny his right and hold adversely to him. Until this is shown the statute does not commence to run. [Citing authorities.] The distinction between a vendor and a stranger in such a case relates to the character of evidence necessary to show that the possession was adverse. If the parties are strangers in title, possession and the exercise of acts of ownership are, in themselves, in the absence of explanatory evidence, proof that the holding is adverse; whereas, if the vendor, after having executed deed, continues to remain in possession, the natural and reasonable inference, in the absence of evidence to the contrary, would be that he holds in recognition of the rights of the person to whom he has conveyed."

In *Eldorado v. Ritchie Gro. Co.*, 84 Ark. 52, 104 S. W. 549, 120 Am. St. Rep. 22, which was a controversy between an incorporated town and the grantee of the original dedicant of a street, in which the statute was pleaded, the court held that such grantee was a stranger to the title under the dedication, and applied the rule announced in the *Graham Case*, holding that the possession ripened into title by limitation. In a similar case the court said: "The rule is different as to Mrs. John, who was a stranger to the dedication deed, and her occupancy of the premises and exercise of acts of ownership over it were of themselves evidence of ad-

verse possession." *Stuttgart v. John*, 85 Ark. 520, 109 S. W. 541.

The presumption as to whether the appellee's possession was hostile to the rights of the railroad company, or in subordination thereto, would be different if he had accepted a conveyance which in terms recognized the rights of the company; but the various deeds to the land expressly include the land in controversy, for they convey the whole lots except that part upon which the track is laid. This language is susceptible of only one construction, and that is that the intention was to convey all that part which had been previously conveyed to the railroad company except the part covered by the track. This leaves no room for the contention that appellee, by the acceptance of the conveyance, recognized the rights of the company in and to the strip conveyed to him.

We are therefore of the opinion that the evidence established appellee's title by limitation, and that the judgment of the court in his favor was correct.

Affirmed.

PRICE, County Treasurer, v. MADISON COUNTY BANK.

(Supreme Court of Arkansas. April 19, 1909.)

1. APPEAL AND ERROR (§ 20*)—NATURE OF APPELLATE JURISDICTION — JURISDICTION OF LOWER COURT.

The circuit court on appeal from the county court acquires only such jurisdiction as the county court had, and can render only such judgment as the county court should have rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 81-87; Dec. Dig. § 20.*]

2. COURTS (§ 124*)—GENERAL JURISDICTION—COUNTY AND CIRCUIT COURT.

An action to compel a depository of county funds selected under Acts 1907, p. 113, to pay interest in United States currency, and not in county warrants, is within the jurisdiction of the circuit court under Const. art. 7, § 11, conferring on the circuit courts jurisdiction in cases not vested in some other court, and is not within the jurisdiction of the county court under section 28, giving the county courts exclusive original jurisdiction in all matters relating to taxes.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 124.*]

3. COURTS (§ 37*)—JURISDICTION—OBJECTIONS—WAIVER BY CONSENT.

Since consent cannot give jurisdiction of the subject-matter where none exists, the question of jurisdiction of the subject-matter may be raised at any time.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 146; Dec. Dig. § 37.*]

4. COSTS (§ 232*)—COSTS ON APPEAL.

One appealing from a judgment of the circuit court rendered on appeal from the county court is entitled to the costs of the appeal on the appellate court dismissing the cause because the county court was without jurisdiction.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 880; Dec. Dig. § 232.*]

Appeal from Circuit Court, Madison County; Joseph S. Maples, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Proceedings by J. R. Price, county treasurer, against the Madison County Bank, to require defendant to show cause why it had not paid to the county treasurer interest due on county funds, and for the penalties because of its refusal to so pay. From a judgment of the circuit court ordering the county treasurer to accept county warrants in payment of the interest rendered on appeal from the county court in favor of the county treasurer, he appeals. Reversed, and cause dismissed.

Harris & Ivie, for appellant. E. A. Routh, for appellee.

HART, J. The General Assembly of 1907 passed an act to provide a depository for the county funds of Madison county. Acts 1907, p. 113. Pursuant to the provisions of the act, an advertisement for bids was made, and an order was made by the county court selecting the Madison County Bank as such depository; it having offered the highest rate of interest per annum offered for said funds. Section 3 of the act provides that the interest shall be computed on the daily balances to the credit of the county, and that the same shall be payable to the county treasurer quarterly, and shall be immediately placed by said treasurer to the credit of the common school funds of the county. One quarter's interest, amounting to \$300, became due. The Madison County Bank claimed that it was payable in county warrants. The county treasurer contended that it was payable in lawful currency of the United States, and, upon the refusal of the bank to make payment in such currency, filed a petition with the county court of Madison county reciting the above facts, and asking that said bank be required to appear in said county court and to show cause why it had not paid to the county treasurer said amount of interest due, and why judgment should not be rendered against it for the interest due, amounting to \$300, and for the penalties attaching on account of its refusal so to pay. On a hearing of the cause the county court rendered judgment in favor of the county treasurer against said bank for the sum of \$300, with interest at the rate of 6% per cent. The bank appealed to the circuit court. On a trial anew in the circuit court the presiding judge was of the opinion that said interest was payable in Madison county warrants, and a judgment was rendered ordering the county treasurer to accept county warrants in payment of said interest. The county treasurer, in turn, has appealed to this court.

The first question that presents itself is that of jurisdiction. It is settled that upon appeal from the county court the circuit court acquires only such jurisdiction as the county court had, and can render only such judgment as the county court should have rendered. *Pride v. State*, 52 Ark. 502, 13 S.

W. 135. The question then is: Did the county court have jurisdiction of the matter in the first instance? If the county court had jurisdiction, it acquired it under section 28, art. 7, Const., which provides that "the county courts shall have exclusive original jurisdiction in all matters relating to county taxes," etc. In the case of *Christian et al. v. Ashley County*, 24 Ark. 142, it was held that the county court has jurisdiction to render judgment against a delinquent collector or his sureties "for the county revenue which he has collected and failed to pay over as required by law." To the same effect, see, also, *Pettigrew et al. v. Washington County*, 43 Ark. 83. Here the case is different. This is not a matter of the settlement of the collector or treasurer with the county court for the taxes. Prior to the passage of the act, no one had authority to loan out the county funds. The act under consideration makes it lawful to loan out the public funds of the county under the conditions imposed by the act. Section 4 of the act provides that all stockholders of any such bank shall be liable for all public funds that such bank shall fail to pay over on demand to the person entitled to receive the same. Section 6 provides that a bond shall be given for the prompt payment and accounting of the funds according to law, and that for any breach of the bond the county or any person injured may maintain an action in the name of the county to the use of the county, or person thereby injured. In the present case there was no settlement to be made, for there was no dispute about the amount due. The controversy was as to whether the amount due should be paid only in United States currency, or whether it might be paid in county warrants. It was a debt due the county. The act authorized the funds of the county to be loaned out to the highest bidder; and, upon the failure of the bank to pay the loan when it became due, there arose a cause of action in favor of the county for the amount due. We do not think the clause of the Constitution above referred to in regard to taxes meant to give the county court jurisdiction of all matters indirectly affecting that subject. Such a broad construction would give to a court whose presiding judge is not required to be "learned in the law" powers which evidently were not contemplated by the framers of the Constitution. We think that it was only intended by them that the county court should have jurisdiction when the subjects enumerated in section 28, art. 7, were directly affected. This construction is borne out by the decisions of our court. This distinction has already been recognized by this court. *Martin v. State*, 79 Ark. 236, 96 S. W. 372; *Hunter State Bank v. Mills* (Ark.) 117 S. W. 760. In the case of *Martin v. State*, 79 Ark. 236, 96 S. W. 372, under an act similar in all essential respects to this act, suit was brought

by the state against the treasurer of Scott county for penalties for failing to comply with an order of the county court directing him to deposit the public funds in a county depository.

The suit was brought in the circuit court; and, while the question of jurisdiction was not raised by the pleadings or discussed in the opinion, yet the question of jurisdiction of the subject-matter always presents itself; for it is well settled that consent cannot give jurisdiction of the subject-matter where none exists. *Feld, Brown et al. v. Dortch*, 84 Ark. 399; *American Soda Fountain Co. v. Battle*, 85 Ark. 213, 107 S. W. 672, 108 S. W. 508. Obviously if section 28, art. 7, gives exclusive jurisdiction to the county court in the matter, none could exist in the circuit court. We are of the opinion that the circuit court was the proper forum under section 11, art. 7, Const., which provides that "the circuit courts shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which may not be vested in some other court provided for by this Constitution." Appellant, however, is entitled to a judgment for the costs of the appeal. *American Soda Fountain Co. v. Battle*, supra.

Therefore it is ordered that the judgment be reversed, and that the cause be dismissed without prejudice to bringing another action.

ABBOTT v. HERRON.

(Supreme Court of Arkansas. April 19, 1909.)

1. WITNESSES (§ 405*)—CONTRADICTION—COLLATERAL MATTER.

A witness cannot be contradicted as to a collateral matter testified to on cross-examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405.*]

2. TENDER (§ 18*)—KEEPING GOOD.

To preserve the legal effect of a tender which has been refused, it must be kept good.

[Ed. Note.—For other cases, see *Tender*, Cent. Dig. §§ 55-58; Dec. Dig. § 18.*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by C. C. Abbott against Tate Herron. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Trimble, Robinson & Trimble, for appellant. Geo. M. Chapline, for appellee.

BATTLE, J. C. C. Abbott filed a complaint against Tate Herron, in the Lonoke circuit court, alleging that he was the owner of and entitled to the possession of certain lots in the town of Lonoke, in this state. That on the 15th day of August, 1906, he leased the lots to the defendant for one year, and placed him in possession thereof.

"That after the expiration of said lease, plaintiff demanded possession and declined to lease the same to Herron for any addition-

al length of time, because it was his intention to move to Lonoke permanently and occupy the premises himself.

"That afterwards, on the 6th day of September, he agreed to let the defendant remain on said premises and occupy the house thereon as a tenant at sufferance, until he, the plaintiff, got ready to move to Lonoke. This was with the understanding and agreement that Herron, during the time he occupied said premises as such tenant, would pay rent therefor at the end of each month.

"That he wholly failed, neglected, and omitted to do so from that time up until the 20th day of December, 1907. That about the same time plaintiff further agreed that the said Herron might continue to occupy said premises with his family in consideration that Herron would board plaintiff when plaintiff moved to Lonoke, for said occupancy, but refused to lease said premises to defendant for any definite length of time or for any other consideration.

"That on the 30th day of June the said Herron notified plaintiff that he could not board him any longer, and demanded that plaintiff get out by the 1st of July, 1908, and further stated to the plaintiff that he had eaten his last meal there, and refused to board him any longer, which was a breach of his said agreement and contract.

"That the said defendant owed a balance of \$25.80 as rent during the time he occupied said premises from September 6, 1907, to December 20, 1907, the time his board was to begin, which was past due, which defendant refused to pay. That he now willfully and unlawfully occupies and holds possession of said premises after possession thereof has been demanded and notice to quit in writing duly served on him.

"That plaintiff is lawfully entitled to the possession of said lots and premises above described."

And asked for judgment for the possession of the lots, and for \$100 as damages, and for costs.

Defendant answered, and alleged that on the 15th day of September, 1907, he paid the plaintiff all that he was owing him for the rent of lots in Lonoke, and that plaintiff leased to him the lots until the 1st day of January, 1909.

He denied that he is indebted to plaintiff for the rent of the lots from the 2d day of September, 1907, until the 20th day of December, 1907, and denied that at the time he leased the lots he agreed to board plaintiff for the use and occupancy of the lots.

He alleged that plaintiff, on the 22d day of December, 1907, moved to the lots to board, but no price was agreed upon; and that he took possession of a part of the lots and kept his horses there.

He denied that he owed plaintiff a balance of \$25.80 for rent for the time he occupied

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the lots from the 2d day of September, 1907, until the 20th day of December, 1907.

He alleged that, at the time this action was brought, plaintiff was indebted to him for board from the 22d day of December to the day of the commencement of this action, at the rate of \$20 per month, aggregating \$128.66; that plaintiff is indebted to him for 32 bushels of corn at 85 cents per bushel—\$20.80; for work on hydrant, \$1.50; for padlock, 50 cents; and for amount paid for water, \$5.

He alleged that, notwithstanding plaintiff is indebted to him, he, within three days after he was notified to surrender possession of the lots, tendered to plaintiff \$15, which was more than he was entitled to.

Plaintiff replied, and denied that he was indebted to the defendant for board, or on any other account, and that legal tender was made to him for rent due and unpaid.

Each of the parties adduced evidence in the trial in the action which tended to prove the allegations of his pleadings. Plaintiff testified in his own behalf. On cross-examination he testified in response to interrogatories as follows:

"Q. Now, Doctor, didn't you make arrangements while you were there at Mr. Herron's to move to Kerr Station?

"A. I did make arrangements.

"Q. Make a trade with Dr. Brewer?

"A. In February * * * Dr. Brewer spoke to me and told me what a nice location he had, and wanted me to come there and locate, and asked me how would I like it, and I said I had not considered it very much and that I would think it over, and after I had thought over it for a while I would see him again. I told him that if I could make the arrangements that I wanted to and could see my way clear it might be possible he and I could make a deal. * * *

"A. I could not tell exactly when it was.

"Q. Didn't you consummate the trade with him? * * *

"A. No, sir, I didn't."

Over the objection of the plaintiff, Dr. J. F. Brewer testified in behalf of the defendant as follows: "I am acquainted with Dr. Abbott. I live at Kerr, Ark. Dr. Abbott made a trade with me to move to Kerr, which we closed the 1st of February (1908). He did not comply with his trade."

The court instructed the jury at the request of the defendant, over the objection of the plaintiff, as follows: "If you find that the defendant was renting by the month for money rent, and within three days after notice to quit you find that upon a settlement

between them he would not have owed the plaintiff more than \$15, and he offered to pay that amount, then the plaintiff fails in this action, and you will find for the defendant."

Other instructions were given.

The jury returned a verdict, and the court rendered a judgment in favor of the defendant, and the plaintiff appealed.

The testimony of Dr. Brewer was inadmissible. It was used to contradict the plaintiff, Abbott, as to a collateral matter, as to which he testified on cross-examination. The rule in such cases was stated by this court in *Butler v. State*, 34 Ark. 480, 485, as follows: "In order to avoid an interminable multiplication of issues, it is a settled rule of practice that, when a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question. The test of whether a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as part of his case, tending to establish his plea?" In this case the defendant denied that he agreed to board the plaintiff in payment for rent, and alleged that he had leased the lots until the 1st day of January, 1909, and that plaintiff was indebted to him. The testimony of Dr. Brewer was as to transactions which occurred subsequently to the time when the contract of lease by plaintiff to defendant was made, was entirely disconnected with it, threw no light upon it, and did not tend to prove that either was indebted to the other, and according to the rule stated was inadmissible. See *Brown v. State*, 24 Ark. 620; *Jones v. Malvern Lumber Co.*, 58 Ark. 125, 23 S. W. 679; *Plunkett v. State*, 72 Ark. 409, 82 S. W. 845; *Hinson v. State*, 76 Ark. 366, 88 S. W. 947.

The instruction given at the request of the defendant, over the objection of the plaintiff, as to tender of \$15, should not have been given. There was no evidence that he kept the tender good. It is true that he tendered to plaintiff \$15, which was refused. But this is not sufficient. "After a tender is duly made it must, to preserve its legal effect, be kept good." *Kelly v. Keith*, 85 Ark. 30, 32, 106 S. W. 1173. The defendant denied that he was indebted to plaintiff, but said he had tendered to him \$15. He made no offer to keep it good by paying it into the registry of the court or otherwise. He was content with having made it at two different times. He did not renew it in his answer.

Reversed, and remanded for a new trial.

**MCGRORY v. ULTIMA THULE, A. & M.
RY. CO.**

(Supreme Court of Arkansas. April 19, 1909.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—DISCRETION OF VERDICT.

On review of the direction of a verdict, the question is whether there was evidence to warrant a verdict for the adverse party, giving it the strongest probative force the jury might have accorded it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. § 927.*]

2. MASTER AND SERVANT (§ 177*)—INJURIES TO VICE PRINCIPAL—NEGLIGENCE OF SUBORDINATE.

A master is not responsible to a vice principal for the negligence of another servant who is a subordinate of the vice principal and under the latter's control.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 177.*]

3. MASTER AND SERVANT (§ 128*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—SAFE APPLIANCES.

Negligence in permitting the drawheads of a flat car to become out of repair, so that too much play was allowed between the car and another when coupled together, cannot be made the basis of a recovery by an employé whose foot was caught between the drawheads while attempting to climb upon the car, for it could not have been anticipated by the master, in furnishing reasonably safe appliances, that a danger of that sort should be guarded against.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 256; Dec. Dig. § 128.*]

Appeal from Circuit Court, Clark County; Jacob M. Carter, Judge.

Action by Patrick McGrory against the Ultima Thule, Arkadelphia & Mississippi Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Wood & Henderson, for appellant. T. D. Wynne, J. H. Crawford, and T. D. Crawford, for appellee.

MCCULLOCH, C. J. The plaintiff, Patrick McGrory, sues his employer, the Ultima Thule, Arkadelphia & Mississippi Railway Company, for damages resulting from physical injuries received while performing his duties, and alleged to be due to the negligence of other servants for whom the employer is claimed to be responsible. After all the testimony had been introduced, the trial court gave the jury a peremptory instruction to return a verdict in favor of the defendant, and judgment was entered accordingly. Thus the only question presented here is whether the testimony was sufficient to warrant a verdict in favor of the plaintiff, giving it the strongest probative force which the jury might have accorded to it.

There is little, if any, conflict in the testimony on the material points. The defendant owned a railroad which it operated as a common carrier through Clark and Dallas counties in Arkansas, and plaintiff was em-

ployed as road master and superintendent of construction. He had no authority to employ or discharge trainmen; but, in the event of accident or wreck of a train on the line, it was his duty to take charge of the train or trains for the purpose of clearing up the wreck and restoring the trains to proper service. On such occasions, he had charge of the trains, and his authority was supreme; the conductors and other trainmen being under his immediate supervision and subject to his orders. The evidence shows, however, that the conductors were left in charge of their trains subject to his orders, and that they were expected to give orders according to their judgment, except when otherwise directed by the plaintiff as superintendent. The latter's orders to trainmen were given through the conductors. On the occasion of the plaintiff's injury, one of the engines, No. 12, got off the track, and it was necessary to procure the assistance of another engine in getting it back, and plaintiff was notified. He got another engine, No. 14, and, after coupling two flat cars to it, proceeded to the scene of the wreck of engine No. 12. Night fell while the work was going on, and plaintiff went over to engine No. 14 to give an order to the engineer, and, water being up to the track on either side, he undertook to climb upon a flat car attached to the engine in order to pass over to the engine, and while doing so the engine and cars were moved, and his foot was caught between the drawheads. The signal to the engineer to move his engine was given by the conductor in response to the request of the section foreman for the engine to be moved, so that he could repair the track. This was after engine No. 12 had been gotten back on the track. Neither the conductor who gave the signal, nor the engineer of No. 14, knew of the situation of plaintiff when the signal to move the engine was given and acted upon. It was dark, and neither of the trainmen knew where the plaintiff was, or that he had started over to engine No. 14.

It is contended that the act of the conductor in giving the signal to move the train constituted negligence for which the defendant would be liable. According to the undisputed facts, the plaintiff was a vice principal of the defendant at the time of the injury, and the negligence of the employé, if any, which caused the injury, was that of one of his subordinates. Is the master responsible to a vice principal on account of the negligence of another of its servants who is a subordinate of the vice principal and under the latter's control? It is plain that the master is not responsible, for that is one of the ordinary risks which the servant assumes when he takes service and assumes control over his subordinates.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The master is not bound, under the doctrine of respondeat superior, to indemnify one servant for an injury caused by the negligence of another servant in the same common employment, unless the negligent servant is at the time acting as the master's representative; in other words, the vice principal of the master. 2 Labatt on Master & Servant, § 470; Quebec Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 856. The subordinates of the vice principal over whom he exercises control are his fellow servants in a common employment so far as the responsibility of the master to him for their acts is concerned, and the master discharges his full duty to his vice principal by exercising ordinary care in selecting competent subordinate servants.

It is contended that a contrary doctrine is announced in the case of *St. L. & S. F. R. Co. v. McFall*, 75 Ark. 30, 86 S. W. 824, 69 L. R. A. 217. We think, however, that that case announced a principle altogether different from the one applicable here. There, the injured party was a conductor on a train, and his injury was caused by the concurring negligence of Adams, the engineer of his train, and the servants in charge of another train. The question there was whether the negligence of Adams, the engineer, which contributed to the injury, should be imputed to McFall so as to deny him the right of recovery; and we held that, inasmuch as Adams was not under the immediate control of McFall, the negligence of the one could not be imputed to the other. The controlling principle in that case was announced in the following language: "It follows, then, that in cases where the injured and negligent do not sustain to each other the relations of master and servant, or principal and agent, or other relation by which alone one is responsible for the act of the other, the contributory negligence of a third person will not be imputed to the party thereby affected, unless he was at the time subject to the control of the injured person, and the wrong, the negligence, was committed at a time when it was within the power of such person to prevent it, and it was his duty to do so, and under circumstances which indicated that he assented to or acquiesced in the wrong by his failure to interfere, or directed it to be done; and that, when the conditions are reversed, the reverse is true—it will be imputed." Now in the present case, there is no question of imputed negligence involved. The sole question, as before stated, is whether the master is responsible to his representative, or vice principal, for the acts of another servant in the common employment, but who is a subordinate of the former.

There is another allegation of negligence in the complaint, to the effect that the mas-

ter was guilty of negligence in permitting the drawheads of the flat car to become out of repair, so that too much space or play was allowed between the cars when coupled together. It is contended that but for this negligence there would not have been enough space between the two drawheads for the plaintiff's foot to have gotten down between them, and therefore no injury would have occurred. We are of the opinion, however, that this could not be made the basis of a charge of negligence as the proximate cause of the injury. It could not have been anticipated by the master, in furnishing reasonably safe appliances, that a danger of this sort should be guarded against. It could not have been reasonably anticipated that a servant would place his foot between the drawheads, or in the discharge of his duties would permit his foot to get in that position. We can see no causal relation between the alleged act of negligence and the injury, and therefore it could not be made the basis of a recovery.

We do not undertake to decide whether or not, under the facts in this case, the plaintiff himself was, as a matter of law, guilty of contributory negligence in climbing on the car in the darkness without apprising the trainmen of his presence. It is unnecessary to do so. Upon the whole, we are of the opinion that the undisputed evidence shows affirmatively that the plaintiff is not entitled to recover, and the peremptory instruction to the jury was correct.

Affirmed.

STATE v. BOWMAN.

(Supreme Court of Arkansas. March 22, 1909.)

1. STATUTES (§ 19*)—ENACTMENT—CONSTITUTIONAL PROVISION—VOTE.

Const. art. 5, § 21, providing that on the final passage of all bills the vote shall be taken by yeas and nays and entered on the journal, is mandatory, and failure to comply therewith, as a rule, renders the law void.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 20; Dec. Dig. § 19.*]

2. STATUTES (§ 60*)—CONSTRUCTION—EXTRINSIC AIDS.

When a question arises as to the existence of a statute, the court may resort to any source of information in order to arrive at a correct determination, and to that end may examine the legislative journals.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 55; Dec. Dig. § 60.*]

3. STATUTES (§ 60*)—LEGISLATIVE JOURNALS—CERTIFICATE.

The certificate of the Secretary of State as to the contents of the legislative journals is not conclusive, but the court may examine them for the purpose of verification.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 60.*]

4. STATUTES (§ 283*)—ENACTMENT—PRESUMPTIONS.

Where an act has been signed by the Governor, deposited with the Secretary of State, and duly published as a law, it will be presumed that every rule and requirement was complied with in its passage.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 382; Dec. Dig. § 283.*]

5. STATUTES (§ 18*)—ENACTMENT—LEGALITY.

The vote on the final passage of Act No. 59, Gen. Assem. 1868, approved July 23, 1868, entitled "An act to define and punish offenses against the public peace and tranquillity" (Acts 1868, p. 214), having been taken by yeas and nays, and entered on the journal, and the act having been duly signed by the Governor, deposited with the Secretary of State, and published as a law, it was legally enacted.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 18.*]

Appeal from Circuit Court, Johnson County; Hugh Barham, Judge.

John Bowman was convicted of a breach of the peace. On appeal to the circuit court, a demurrer to the information was sustained, and the State appeals. Reversed and remanded.

Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

FRAUENTHAL, J. An information was properly filed with a justice of the peace of Johnson county charging that defendant, John Bowman, did commit the offense of a breach of the peace in violation of section 1648, Kirby's Dig. He was convicted in the court of the justice of the peace, and duly appealed to the circuit court. In the circuit court the defendant interposed a demurrer to the information upon the ground that section 1648, Kirby's Dig., under which the information was filed and the prosecution brought, was never enacted or passed by the Legislature of the state of Arkansas, and that therefore the information did not state facts sufficient to constitute an offense against the laws of Arkansas. Section 1648, Kirby's Dig., is one of the sections of Act No. 59 of the General Assembly of the state of Arkansas of 1868, entitled "An act to define and punish offenses against the public peace and tranquillity," approved July 23, 1868 (Acts 1868, p. 214). With his demurrer the defendant filed a certified copy of the journals of the Senate and the House of Representatives of the General Assembly of 1868, showing the proceedings of the Legislature relative to the passage of said Act No. 59, which is duly authenticated by the Secretary of State in manner prescribed by law. From this certified copy of said journals it appeared that said Act No. 59 was Senate Bill No. 15, and that it regularly passed the Senate, and that on the final passage of the bill in the Senate the vote was taken by yeas and nays, and duly entered on the journal of the Senate. But from said certified copy of the journal of the House

it did not appear that said Senate Bill No. 15 was read a third time, and it did not appear on the journal of the House that on the final passage of said bill in the House the vote was taken by the yeas and nays, and entered on the journal of the House. The circuit court sustained the demurrer of the defendant, presumably on said ground that, upon the final passage of said bill in the House, the vote was not taken by the yeas and nays, and entered on the journal. The state of Arkansas through its prosecuting officers has duly prosecuted this appeal from the judgment of the circuit court sustaining said demurrer, and discharging the defendant.

The question thus involved in this case is whether said Senate Bill No. 15 in the printed Acts of 1868 became Act No. 59 of the General Assembly of Arkansas of 1868 and was legally enacted. By article 5, § 21, of the Constitution of 1868, under which the above act was passed, it is provided: "On the final passage of all bills the vote shall be taken by yeas and nays and entered on the journal." The failure to comply with the above provision of the Constitution on the final passage of a bill by the Legislature, as a rule, renders the law void; and in this state this court has held uniformly that said provision is mandatory and imperative. 26 Am. & Eng. Ency. Law (2d Ed.) 543; Coolley's Constitutional Limitations (7th Ed.) 201; Post v. Supervisors, 105 U. S. 607, 26 L. Ed. 1204; Vinsant v. Knox, 27 Ark. 267; Worthen v. Badgett, 32 Ark. 496; Smithee, Land Com'r, v. Garth, 33 Ark. 17. Now, whenever a question arises as to the existence of a statute, the judges who are called upon to decide have a right to resort to any source of information in order to arrive at a correct determination, and to that end may examine the legislative journals. The certificate of the Secretary of State as to the contents of the legislative journals is not conclusive, but the judges may examine them for the purpose of verification. In the case of Gardner v. Collector, 6 Wall. 499, 18 L. Ed. 890, it is said: "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, the judges who are called upon to decide have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted another rule." Worthen v. Badgett, 32 Ark. 496; Chicot County v. Davies, 40 Ark. 200; Powell v. Hays, 83 Ark. 448, 104 S. W. 177; 12 Ency. of Evidence, 43.

Upon a more careful examination of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

journal of the proceedings of the House of Representatives of the General Assembly of the state of Arkansas of 1868 it is found in said journal that on the final passage of said Senate Bill No. 15 the vote was taken by the yeas and nays, and entered on the journal of the House. In the House on July 8, 1868, the said Senate Bill No. 15 was read the first time, and on July 10, 1868, it was read the second time. On page 514 of said journal of said House of Representatives appears the following: "On motion of Mr. Johnson the report of the judiciary committee on Senate Bill No. 15, 'An act to punish disturbers of the public peace,' was adopted. On motion of Mr. Benjamin the bill was read third time and put upon its final passage. Mr. Speaker put the question whether the House would agree to the final passage of said bill and it was determined in the affirmative. Yeas 45, nays 1. Those who voted in the affirmative were: [The journal gives here a complete list of those voting in the affirmative, those voting in the negative, and those absent and not voting.] Ordered that the clerk return said bill to the Senate, with information that the house has concurred in the passage of the same." This entry in said journal of the House must have been inadvertently overlooked when the above certificate was prepared, and upon which the circuit court acted. We have examined the journals of the Senate and House of Representatives of the General Assembly of 1868, and the proceedings as shown by those journals relating to the passage of said Senate Bill No. 15,

and we find that the journals show every action taken that was expressly required by the Constitution for the legal enactment of said bill. And as to every other matter, as is said by Mr. Cooley in his work on Constitutional Limitations (7th Ed.) 193: "When the Legislature is acting in the apparent performance of its legal functions, every reasonable presumption is to be made in favor of its action. It will not be presumed in any case, from the mere silence of their journals, that either house has exceeded its authority or disregarded a constitutional requirement in the passage of legislative acts, unless when the Constitution has expressly required the journals to show the action taken." This act of the Legislature of 1868 was duly signed by the Governor, deposited with the Secretary of State, and duly published as a law. It will be presumed that every rule and requirement was complied with in its passage. *Pelt v. Payne*, 60 Ark. 637, 30 S. W. 426; *Chicot Co. v. Davis*, 40 Ark. 200 (215); *Glidewell v. Morton*, 51 Ark. 566, 11 S. W. 882; 12 Ency. of Evidence, 48. Act No. 59 of the General Assembly of the state of Arkansas of 1868, approved July 23, 1868, which was Senate Bill No. 15, and section 1648 of Kirby's Digest, which is one of the sections of that act, was therefore legally enacted.

The judgment of the Johnson circuit court sustaining the demurrer to the information, and discharging the defendant, is reversed, and this cause is remanded, with directions to overrule the demurrer, and to proceed with the trial of the defendant.

TRAIL et al. v. STATE.

(Court of Criminal Appeals of Texas. Jan. 22, 1908. Rehearing Denied April 28, 1909.)

1. BAIL (§ 56*)—CRIMINAL PROSECUTION—ACTION ON BOND.

In view of Code Cr. Proc. 1895, art. 443, relating to the requisites of the citation in proceedings to forfeit a bail bond, it is not necessary in such proceedings to show that accused was arrested, so that it is immaterial whether the capias was valid.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 242; Dec. Dig. § 56.*]

2. BAIL (§ 58*)—CRIMINAL PROSECUTION—REQUISITES OF BOND.

It is not necessary that a bail bond should state whether accused was charged by information or indictment.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 277; Dec. Dig. § 58.*]

3. BAIL (§ 77*)—CRIMINAL PROSECUTIONS—REQUISITES OF JUDGMENT NISI.

It is not necessary that a judgment nisi on forfeiture of bail should state whether accused was charged by information or indictment.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 77.*]

4. BAIL (§ 77*)—CRIMINAL PROSECUTIONS—ACTION ON BOND—VARIANCE BETWEEN BOND AND JUDGMENT.

Since it is not necessary that either the bail bond or the judgment nisi state whether accused was charged by information or complaint, that the judgment stated that he was charged by information and the bond stated that he was charged by complaint was an immaterial variance.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 77.*]

5. BAIL (§ 76*)—CRIMINAL PROSECUTIONS—BOND—NATURE OF OBLIGATION.

Though a bail bond in a criminal case was a joint obligation in terms, the Court of Criminal Appeals would construe it to be a joint and several obligation.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 76.*]

Appeal from Grayson County Court; J. W. Hassell, Judge.

Action on a bail bond by the State against Bill Trail and others. From a judgment for the State, defendants appeal. Affirmed.

Smith & Wall, for appellants. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. This appeal is from the judgment of the county court on a forfeited bail bond. Appellant insists that no forfeited bond could be taken, because the capias upon which the principal was arrested failed to charge any offense against the law, and that an arrest could not be had without a capias, and, as the capias was void, therefore, the whole proceeding, as well as the taking of the bond, was void. It is not necessary or material, in a proceeding to forfeit a bail bond, to show the defendant was arrested. See article 443, Code Cr. Proc. 1895. In the case of *Lindley v. State*, 17 Tex. App. 121, we held that it was a requisite to the validity of a bond for the state to show a legal

capias. The case cited, however, was subsequently overruled in *Werbiski's Case*, 20 Tex. App. 131, and followed in *Conner's Case* (Tex. App.) 9 S. W. 63.

Appellant further contends that there is a variance between the bond and the judgment nisi, and that the judgment nisi recites that the principal stands charged by information, whereas the bond says by complaint. We hold that it is not necessary that either the bond or the judgment nisi should state whether the party was accused by information or indictment, and that it is not necessary to allege either one or the other. The variance, if as stated, would be an immaterial one. See *McGee v. State*, 11 Tex. App. 520.

The last insistence of appellant is that the judgment is erroneous in that it is against each surety for the full amount of the bond, while the bond charged upon was a joint obligation. The bond is not a joint obligation, but a joint and several obligation, and so states upon its face; but, even if it had been, this court could correct same, as indicated in the following authorities: *Mathena v. State*, 15 Tex. App. 460; *Rainbolt v. State*, 34 Tex. 286. As stated, however, the bond is both joint and several.

We find no error in this record, and the judgment is affirmed.

KEMPNER v. ADVANCE THRESHER CO.†

(Court of Civil Appeals of Texas. March 31, 1909. Rehearing Denied April 21, 1909.)

SALES (§ 178*)—WARRANTY—BREACH—WAIVER.

On a sale of a threshing machine requiring notice of any defects within five days after the first day's use, and providing that continued possession of the machine for five days without such notice or a failure to return should be conclusive that all warranties had been fulfilled and that the buyer released all claim for damages and right to return the machine, where, after the machine had been used for a season, the buyer expressed dissatisfaction, offered to return it, but used it through subsequent seasons and then traded it for another machine, she must be taken to have receded from her offer to return it, and is not relieved from paying for the machine, and is precluded from claiming damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 454; Dec. Dig. § 178.*]

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Action by the Advance Thresher Company against Eliza Kempner, doing business under the name of "H. Kempner." Judgment for plaintiff, and defendant appeals. Affirmed.

Kleberg & Neethe, for appellant. Terry, Cavin & Mills and Baker, Botts, Parker & Garwood, for appellee.

JAMES, C. J. The case was once before tried and appealed, and the cause remand-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 26, 1908.

ed by the Court of Civil Appeals at Galveston. 44 Tex. Civ. App. 123, 97 S. W. 1078. The case appears to have been tried again on the same pleadings, with the same result, in the district court, to wit, a verdict instructed for the plaintiff.

As stated by appellant in her brief, the suit is brought by the Advance Thresher Company against Eliza Kempner, doing business under the name of "H. Kempner," for the contract price of a threshing machine and automatic stacker, amounting to \$835, with \$91.20 freight charges. Defendant denied liability, and by way of cross-bill sought to recover damages of plaintiff, alleged to have been the result of plaintiff's breach of warranty or agreement with reference to said machinery.

The Court of Civil Appeals, upon the former appeal, held that under the evidence the contract between the parties consisted of the original contract made in January, 1903, except as the same was modified by subsequent correspondence in the same year. We hold the same upon the testimony in this record. We hold, also, that there was nothing in the subsequent correspondence changing or inconsistent with the remedy embodied in the provisions of the original contract on the subject of "warranties," which provided and stipulated that the machinery should be of certain character, perform certain work, and in a certain manner, and further provided:

"That if any of the parts of said machinery (except the belting) fail during the year of purchase, in consequence of any defect in material of said part, the Advance Thresher Company agree to repair the same, or to furnish a duplicate of said part, free of charge, except freight, after presentation of defective piece showing flaw in the material, at the factory or to the dealer through whom said machinery was bought, at any time within the year, but deficiencies in any piece not to condemn other parts.

"Each of the above warranties and warranties is made by this company and accepted by the party giving the within order on the following conditions, and agreed settlement of all claims for damages: That upon starting the machine, and the purchasers using the usual care and skill of threshermen, are unable to make the engine, thresher, stacker, feeder or other attachment herein ordered to operate well, they shall within five days from the day of the first use, give written notice to the Advance Thresher Company, at Battle Creek, Michigan, by registered letter, stating which machine or part, and in what manner and wherein it fails to fill the warranty; and also, within said time, shall notify the agent through whom purchased, and a reasonable time shall be allowed them to get to the machine and remedy the defect, if any there be (if it be of such a nature that a remedy cannot be

suggested by letter), and the purchaser hereby agrees to render freely all assistance asked of him, and longer use or use without such notice, is to be taken as fulfillment of all warranty. That if the workman visiting the machine from the company does not leave the same working well, the purchaser must at once give notice to the company at Battle Creek, Michigan, by registered letter, and to the local dealer as before, and state in writing specifically the machine's defects, and wherein, and another workman may be sent to remedy the defect. That on failure to send a second workman for five days, or failure of workman to remedy the defect, then the part of the machinery that could not be made to fill this warranty shall be returned by the purchaser to the place where received, and another furnished, or the money and notes which have been given for the same shall be returned if the whole purchased machinery is defective, or there will be indorsed on the notes, if only part of the machinery covered by this order, a proportionate part of the purchase price, as shown by the price list of the year of sale, to the price for which the same was sold, the company to have said options. No further or any other claim is to be made on the Advance Thresher Company under the sale of said machinery. That being the stipulated and agreed satisfaction of all claims for damages by the purchaser under this order and said company, and that the conditions of the warranty are thereby settled, and the contract under this order at an end. Each machine, apparatus or appliance herein ordered to be taken as separate machinery, and defects in one not to apply to the other; and the defective machinery returned, to be returned without discount to the other.

"Continued possession of said machinery for five days, without said notices, or failure to return said machinery as above provided, shall be conclusive evidence that all warranty has been fulfilled, and the purchaser hereby releases all claim for damages and the right to return the machinery after said time, and any and all right or claim to recoup for any damages or injury in any suit brought to collect the purchase price.

"Order for Pneumatic Straw Stacker.

"Agents taking this order will mail the original at once to the factory at Battle Creek, Michigan, retaining two copies, one for themselves and one for the purchasers.

"Dated at Galveston, state of Texas, this 31st day of January, 1903.

"The undersigned hereby contract with the Advance Thresher Company (a Michigan corporation) at Crowley, Louisiana, for one pneumatic straw stacker, as indicated below, manufactured by said company, at their factory at Battle Creek, Michigan, to be

shipped to or in care of Howard Smith Co., at Houston, Texas.

* * * * *

"The above stacker is ordered, purchased and sold, subject to the following express warranty and agreement, and none other, viz.:

"That the said stacker is well made, of good material, and, when properly run and rightly managed, will carry off the straw and chaff and stack them together, clear of the separator, with the help of one man to direct the chute and blast.

"It is expressly agreed that upon starting this stacker, if the undersigned are not able to make it operate well, written notice by registered letter, stating wherein it fails to satisfy the warranty, is to be immediately given by the undersigned to the Advance Thresher Company, at Battle Creek, Michigan, and also, within said time, shall notify the agent through whom purchased, and reasonable time allowed them to get to it and remedy the defect, if any, unless it is of such nature that they can advise by letter, and the undersigned hereby agrees to render freely all assistance asked of him, but if failure of said stacker to perform in a satisfactory manner is through improper management or lack of proper appliances on the part of the undersigned, then the purchasers will pay all necessary expenses incurred.

"It is expressly agreed that any failure or deficiency in said stacker shall be reported by the undersigned in writing, by registered letter, as above stated, within five days after starting said stacker, and longer use, or use without such written notice, is conclusive evidence of satisfaction and fulfillment of all warranty.

"That if the workman visiting the stacker does not leave the same working well, the purchaser must again give notice to the company at Battle Creek, Michigan, by registered letter, and to the local dealers, as before, and state in writing specifically wherein the machine is defective, and another workman may be sent to remedy this defect. Failure to send said second workman for ten (10) days, or failure of workman to remedy the defect, and said stacker cannot be made to work as warranted, then the undersigned shall remove the same from said separator, and shall order from said Advance Thresher Company their regular ordinary stacker, 18 feet long, with riddle, belts, shafts, etc., complete, to attach to said separator, at a cost of thirty dollars (\$30.00) and freight, and the cash and notes given in settlement of this pneumatic stacker shall be returned or credited upon the notes of the undersigned, and said Advance Thresher Company shall be discharged from all liability whatever on account of said stacker, all the conditions of this warranty being thereby settled, that being the stipu-

lated and agreed satisfaction of all claims for damages by the purchaser under this order and said company, and that the conditions of the warranty are thereby settled, and the contract under this order at an end.

"It is expressly agreed that if any part of said stacker falls during this year, in consequence of defect in material of said part, the Advance Thresher Company have the option to repair the same or to furnish a duplicate of said part, free of charge, except the freight, after presentation of the defective piece, clearly showing the flaw in material, at the factory or to the dealer through whom said stacker was bought, at any time within this year, but deficiencies in any piece not to condemn other parts.

"It is further expressly understood and agreed by the undersigned that the sale and warranty of this stacker is wholly separate and distinct from the warranty and sale of any other machinery and of the separator to which this stacker is attached, and that a failure in whole or in part in said stacker in no way affects the sale or warranty of said separator or other machinery.

"Notice.—It is expressly understood and agreed by the undersigned that the agents, salesmen and experts of the company have no general powers, and are only authorized to make sales upon this form, and that all agreements appertaining to this order are included herein, and that the above warranty is the only one, and only form made or authorized by the Advance Thresher Company to be given on the above machinery, and that failure to follow the same waives and settles all claim for damages for any cause, and all claim or rights to recoup for damages or injury in any suit brought to recover the purchase price.

"That no agent or other person shall or can make any different warranty, or vary or modify any of its terms, or waive any of its conditions; that any attempt to do so shall not bind the Advance Thresher Company or affect this contract. The fact of any agent, expert or employé of this company being sent to said machinery, or working on the same, shall not change or modify this contract, or the terms or conditions of the warranty herein.

"Changes can only be made in writing by the treasurer and the board of directors.

"All agreements must be in writing, as no verbal agreement shall be recognized or claim under same made by undersigned.

"This order is forwarded to the factory at Battle Creek, Michigan, to ascertain if the above-described machinery can be furnished according to specifications, with the express understanding that the Advance Thresher Company shall not be liable for any inability to fill this order, or for any delay, either in shipping or in transit."

We find, as a fact, from the undisputed evidence, that defendant has not shown by tes-

timony that she has ever been placed in a position to demand of plaintiff, under the contract as above interpreted, any remedy in reference to the machine, unless it was the right, at a proper time, if the machine was defective, etc., to return the same and thereby cancel her obligation for the price. And we further find that, while there is evidence that after it had been used through the season of 1903 defendant expressed dissatisfaction with the machine, and complained of the unsatisfactory manner in which it worked and offered to return it, and Foley was unwilling to take it back, still defendant went on and used it through subsequent seasons and then traded it off to Gaar-Scott & Co. for another machine.

The course pursued by defendant did not, under the circumstances, operate to relieve her from paying for the machine, as a positive and sustained tender might have done; and the very terms of the contract preclude her from claiming consequential or other damages. *Buckstaff v. Russell*, 79 Fed. 611, 25 C. C. A. 129; *Shearer v. Gaar-Scott & Co.*, 41 Tex. Civ. App. 39, 90 S. W. 684; *Gaar-Scott & Co. v. Hodges* (Tex. Civ. App.) 90 S. W. 580; *Wisdom v. Nichols* (Ky.) 97 S. W. 18; *Watts v. Nat. Cash Register Co.* (Ky.) 78 S. W. 118.

Appellant claims that in the correspondence Foley warranted that the machine should give satisfaction and thresh from 350 to 400 sacks of rice daily, and also claims that whether Foley's statement in this regard was a representation or a warranty was a matter of fact which should have been submitted to the jury. We think the statement did not amount to a warranty, and, if it could be taken as a warranty, the effect would be merely to add it to the category of warranties mentioned in the original contract, and its failure would give defendant no further right than to cancel the notes by a return of the machine.

It is apparent that the reason why Foley was unwilling to take back the machine was that he was claiming that the machine worked all right. The testimony concerning the offer to return the machine, and the unwillingness of Foley to allow it, was that this occurred in a conversation in H. Kempner's office between the agents of Mrs. Kempner and Foley, the latter of whom was there demanding payment of the notes. This occurred late in November or early in December, 1903, and the correspondence immediately preceding shows that there was a difference between them concerning the working of the machine.

Mrs. Kempner's right to return the machine and get back the notes depended upon the defectiveness of the machine. If not defective within the meaning of the warranties, she had no such right. Now it seems to us that when her agent offered to return the machine and Foley did not accede to this,

and no further effort was made to return it, but, on the contrary, she continued to use it in the field for two more seasons and then disposed of it as her own, she must be taken to have receded from her offer to return it, and acceded to Foley's refusal to allow her to do so. It is not deemed necessary to consider whether or not appellee was bound by Foley's correspondence. We have proceeded upon the assumption that he was authorized.

The above conclusions of fact and law dispose of all the assignments of error.

Affirmed.

WESTERN UNION TELEGRAPH CO. v. COBB.

(Court of Civil Appeals of Texas. March 4, 1909. Rehearing Denied April 1, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 66*)—DELIVERY OF MESSAGE—NEGLIGENT DELAY—EVIDENCE.

Evidence in an action for delay in delivery of a telegram held to show that the messenger intrusted therewith was negligent.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.*]

2. TELEGRAPHS AND TELEPHONES (§ 81*)—DELIVERY OF MESSAGE—REGULATIONS—OFFICE HOURS.

The regulation of a telegraph company fixing office hours in a town of about 600 people of from 8 a. m. to 8 p. m. on week days, and from 8 to 10 a. m., and from 4 to 6 p. m. on Sundays, is reasonable.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 81.*]

3. TELEGRAPHS AND TELEPHONES (§ 32*)—DELIVERY OF MESSAGE—CONTRACTS—AUTHORITY OF AGENT.

A telegraph company cannot be held liable on an unauthorized contract of its agent at a sending office to deliver a telegram, tendered for transmission after the receiving office, under a reasonable rule as to office hours, had closed for the night, before opening time next morning.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 32.*]

4. TELEGRAPHS AND TELEPHONES (§ 74*)—DELIVERY OF MESSAGE—DELAY—TRIAL—INSTRUCTIONS.

Where, in an action for failure to promptly deliver a telegram tendered to the agent at the sending office for transmission after the receiving office had closed for the night, it appeared that such agent had no authority to contract to deliver before office hours the next morning, it was error to submit to the jury the issue of defendant's negligence in failing to deliver that night.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 74.*]

5. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Error in submitting such issue was harmless, where defendant was negligent in failing to use reasonable care to make timely delivery after the telegram's receipt at the receiving office the next morning.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1064.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. TELEGRAPHS AND TELEPHONES (§ 71*)—DELIVERY OF MESSAGE—NEGLIGENCE—EXCESSIVE DAMAGES.

Where, in an action against a telegraph company for mental anguish caused by negligent delay in delivering a telegram, it appeared that such negligence prevented plaintiff from reaching the bedside of his son, to whom he was greatly attached, before death, a verdict for \$1,200 was not excessive.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 74; Dec. Dig. § 71.*]

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by J. E. Cobb against the Western Union Telegraph Company. From a judgment for plaintiff for \$1,200, defendant appeals. Affirmed.

Hume, Robinson & Hume and Norman G. Kittrell, Jr., for appellant. Love & Channell, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against the appellant to recover the sum of \$1,999 as damages for mental anguish caused him by the negligent failure of appellant to transmit and deliver with reasonable promptness a telegraphic message informing appellee of the fatal illness of his son, by reason of which negligence he was unable to see his son before his death. The petition contains the following allegations: "That heretofore, to wit, on or about June 13, 1905, J. E. Cobb was at Bay Ridge, about two miles from La Porte, in Harris county, Tex., at which time his son, John Cobb, was very sick at his (plaintiff's) home at Houston Heights, in said county; that during the afternoon he (John Cobb) became worse and, to wit, about 11:30 p. m. of the same day, E. S. Cobb, another son of plaintiff, prepared a written message and delivered it to defendant at Houston, Tex., for transmission by telegraph to plaintiff, at his instance and request and for his use and benefit advising him to come home at once, that his son was worse, a substantial copy of which is hereto attached and marked 'Exhibit A'; that said E. S. Cobb paid defendant for the transmission of same 25 cents; that he explained to defendant's agent that plaintiff's son, the sender's brother, was very low and could not live long, and said agent agreed, in consideration of an additional amount of 50 cents, paid to it, to have the said telegram delivered that same night, to wit, the night of the 13th, which said amounts were duly paid to defendant for plaintiff's benefit; that notwithstanding defendant's duty and agreement to deliver it immediately, it was not delivered until about 4 o'clock p. m. of the next day, and after his son's death, which occurred at 1:30 p. m. on that day; that his said son was rational until a few minutes before his death, and was repeatedly asking for his

father, saying he wanted to see him and talk to him; and that on account of plaintiff's failure to see his said son before his death, plaintiff has suffered great mental distress and anguish."

It is further alleged that, after sending said telegram on the night of June 13th, the said E. S. Cobb on the next day, about 1:30 p. m., delivered to defendant's agent at Houston a second telegram to be sent to his father notifying him of the condition of his son and requesting him to return home at once, but that said telegram was not delivered by the defendant until about 3:45 p. m. on said day. The petition then proceeds as follows: "Plaintiff alleges that his suffering was directly and proximately caused and occasioned by the negligence and carelessness of the said defendant company, its servants, agents and employes, in that: (1) It failed to send and deliver the first said message or telegram to plaintiff on the night of the 13th aforesaid. (2) The said first telegram having arrived at La Porte at 8:10 a. m., or about 10 minutes after 8 o'clock a. m. of the 14th of June aforesaid, defendant failed to deliver it within a reasonable time and without unnecessary delay, and that 30 minutes would have been ample time and a reasonable time in which to have delivered same, but the delivery of same was negligently and unnecessarily delayed until about 4 o'clock p. m. of said day. (3) That both of said messages were not transmitted and delivered within a reasonable time and without unnecessary delay. That notwithstanding defendant had notice of the nature and importance of said messages to plaintiff, and that up to the time of the delivery of the messages plaintiff was at Bay Ridge, it failed to deliver the first until after 4 o'clock p. m. of the 14th of June aforesaid, and after his son's death. That had defendant delivered same on the night of the 13th aforesaid, plaintiff could have taken the morning train leaving La Porte for Houston about 7:30 a. m. and arrived at home at about 8 o'clock a. m. of the 14th aforesaid. That had defendant delivered the first of said messages within a half hour, or a reasonable time after it was received at La Porte, or would have been received at La Porte by the exercise of ordinary care by defendant, plaintiff could and would have driven home, a distance of about 20 miles, within three hours, and have been with his son by 40 minutes after 11 o'clock a. m., and several hours before the death of his son. And that he did not know of the dangerous condition of his son and was deprived of the privilege of seeing him through the negligence of defendant."

In addition to a general demurrer and general denial, the defendant's answer contains a special plea setting up that it had established office hours at its office at La Porte,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said hours being from 8 a. m. to 8 p. m. on week days, from 8 to 10 a. m. and from 4 to 6 p. m. on Sundays, and that at the time the telegram was filed with its agent at Houston for transmission to La Porte the office at the latter place was closed, and it was therefore impossible to transmit the telegram before 8 a. m. on the following day. Defendant also filed a special plea denying the authority of the agent at Houston, who received said telegram, to contract for the delivery of the message on the night on which it was sent, or to make any special contract with reference to the transmission and delivery of the telegram. The cause was tried with a jury, and verdict and judgment were rendered in favor of plaintiff for \$1,200.

The evidence shows that plaintiff and his family resided in Houston Heights, a suburb of the city of Houston, at the time of the sending of the telegram. Plaintiff is a carpenter, and for some time prior to said date had been working at his trade at Bay Ridge, a well-known subdivision of the town of La Porte, about 18 miles from the city of Houston. He left home to go to his work at La Porte the Sunday evening before the death of his son. At that time his son, John Cobb, who was about 14 years old, was sick, having had a chill on that day; but his sickness was not thought to be serious. On the following Tuesday the boy's condition became serious, and on that night it became so alarming that the family decided to notify plaintiff and request his return home. In pursuance of this purpose, E. S. Cobb, another son of plaintiff, went to the telegraph office of appellant in the city of Houston and delivered to the receiving clerk at said office the following telegram to be sent to plaintiff at La Porte: "To J. E. Cobb, Bay Ridge, La Porte, Texas. Come at once. John is worse. [Signed] E. S. Cobb." This telegram was received by appellant's agent about 10:30 p. m.

E. S. Cobb, after stating that he first tried to communicate with his father by telephone, testified in regard to sending the telegram as follows: "I went to the telegraph office and sent a message to J. E. Cobb. That is the message I sent (referring to the telegram above copied). I delivered that message to the company's agent, I suppose. I delivered it over here at the telegraph office; at the office of the Western Union Telegraph Company over here on Main street in Houston, Tex. I did ask the agent what the charges would be to deliver that message. He charged me 40 cents to send it—to deliver it after it got to La Porte. I did explain to him where my father was. I told him he was at Bay Ridge, La Porte, Tex. I told him, I asked him, could he send it off, and he told me, 'Yes,' and I told him, well, I wished he would. The boy was very sick, and I wished he would deliver it, and I wanted him to come

home. What he said about delivering it was, he told me all right. I paid the fee to send it to La Porte, 25 cents. About the charge for delivering it from La Porte to Bay Ridge, he told me 40 cents. I asked him and paid it to him. I paid him the money, and that was somewhere about 10 or 11 o'clock, and I then went home. The boy was very bad off when I went home, he was not any better at that time. The next day the effort I made to communicate with my father was: I waited and I went down to the office here frequently. He had not come in, in the first place. I had not heard anything from him, and I went to the office and asked had the telegram been delivered, and they said 'No,' and then I waited around there for awhile for to hear from him, and I never did hear, and I went on home and told my mother at once. The reason, they said, they had not delivered it, they could not find him, and I went home and told my mother at once. That was between 10 and 11 o'clock, when I went home, and then after dinner, about 1 o'clock I reckon, when I left the house, she told me to go and send him another telegram. When I sent the second telegram, it was about 1 o'clock, somewhere along there. After sending that last telegram, I waited around the telegraph office until about 5 o'clock in the evening, waited trying to hear from my father, and I heard he had got the telegram, and I went home, and when I got home the boy was dead. I suppose it was 9 o'clock or 9:30 o'clock that same night that my father got home. I was not there when my brother died. This last telegram I paid for it, to send it there is all I paid for. I paid to send it there, I mean I just paid for the message, the message fees to La Porte, straight message fees. I did not pay any special charges on the last one. On the first one I paid special charges on it to be delivered. Before I sent the first telegram on the night of the 13th, I made inquiry of the clerk there as to whether it could be delivered if I sent a telegram, if they could deliver it. That was my understanding of it, it was to be delivered that night, and after that, after he told me that, I wrote the telegram and paid him for it to go and to be delivered both."

The second telegram was as follows: "J. E. Cobb, Bay Ridge, Texas, John Stradley residence: Come home at once. John is very low. [Signed] E. S. Cobb." The first telegram before set out was not transmitted to La Porte until the morning of June 14, 1905. The indorsement upon this telegram shows that it was received at La Porte at 8:10 a. m. on June 14th. It was not delivered to plaintiff until after he had received the second telegram, which was delivered to him between 2 and 3 o'clock p. m. on said day.

The town of La Porte has a population of about 600. Bay Ridge is a well-known resi-

dence section of said town and is situated about two miles from the railroad station, where the defendant has its telegraph office. It would take about 30 minutes for a messenger to carry a telegram from the office at La Porte to Bay Ridge. Plaintiff was at work at Bay Ridge during the whole of the day of June 14th and could have been readily found if reasonable inquiry had been made in that section of the town; there not being many houses in said section. When plaintiff received the telegram informing him of the serious condition of his son, he at once inquired as to when the first train would leave for Houston and was advised by friends who were with him that there would be a train that evening, and that he could reach Houston just as soon by waiting for the train as he could by going by private conveyance, and, acting upon this suggestion, he waited for the train and arrived in Houston between 8 and 9 o'clock. His son died about half past 1 o'clock that evening. If the telegram had been delivered to plaintiff within a reasonable time after it reached La Porte, he could have reached home by private conveyance some time before his son's death. While plaintiff does not testify in express terms that he would have immediately gone to the bedside of his son upon receipt of the telegram, from the anxiety which he showed to reach home as soon as he heard of his serious condition and the undisputed evidence as to the affection which existed between the father and son, no other reasonable conclusion can be drawn than that he would have gone to him as soon as possible, and the undisputed evidence shows that he could have procured a horse and conveyance and could have reached home by such conveyance within three hours. Shortly after the telegram was received at La Porte on the morning of June 14th, it was placed in the hands of N. J. Bonner, a hack driver, who promised defendant's agent at La Porte to deliver it to plaintiff. The testimony in the record as to the efforts of Bonner to make prompt delivery, we think conclusively shows that he was negligent in such undertaking, and that, if any reasonable effort had been made to deliver the telegram, plaintiff could have received it in time to have reached home before his son's death. Plaintiff was at Bay Ridge on the night of the 13th of June, and, if the telegram had been sent to La Porte on that night, he could have been found, and the telegram delivered, if there had been reasonable diligence on the part of the defendant to make such delivery. A train left La Porte for Houston about 8 a. m. on the morning of the 14th, and, if plaintiff had received the telegram on the night it was sent, he would have taken this train for Houston and arrived at home about 9 a. m.

The agent of defendant at Houston who received the telegram on the night of June 13th had no authority to contract with E. S.

Cobb that said telegram would be transmitted and delivered that night. The telegraph office at La Porte was closed at the time the message was received at Houston, and it was impossible to have transmitted said telegram before 8 a. m. on June 14th. The regulation of the defendant as to office hours at La Porte was reasonable.

Under appropriate assignments of error, the appellant complains of the charge of the court submitting to the jury the issue of negligence on the part of the appellant in failing to transmit and deliver the telegram on the night of June 13th under the special contract alleged to have been made with the Houston agent, and of the refusal of the court to charge the jury, at appellant's request, that the failure of defendant to transmit the message on the night of June 13th was not negligence. We agree with appellant that under the pleading and evidence it could not be held liable for failure to transmit and deliver the telegram on the night of June 13th, and that issue ought not to have been submitted to the jury.

Conceding for the sake of argument that appellant might be held liable on the special contract to deliver the message on the night of June 13th notwithstanding its office at La Porte, under a reasonable rule as to office hours, was closed at the time the telegram was received for transmission at Houston, and it was therefore impossible to send it to La Porte that night, it could not be held upon a special contract of this kind made by an agent who had no authority to make same, and the undisputed evidence shows that the agent of appellant who it is claimed by appellee made said contract had no such authority. The issue of estoppel against appellant's denial of the authority of said agent to make the contract based upon his apparent authority is not raised by the pleadings, and it is therefore not in the case. *Trespalcios Rice Co. v. Eldman*, 41 Tex. Civ. App. 542, 93 S. W. 699. This error in the charge, however, does not require or authorize a reversal of the judgment because the undisputed evidence establishes as a matter of law that appellant was negligent in failing to use reasonable care to make timely delivery of the telegram after its receipt at La Porte, and that as a result of such negligence appellee failed to see his son before his death and was thereby caused to suffer mental pain and anguish as alleged in his petition. Such being the state of the evidence, no other verdict than one in favor of appellee could have been properly rendered, and therefore the error in the charge was immaterial.

There is no merit in the assignment assailing the verdict on the ground that it is excessive. There is nothing in the record to raise a suspicion that in arriving at the amount of their verdict the jury were influenced by any improper motive, and the size

of the verdict is not such as to justify this court to conclude that they were actuated by any improper motive, or that the amount awarded was not the result of their unimpassioned and unprejudiced judgment as to what amount would fairly compensate appellee for the wrong sustained by him through appellant's negligence. *Telegraph Co. v. Sloss* (Tex. Civ. App.) 100 S. W. 854.

We are of opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

HOUSTON & T. C. R. CO. v. MALLOY.†

(Court of Civil Appeals of Texas. March 19, 1909. Rehearing Denied April 8, 1909.)

1. MASTER AND SERVANT (§ 150*)—INJURIES TO SERVANT—NEGLIGENCE—FAILURE TO WARN.

In action for injuries to servant, defendant held negligent in failing to warn plaintiff of the danger in the manner in which the work was done.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 297; Dec. Dig. § 150.*]

2. MASTER AND SERVANT (§ 213*)—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff held not to have assumed the risk of injury from metal flying out under blows from the sledge hammer which he was using under directions of his foreman.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 559; Dec. Dig. § 213.*]

3. MASTER AND SERVANT (§ 245*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where plaintiff was injured by striking the axle of a railroad locomotive with a sledge hammer in accordance with the direction of his foreman, and the danger was not so patent to plaintiff as to justify him in refusing to obey his superior's command or to require a finding that no prudent man would have undertaken it, plaintiff's act of obedience was not negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 781, 782; Dec. Dig. § 245.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF REQUEST.

Where the court's main charge sufficiently presented the law of the case on the issues involved, the court did not err in refusing defendant's special request.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651; Dec. Dig. § 260.*]

5. APPEAL AND ERROR (§ 1051*)—RECEPTION OF EVIDENCE—HARMLESS ERROR.

Admission of plaintiff's statement that, if metal which struck his eye under a blow from a sledge hammer had been steel, the accident might have been more serious, was harmless error, where defendant consented to the introduction of a portion of plaintiff's written statement that plaintiff believed it was a particle of lead that hit him, and that if it had been steel it would have gone through the plaintiff's head further than it did, and that he did not think it could have been a piece of the hammer.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4161; Dec. Dig. § 1051.*]

Error from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Charles P. Malloy against the Houston & Texas Central Railroad Company. Judgment for plaintiff, and defendant brings error. **Affirmed.**

Baker, Botts, Parker & Garwood and Lane, Jackson, Kelley & Walters, for plaintiff in error. Lovejoy & Parker, for defendant in error.

McMEANS, J. This suit was brought by Charles P. Malloy, as plaintiff, against the Houston & Texas Central Railroad Company, to recover damages for personal injuries sustained by him while in its employ. The plaintiff alleged that he was employed by the company as a boiler maker, and was sent from Houston to Austin, November, 1905, to work on certain boilers at that place; that while so engaged he was sent for by one Glass, foreman of the company's roundhouse at Austin, to assist in adjusting a driving wheel of a locomotive on the axle by striking with a hammer on the end or face of the axle; that, in obedience to the order of said roundhouse foreman, he struck with great force with a sledge hammer on the end of the axle, and thereby caused a portion of lead, babbitt, or other soft metal in the end of the axle to fly or spurt out and strike him in the eye, causing the loss of one eye. The plaintiff alleged with particularity that his injuries "were due to the negligence and carelessness of the defendant, its agents, servants, and employes, in this: That plaintiff was not employed by defendant to do the character of work which he was required to perform, and which he was performing, when injured; that the work involved the danger of lead or babbitt or other soft metal flying or spurring out under the blows of the hammer, and was more perilous than the work plaintiff was employed to perform; that plaintiff was inexperienced in said work, and was ignorant of the danger of said metal flying or spurring out under the blows delivered by him on the end or the face of the said axle, and that he had not equal means with the defendant of knowing the danger; that defendant and its agents, servants, and employes in charge of the said work knew, or in the exercise of ordinary care would have known, of the danger, and they knew, or in the exercise of ordinary care would have known, of plaintiff's inexperience and ignorance, and, so knowing, they wholly failed to warn him of such danger. And, in this connection, plaintiff further alleges that the method employed in doing the work was not the one usually and customarily employed in such cases; that the usual methods in doing said work were slackening the tire of the wheel by heating the same, by means of hydraulic pressure, to be applied in the regular workshops, etc.; that the defendant was familiar with such methods, and had the facilities

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
118 S.W.—46 † Writ of error denied by Supreme Court May 12, 1909.

for applying the same, and that such methods involved no peril to those employed in their execution, and plaintiff is informed that defendant, after his injury, did in fact, adjust the said wheel by the use of a sufficient and proper method, namely, hydraulic pressure." The defendant answered by general demurrer, general denial, and pleaded assumed risk and contributory negligence. A trial before a jury resulted in a verdict and judgment for plaintiff for the sum of \$6,000. The case is now properly before us on writ of error.

The evidence justifies the following conclusions of fact: Plaintiff was about 30 years old, and had worked several years in railroad shops, and was an expert boiler maker, and was employed in that capacity in defendant's railroad shops in Houston. In November, 1905, several days before his injury, he had been sent by his foreman, at Houston, to Austin, to make certain repairs upon boilers of locomotives there, and directed to report to one Glass, the defendant's foreman at Austin, upon his arrival. This he did, and was put to work by Glass upon the boilers he was sent to repair, and continuously engaged in this work up to the 28th of November, 1905, when the foreman, Glass, sent for him to assist in trying to force into position one of the driving wheels of a locomotive that had moved a little out of line on the axle. The axle, when originally made, is turned or rounded by means of a lathe, the axle being held by appliances at each end in holes called "lathe holes," that are afterwards filled with lead or babbitt metal, which conceals the hole and makes the end of the axle smooth, and gives it the appearance, after it is painted, of being solid. Plaintiff knew that lathe holes were in the ends of all such axles, and that some of these holes were filled with lead or babbitt metal, but at the time in question he did not think of it. When he reached the engine he found the foreman and some of his machinists striking the end of the axle, and was told by the foreman to strike with the hammer on a piece of iron which was held against the end of the axle; but this he declined to do, for fear that the iron, being brittle, would break under the force of his blows, and that flying particles might injure himself or some of the others present, and, to demonstrate the reasonableness of his fear, struck the iron a light blow which broke it. The iron was then removed, and plaintiff was directed by the foreman to strike on the naked end of the axle, which he did, without the hoped-for result. Plaintiff then suggested the use of a ram, and one was constructed; but the piece of iron used as a ram was too light to answer the purpose, and this method was abandoned. The foreman again directed plaintiff to strike the end of the axle with the hammer, and although the latter protested that his efforts would be futile, because the driving wheels

were placed on the axles by hydraulic pressure of forty or fifty thousand pounds and could not be moved by the method employed by the foreman, he, in compliance with the orders of the foreman, again began striking the naked end of the axle, and on delivering the last blow a piece of lead or babbitt metal, with which the lathe hole was filled, spurted out, striking plaintiff in the eye with such force as to destroy the sight and to require the removal of the eye. The work which plaintiff was called upon to perform was work usually done by machinists and their helpers, and not by boiler makers, but the work in question was not such as required any special skill further than to strike with reasonable accuracy a heavy blow with a sledge hammer. It was not infrequently the case that boiler makers would be directed by their superiors to do certain kinds of work usually performed by machinists where no special skill was required, and, when called upon by the proper authorities to do such work, were required to obey. Had plaintiff thought about it, he would have known that the soft metal was in the lathe hole; but he had never worked with that character of metal, nor had he ever done that character of work before, nor had he seen it done, and did not know that the metal was likely to fly out under the force of the blows. The foreman did know this, however, although he did not think of it at the time; and the uncontradicted evidence is that such blows delivered on the face of the axle frequently caused the soft metal to spurt out with such force as to injure persons near by, and that this was known to machinists generally. Plaintiff was unaware of this danger, and the foreman did not warn him nor did he take any precaution against plaintiff being injured by the flying out of the metal. It was shown that the reason the metal flew out was because plaintiff, although directed to strike as near the center of the face of the axle as possible, did not strike truly, so that the face of the hammer did not entirely cover the soft metal in the lathe hole and thereby prevent the spurting out of the metal, but that with a hammer weighing 18 to 20 pounds it is impossible to strike in the same place every time. The end of the axle had been painted, and the lead or babbitt metal was not visible prior to the blow that caused a part of it to fly out and injure plaintiff.

Under these facts we conclude that the plaintiff was not guilty of contributory negligence in striking upon the axle under the circumstances, nor was his injury the result of a risk assumed by him, but was due to the negligence of defendant in failing to warn plaintiff of a latent danger of which the plaintiff did not know, but of which the defendant knew, or in the exercise of ordinary care should have known.

By its first assignment of error plaintiff

in error complains of the refusal of the court to give its first special charge instructing the jury that under the undisputed facts the plaintiff had failed to show any liability on the part of the defendant, and to return a verdict for defendant. It is urged in support of this assignment (1) that the testimony being undisputed, and the facts being such that ordinary minds could not differ in concluding that no actionable negligence was shown, it was the duty of the trial court to direct a verdict for the defendant as requested in the special charge; (2) that whatever danger there was of the lead or babbitt metal flying out under the blows from the hammer was as well known to plaintiff, as open to his observation, as to the foreman, and there being no defect in the instruments used, and the flying out of the lead or babbitt metal being the natural effect of a blow from a hammer on soft metal, the resulting injury was a known risk or danger ordinarily incident to such work, for which the defendant was not liable; and (3) that the undisputed testimony showing that the flying out of the soft metal was directly caused by the improper and careless manner in which plaintiff struck the blows, not on the center of the axle face, his own careless conduct was the proximate cause of the injury, and he was not entitled to recover.

The foregoing findings necessarily dispose of these contentions adversely to plaintiff in error. The danger to which plaintiff was subjected was not open to his observation and was not known by him, but was known to the foreman, who was the representative of the master. Plaintiff had had no previous experience in that kind of work, further than that he knew how to wield a sledge hammer; and he was employed in a different department of the service from those whose duties required them to perform such work, yet he was called from his duties and ordered to perform service in another department, which order he was required to obey, and which he undertook to obey without knowledge of the danger, and was given no warning by the foreman.

In *Railway v. Callbreath*, 66 Tex. 526, 1 S. W. 622, it is said by our Supreme Court: "As a general rule it is not the duty of the employer to instruct him (the employe) as to the rules of the service, or warn him of the dangers incident thereto, unless information be asked." *Railway Company v. Watts*, 64 Tex. 568. But the court proceeds to say: "This rule is subject to some qualifications. It was held by the court in the case last cited that, the servant being inexperienced and ignorant of the dangers of the service upon which he was just entering, it was the duty of the company to have informed him of the dangers. The law is thus stated by a well known text-writer: 'When there are hazards incident to an occupation, which the master knows or ought to

know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect; and this rule applies where the danger or hazard is patent, if through youth, inexperience, or other cause the servant is incompetent to fully understand the nature and extent of the hazard.' *Wood on Master and Servant*, 714." *Railway Company v. Rutland* (Tex. Civ. App.) 101 S. W. 531. As said in the case last cited: "We think that the correct rule applicable to cases where the danger is secret and extraordinary, as in the present case, is thus stated in appellees' brief, quoting from *Labatt on Master and Servant*: 'The doctrine which may be regarded as representing the converse of the propositions, discussed in the preceding sections, is that a master is prima facie bound to instruct a servant as to all risks which are abnormal or extraordinary, and at the same time of such a kind that the servant cannot be held chargeable with an adequate comprehension of their nature and extent, or of the proper means by which to safeguard himself. The presumption is that all risks which belong to this category are not known to the servant. Hence the question whether the servant should have been warned is always for the jury, where the evidence is fairly susceptible of the construction that the peril to which his injury was due was one of this description, and there is no positive evidence tending to charge him with actual or constructive knowledge of that peril.' *Labatt, Master and Servant*, §§ 240, 241; *Bailey, Master and Servant*, 111 et seq., 124, 125; *Mather v. Rillston*, 156 U. S. 399, 15 Sup. Ct. 464, 39 L. Ed. 464; *Dowling v. Allen*, 74 Mo. 13, 41 Am. Rep. 298; *Perry v. Marsh*, 25 Ala. 659; *Smith v. Peninsular Car Works*, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542; *Fox v. Peninsular Car Works*, 84 Mich. 676, 48 N. W. 203; *McGowan v. La Plata, etc., Works* (C. C.) 9 Fed. 861; *Kliegel v. Aitken*, 94 Wis. 432, 69 N. W. 67, 35 L. R. A. 251, 59 Am. St. Rep. 901; *W. U. Tel. Co. v. McMullen*, 58 N. J. Law, 155, 33 Atl. 384, 32 L. R. A. 353."

Applying this rule to the facts of the present case, we think the evidence was sufficient to authorize the jury to find that plaintiff in error was negligent in failing to instruct the plaintiff as to the danger in the work which he was ordered to perform. Nor do we think that the plaintiff was guilty of negligence as a matter of law in the manner in which he struck upon the face of the axle. It may be that if he had struck truly in the center the metal would not have spurted out, but the fact that he did not so strike was not because of carelessness upon his part, but because of the impossibility of any one striking, with such an implement, in the same place at every blow. There is nothing in the facts of this case to justify the court in taking the case from the jury.

The danger of striking upon the axle was not so patent to plaintiff as to justify him in refusing to obey the command of his superior, or to render such obedience an act of negligence under the circumstances. "Where an act is done by one in obedience to the order of his foreman, the law will not declare the act of obedience negligence per se, unless the danger of obeying the order was so obvious and glaring from the servant's standpoint at the time he undertook to obey it that no prudent man would have undertaken it, but will leave it to the jury to say whether he ought to have obeyed it or not." *Railway v. Wray*, 43 Tex. Civ. App. 380, 96 S. W. 74, 16 Tex. Ct. Rep. 679; *Railway Company v. Puente*, 30 Tex. Civ. App. 246, 70 S. W. 362, 5 Tex. Ct. Rep. 957.

There are a number of assignments of error complaining of the charge of the court and the action of the court in refusing special charges. We think the main charge of the court sufficiently presented to the jury the law of the case upon the issues involved. In our judgment it contains no errors of which the plaintiff in error can complain, and sufficiently embraces the law applicable to the facts proved as to render the requested special charges wholly unnecessary. The charge of the court, omitting various definitions, is as follows:

"Now, therefore, if you shall believe from a preponderance of the evidence that plaintiff, while at work for defendant on certain of its boilers at Austin, Texas, was sent for by Charles Glass, foreman of defendant's roundhouse at Austin, and ordered by said Glass to strike with a sledge hammer with great force upon the end or face of the axle or journal of a locomotive, and believe there was lead in a hole in the end of the said axle or journal, and that the striking by plaintiff caused a portion of the lead to fly or spurt out and strike plaintiff in his right eye, and injure the eye so that the same had to be and was thereafter removed; and you further believe from a preponderance of the evidence that the said Glass, as foreman of defendant's roundhouse, had authority to order plaintiff to strike upon the axle or journal, and you believe that plaintiff was caused to strike thereupon by the order of said Glass, and that in so doing he did that which a man of ordinary prudence would have done under the circumstances, and you believe that the flying or spurring out of the lead under the blows delivered by plaintiff and striking him in the eye, if it did that, was a latent or secret danger incident to the said work of striking, and believe that the said danger, if any, was known to the defendant and the said Glass before the said striking, and believe that the said danger, if any, was unknown to plaintiff at the time of the said striking, and would not have been known to him in the exercise of ordinary care at said time, and believe that the said Glass, in ordering

plaintiff to strike upon the said axle or journal, if he did that, rested under a duty to plaintiff to warn him of the said danger, if you find there was such danger, and believe he failed to give him such warning, and that in so failing he was guilty of negligence as that term has been hereinbefore defined to you, and you believe that such negligence, if any, was the proximate cause of plaintiff's injury, and you do not find that plaintiff assumed the risk of injury, or was himself guilty of contributory negligence, as herein-after explained to you—you will return a verdict for plaintiff, but, unless you so find, you will return a verdict for defendant.

"If, however, you do not find from a preponderance of the evidence that plaintiff was caused to lose his eye by lead flying or spurring out of a hole in the end of the axle or journal under the striking of plaintiff; or if you do believe that he lost his eye from such cause, but do not believe such action of the lead was a latent or secret danger, or if you believe that the said danger, if any, was unknown to the said Glass and would not have been known to him in the exercise of ordinary care; or if you believe the danger was not of such character as to impose upon the said Glass, when he ordered plaintiff to strike upon the said axle or journal, if he did that, the duty to warn him thereof in the exercise of ordinary care; or if you believe plaintiff had equal means with defendant of knowing the danger, if any—you will, without inquiring further, return a verdict for defendant.

"Or if you believe the striking was attended by a latent or secret danger, but yet you believe that the plaintiff knew thereof, or in the exercise of ordinary care would necessarily have known thereof; or if you believe the said danger, if any, was open to ordinary observation, or was patent or obvious—then in either such case he assumed the risk of injury therefrom, and you will return a verdict for the defendant.

"Or if you believe from a preponderance of the evidence that plaintiff carelessly and recklessly struck upon the axle or journal and upon the lead or other soft metals thereof in such manner and with such force as to cause his injury, as that in so doing he was guilty of 'contributory negligence,' you will also return a verdict for defendant.

"Or, if you believe that the accident which occurred to plaintiff was one which arose from the ordinary risks of the business in which he was engaged, you will find for defendant.

"Or, if you believe the plaintiff's injury was the result of an accident, you will also return a verdict for defendant.

"Or if you find that the plaintiff has failed to prove by a preponderance of the evidence that the injury to his eye was caused by a piece of lead or babbitt or other soft metal which was in the end of the journal striking him in the eye, or if he has failed

to prove by a preponderance of the evidence what missile struck him and where it came from, you will find for defendant."

Plaintiff in error's fourth assignment is as follows: "The court erred in permitting the plaintiff to testify, over the objection of the defendant, that, if the missile which struck him in the eye had been a piece of steel off of the hammer, it would have produced a more serious injury than that which occurred to him; because the plaintiff testified that he did not know what struck him in the eye, and this question and answer elicited merely an inference, based upon his opinion, and should not have been permitted to go to the jury as evidence."

Plaintiff alleged, and was then endeavoring to prove, that the missile that injured him was a piece of lead or babbitt metal that flew out of the lathe holes under the force of his blows. While testifying in his own behalf, he was asked by his counsel: "If that had been a piece of steel off of the hammer, what would have been the result?" and was permitted, over the objection of defendant, to reply: "It might have been more serious." If the evidence was not competent, and upon this we make no decision, we think that its admission was harmless error, because it seems clear the defendant waived the objection by consenting for plaintiff to introduce in evidence the following portion of his written statement, made at the instance of defendant soon after he was hurt: "After hitting several times, a piece of metal flew and hit me in the eye. It is my idea it was a particle of lead that hit me. I think, had it been steel, it would have gone through my head further than it did. I do not hardly think it could have been a piece of the hammer, as the journal (axle) was of sufficient width so that I would not hit an edge which might have silvered it." The defendant then introduced in evidence the whole of the statement, including the portion above set out. The assignment is overruled.

We are of the opinion that plaintiff in error's assignments present no reversible errors, and the judgment of the district court is affirmed.

Affirmed.

MAYES v. MILLER et al.

(Court of Civil Appeals of Texas. April 7, 1909.)

VENDOR AND PURCHASER (§ 85*)—CONSIDERATION—AGREEMENT TO RESCIND.

A deed to land purchased under an agreement to refund the money if the vendor does not dig an oil well on neighboring land is a sufficient consideration for the promise of the vendor to refund the purchase money, and a rescission of the contract of sale and a transfer of the property back to the vendor constitutes

a sufficient consideration for a promise to return the purchase money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 141-143; Dec. Dig. § 85.*]

Appeal from Harris County Court; A. E. Amerman, Judge.

Action by W. H. Miller and another against A. B. Mayes. Judgment for plaintiffs, and defendant appeals. Affirmed.

Masterson, Atkinson & Masterson, for appellant. Baker, Botts, Parker & Garwood, for appellees.

FLY, J. This is a suit instituted by W. H. Miller and T. T. Cotman to recover of appellant the sum of \$625, alleged to be due by appellant on a written promise to pay the same. The cause was tried by the court, and judgment rendered in favor of appellees.

It appears that appellant, for himself and others, sold to appellees 2½ acres of land in Matagorda county for \$625, which was paid by them. It appears from letters written by appellant that he had promised to dig an oil well on land near that he sold to appellees, and that if he did not he would refund the purchase money. He did not have the well dug, and agreed, if appellees would send a deed to the land and a check for the amount, that he would pay it. The deed and check were sent, and appellant failed to pay the amount due by him on his promise. He admits that he made the promise to refund the money, but did not do so because he had failed to sell the land to another party.

The deed to the land was a sufficient consideration for the promise to refund the money. The land may not have been worth the amount appellant agreed to pay for it, but that would not destroy the consideration. Appellant got that amount for the land, and cannot avoid his repurchase on the ground of a want of consideration. A rescission of the contract of sale and a transfer of the property back to appellant constituted a sufficient consideration for the return of the purchase money, when it was voluntarily agreed to by appellant. It would not matter what appellees' reason was for desiring to reconvey the property to appellant. The latter agreed to the reconveyance, and agreed to repay the money they had paid him for the land.

The judgment is affirmed.

LEWRIGHT et al. v. TRAVIS COUNTY.

(Court of Civil Appeals of Texas. March 24, 1909. Rehearing Denied April 21, 1909.)

PUBLIC LANDS (§ 175*)—CONFLICTING SURVEYS—LANDS BELONGING TO STATES—TEXAS.

Rev. St. 1896, art. 4269, provides that the surveys of all county school lands heretofore

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made, and upon which patents have issued, are declared valid, and the titles to the lands within their lines are vested in the counties for which the same were made, and in all such surveys the calls for distance shall control calls for natural objects when the calls for distance will give the quantity of land intended to be included in the survey and the calls for natural objects will not. *Held*, that the boundaries of the survey of school land will be determined by the field notes, and the calls of the survey will not be affected by a mistake of the surveyor, and the ordinary rules of ascertaining the effect of calls will not affect the right of the county to all of the lands embraced in any of the calls in the field notes which can be ascertained with certainty, although the survey so constructed will contain an excess, and it is permissible in ascertaining the boundaries of school lands to run a reverse course from that stated in the field notes, where such a method recognizes the controlling influence of the only calls the identity of which is clearly established.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 555-570; Dec. Dig. § 175.*]

Appeal from District Court, Travis County; Chas. A. Wilcox, Judge.

Action by J. M. Lewright and others against Travis County. Judgment for defendant, and plaintiffs appeal. Affirmed.

James & Yelser, for appellants. John W. Brady, Co. Atty., D. W. Doom, and D. H. Doom, for appellee.

FISHER, C. J. This is an action of trespass to try title, brought by the appellants against Travis county to recover certain lands described in plaintiffs' petition.

The defendant answered, claiming title to a part of the land described in the plaintiffs' petition, and disclaimed as to other lands not contained within the boundaries of the Travis county school survey. The answer in this respect is as follows: "That the defendant disclaims all interest in or claim to any part of the land sued for by the plaintiffs, except that part included in all that certain tract of land lying and being situated in the county of Throckmorton (formerly in the county of Cooke), in the state of Texas, viz.: Four leagues of land, situated and described as follows: In Cooke county on the Salt fork of the Brazos about 28 miles north 60° west of Fort Belknap, by virtue of an act of Congress of the late republic of Texas, entitled an act appropriating certain lands for the establishment of a general system of education, approved January 26, 1839, beginning 1,944 varas north of the southwest corner of a one-third league survey No. 9, a stake from which a mesquite marked X bears south 44½° W., 28 varas, another forked marked X bears S. 12° W., 44 vrs., thence west 10,000 varas to a pile of stones, from which a mesquite marked X bears N. 64° W., 35 vrs., another marked X bears S. 73° W., 100 varas, a round mound bears S. 18½° E., 2,200 varas; thence south 10,000 varas to a stake in prairie, from which a mesquite marked X bears S. 40° E., 40 varas and an-

other forked marked X bears S. 61½° W., 40 varas. Thence east 10,000 varas to a stake on the north boundary line of Colony survey. Thence north at 1,283 varas pass the southwest corner of survey No. 7 of 1,280 acres, 10,000 varas, to the place of beginning. That as to all of the said land sued for included in the said four leagues of land hereinbefore described, the said defendant denies all and singular the allegations contained in the said amended original petition, and says that it is not guilty of the said supposed wrongs, injuries, and trespasses, or any of them, laid to its charge in the said amended original petition, as therein stated, and of this it puts itself upon the country and prays judgment."

This survey is known as the Travis county school land, title to which is alleged and claimed by the defendant. This land was surveyed according to the field notes as stated in defendant's answer for Travis county in 1854, and a patent therefor, as described in the field notes, was issued on the 16th day of October, 1856. The lands claimed by the defendant were surveyed in 1888, and patent issued in that year. The plaintiffs' surveys called to commence at the southwest corner or the south line of the Travis county school land. It is conceded by both parties, and the case was so treated in the trial court, that the question in controversy, and the one to be determined, is the whereabouts of the true location of the south line of the Travis county school land. Plaintiffs contend that this south line should be located running east from the southwest corner of the Travis county school lands where this corner would be established by course and distance called for in the field notes from the northwest corner of the survey. There can be no question but what this northwest corner is well established, and its whereabouts can be ascertained from the round mound called for in the field notes. The defendant contends that the south line of the Travis county school land should be established to coincide with the calls in the field notes for the north boundary line of the Colony surveys. It is a fact well established, and about which there is no controversy, that the Colony lines called for are well established and can be found upon the ground. The verdict of the jury was general in favor of the defendant, and upon that verdict the court rendered judgment establishing the south line of the Travis county school land in accordance with the contention of the appellee. If the judgment of the court can be maintained in so establishing the south line, the appellee is entitled to recover all of the land sued for by the plaintiffs, except that to which the disclaimer applies.

The assignments of error raise a number of interesting questions which the view that we take of the case renders it unnecessary

ry that we should decide. We think the disposition of this case is controlled by article 4269 of the Revised Statutes of 1895 as construed and applied in *Steward v. Coleman County*, 95 Tex. 446, 67 S. W. 1016, which law was in force at the time the appellants' location and surveys were made. The case cited was before this court and will be found reported in 65 S. W. 384. It involved the location of the lines of a part of the Coleman county school lands. Our opinion, which is referred to as possibly stating the field notes more fully than the opinion of the Supreme Court, shows that the beginning corner of that survey was the northwest corner of the Samuel T. Belt, and called for course and distance for a certain point, and also for the north line of the Montez survey and of other surveys. The distance called for did not reach the lines of the other surveys called for and fell short about 400 varas. A strip of that width was subsequently located and claimed by the appellants Steward and others; he contending that the calls for course and distance should control over the lines of the other surveys called for. The only corner actually established on the ground was the beginning corner, and from that point the calls and surveys were made by projection. Steward recovered in the court below, but we reversed and rendered judgment in favor of Coleman county, holding to the effect that the calls for the other surveys would control the calls for course and distance, and that the south line of the Coleman surveys should be established on the north line of the surveys called for, thereby holding that there was no vacancy between the Coleman county surveys and that tier of surveys. Our judgment of rendition in favor of the county was based upon the superiority of the calls of the river surveys, and we determined the question as we would any ordinary case of boundary where county school lands were not involved. The Supreme Court granted a writ of error and affirmed the judgment of this court, but upon a different ground indicated in its opinion, wherein they applied the article of the statute referred to. So much of the opinion that relates to this question is as follows:

"As before stated, the writ of error was granted, because it was thought there was error in the holding of the Court of Civil Appeals that, upon the uncontradicted facts, the land in question was included in the plaintiff's survey, and in the rendition of judgment for plaintiff. We have concluded that the judgment was justified by the provisions of the statute (article 4269, Rev. St. 1895) which escaped our attention when we granted the writ; and we may add that, when the facts are fully understood, it is by no means clear that, without such a statute, the judgment would be wrong. The provision is as follows: 'Art. 4269. The surveys of all county school lands heretofore made,

either actually on the ground or by protraction, and returned into the General Land Office according to law, and upon which patents have issued, are hereby declared valid surveys, and the titles to the lands included within the lines of said surveys, as returned to the General Land Office, are hereby vested in the counties for which the same were made; and in all such surveys the calls for distance shall have precedence and control calls for rivers or natural objects when the call for distance will give the quantity of land intended to be included in the survey and the calls for natural objects or rivers will not; provided, this law shall not divest any vested right.'

"To show its application a general statement of a rather complicated state of facts is necessary. Coleman county school survey No. 91, intended by the surveyor to embrace a league, was made upon a body of vacant land lying between two tiers of older surveys; those on the south bordering on the Colorado river and being separated from those on the north by the intervening vacancy. There was no actual survey of the lines of survey No. 91 beyond the finding of one of the corners of the northern tier of surveys. Beginning at this corner, the surveyor merely platted in between the older surveys the land which he intended to appropriate, calling for their lines and corners and giving the courses and distances which he believed would reach them. The field notes and a sketch, showing this action and representing the land taken up by him as occupying the whole of the space between the northern and southern surveys, he returned to the land office, and a patent was issued giving the field notes so returned. The evidence shows that the distances from the northern surveys to those on the south, as given in these field notes, do not reach the northern boundaries of the latter, and that, if these calls for distance are to control in locating the southern boundary of survey No. 91, it does not include most of the land in controversy; while, if the calls for the lines of the river surveys are to govern, all of the space between the older surveys is taken up. The evidence further shows that the surveyor before platting survey No. 91, in order to ascertain the distances between the northern and southern surveys, ran a line between two of them west of the point where he afterwards fixed the western boundary of the league in question. In so doing he started at a point which he supposed to be the northeast corner of one of the river surveys, but which was in fact 401 varas north of the true corner. In extending his line north from this point, he located, as he supposed, the northwest corner of that one of the southern surveys which at this place bordered on the vacant tract, and there erected a mound for the corner of the two. It thus resulted that

this corner was fixed 401 varas too far north, and the vacant tract was thus assumed to be too narrow. The line thus run on the ground was not made one of the lines of survey No. 91, nor are any of the corners which the surveyor thus mistakenly established called for or referred to in the field notes of that survey, and his error is no way indicated in his return to the land office. The only influence which the running of this preliminary line had upon the subsequent work of platting survey No. 91 was to cause the surveyor to mistake the width of the vacancy and to include in the league survey an excess of about 1,500 acres, if his calls for the lines of the river surveys are regarded.

"We are relieved by the statute of the necessity of determining what, upon general principles, should be the proper construction of this office work. The language used in the statute vesting in the counties 'the titles to the lands included within the lines of said surveys,' as returned to the General Land Office,' applies exactly to the question before us. By the description returned to the land office, the lines of this survey are the same as the lines of the older grants. There is nothing in this description to raise any question as to the mistake of the surveyor or to suggest any other lines than those expressly given. The land included in these lines appears on the face of the field notes to be all that lies between the two tiers of surveys called for, and the express language of the statute governs. The fact that the rule laid down is made to apply to surveys made actually on the ground, as well as to those made by protraction, shows that the Legislature intended to prescribe one broad general rule to the construction of grants of school lands to counties, and that rule is that the land included in the patents shall be held to be that included in the lines returned to the land office, without regard to mistakes in surveying, such as that which occurred here. The case is a good example of the application of the statute. Lines are given which embrace all of the land between two sets of surveys, but the surveyor, by a mistake not shown by his return, has erroneously stated the distance, and the lines given in the land office are made to conclusively control, whether the distance and quantity are as the surveyor intended or not. No other application of the statute will give complete effect to its language. The final provision strengthens this construction, for it expressly makes the distances called for govern as against natural objects, where necessary to include the quantity, which is a precautionary provision against the effect the first part of the article would otherwise have. It will not do to say that the language, 'lands included within the lines as returned to the General Land Office,' means merely such lands as are found on a trial of the question of

boundary to be so included, for that construction would make this provision wholly useless. The evident meaning is the lines as stated on the face of the description filed in the land office.

"No right which vested prior to the passage of the statute is shown by defendants, and the subject was entirely within the control of the Legislature. The judgment is correct."

This construction of the statute means that the boundaries of the survey will be determined by the field notes returned to the land office, and that the calls of the survey will not be affected by a mistake of the surveyor, and the ordinary rules of ascertaining and determining the effect of calls and establishing boundaries will not affect the right of the county to all of the lands embraced in any of the calls in the field notes which can be ascertained with any degree of certainty, although the survey so constructed will contain an excess. The object of the statute was to appropriate to the benefit of the county all of the lands included within those calls in the field notes so returned to the land office which were most favorable to the county, provided they could be ascertained and identified, although such calls might be inconsistent with some other calls, such, for instance, as was the case in the Coleman county lands, where the calls for distance were made to yield to the calls for lines of other surveys. In other words, in its final analysis, this decision means that, in ascertaining the boundaries of county school lands, such construction will be given to the field notes so returned to the land office as to give to the county the benefit of those calls that are most favorable to its interests, when they can be ascertained with a reasonable degree of certainty, although by so doing some other call may be displaced which might, under the ordinary rules of determining the superiority of calls, be given effect and made to control in cases where the lines of county school lands were not involved.

There is enough similarity between the facts of this case and those stated in the opinion cited as to make the principle upon which that case is based applicable here. There the county relied upon the calls for the lines of other surveys over a call for course and distance from an established corner, although the effect would be to give the county a large excess, and in that case the field notes so returned contained the calls for the lines of other surveys and also the calls for course and distance from a known corner. This latter call did not reach the line of the surveys called for. This statement shows the similarity between the calls in the field notes set out in that case, and those set out in the Travis county survey. By force of the statute referred to, the court in the Coleman County Case held the boundaries of the survey would extend to

the lines of the surveys called for. In this case it appears that the northwest corner of the Travis county school land is established a certain distance from the round mound called for in the field notes returned to the land office. The court below, as well as the parties to this appeal, treat that corner as ascertained by the surveyor Howerin to be well established and located where he fixed it, running course and distance from the round mound as called for. From that point the west line of the survey is constructed by course and distance south 10,000 varas for the southwest corner. Bearing trees are called for at this point, but none are found. From thence the call is for 10,000 varas east for the Colony line. This latter line is well established, and there is no controversy as to its location. From the southeast corner the call is north to the northeast corner 10,000 varas to the place of beginning. The northeast corner is not found on the ground.

The plaintiffs contend: That the survey should be constructed by running from the northwest corner south the course and distance called for, and then run east the course and distance called, so as to establish the south line of the survey, and claim that the call for the Colony line by the surveyor was a mistake; that in constructing the survey in this way Travis county will get the quantity of land she is entitled to; that to extend the survey to the Colony line will include a large excess. The judgment rendered by the trial court in establishing the south line of the Travis county school land ignored the call for distance, as claimed by the plaintiffs, and extended the survey to the line of the Colony surveys, where the judgment establishes the south line to be. While the Colony line does not extend west the full distance of the Travis county land, it does extend west some considerable distance from where the east line of the Travis county school land would intersect it, if extended to it, as called for; and where this point of intersection should be can be readily determined by commencing at the fixed and ascertained northwest corner of the survey and running east 10,000 varas for the northeast corner, thence south the course called for in order to reach the Colony line, and the point on the line so reached would be the southeast corner of the survey, thence west along the Colony line for its distance and therefrom extending the line the distance called for, and thence north to the northwest corner of the survey. This, it is true, would construct the survey by running a reverse course from that stated in the field notes, but a resort to this method would close the survey, and would be in recognition of the importance and controlling influence of the only two calls which cannot well be questioned, and the identity of which

is clearly established. These calls for the northwest corner and the Colony line on the south, if adhered to, fix definite points of the survey which includes all of the land lying between them, and they fix the measure of the land the county is entitled to, although the result would be to displace a conflicting call for distance. Such is the effect of the decision of the Supreme Court in the Coleman County Case.

We do not think that this case can be distinguished from the one cited on the ground merely that there is evidence in the record to the effect that the surveyor actually ran the west line and established the southwest corner the course and distance called for from the northwest corner. The discussion of the statute in the opinion in the case cited, and as we construed it, in effect disposes of this question, for there it is held that the county is to get the benefit of calls in the field notes that can be definitely ascertained, although to do so would be to ignore and disregard some other calls. Notwithstanding what has been said in *Ayers v. Lancaster*, 64 Tex. 312, and the suggestion in appellants' brief, we see no good reason why this survey could not be constructed by reversing the course from the northwest corner.

If we are correct in the views expressed, no other judgment was possible than the one rendered by the trial court. Therefore it is unnecessary to consider the errors assigned.

Judgment affirmed.

TEXAS & P. RY. CO. v. BECKWORTH et al.
(Court of Civil Appeals of Texas. April 10, 1909.)

REMOVAL OF CAUSES (§ 19*)—FEDERAL QUESTION—JOINT DEFENDANTS.

An action brought against a corporation created under an act of Congress and an employé of such corporation to establish a joint liability for the same wrong is, as to such individual defendant as well as to the corporation, an action arising under the federal Constitution or laws, within Act Aug. 13, 1888, c. 860, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), and is therefore removable to a federal court on petition of both defendants.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-53; Dec. Dig. § 19.*]

Appeal from District Court, Van Zandt County; R. W. Simpson, Judge.

Action by M. M. Beckworth, for herself and another, against the Texas & Pacific Railway Company and another. From a judgment for plaintiffs, defendant railway company appeals. Reversed.

W. L. Hall, Greer & Sanders, and J. A. Germany, for appellant.

TALBOT, J. This suit was instituted August 23, 1907, by Mrs. M. M. Beckworth, for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

herself and minor son, John Beckworth, against the Texas & Pacific Railway Company and T. M. Watts, jointly, to recover damages in the sum of \$40,000 alleged to have been sustained on account of the negligent killing of J. P. Beckworth, husband of plaintiff and father of her said minor son, by said defendant in the operation of one of the railway company's passenger trains within the limits of the city of Grand Saline, Van Zandt county, Tex., on May 9, 1907. The petition avers that the plaintiff and her said son are resident citizens of said Van Zandt county and state of Texas; that the defendant the Texas & Pacific Railway Company is duly incorporated and has a local agent in said county, namely, W. P. Gibson; and that the defendant T. M. Watts resides in Harrison county, state of Texas, and was the engineer in charge of and operating the locomotive engine drawing the train that struck and killed the said J. P. Beckworth, deceased. The Texas & Pacific Railway Company, joined by the defendant T. M. Watts, in due time filed its petition and bond, which bond was approved by the court, for the removal of the cause to the federal court for the Eastern district of Texas, on the ground that it was chartered by an act of Congress. Upon the presentation of the petition for removal, it was refused, for the reason, as shown by the judgment of the court, that the court had jurisdiction of the defendant Watts, and the case was not therefore removable. The case was then tried on its merits, and judgment rendered in favor of appellees for the sum of \$4,000, from which this appeal is prosecuted.

The first assignment of error questions the correctness of the court's action in refusing to grant appellant's application for removal. This assignment must be sustained. In the recent decision of the Supreme Court of the United States, in the matter of the application of Mary Dunn et al. to that court for a writ of mandamus against the District Judge of the United States for the Northern District of Texas and the Circuit Court of the United States for that district, commanding said judge and said court to remand a certain action at law, wherein the said Mary Dunn et al. were plaintiffs and the Texas & Pacific Railway Company was defendant, to the state court (212 U. S. 374, 29 Sup. Ct. 290, 53 L. Ed. —), it is held that, where the individual defendant joined in the application for removal, an action brought against a corporation created by an act of Congress and against an employé of such corporation to establish a joint liability for the same wrong done by both, is as to such individual defendant, as well as to the corporation, a suit arising under the federal Constitution or laws, within the meaning of the removal provisions of Act Aug. 13, 1888, c. 866, 25

Stat. 483 (U. S. Comp. St. 1901, p. 506), and is therefore removable to the federal court. There were two employés of the railway company joined with it as defendants in the case sought to be remanded to the state court by Mrs. Dunn et al., and in passing upon their application for mandamus commanding such action to be taken the Supreme Court of the United States said: "A suit against the company would, as we have seen, be one arising under the Constitution or laws of the United States; and as the individual defendants resided in the state of Texas (the same state as the plaintiffs) the ground of jurisdiction of the federal court as to them must be that, by joining all as defendants in a joint action for the same wrong done by all of them, the plaintiffs thereby made the suit against the individual defendants also one which arises under the Constitution or laws of the United States."

The Supreme Court of this state, in the cases of *Eastin v. Texas & Pacific Railway Company*, 99 Tex. 654, 92 S. W. 838, and *Texas & Pacific Railway Company v. Huber*, 100 Tex. 1, 92 S. W. 832, decided prior to the Dunn Case, seems to have reached a different conclusion upon the question; but, as the Supreme Court of the United States is the court of last resort in cases of this character, we presume the Supreme Court of Texas will follow its decision.

It becomes unnecessary to consider the other assignments of error presented by the appellant.

For the error in refusing to grant appellant's application to remove the cause to the federal court, the judgment is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. THOMAS.

(Court of Civil Appeals of Texas. April 9, 1909.)

APPEAL AND ERROR (§ 1013*)—VERDICT—EXCESSIVENESS.

Where, in an action for injuries to cattle by rough handling and delay, there was evidence on an issue of delay and loss of market, in addition to the loss from shrinkage, etc., that would have justified a finding for more than the court allowed, a judgment will not be set aside on appeal on the theory that the evidence failed to show any damage sustained, except on account of the stale appearance of the cattle and shrinkage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3993-3995; Dec. Dig. § 1013.*]

Appeal from Llano County Court; A. H. Wilbern, Judge.

Action by J. I. Thomas against the Gulf, Colorado & Santa Fé Railway Company and another. Judgment for plaintiff against the Gulf, Colorado & Santa Fé Railway Company alone, and it appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

S. R. Fisher, J. H. Tallichet, S. W. Fisher, and Terry, Cavin & Mills, for appellant. McLean & Spears, for appellee.

RICE, J. This suit was brought by appellee against the appellant and the Houston & Texas Central Railroad Company to recover \$250 damages, alleged to have been sustained by him on account of rough handling and delay to a shipment of 30 head of cattle from Llano to Ft. Worth on the 19th of February, 1907, over said lines of railway. Upon trial before the court without a jury, judgment was rendered in favor of the Houston & Texas Central Railroad Company, but against appellant for the sum of \$100, together with interest and costs of suit, from which judgment this appeal is prosecuted.

The only assignment of error presented urges that the judgment of the court is excessive and not warranted by the evidence. Appellant admits, however, that the judgment would have been properly rendered against it for \$76.07½, with interest. The basis of its contention is that the evidence failed to show any damage sustained by plaintiff, except 25 cents per hundredweight decline in value on account of stale appearance of cattle and 25 pounds per head as shrinkage. It must be observed, however, that plaintiff also sued to recover the difference in value of this shipment on account of the delay, whereby it failed to reach Ft. Worth in time for the market of the 20th of February. The evidence shows that this shipment, if promptly forwarded, ought to have reached Ft. Worth in time for the market of the 20th, but on account of the negligence of appellant failed to do so. While there is a conflict in the testimony as to the market price between the 20th and 21st of February, still there is evidence showing that, if this shipment had reached Ft. Worth in time to have been sold on the market of the 20th, they would have brought 25 cents per hundredweight more than they did on the market of the 21st. Taking this as true, the trial court would have been justified in rendering judgment in favor of plaintiff for more than it did, and, the court having determined this issue in favor of appellee, we are not disposed to disturb its judgment.

Finding no error in the record, the judgment of the court below is affirmed.

Affirmed.

PARLIN & ORENDORFF CO. v. GLOVER et al.

(Court of Civil Appeals of Texas. April 7, 1909.)

1. PLEADING (§ 380*) — ISSUES, PROOF, AND VARIANCE.

In an action to recover possession of wagons, obtained by defendants from a third

person, defendants alleged that they were innocent purchasers, and had no notice of any fraud as between such third person and plaintiff. Plaintiff alleged that such third person was indebted to defendants for money loaned under an agreement that he should establish a mercantile business, in which defendants were to become part owners, and plaintiff also filed a general denial of defendants' plea of innocent purchasers. *Held*, that evidence was admissible to show that such third person and defendants were in fact partners in such mercantile business, and the evidence was not rendered inadmissible by plaintiff's allegation as to the contemplated partnership, as it is permitted by statute to file inconsistent pleas, without having those pleas limit each other, and the evidence was also admissible under the general denial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1239; Dec. Dig. § 380.*]

2. TRIAL (§ 244*) — INSTRUCTIONS — UNDUE PROMINENCE OF PARTICULAR FACT.

In an action to recover possession of wagons, obtained by defendants from a third person, an instruction that, if defendants knew, before the purchase of the stock of such third person, that he owed plaintiff for the wagons in controversy, this knowledge alone is not sufficient to put defendants on notice as to any fraud of such third person in obtaining the wagons, is objectionable, as giving undue prominence to a particular fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

3. TRIAL (§ 194*) — INSTRUCTIONS.

The instruction was erroneous as on the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 448-454, 456-466; Dec. Dig. § 194.*]

4. TRIAL (§ 240*) — INSTRUCTIONS.

The instruction was erroneous as argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.*]

Error from District Court, Hays County; L. W. Moore, Judge.

Action by the Parlin & Orendorff Company against F. D. Glover and another. Judgment for defendants, and plaintiff prosecutes a writ of error. Reversed and remanded.

See, also, 99 S. W. 592.

Will G. Barber and U. F. Short, for plaintiff in error. A. B. Storey and R. E. McKie, for defendants in error.

KEY, J. This is a suit for the recovery of 19 wagons of the value of \$1,140, charged by the plaintiff to have been obtained from it by one H. A. McMeans by fraud, and under such circumstances as that the purported sale from the plaintiff to McMeans did not vest in the latter right to the property, and left the superior title in the plaintiff. The plaintiff charged that the defendants had attempted to purchase the wagons from McMeans, but had acquired no title thereto. At the instance of the plaintiff a writ of sequestration was issued, and the wagons seized by the sheriff under that writ, and delivered to the plaintiff under a replevin bond executed by it. The defendants filed separate answers pre-

senting the same defenses and tendering similar issues, including a general denial, several special exceptions, and a special plea alleging that they were innocent purchasers, because they had bought from McMeans his entire stock of merchandise, including the wagons in controversy, and had paid for the same by canceling McMeans' indebtedness to them, amounting to \$7,500, and by assuming and obligating themselves to pay, to other creditors of McMeans, certain debts amounting to \$2,636.10, all of which they alleged was done in good faith, and without notice that the wagons had been obtained from the plaintiff by fraud. They also filed a cross-action, seeking to recover upon the replevin bond. Plaintiff filed a supplemental petition, containing, among other matters, a general denial of the defendants' plea of innocent purchasers. There was a jury trial, which resulted in a verdict and judgment against the plaintiff upon its suit, and in favor of the defendants against the plaintiff, and the sureties upon its indemnity bond, for \$1,140, which sum the judgment divides equally between the two defendants. The plaintiff has brought the case to this court by writ of error, and has presented it upon several assignments of error, the most of which will be overruled without discussion.

We sustain the ninth and tenth assignments of error, which complain of the action of the court in excluding certain testimony offered by the plaintiffs, tending to show that McMeans and the defendants were in fact partners in the mercantile business conducted in the name of McMeans. The excluded evidence was pertinent and admissible upon the issue of innocent purchaser. In their answer the defendants averred that, even if McMeans had been guilty of such fraud as would, as between him and the plaintiff, vitiate his title to the wagons, still the defendants were innocent purchasers without notice, and had therefore acquired title to the property as against the plaintiff. The excluded testimony was pertinent upon the question of notice, because if, in fact, the defendants were partners with McMeans, then his knowledge of the fraud will be imputed to the defendants, and constitute notice to them. *Palmo v. Slayden*, 100 Tex. 13, 92 S. W. 798; *Dockery v. Faulkner* (Tex. Civ. App.) 101 S. W. 501; *Kneisley Lumber Co. v. Stoddard & Co.*, 131 Mo. App. 15, 109 S. W. 840. Counsel for defendants contend that this evidence was not admissible, because the plaintiff alleged in its petition that McMeans was engaged in the mercantile business, and was indebted to the defendants in the sum of \$7,500 for borrowed money, and also alleged that the money referred to was lent to McMeans upon an agreement that he should establish a mercantile business in the town of San Marcos, and, when the same was fully established and proven to be safe, then the defendants would become part owners of it,

and would share in the profits and losses. We do not hold that the testimony was admissible in support of the plaintiff's case as set out in its petition, but it was admissible upon the issue of want of notice set up in the defendants' plea of purchase in good faith, all of which was denied by the plaintiff's supplemental petition. As a matter of fact it was not alleged in the plaintiff's petition that the defendants and McMeans were not partners at the time McMeans perpetrated the alleged fraud; but, even if it had been, such allegation would not have cut off plaintiff's right to prove that they were partners, in order to break down the plea of innocent purchasers asserted by the defendants. We have a statute which permits parties to file inconsistent pleas; and, when that course is pursued, such pleas do not limit or otherwise affect each other. *Duncan v. Magette*, 23 Tex. 245; *Bauman v. Chambers*, 91 Tex. 108, 41 S. W. 471. If, in response to the plea of innocent purchasers, the plaintiff had alleged that the defendants were in partnership with McMeans at the time he perpetrated the fraud upon the plaintiff, and therefore had notice of such fraud, such plea could not have been objected to because of its inconsistency with the former plea of the plaintiff. Now the only difference is that the defendants alleged that they bought the property from McMeans without notice of the fraud, and the plaintiff in replication filed a general denial. The general denial was all that was necessary to render admissible any testimony which would tend to show that the defendants had notice of the fraud. Such being the case, the excluded testimony was admissible, regardless of the averments contained in the plaintiff's petition.

At the request of the defendants the court instructed the jury as follows: "If you find from the evidence that Crews and Glover knew, before the purchase of McMeans' stock, that McMeans owed Parlin & Orendorff Company for the wagons in controversy, you are instructed that this knowledge alone is not such knowledge as would put them upon notice or inquiry as to any fraud upon the part of McMeans in obtaining these wagons." The giving of this charge is assigned as error, the contention being that in so doing the court gave undue prominence to a particular fact, which action of the court was calculated to mislead the jury. We sustain that contention, and also hold that the charge was argumentative and upon the weight of testimony. The court had already sufficiently instructed the jury as to the rules of law by which they were to be guided in their deliberations; and to single out any particular fact and tell the jury that it was, or was not, sufficient proof upon a particular issue was not only argumentative, but was giving undue prominence to that fact, and invading the province of the jury by indicating to them the judge's opinion as to the effect to be given certain

testimony. Tested by the rules of logic and reason, it may be proper to say that knowledge by the defendants of McMeans' indebtedness for the wagons, considered alone, was not sufficient to put them upon notice or inquiry as to the fraud practiced by McMeans in obtaining the property; but rules of logic and reason are not necessarily rules of law that should be given in charge to a jury. In determining the question of notice it was the duty of the jury, after hearing argument in behalf of both parties, and without any aid or suggestion from the court other than had already been given in the charge, to weigh and determine the force of all the testimony bearing on that point; and the court had no more right to single out the particular fact referred to and comment upon it than it had to single out and comment upon any other fact bearing upon that issue. *G., C. & S. F. Ry. Co. v. Harriett*, 80 Tex. 73, 15 S. W. 556; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705; *Medlin v. Wilkins*, 60 Tex. 409; *G., H. & S. A. Ry. Co. v. Kutac*, 76 Tex. 473, 13 S. W. 327; *Pan Handle National Bank v. Emery*, 78 Tex. 498, 15 S. W. 23.

Error is addressed to the action of the court in overruling a special exception to the defendants' plea of innocent purchasers, wherein it was alleged that, as a consideration for the purchase of McMeans' stock of merchandise, including the wagons here in controversy, the defendants obligated themselves to pay debts owing by McMeans in excess of the value of the wagons; the basis of the exception being that the plea did not state the names of such other creditors, nor the amounts of their respective debts. The record shows that the omission complained of can be readily supplied; and, without making a distinct ruling on the question, we suggest that the defendants amend their answer in such manner as to obviate the objection.

On all the other assignments we rule in favor of defendants in error.

For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

QUINN v. GLENN LUMBER CO.

(Court of Civil Appeals of Texas. March 20, 1909. Rehearing Denied April 22, 1909.)

1. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DEFECTS.

An employé in a sawmill was injured while adjusting a guide pin of a circular saw, by the slipping of the wrench used to tighten the pin. The wrench was worn, and loosely fitted the head of the pin, which was also worn, both of which facts he knew. He was an experienced man, and was familiar with the tightening of the guide pin. He voluntarily continued to work with the defective appliances. *Held*, that

he assumed the risk as a matter of law, precluding a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

2. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé who, with actual knowledge of the defective condition of the appliances furnished him, and with experience, capacity, and opportunity to appreciate the danger, and who without protest voluntarily remains in the service, and attempts to use the appliances, assumes the risk, and cannot recover for an injury resulting therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

3. MASTER AND SERVANT (§ 201*)—INJURY TO SERVANT—PROXIMATE CAUSE.

An employé in a sawmill was injured while adjusting a guide pin of a circular saw, by the slipping of the wrench used to tighten the pin. The wrench was worn, and loosely fitted the head of the pin, which was also worn. A co-employé had put cloth in the threads of the guide pin to hold it more securely, and the employé put a severer strain on the wrench than ordinary. *Held*, that the act of the co-employé was not the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

4. MASTER AND SERVANT (§ 189*)—FELLOW SERVANTS—EVIDENCE.

Mere proof that an employé was a foreman, unaccompanied by any proof that he was deputed by the employer to perform the personal and nondelegable duties of the employer, did not show that the employé was a vice principal for whose acts the employer was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 189.*]

5. MASTER AND SERVANT (§ 180*)—FELLOW SERVANTS—STATUTES.

The statute on the subject of fellow servants, relating to employes in the service of railway companies, does not apply to the case of an injury of a sawmill employé by the act of a co-employé.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 180.*]

Appeal from District Court, Marion County; P. A. Turner, Judge.

Action by B. C. Quinn against the Glenn Lumber Company. From a judgment for defendant, plaintiff appeals. *Affirmed*.

Appellant was an employé of the appellee, engaged in the performance of his duties in operating a circular saw in its sawmill, when he received his injuries. The saw ran between two guide pins, which held it true to its course in its revolutions, so that the lumber would be cut into boards of uniform thickness. One of the guide pins was stationary, and the other, which is the one in controversy, was adjustable, and had to be tightened as occasion required, and was regulated by the application of a monkey-wrench to the corners of the head of the guide pin. It was appellant's duty to tighten the guide pin. The monkey-wrench furnished appellant for this purpose by the appellee was of one piece, and straight, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made of flat iron, was nonadjustable, and its inner jaws, at the time of the injury, were considerably worn and stretched, and, because of such present condition, "fit the head of the pin very loose." Appellant had used this wrench frequently before, and several times during the day he was injured, and fully knew its condition and defects, and fully knew, before the time of his injury, and at the time of his injury, that it, as he says, "fit the head of the pin very loose, very loose," and fully knew the danger to his hand before the saw if the monkey-wrench should slip from the bolt. The corners of the head of the guide pin, the object upon which the monkey-wrench was used, were, as appellant says, "worn considerably," and he knew of such defect in the corners of the head of the guide pin, and it was plainly open and exposed to his view. He says, speaking of the corners of the head of the guide pin, "I had tightened and adjusted it on this day, before this particular occasion." On the late afternoon of the day appellant was injured the guide pin needed tightening, and he undertook to do it, and, in attempting to turn the monkey-wrench, it slipped off the corners of the head of the guide pin, which threw his fingers in contact with the revolving saw, whereby he was injured. The guide pin did not move. Appellant was an experienced employé at sawmills, and was familiar with the tightening of the guide pin, and fully knew the dangers attending the work before the saw. He made no complaint or protest to the use of these worn tools, but voluntarily continued in their use. Appellant's right to recover was based upon the alleged negligence of the appellee in failing to provide him, for use about the saw, a reasonably safe wrench and guide pin. Appellee answered by general denial, contributory negligence, and assumed risk. After all the evidence was heard, and it being without conflict, the trial court gave a peremptory instruction to the jury to return a verdict for the appellee.

T. W. Davidson, for appellant. W. T. Armstead, for appellee.

LEVY, J. (after stating the facts as above). It is contended by the appellant that the court erred in directing a verdict against him. We do not think the court erred. There is no contrariety of proof as to the fact that appellant, before and at the time of the injury, actually and fully knew that the monkey-wrench, the slipping of which off the corners of the head of the guide pin caused his injury, was defective and worn and dangerous for use. All the evidence agrees that the wrench was defective and dangerous for use before the saw, because, by reason of its inner jaws being worn and stretched and nonadjustable, it would fail to securely grip, and would easily slip from the head of the guide pin, the object on which

it was used, that object also being considerably worn. Appellant testified that the wrench was nonadjustable, its jaws worn and stretched, and "fit the head of the pin very loose, very loose." He had used the wrench several times during the day. All the evidence agrees, and appellant so says, that the threads of the guide pin were worn, and that its corners were "worn considerably" with respect to its squareness, and it was open and in full view to him, and he knew of its worn condition, and, as he says, "I had tightened and adjusted it on this day, before this particular occasion." All the evidence agrees that the cause of the injury to appellant was the slipping of the worn monkey-wrench off the considerably worn corners of the head of the guide pin. Appellant says: "When I got hurt, the wrench slipped over the corners of the pin." The guide pin did not move. There is not, and cannot be, any contention in the evidence that appellant was inexperienced in the use of a wrench in adjusting guide pins of the saw, for he testifies that he was an old and experienced employé at sawmills, and had worked at sawmills the same as the one in evidence, as an edgeman and extra sawyer, for 10 or 12 years, and was familiar with the tightening of the guide pin, and had been tightening the guide pin in this case, as was his duty, from November, 1906, to August, 1907. He says: "With proper tools the work is not very dangerous." The monkey-wrench and guide pin were each simple, and not complicated mechanical contrivances, and of the kind usually employed in sawmills, and in make were safe for use in the work to be performed. Their want of safety for use rested in the evidence alone of the present worn condition of the same, and such condition was actually known to him before, and at the time of, his injury. The evidence agrees that appellant made no protest to their use, knowing their condition, but, with his knowledge of their condition, and appreciating the danger of the use of them before the saw, voluntarily continued in their use. He did not, and was not required to, hurriedly use the same. The evidence being without conflict and clear, but one finding would be reasonably warranted therefrom; and, giving such finding its proper legal effect, it must be held in the case that appellant is precluded from a recovery, on the ground that, having full and actual knowledge of the worn condition of the monkey-wrench, the slipping of which caused the injury, and the corners of the head of the guide pin, on which object the wrench was used, and full opportunity and capacity to know, as he did, of their condition, and the danger of their use before the saw in such condition, before and at the time of his injury, he voluntarily assumed the risk of injury therefrom. It is a settled rule of law, not needing citation of authorities, that if the servant, after having actual knowledge

of the worn and defective condition of the appliances for his use, and experience and capacity and opportunity to know and appreciate the danger without protest, and voluntarily, remains in the service, and attempts to use the same, and is injured thereby, he assumes the risk, and cannot recover for such injury. 4 Thompson on Neg. § 4808; 1 Labatt on Master and Servant, § 263; Ry. Co. v. Somers, 78 Tex. 439, 14 S. W. 779; Green v. Cross, 79 Tex. 130, 15 S. W. 220; Ry. Co. v. Larkin, 98 Tex. 225, 82 S. W. 1027, 1 L. R. A. (N. S.) 944.

If, as shown by the evidence, Burns, a co-employé with appellant, put cloth in the threads of the guide pin to hold it more securely, and appellant, on account thereof, put a severer strain upon the monkey-wrench than he formerly used, and this strain, in connection with the defective condition of the jaws of the wrench and its hold upon the guide pin, caused the wrench to slip, he could not recover in the case. Appellant says: "As to whether I knew that he (Burns) had changed the guide pin, I didn't know to what effect. I knew he had been working on it." It was appellant's duty to fix the guide pin. It is not material in the case whether appellant knew or did not know that Burns had more securely fixed the pin by means of the cloth, as the act of Burns, in law, must in this case be held to be the act of a fellow servant, for which the appellee would not be responsible. But in this connection we think it is conclusive that the wrapping of the pin was not the immediate nor the direct and proximate cause of the injury. To hold appellee liable for the act and knowledge of Burns it should appear that he was a vice principal. This the evidence does not show, nor does it warrant the assumption that he was. The evidence in the record contains the bare proof in the statement that Burns "was filer and foreman," and, while appellant was changing the saw for another sharper, saw Burns fix the guide pin. The evidence conclusively shows that Mr. Dodd, and not Burns, was the superintending agent of the corporation, and its general manager at the mill. The bare statement in the record that Burns was a "foreman," unaccompanied by any proof that he was deputed by appellee to perform the personal and nondelegable duties of the master, would not constitute him a vice principal of the appellee for whose acts and knowledge it would, in law, be held liable. See *Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36, 79 S. W. 869, and authorities cited; *Coal Co. v. Manning*, 34 Tex. Civ. App. 322, 78 S. W. 545; *Fogarty v. Ry. Co.*, 180 Mo. 490, 79 S. W. 664.

Appellant was not a railway employé, and so the common law, and not the statute of fellow servants, would apply. See *Oil Co. v. Jonte*, 36 Tex. Civ. App. 18, 80 S. W. 847.

The case was ordered affirmed.

KRAMER v. LILLEY.

(Court of Civil Appeals of Texas. April 19, 1909.)

1. JUSTICES OF THE PEACE (§ 73*)—PRIVILEGE OF DEFENDANT—CHANGE OF VENUE.

Under Rev. St. 1895, art. 1585, subd. 8, allowing suits against nonresidents of the state to be brought in the county and precinct where plaintiff resides, and Acts 1907, 30th Leg. p. 249, c. 133, art. 1194b, providing that on sustaining a plea of privilege to be sued in another county the cause shall be transferred to the proper court, and article 1194c, providing that whenever such a plea is sustained the court shall order the venue changed to the proper court, and the clerk shall transmit the papers in the case to such court, and Rev. St. 1895, art. 1677, providing that, whenever the mode of proceeding in any case before a justice is not prescribed, it shall be that governing district and county courts, a suit on a contract for the payment of money, which does not specify the place of payment, brought in a justice court in a precinct in which plaintiff was not a resident, against a nonresident of the state, should have been transferred to the county and precinct in which plaintiff resided, on a plea of privilege, and Rev. St. 1895, art. 1585, subd. 4, permitting suits on a written contract promising performance at any particular place may be brought in the county in which contract was to be performed, has no application.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 73.*]

2. ATTACHMENT (§ 324*)—AMENDMENT OF RETURN.

Where the return on an attachment is signed by the officer as deputy constable of a certain precinct and county, and it is shown that such officer was a deputy sheriff of the county at the time, and that there was no constable in the precinct named, and that there was no city in said precinct large enough to necessitate the appointment of a deputy constable, there was no error in allowing the sheriff, whose deputy signed the return, to correct the return so as to show that the writ was executed by the officer as deputy sheriff.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 1160-1165; Dec. Dig. § 324.*]

Appeal from Liberty County Court; J. B. Simmon, Judge.

Action by V. L. Lilley against H. Kramer. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Stevens & Pickett, for appellant.

REESE, J. This suit was instituted in the justice court of precinct 6 of Liberty county by V. L. Lilley, a resident of San Jacinto county, against H. Kramer, a nonresident of the state of Texas, to recover the sum of \$104.10 alleged to be owing by defendant to plaintiff. The suit was brought upon a written contract executed by defendant and plaintiff, whereby plaintiff agreed to haul for defendant and deliver at Cleveland, in Liberty county, Tex., certain staves at an agreed price for such services, which defendant agreed to pay. Cleveland is in the precinct in which the suit was instituted. No place of payment is specified in the contract. Defendant interposed a plea of privilege,

alleging that he was a nonresident of the state of Texas, that plaintiff was not a resident of the precinct in which the suit was brought, but was a resident of San Jacinto county, and that the suit should have been brought in the precinct of plaintiff's residence. With the institution of the suit plaintiff sued out a writ of attachment, which was levied upon a lot of staves the property of defendant. The plea of privilege was overruled by the justice of the peace, and judgment rendered for plaintiff. The case was taken by appeal to the county court, where the plea of privilege supported by proof was again presented and overruled, and judgment rendered for plaintiff, from which defendant appeals. No briefs are on file for appellee.

By the first assignment of error appellant complains of the action of the court in overruling the plea of privilege. The facts on which it is based seem to be undisputed, and are as stated above. There is nothing in the contract providing for payment to be made by appellant in precinct 6, Liberty county. Nothing is said as to the place of payment of the money. That the service was to be performed by appellee in Liberty county and in that justice precinct does not affect the question; there being no contract by appellant to pay there. Subdivision 4, art. 1585, Rev. St. 1895, has no application. *Lindheim v. Muschamp*, 72 Tex. 33, 12 S. W. 125; *Mann, Mauck & Stephens v. Clapp & Brown*, 1 White & W. Civ. Cas. Ct. App. § 503; *Barker v. Foster*, 3 Willson's Civ. Cas. Ct. App. § 305; *Little v. Woodbridge*, 1 White & W. Civ. Cas. Ct. App. § 152.

We think the case comes directly within subdivision 8 of article 1585, Rev. St. 1895, which requires suits against nonresidents of the state to be brought in the county and precinct of plaintiff's residence. The plea of privilege should have been sustained, and under the provisions of articles 1194b and 1194c, c. 133, p. 249, Acts 1907, 30th Leg., the cause should have been transferred for trial to the justice court of the justice precinct of San Jacinto county in which appellee resides. Although this act does not in terms apply to justice's court, we think it does apply by virtue of article 1677, Rev. St. 1895.

The attachment sued out by appellee was executed by one T. J. Lilley, who signed his return "Deputy Constable, Precinct No. 6, Liberty County, Texas." It was shown that he was a deputy sheriff of Liberty county at the time, and that there was no constable of precinct No. 6. It was further shown that there was no city of 8,000 inhabitants in said precinct; hence no authority for the appointment of a deputy constable. Appellant made a motion to quash the levy of the attachment for want of authority in the officer to levy it. It seems clear from

the evidence that the officer was acting as deputy sheriff, and that his signature to the writ as deputy constable was a mistake. We think there was no error in allowing the sheriff, whose deputy Lilley was, to correct the return so as to show that the writ was executed by him as deputy sheriff. This, we think, the sheriff could do, and it was not essential that it be done by the deputy himself. This having been done, there was no error in overruling the motion to quash the attachment. There was some indefiniteness in the evidence as to whether Lilley was, at the time of this service deputy sheriff, but there was sufficient to authorize the court to find that he was. However, appellant having pleaded in limine his personal privilege to be sued elsewhere, which plea should have been sustained without proceeding further, on that account this action of the trial court will have to be set aside, and the case be tried de novo in the justice court to which it will be transferred.

For the error presented in the first assignment of error, the judgment is reversed, and the cause remanded to the county court, with instructions to sustain the plea of privilege of appellant and to transfer the cause for trial to the justice court of the precinct of appellee's residence, as provided by articles 1194b and 1194c, Acts 30th Leg., as found in chapter 133, p. 249, Acts 1907. The writ of attachment and other process are not affected by this reversal, but the same will stand as though issued out of the justice's court of the proper precinct.

STATE v. GULF, C. & S. F. RY. CO.

(Court of Civil Appeals of Texas. April 7, 1909.)

1. RAILROADS (§ 6*)—REGULATION—PENAL STATUTES—CONSTRUCTION.

Rev. St. 1895, art. 4571, imposing a penalty for the failure of a railroad company or its officers to furnish information required by the Railroad Commission, is highly penal and must be strictly construed.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 6.*]

2. RAILROADS (§ 9*)—REGULATION—STATUTES—CONSTRUCTION—"BLANKS."

Rev. St. 1895, art. 4571, requiring the Railroad Commission to prepare "suitable blanks" with questions eliciting information concerning railroads desired by the commission, and imposing a penalty for the failure of a railroad company or its officers to fill out and return the "blanks" or to correctly answer the questions propounded therein, imposes a penalty only when the questions propounded and the information requested on the face of the "blanks" are not answered and furnished, and orders passed by the commission requiring a railroad company to give information as to the number of freight cars handled at designated stations during specified months, and calling for information as to salaries of attorneys, etc., are not "blanks" required by the statute, and to authorize the imposition of the penalty it must appear that the commission forwarded

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to the company blanks calling for the information, and that it failed to fill up the blanks and return them to the commission.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 9.*]

Appeal from District Court, Travis County; Chas. A. Wilcox, Judge.

Action by the State of Texas against the Gulf, Colorado & Santa Fé Railway Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

This suit was instituted by the state of Texas, through her Attorney General, R. V. Davidson, the said Attorney General acting by authority and under instructions from the Railroad Commission of Texas, against the Gulf, Colorado & Santa Fé Railway Company for penalties for failure and refusal to comply with the following special orders, to wit:

"Office of Railroad Commission of Texas. Austin, Texas, July 31, 1907. Special Order: Under the authority conferred upon it by article 4571 of the Revised Statutes of Texas, it is hereby ordered by the Railroad Commission of Texas that the Gulf, Colorado & Santa Fé Railway Company be and it is hereby ordered and required to compile and file with this commission, on or before September 15, 1909, a full and complete statement in the manner and form prescribed below and showing the following information, to wit: The total number of all freight cars handled at Houston, Waco, — during the months of October, 1906, and June, 1906. State separately the number of cars originating at and forwarded from above-named stations; the number of cars received and destined to above stations; the number of passing cars delivered to and received from connecting lines. Separate statements shall be made for each station and for each month. Allison Mayfield, Chairman, L. J. Storey, O. B. Colquitt, Commissioners. Attest: E. R. McLean, Secretary."

"Office of Railroad Commission of Texas. Austin, Texas, August 1, 1907. Special Order: Under the authority conferred upon it by article 4571 of the Revised Statutes of Texas, it is hereby ordered by the Railroad Commission of Texas that the — Company be and it is hereby ordered and required to file with this commission on or before September 15, 1907, a full and complete statement showing the amounts paid and charged to 'Legal Expenses' for each year for a period of five years ending with June 30, 1907, in the manner and form prescribed below, to wit: (1) Salaries of general attorney, assistants, clerks and office expenses. (2) Actual traveling expenses of general attorney, assistants and clerks. (3) Other expenses of general attorney, assistants and clerks, giving details of each item of such expense. (4) Amount paid as fees to attorneys other than general attorneys and assistants. (5) Amount paid for court costs

and witness fees. (6) All other expenses incidental to the trial and settlement of law suits to be given in detail. (7) Amount of expenses of general attorney assistants and other employes in attendance on legislative bodies, state and national, to be stated separately, and each item of expenses to be shown in detail. (8) Amount paid as proportion of salaries of solicitors, attorneys and their assistants of owning system and holding company charged to or paid by Texas Company. (9) Amount paid as proportion of expenses of solicitors, attorneys and their assistants of owning system and holding company, to be itemized. (10) Amount paid for any other purpose, including expense of attendance on sessions of Texas Railroad Commission, sessions of Interstate Commerce Commission, donations and contributions of all kinds; these amounts to be shown in detail. Allison Mayfield, Chairman, L. J. Storey, O. B. Colquitt, Commissioners. Attest: E. R. McLean, Secretary."

"Office of the Railroad Commission of Texas. Austin, Texas, August 27, 1907. It is ordered by the Railroad Commission of Texas that the Gulf, Colorado & Santa Fé Railway Company shall file with the commission not later than October 1, 1907, a statement, the correctness of which shall be sworn to by the auditor of said railway company, showing the earnings of said company on the cotton hauled by it for the year beginning July 1, 1906, and ending with June 30, 1906, as follows: (1) The gross earnings received by said company for hauling cotton. (2) The gross earnings received by said company for hauling cotton which had origin and destination in Texas and credited to intrastate earnings. (3) The gross earnings received by said company on all cotton hauled by it under interstate or foreign bills of lading and credited to interstate earnings. (4) The gross earnings on all cotton hauled by said railway company originating in Texas under bills of lading which did not name an interstate or foreign destination, but did name destination at a point in Texas, and which earnings were credited to interstate traffic. Explanation: The amount of earnings on concentrated cotton to be included in gross earnings shall be that remaining after concentration charge adjustments have been made. Allison Mayfield, Chairman, L. J. Storey, O. B. Colquitt, Commissioners. Attest: E. R. McLean, Secretary."

In the petition of the plaintiff it was alleged that the said orders were duly and legally made and entered under the provisions of article 4571 of the Revised Statutes of 1895, and that notices thereof were duly and legally served on the defendant, but that the defendant failed and refused to comply with the terms and provisions of said orders, and failed and refused to furnish the information requested in said orders. The defend-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ant, the Gulf, Colorado & Santa Fé Railway Company, answered by a general and special exception and also by a general denial. The defendant specially excepted to the plaintiff's petition, because it was not alleged therein that the Railroad Commission ever forwarded to the defendant any blanks to be filled under the provisions of said article 4571, and because it was not alleged that the defendant ever failed or refused to fill up any blanks sent it by the Railroad Commission of Texas under the authority of said article 4571. Upon the trial of the cause, the defendant's general and special exceptions were sustained, and, the plaintiff declining to amend, the court rendered judgment dismissing the cause of action, to which judgment the plaintiff in open court excepted and gave notice of appeal to this court.

R. V. Davidson, Atty. Gen., and Jas. D. Walthall, Asst. Atty. Gen., for the State.

FISHER, J. (after stating the facts as above). Article 4571 of the statute (Rev. St. 1895), under which this suit was brought, provides that the Railroad Commission shall cause to be prepared suitable blanks, with questions calculated to elicit all information concerning railroads, and, as often as may be necessary, furnish said blanks to the railroad companies. Any railroad company receiving from the commission any such blanks shall cause said blanks to be properly filled out, so as to answer fully and correctly each question therein propounded, and in case they are unable to answer any question they shall give a satisfactory reason for their failure; and the said answers, duly sworn to by the proper officer of said company, shall be returned to said commission at its office in the city of Austin within 30 days from the receipt thereof. Subdivision 1 of this article also provides that if any officer or employé of the railway company shall fail or refuse to fill out and return any blanks, as above required, or refuse to answer any question therein propounded, etc., he shall be guilty of a misdemeanor and shall on conviction be fined, each day he shall refuse to perform such duty after the expiration of the time aforesaid, a penalty of \$500, and the commission shall cause the prosecution thereof in the proper court; and a penalty of like amount shall be recovered from the company, when it appears that such person acted in obedience to its direction, permission, or request in his failure, or evasion or refusal.

This statute in its character is highly penal, and must be strictly construed. *Schlöss v. Atchison, Topeka & Santa Fé Railway Co.*, 85 Tex. 602, 22 S. W. 1014. The appellant seeks a recovery against appellee on the ground that it failed and refused to comply

with the terms and provisions of the orders above mentioned and to furnish the information as therein requested. The statute imposes a penalty when the railway company or its officers fail or refuse to answer the questions propounded in the blanks to be furnished by the Railroad Commission. It is not alleged that such blanks were furnished, and, of course, it follows that there was no refusal to fill out the blanks and answer the questions therein propounded or furnish the information therein requested. The statute requires of the commission the duty to furnish the railway companies blanks embracing questions concerning which it desires information, and only imposes a penalty when the questions propounded and the information requested on the face of the blanks are not answered and furnished. The orders passed by the commission which required the railways to furnish the desired information could not be regarded as blanks required by the article in question. The rule of strict construction applying, there was no error in the trial court's sustaining the demurrers.

We find no error in the record, and the judgment is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS et al. v. ROGERS.

(Court of Civil Appeals of Texas. April 7, 1909.)

1. CARRIERS (§ 228*) — TRANSPORTATION OF LIVE STOCK—NEGLIGENT DELAY—EVIDENCE.

Proof that a carrier, carrying live stock under a contract containing no reference to the time of transportation nor requiring a special train, delayed the train at a station an hour and a half, and that the delay was longer than usual or necessary, does not show injury to the stock; it not being claimed that the stock remained in the cars a longer time by reason of the delay, or that there was any intention to remove the stock from the cars to feed, water, and rest.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

2. APPEAL AND ERROR (§ 1151*)—DETERMINATION—MODIFICATION—ENTRY OF PROPER JUDGMENT.

Where the evidence of the amount of damages to a shipment of live stock is uncertain, and the carrier appealing from the judgment states in its brief that the amount of damages cannot be ascertained to be more than a specified sum, the court on appeal will reform and render judgment for that amount on the shipper remitting the excess thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.*]

3. APPEAL AND ERROR (§ 1175*)—DISPOSITION OF CASE ON APPEAL.

Where the evidence was fully developed on the trial, the court on appeal from an erroneous judgment will reverse it and render a proper judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Llano County Court; A. H. Wilbern, Judge.

Action by W. J. Rogers against the Missouri, Kansas & Texas Railway Company of Texas and another. From a judgment for plaintiff, defendants appeal. Reversed and rendered in part, and conditionally affirmed in part.

See, also, 116 S. W. 624.

S. R. Fisher, J. H. Tallichet, S. W. Fisher, Baker, Botts, Parker & Garwood, and Fiset & McClendon, for appellants. McLean & Spears, for appellee.

FISHER, C. J. This is a suit by appellee, Rogers, against the Houston & Texas Central Railroad Company, the Missouri, Kansas & Texas Railway Company of Texas, and the Missouri, Kansas & Texas Railway Company, to recover damages in the sum of \$445, alleged to have been sustained to a shipment of two car loads of cattle from Llano to Kansas City on July 18, 1907. The case was tried before the court without a jury, and judgment rendered in plaintiff's favor against the Houston & Texas Central Railroad Company for \$50, with 6 per cent. interest from date of delivery of cattle and against the Missouri, Kansas & Texas Railway Companies jointly for \$300.

There is no evidence whatever in the record that would justify the judgment against the Houston & Texas Central Railroad Company. The cattle were transported by this company from Llano, Tex., to Elgin, Tex., and there delivered to its connecting carrier, the Missouri, Kansas & Texas Railway Company of Texas. It is not claimed by the appellee that there was any special contract with reference to the time of transportation of this shipment, nor that any special train was to be furnished to carry these two cars of cattle. It appears from the appellee's evidence that he understood that the cattle were to be shipped on the regular freight train that left Llano in the morning, and he knew of the run of that train, and knew that it was laid over in Austin, and knew about the time that it would reach Elgin; and it is admitted by his witness who accompanied the shipment that there was no rough handling of the cattle between those points. There was no unreasonable delay shown at Llano. It left there at the usual time in the morning, and reached Austin at the usual time in the evening, and left Austin at the usual time at night, and arrived at Elgin at the usual time, and was there delivered to its connecting line, the Missouri, Kansas & Texas. No unreasonable delay was shown in making this run. It is true, the train remained at Burnet an hour and a half, but no injury is shown from that delay. Whether it remained there longer than usual or longer than was necessary is not

made to appear; but, assuming that the train did remain there a longer time than necessary, no injury is shown from this fact, because it is not claimed that the cattle remained in the cars a longer time by reason of that fact, or that there was any expectation or intention to remove the cattle from the cars and to give them feed, water, and rest before the same were delivered to the Missouri, Kansas & Texas at Elgin.

There is evidence in the record which would justify the judgment against the Missouri, Kansas & Texas for some amount, but we are not able from the facts stated in the record to determine that this amount is the sum found by the judgment of the trial court. The evidence upon this subject is uncertain, and there is a statement in appellants' brief that this amount cannot be ascertained to be more than \$208.39, and in view of this statement we will say that, if the appellee will remit his judgment against the Missouri, Kansas & Texas to this sum, we will here reform and render for that amount, but otherwise the judgment will be reversed on account of the assignment that the evidence does not sustain the judgment for the amount determined in appellee's favor.

The conclusion reached by this court with reference to the Houston & Texas Central being based in the main upon the evidence of appellee and his witness, and it appearing that the testimony upon this subject is fully developed, the judgment as to that road is reversed and here rendered to the effect that as against it plaintiff take nothing, and that that appellant go hence with its costs.

The judgment as to the Missouri, Kansas & Texas Railway Company of Texas, and the Missouri, Kansas & Texas Railway Company will be reversed, with the privilege of the appellee within 15 days, if he so desired, to remit to the amount of \$208.39, and if so done it will be affirmed at appellee's costs; otherwise the judgment as to these two roads will be reversed, and the cause remanded.

FT. WORTH & R. G. RY. CO. et al. v. DAY.

(Court of Civil Appeals of Texas. April 1, 1909. Rehearing Denied April 22, 1909.)

1. MASTER AND SERVANT (§ 111*)—INJURY TO SERVANT—APPLIANCES—DUTY TO INSPECT.

Where it was customary for brakemen and switchmen to use the oil boxes on freight cars as a step in mounting the cars when the ground along the track is so much lower than the rail that the ladder on the car is inadequate, and the railroad company has never forbidden such use, the company is liable to a switchman for injuries resulting from the failure of the company to keep in repair an oil box which the switchman attempted to so use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217; Dec. Dig. § 111.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. MASTER AND SERVANT (§ 219*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where it was customary for brakemen and switchmen to use oil boxes on freight cars as steps in mounting cars, and the railroad company has never forbidden such use, a switchman in so using an oil box did not assume the risk of injury from its defective condition which was not obvious to him while engaged in his work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

3. MASTER AND SERVANT (§ 281*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence held insufficient to show that plaintiff, a switchman, was guilty of contributory negligence in using the oil box on a freight car as a step in mounting the car.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by E. B. Day against the Ft. Worth & Rio Grande Railway Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Andrews, Ball & Streetman, and H. M. Chapman, for appellants. McLean & Carlock, for appellee.

WILLSON, C. J. The appeal is from a judgment against appellants in favor of appellee for the sum of \$4,000 as damages for personal injuries suffered by him as the result, as alleged, of negligence on the part of appellants.

From the record it appears that appellee received the injuries complained of while in appellants' service as a switchman in their yards in Ft. Worth at about 10 o'clock of the morning of April 19, 1908. At the time he was injured, in the discharge of his duties as appellants' switchman, he was attempting to mount a box car moving at a speed of six or eight miles an hour. The car was a "foreign car"; that is, it did not belong to appellants. It had been in their charge only about two days. It had a ladder or steps on its side and near one of its ends. The bottom round of the ladder, called the "sill step," extended 12 or 14 inches below the sill of the car, or about 14 inches above and 12 inches towards the end of the car from the oil box of the axle of the car. The oil box referred to was about 18 inches above the top of the rail of the track. It was provided with a wooden lid. At the point where the accident occurred the ground on the side of the car where appellee attempted to mount it was about 14 inches lower than the top of the rail. In attempting to mount the car, appellee grasped the lower round of the ladder with his hands, and placed his left foot against the lid of the oil box, intending to throw his right foot onto the "sill step." Because the wooden lid of the oil box was rotten, and therefore broke or slipped in its place when

appellee threw his foot against it, his foot slipped from it, causing his right foot to miss the sill step and go under and in front of the wheel of the car, which ran over and crushed it. It further appears from the record that appellee had had about nine years' experience as a switchman, and that as such he had been in appellants' employ about five years, and in their Ft. Worth yards about three months; that oil boxes like the one he put his foot against in the effort to mount the car usually, though not always, were provided with iron lids; that, while the oil box was not primarily designed or intended to be so used, it was and long had been a custom, almost universal among switchmen, to use the oil box in mounting such cars at places where the ground was lower than the track, and that, where the ground was as much as 14 inches lower than the track, brakemen could not mount such a car while moving six or eight miles an hour by means of the ladder alone. It further appeared that if appellee at the time he attempted to mount the car knew the lid of the oil box was a wooden instead of an iron one, he did not know it was unsound.

Appellants insist that the evidence established that they had discharged their duty to appellee by providing the ladder for his use in mounting the car; that they owed him no duty to inspect the lid of the oil box and have it in proper repair for the use he attempted to make of it; and that, therefore, an issue as to negligence on their part was not made by the evidence, and should not have been submitted to the jury. In the application of the rule imposing upon the master the duty to his servant "to use ordinary care and diligence to provide such sound and sufficient appliances or instrumentalities as are reasonably calculated to insure the safety of the servant in performing the service, to discover and repair any defect therein, and to provide a reasonably safe place in which to perform the service" (4 Thompson on Negligence, § 3987), it has been uniformly held that, when the master has discharged the duty, he is not liable on account of an injury suffered by the servant as a result of his using such appliances or instrumentalities for a purpose not required, nor contemplated or intended by the master. But it not infrequently happens that an appliance or instrumentality designed and intended by the master for a specific purpose alone is found to be convenient and effective for another or other purposes. There can be no doubt, if the master, discovering the new purpose to which the instrumentality advantageously could be applied, should direct its use for such purpose, the duty would at once devolve upon him to use ordinary care and diligence to discover and repair defects in it with reference to such new use. Should the rule be different if the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

master's servants, themselves discovering the new use to which such instrumentality could be put in discharging their duties, apply it to such use, in the absence of the master's instruction to do so, but without objection and with knowledge on his part that it would be so used? In considering the question, it will be instructive to refer to some of the cases where it has been presented and determined with more or less directness.

In *Lauter v. Duckworth*, 19 Ind. App. 535, 48 N. E. 867, the defendant had constructed a "dry well" of loose bricks for the purpose of receiving waste water from a factory, which entered the well through pipes at the bottom, along with a little steam. Afterward the well was used to receive waste steam, which was let into it by a pipe in the top. The pipes in the bottom becoming stopped up by sediment, the steam forced its way through them, and through the walls of the well into the surrounding earth, where it formed a hole underneath the surface filled with steam, hot water, and hot mud. While the plaintiff was passing over the spot in the discharge of his duties, the earth gave way beneath him, precipitating him three or four feet into the hole, and scalding him. With reference to a contention made by the defendant that the evidence did not show the well to have been constructed for uses made of it, resulting in the injuries to the plaintiff, the court said: "Appellant must be held to know the manner of construction, and the use to which it was put; and, if this improper use was permitted by him, it was equivalent to its construction for such use, so far as his liability might be affected for damages resulting from such use." In *Dupree, Receiver, v. Tamborilla*, 27 Tex. Civ. App. 603, 66 S. W. 595, the plaintiff, while in the service of Dupree as receiver of the Citizens' Electric Light & Power Company of Houston, had gone to the top of one of the company's poles to trim an electric lamp supported then by iron rods extending over the top of the pole from the arms of an iron casting fitted over the top of the pole. Plaintiff thought the rods were solid, and could not have ascertained that they were otherwise by the exercise of ordinary care in the discharge of his duties as a trimmer. As a matter of fact the rods were hollow and weakened by rust, and broke when plaintiff, in reaching a point from which to trim the lamp, rested his weight on them. As a result of the breaking of the rods plaintiff fell to the ground, and was injured. The receiver contended that the evidence showed that the rods were designed alone to support the lamp and its hood, and were never intended to be used as a means of climbing to a position necessary to be assumed by a trimmer in order to trim the lamp. The court said: "It should be borne in mind that the lamp was at a considerable and dangerous height from the ground; that the trimming of the lamp required the use of

both hands. The position necessarily assumed in performing this task placed practically the entire body higher than the top of the pole and the metal casting or cross-arm thus leaving nothing by which the operator could steady or support himself save the rods supporting the lamp and hood. The consensus of the testimony shows that even the most careful and prudent and experienced trimmers, and those who knew the rods were not solid iron, placed some weight on these upright supports while adjusting the carbons, and this is true in the very nature of things. The defendant must have known from the character of the structure that the rods would be used by trimmers in reaching and maintaining their perilous position." And in another part of the opinion, referring to the rods, the court said: "It was the master's duty to construct against the use to which he might reasonably expect they would be subjected."

In *Dunn v. New York, N. H. & H. R. Ry. Co.*, 107 Fed. 666, 46 C. C. A. 546, Dunn, in the service of the railway company as a brakeman, was injured while engaged in uncoupling cars from the front end of a locomotive. To steady himself, with one hand he grasped the round plate fastened in the middle of the front end of the boiler, known as the "figure plate," while with the other he pulled the coupling pin. The plate was loose, turned when he grasped it, and as a result he was thrown under the pilot of the locomotive, and thereby was injured. The railway company insisted it was under no obligation to inspect and keep properly secured the plate referred to. The Circuit Court of Appeals in overruling the contention, after discussing the manner in which the uncoupling was to be made and the means provided by the railway company to protect the brakeman while making it, said: "It appears, then, that the defendant set this engine to work switching, and put plaintiff to work on it at a place where defendant knew he must hold on to something. If provided no special handhold. It directed no particular projection to be used as such. It forbade no such use. It maintained on its engine a figure plate, adapted for use as a handhold, and so located that a man of plaintiff's size would find it the most convenient thing to take hold of. * * * Knowing it would be so used, if for any reason it was difficult to maintain it firmly in position or to inspect it, the defendant might have prohibited its use for that purpose. Not having done so, it owed a duty of inspection commensurate with the purpose which it must be assumed that defendant knew it was subserving."

In *Coates v. Boston & Maine Ry. Co.*, 153 Mass. 297, 26 N. E. 864, 10 L. R. A. 769, decided by the Supreme Court of Massachusetts, Coates, a brakeman, was directed by the conductor of a freight train to ride upon a coal car for the purpose of pulling out the

coupling pin and separating it from other cars. He started to get on the rear of the coal car, put one hand on the top thereof, and tried to put his left foot on the jaw strap, an iron bar running below and between the ends of the axles, out of sight under the body of the car. The jaw strap was not where it should have been, and his foot went on the rail, and was crushed. The jaw strap was intended only to strengthen the car, but such cars were not provided with other means for getting upon them, and in getting upon them it was the custom of brakemen to use the jaw strap as Coates attempted to use it. There was evidence that the jaw strap had been gone for some time, and from this evidence the court said the jury might have inferred that the railway company knew of its absence. The court also thought the evidence sufficient to support a finding that the company reasonably should have anticipated that brakemen ignorant of the absence of the jaw strap might be, as Coates was, ordered to and might go upon the car to uncouple it, and that such a finding would be sufficient as a basis for the further finding that the defendant was guilty of negligence in failing to warn Coates of the fact that the jaw strap was absent. The court declined to consider as a question made by the record in that case the question made by the record in this one, saying: "We do not consider whether in view of the constant use of the jaw strap as a means of getting upon the car, and the fact that we cannot pronounce it to be a negligent use, the company might not properly be taken to have notice of it, and if it did not prohibit such use, which probably would have seemed absurd to all concerned, then be bound to see that the jaw strap was reasonably safe for this secondary use, although not that for which it was designed." In *Prosser v. Montana Central Ry. Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814, a road engine, instead of a switch engine, had been used in switching cars. Because the road engine had a pilot and no footboard in front to aid in the switching, a flat car had been placed in front of the engine. The flat car was provided with a brake beam and staff. Plaintiff in the discharge of his duty as a brakeman stepped upon the brake beam and grasped the brake staff. It was bent, turned with him, and he fell, and thereby was injured. It appeared that the brake beam and staff were used by brakemen for the purpose plaintiff was attempting to use same. The court said: "The brake beam and staff being used for the purpose of mounting the car by the brakemen and switchmen, we do not hesitate to say that to allow the apparatus to remain in the condition it was, was a showing of negligence sufficient to go to the jury."

In *Donk Bros. Coal & Coke Co. v. Retzliff*, 229 Ill. 194, 82 N. E. 214, Retzliff while in

the coke company's service had been injured as the result of the latter's failure to have in proper repair bumpers on cars used in its mine which it became Retzliff's duty to couple. It was argued by the coke company that the proof showed that the bumpers were not placed on the cars for the protection of employes engaged in coupling them, but were placed there to prevent the bodies of the cars from striking against each other when the cars came together. In disposing of the contention, the court said: "It is apparent from the evidence that the bumpers were of material assistance in enabling employes to make couplings, and, whether the primary purpose of placing them on the cars was to enable couplings to be made by employes and to protect them while being made or not, they did serve that purpose, which appellant was bound to know, and it became its duty, therefore, to exercise reasonable diligence in keeping them in a reasonably safe condition for use."

On the authority of some of the cases to which we have referred and others to which we have not referred, in his excellent work on *Master and Servant* (volume 1, § 28), Mr. Labatt states as the qualification of the rule indicated by them: "If new functions are imposed upon an instrumentality by the master himself or his representative, and the servant is thereby exposed to undue risks, the master must answer for any injury resulting from those risks, and cannot excuse himself by showing that the instrumentality was a suitable one for the performance of the work for which it was originally supplied. The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose. Accordingly a qualification of this rule that a servant cannot recover in the absence of evidence showing that the appliance in question was constructed with reference to the use to which it was being put when the accident occurred is admitted in cases where it appears that it was customary for employes to put it to that use, and that the master knew of this custom." And see 4 *Thompson on Negligence*, § 4000.

Keeping in mind the qualification which seems to be established by the authorities referred to of the general rule measuring the master's duty with regard to instrumentalities furnished to the servant, and looking to the evidence in the record before us, we are not prepared to say that the evidence was not sufficient to make an issue as to negligence *vel non* on the part of appellants in failing to inspect the lid of the oil box and have it in proper repair for the use appellee attempted to make of it. While the lid primarily was intended for another use, the evidence overwhelmingly established that it was commonly—almost

universally—used by appellants' brakemen as appellee was attempting to use it when he was injured. It is not contended, and reasonably it could not be, that appellants were ignorant of the use their switchmen had made and were making of such ladders in discharging their duties. Yet they had in no way indicated that they did not approve of the use being made of them by the switchmen. Furthermore, it appeared that the ladders provided on such cars for mounting same, while sufficient for the purpose where the ground was not lower than the track, were not sufficient for the purpose at places along its track where the ground was as much as 14 inches lower than the track. Appellants should be held to have had knowledge of the limit to the effective use which could be made of the ladders. The case, then, is one where the instrumentalities provided under all circumstances were not sufficient to enable the employé to discharge his duties; where, in accordance with a custom known to the master to exist, the employé attempted, under circumstances which the master knew might arise rendering it necessary for the employé to do so, to make use of an appliance primarily designed and intended to be used for another purpose to supplement the insufficient appliances furnished to enable him to perform his duties; and where the employé was injured in his attempt to so perform his duties, as the direct result of the master's failure to inspect and properly repair for such use the instrumentality he had, to say the least of it, before commonly permitted to be used to supplement and render effective those he had provided for the purpose. It is but fair, it seems to us, to assume that appellants permitted the use of the ladder because they thereby derived benefit, either in being relieved of the necessity of providing means in addition to the ladders of mounting such cars under such circumstances, or in having the switching done more expeditiously than it could be done in the absence of additional means, if such use should not be made of the ladder. Such permission, we think, should be construed as having the effect a direction by appellants to their switchmen to so use the ladder would have. Had such direction been given by appellants, it is clear that it would have become their duty to exercise ordinary care in discovering and repairing defects in the ladder which might render it unsafe for such use. And it is equally clear, it seems to us, that it should not be held to be an answer to a claim for damages for injuries resulting to its employé from its failure to exercise such care that the ladder was sufficient for another and primary use for which it had been designed. As we understand them, the authorities cited by appellants in support of their contention are not in conflict with

those we have cited, but are only illustrative of the general rule which holds the servant to have assumed the risk of dangers ordinarily incident to his service, or obvious to his senses. In *Williams v. Railway Co.*, 149 Fed. 104, 79 C. C. A. 146, the foreman of a switching crew had slipped and fallen from the footboard on the rear of the tender of the locomotive while it was moving. The board was slanting when it should have been level, and water from a leak had fallen and then frozen on it, rendering it slick and dangerous for use. The court held the defect to be an open and obvious one. Here the testimony tends to show that while the car was moving six or eight miles an hour the fact that the oil box lid was a wooden one and rotten was not obvious to appellee. He testified: "In mounting a car, we usually take observations to see practically how fast the car is going. In mounting a car where you are going to use the oil box, you make a casual glance as to the condition of the box before you put your foot on it. At a slight observation, I could not swear whether I could tell whether the lid was wood or iron. If it was off entirely, I might discover it, or if it was down three or four inches below flush I might discover it. If it had a crack in it, split right in two like the one now shown me, I don't think I would notice it. From practical experience we don't look at all those things. It is owing to the speed of the train whether we make casual examinations to see whether the oil box is there or not, or whether there is the lid on it or not. * * * I believe in my experience you take the entire thing in in a glance—the movement of the train, the position of the handholds—and you will throw your body and catch the oil box and the stirrup. * * * If a wooden lid was the same color as the iron lid, perhaps he would not notice that part. You first take them at a glance, the speed of the car, the handhold, and all that is taken in one glance. * * * These cars moving along, you have not got time to look at them to tell whether it is a wooden lid or not. They look after they get greasy like a black piece of iron, and just as you put your foot on it probably you glance at it and know it is a wooden lid then." In *Cawood v. Lumber Co.*, 128 Ga. 159, 54 S. E. 944, the plaintiff, while operating a machine for sawing shingles, was injured as a result of his hand slipping while pressing against a block of wood which should have been but was not square in shape, and which for that reason failed to respond to the automatic action of the machine. He testified he knew it was dangerous to place his hand on the block as he did, and did so because it was customary with others to do so and saved time. He further testified that he could have stopped the machine, and thereby safely

have unfastened and removed the block. Having chosen a dangerous when he might have chosen a safe way to do the work, it was held he was not entitled to recover; his choice of the dangerous way not being excused by the fact that others were accustomed to use it. To about the same effect are *Railway Co. v. Hamlin* (Ind.) 83 N. E. 343, and *Hutchison v. Mfg. Co.* (Ky.) 112 S. W. 900, the other cases cited by appellants.

The judgment is also attacked upon the ground, as stated in the fifth assignment of error, that the evidence conclusively showed that appellee "was guilty of negligence in using the oil box as a step and placing his foot against the lid or covering of the oil box, which negligence was the direct cause of his injuries." In a proposition under said assignment appellants insist that the evidence disclosed two ways by which appellee could have discharged the duty he owed to them: A safe one, by using the ladder alone in attempting to mount the car; and an unsafe one, in using the lid in connection with the ladder in attempting to mount it. Having chosen the latter way, they insist he was not entitled to recover. In another proposition under the same assignment appellants further insist that appellee was not entitled to a judgment because it appeared from the evidence that, in using the oil box in attempting to mount the car, he placed his foot against the face of the lid thereof, when he should have placed it on top of the box. There was evidence tending to show that, on account of the speed with which the car was moving and the low ground at the point where he attempted to mount the car, appellee could not have mounted it by means of the ladder alone, and therefore that he did not have a choice of ways to mount it in the discharge of his duty. Appellants in their brief refer to no evidence, and we have found none in the record, showing it would have been unsafe for appellee to attempt, as he did, to use the oil box in mounting the car, had the lid thereof been in proper repair for the use we think he was authorized to believe appellants had permitted to be made of it. As to appellants' contention that in using the oil box appellee should have placed his foot on top of it instead of against its lid, it is sufficient to say that the evidence was conflicting as to whether the one or the other way was safest. In fact, the evidence tends to show that the position in which he should place his foot on the box was not always a matter of choice to the switchman, as on account of the movement of the car, etc., he could not always reach with his foot the particular part of the box he might prefer to rest his foot against. There also was evidence tending to show that no one

part of the box was preferable to another in using it as an aid in mounting the car. The witness Conway, for instance, testified: "I don't understand that there is any proper position to put the foot, whether on top of the oil box or against the face of the box. I think it is up to the man himself."

The judgment is affirmed.

TEXAS & P. RY. CO. v. BROOKS.

(Court of Civil Appeals of Texas. March 27, 1909. Rehearing Denied April 17, 1909.)

1. RAILROADS (§ 275*)—INJURIES TO LICENSEES—OPERATION OF CARS.

Where plaintiff and his fellow servant were endeavoring to move a car down an incline to be loaded, and plaintiff, on being warned by his fellow servant on the car that the brake was broken and would not stop the car, jumped in front of it, fell, and was injured, plaintiff could not recover, unless he did so to rescue his fellow servant, and not merely to stop the car.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 275.*]

2. RAILROADS (§ 282*)—INJURIES TO LICENSEES—EVIDENCE.

In an action for injuries to plaintiff in jumping onto a track in front of a car which he knew could not be stopped by his fellow servant riding on the car, because of a defective brake, evidence held insufficient to sustain a recovery on the theory that plaintiff's act was done in trying to rescue his fellow servant from danger.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 282.*]

Appeal from District Court, Van Zandt County; R. W. Simpson, Judge.

Action by E. E. Brooks against the Texas & Pacific Railway Company and others. From a judgment against the Texas & Pacific Railway Company alone, it appeals. Reversed and remanded.

This was a suit by E. E. Brooks against E. F. Hopkins, the Texas & Pacific Railway Company, and B. W. Carrington to recover damages for personal injuries. The pleadings alleged: That plaintiff was an employé of B. W. Carrington & Co., and his duties were to load salt out of B. W. Carrington & Co.'s wareroom into cars placed upon the spur track of the Texas & Pacific Railway Company, running beside the platform at Carrington & Co.'s wareroom. That it was the custom for the employés of the Texas & Pacific Railway Company to place cars between the main line of the railway and B. W. Carrington & Co.'s plant, and that, when Carrington's employés needed a car to load, they went to where the cars were stopped, which was on slightly higher ground, and would plinch the cars down to the point where they wanted to load them. That it was the custom of the railway employés to notify Carrington's employés in the event a car was defective. On the occasion in question, the car so

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

plaintiff and collaborator went up the track and pinched the car down, and, when it was nearing the point where it was desired to be stopped, his collaborator upon the top of the car hallooed there was no brake on the car and he could not stop it. Plaintiff ran around the car upon the platform of Carrington & Co. and jumped off in front of the moving car, fell, and was injured. That defendant Carrington is a manufacturer of salt and had an agreement with the appellant railway company to place the cars upon its switch tracks as aforesaid, and that defendant Carrington knew the customs and methods of handling the cars, and that the brakes on said cars would be applied and blocks would be used by placing same in front of the car to stop the car. That defendant Hopkins was conductor on what is known as the "dodger," which operates at Grand Saline, which is a switch engine, and that defendant Hopkins knew the methods of handling cars, and that, while acting within the scope of his authority and in the discharge of his duty to the railway company in carrying out its agreement and understanding with Carrington & Co., caused to be placed on said spur track a string of cars to be used by Carrington, acting through his employees in loading salt, and Hopkins knew that one of the cars had a bad brake, and that the same could not be handled in its broken condition by the employees of defendant Carrington, of whom plaintiff was the boss. The appellant, railway company, filed a general denial and specially denied that the track complained of was in bad repair, and that the rough condition was open and obvious to the plaintiff, and also pleading contributory negligence by jumping in front of the car when he knew it could not be stopped by the man riding thereon, and also adopting the answer of defendant Carrington as to all allegations as to details of the accident. The case was tried by jury and resulted in a judgment in favor of plaintiff against the appellant, Texas & Pacific Railway Company, for \$1,000. The appellant's motion for new trial having been overruled, an appeal was perfected.

Appellant's first assignment of error is as follows: "The court erred in submitting the case to the jury, because the evidence shows that the plaintiff knew the defective condition of the car, and that the car could not be stopped by the man on top thereof, the condition of the ground and track in front of the car, that it was the custom to block cars in order to stop them at the place where it was desired to load them, that plaintiff jumped off of the platform, and it was the plaintiff's motive when he jumped off of the platform in front of the car to stop it. The evidence shows he had no intention of jumping to save Alexander from injury when he jumped off of the platform in front of the car." The prop-

dence must be clear that plaintiff saw and realized the peril of such third party, and that he (plaintiff) placed himself in a perilous position for the sole purpose of protecting said third party.

Appellee's testimony bearing on this proposition was as follows: "At the time of the accident, I had been working at that salt plant two years, lacking six weeks. In getting cars to the plant, they were placed on a spur up above the plant, and when we wanted a car we went up there with a pinch bar and uncoupled a car, and one man got on top of the car, and the other man hallooed to him and asked him if he was ready, and then he uncoupled the car and pinched it down. It was downgrade from where the cars were left to the platform. The platform was on the east side of the spur track. * * * The track runs up close to the platform. A man could not perform any work between the car and platform. On this occasion Mr. Alexander went on top of the car. He was one of the men working under me. I uncoupled the car and asked Alexander if he was ready and then pinched the car down. When the car started it must have been 50 yards from the edge of the platform. The platform was about 200 or 210 feet long. When the car started down the platform, I got on the side of the car and rode down to the edge of the platform. When I got to the platform, I jumped off on the edge of the gallery. The ladder (on the car) where I was standing was right even with the platform. * * * I jumped off on that (platform) and trotted along right even with the door of the car. The first notice I had that there was any defect in the car was when Mr. Alexander hallooed that there was 'No brake! No brake! I can't stop the car!' or something to that effect. * * * When I heard Alexander halloo that there was no brake on the car, he hallooed it once or twice and attracted my attention, and it seemed to excite me, and on the impulse of the moment I ran and jumped off to stop the car. I could not say definitely how far ahead of the car I got when I jumped off, but it must have been in the neighborhood of 20 feet. The track where I jumped off was rough. * * * When the man on top of the car hallooed he could not work the brake, I jumped off impulsively ahead of the car to stop it. The reason I tried to cross the track was to stop the car. If there had been nobody on the car, and it was just rolling down there, I would not have jumped off in front of it to try to stop it. In my judgment the car was about 20 feet behind me when I jumped off. I could not say definitely what rate of speed it was traveling, as I never had any way of judging such business; but I think it was going 6 or 7 miles an hour. * * * As

best I know, when I jumped off, as to the reason for my falling when I went to make the step, I stumbled over something I could not tell what and fell. As I went to make the first step, I stumbled over something and fell. I fell between the tracks, kind of oblong down the track. I mean I fell between the rails. I did not have time to extricate myself before the car came. * * * The next thing I remember after seeing the car was right on me, was to try to make myself just as small as possible to see if the car would go over me."

On cross-examination he testified: That the condition of the track at the time of the accident was the same that it had always been. That they had blocked cars with pieces of wood prior to this. That they would have to get on the side of the track away from the platform, because there was not room between the car and platform. That there were a few pieces of wood scattered along the track to scotch with. "We had been accustomed to using them for that purpose. I started it down and then got on the car and rode down as far as the platform. There were steps at the end of the platform to ascend it. I got off of the car right on the platform and did not go on the steps. As soon as I struck the platform, I swung off of the platform and trotted along beside the car. I don't know that I had told Alexander where to stop the car. He knew where I wanted to stop it, because I had told him where I was going to load it that morning. Shortly before the car got to the place where I wanted to stop it, Alexander hallooed out, 'No brakes!' * * * When he hallooed out that the brakes would not work, of course, that just kind of excited me. I was not thinking about it, but when he hallooed that out, impulsively, the first thing was to stop the car. I had scotched cars before that, when the brakes would not work sufficiently to stop them. I had never prior to this morning jumped off of the platform in front of a car to scotch it. When Alexander hallooed out the brake would not work, I was ahead of the car. I generally ran along about even with it, or a little ahead of the door. * * * When I jumped, I checked up running; but I did not stop when I jumped. I stopped enough to balance myself to jump and then jumped. As I went to make my first step after I hit the ground, I fell. * * * I was going to step across the track to get a scotch. I saw one to get. As to whether I saw the scotch before I started to jump, I don't know, just the second I did see it. That piece of wood across the track was a trestle bench, or what is commonly known as a 'wooden horse,' was across the track from where I jumped. If I had not seen that thing over there, I cannot say whether it is a fact or not, I would not have jumped. I jumped to stop the car."

On redirect examination he testified: "I knew he could not control the car; that is, I supposed he could not, from his hallooing. At the time I jumped in front of the car, I realized the condition Mr. Alexander was in. I realized the condition and circumstances Mr. Alexander was placed in by being on top of a loose car. I tried to stop the car on the impulse of the moment. If it was not for that fact that influenced my action in jumping to stop the car, I don't know what it was. His hallooing attracted my attention that way. If it was not that, I don't know what it was that attracted me."

On recross examination, he said: "In jumping in front of the car, I acted on the impulse of the moment. If I did not realize the condition of Mr. Alexander, I don't know what gave me the impulse. His hallooing up there gave me the impulse. I cannot say my impulse was to stop that car where I wanted it. I cannot say what my idea was right then, as to whether it was the car was going by the place where I wanted it stopped and wanted to stop it there. I never took time to reason out my ideas. I did this on the impulse of the moment, and Mr. Alexander hallooing caused me to do it. * * * I knew Mr. Alexander was up there on the car without any brakes, and I have reasoned this thing out myself, and thought about it, and asked myself these questions time and again, and I have come to the conclusion that it must have been my impulse to stop the car, because Alexander was on it; but definitely at this time I can't say that because I can't remember it. I started that course of reasoning when I was laying there in bed. I do not know who I told about that course of reasoning first. * * * It is a fact that my purpose in jumping from the platform and crossing the track was to get that sawhorse and stop that car. I could not say whether it is a fact or not that right at that time Alexander's condition ever entered my mind. Since the accident I have reasoned it out, and it must have been that Alexander's situation had something to do with me jumping in front of the car."

On redirect examination he testified: "My motive when I jumped down was to stop the car. That was my purpose. I knew somewhere in the neighborhood of the speed the car was going, but, of course, I didn't reckon out the speed of the car. When I jumped in front of the car to stop it, I would not have done so if it had been a loose car. As to whether or not I jumped in front of the car, I realized that Mr. Alexander was in a position of danger. I will be frank with you and say that his hallooing there attracted my attention to stop the car, and caused me to stop the car, but whether right at that moment I stopped to reason out Mr. Alexander's condition or not, I don't remember. I don't remember right

at that moment whether I did or not. If I gave Mr. Alexander a thought at all, I knew he was in danger."

W. L. Hall and J. A. Germany, for appellant. Wynne & Collins and Davidson & Davidson, for appellee.

BOOKHOUT, J. (after stating the facts as above). It seems to be conceded that if Alexander, who was riding on top of the car, was in peril by reason of the brake failing to work, and if appellee was induced to jump in front of the moving car to rescue him from such peril, he could recover. The contention of appellant is that the evidence fails to show that appellee was induced to jump on the track in front of the moving car to save Alexander from peril. Appellee testified that "if there had been nobody on the car, and it was just rolling down there, I would not have jumped off in front of it to try to stop it." He also says that when Alexander hallooed it seemed to excite him, and on the impulse of the moment he ran and jumped off to stop the car. He further testified that Alexander hallooed out impulsively. But appellee would not testify that he was induced to jump off the platform in front of the moving car to rescue Alexander from peril or from what appeared to him to be a position of peril. His testimony leaves it in doubt whether his purpose was to rescue Alexander from a position of apparent peril, or whether his purpose was to stop the car at the place where he desired to load it. He says: "Whether or not, at the time I jumped in front of the car, I realized that Mr. Alexander was in a position of danger, I will be frank with you and say that his hallooing there attracted my attention to stop the car, and caused me to stop the car; but whether right at that moment I stopped to reason out Mr. Alexander's condition or not, I don't remember. I don't remember right at that moment whether I did or not. If I gave Mr. Alexander a thought at all, I knew he was in danger." Again on cross-examination he testified: "I have never told anybody that my motive in jumping in front of that car was because I thought Alexander was in danger. I just said that my course of reasoning brought me to that conclusion; that it must have been that, and you are the first man I have told it to. This is the first time I have said that my motive in jumping off that platform was the position of danger Alexander was in." And again: "I jumped in front of the car on the impulse of the moment. It is just like I told you a while ago, I don't know right now why I jumped off."

The burden was on appellee to show that his purpose in jumping in front of the moving car was to rescue Alexander from what to

him appeared a position of danger. He would not testify that he jumped in front of the moving car to rescue Alexander. He says that he jumped to stop the car, but he only concludes from his course of reasoning that his purpose in jumping was to rescue Alexander from a position of peril. If his purpose in jumping was to stop the car because it had arrived at the place where he desired to load it, then he was not entitled to recover. The testimony was as strong that he jumped because the car had reached the place for loading, as it was that his intention was to rescue Alexander. We are unwilling to sustain a verdict resting on such testimony. The judgment of the trial court against appellant is reversed, and the cause as between appellant and appellee is remanded. As tending to support these conclusions, see *Seale v. Railway Co.*, 65 Tex. 274, 57 Am. Rep. 602; *Texas & Pacific Ry. Co. v. Doherty et al.* (Tex. App.) 15 S. W. 44; *Texas & Pacific Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162.

Reversed and remanded.

PECOS & N. T. RY. CO. et al. v. FAULKNER.

(Court of Civil Appeals of Texas. April 8, 1909.)

1. APPEAL AND ERROR (§ 64*)—DECISIONS REVIEWABLE—AMOUNT OF JUDGMENT—"INTEREST."

Where, in an action for \$93.65 damages, plaintiff recovered judgment for that sum on appeal to the county court, with interest thereon, which made the total amount recovered \$100.45, the additional amount over the sum sued for was an element of the damages recoverable, and not "interest" within *Sayles' Ann. Civ. St.* 1897, art. 998, subd. 3, giving the Court of Civil Appeals appellate jurisdiction of cases of which the county court had appellate jurisdiction when the judgment shall exceed \$100 exclusive of interest, etc., so that the Court of Civil Appeals would have jurisdiction of the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 306-314; Dec. Dig. § 64.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3706-3709; vol. 8, p. 7691.]

2. JUDGMENT (§ 143*)—DEFAULT—VACATING—EQUITABLE GROUNDS—EXCUSES—FAILURE TO REACH COURTHOUSE.

The case was set for trial April 20th, and defendant's attorneys, who resided about 76 miles away, went to the depot at their home on the 19th in time to take the train which for the past six months had been scheduled to leave at 2:50 p. m.; but the schedule had been changed on April 12th without their knowledge, and the train then left 20 minutes earlier, so that they missed it. The roads were impassable from excessive rains, and they were unsuccessful in repeated efforts to get plaintiff's attorney or the trial judge over the telephone, after missing the train, in order to secure a postponement. Judgment was entered against defendant by default before his attorneys reached the place of trial, after leaving home on the train leaving April 20th. Held that as defendant was prevented from defending, without his own fault, and had

used due diligence in moving to set aside the default, the court abused its discretion in refusing to vacate the default.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 143.*]

Appeal from Hale County Court; George L. Mayfield, Judge.

Action by L. M. Faulkner against Pecos & Northern Texas Railway Company and another. From a default judgment for plaintiff, defendants appeal. Reversed and remanded for a new trial.

Madden & Truelove and Ben. H. Stone, for appellants. Mathes & Williams, for appellee.

WILLSON, C. J. The suit was commenced in a justice court to recover the sum of \$98.65 as damages appellee alleged he had suffered to a shipment of hogs, as the result of negligence on the part of appellants. From a judgment rendered by that court in appellee's favor for said sum of \$98.65, against both the appellants, the latter prosecuted an appeal to the county court, and from a judgment by default rendered by the latter court in favor of appellee for a like sum and 6 per cent. interest thereon from December 30, 1907, to April 20, 1908, against both the appellants, they prosecute this appeal.

The first question to be considered is the one made by appellee in his motion to dismiss the appeal, on the ground that this court is without jurisdiction to hear and determine it, because, he insists, the judgment rendered by the county court on the appeal to it from the justice court was for less than \$100, exclusive of interest and costs. *Sayles' Ann. Civ. St. 1897, art. 996, subd. 3. In Baker v. Smelser, 88 Tex. 28, 29 S. W. 378, 33 L. R. A. 163, in construing the provision of the Constitution conferring upon county courts "concurrent jurisdiction with the district courts when the matter in controversy shall exceed \$500 and not exceed \$1,000 exclusive of interest," the Supreme Court held the "interest" referred to to mean interest eo nomine given by a statute, and not to mean interest recoverable as an element of damages for a tort. In Railway Co. v. Fromme, 98 Tex. 459, 84 S. W. 1055, the plaintiff had sought a recovery of the sum of \$95 and interest thereon as damages suffered by him as the result of a negligent delay on the part of the defendant to furnish cars in which to load and ship certain horses. The plaintiff recovered a judgment for the sum of \$28.04, from which the defendant prosecuted an appeal to the Court of Civil Appeals, when that court certified to the Supreme Court, with others, the following question: "Does the pleading of plaintiff state an amount within the appellate jurisdiction of this court?" The question was answered as follows: "The statement which*

accompanies the certified questions in this case fails to show when the cause of action accrued, or the date of the trial in the county court. Hence we are unable to answer the first question categorically, but reply thereto that if, at the date of the trial in the county court, 6 per cent. per annum added to the \$95, stated as damages, would have amounted to more than \$100, then either party had a right to appeal from that judgment, because the amount in controversy was the full sum that the plaintiff could recover under the allegations of his petition." The ruling of the Supreme Court in the two cases referred to we think is conclusive of the question made by appellee in his motion to dismiss this appeal. While by his pleadings in the court below he sought a recovery of the sum of \$98.65 only, and did not seek a recovery of interest thereon, the judgment in his favor was for interest as well, which, added to the principal sum, made a total of \$100.45 for which the judgment was rendered. Treating the sum adjudged as interest as an element of damages recoverable, in a sense different from that meant by the word "interest" as used in the provisions of the Constitution and laws conferring jurisdiction on the courts of this state, the appeal is from a judgment for a sum exclusive of "interest" in excess of \$100, and this court therefore has jurisdiction to hear and determine it. *Railway Co. v. Hunt, 38 Tex. Civ. App. 460, 85 S. W. 1168; Railway Co. v. Everett (Tex. Civ. App.) 95 S. W. 1085; Railway Co. v. Addison, 96 Tex. 61, 70 S. W. 200.*

The record on this appeal shows: That both the appellants appeared at the trial in the justice court and there urged defenses relied upon by them to defeat a recovery by plaintiff; that the pleadings setting up the defenses relied upon were noted on the justice's docket, a transcript of which was made a part of the record on the appeal to the county court; and that in said justice court the Pecos & Northern Texas Railway Company, in the event of a recovery by appellee against it, by its pleadings sought a recovery over against its codefendant there and coappellant here, the Ft. Worth & Denver City Railway Company. It further appears: That the judgment in the county court was by default against both the appellants; that no disposition was made by that judgment of the Pecos & Northern Texas Railway Company's claim for a recovery over against its codefendant; and that on the next day after the judgment was rendered by the county court, and during the term of the court at which it was rendered, appellants presented and urged motions to set aside the judgment, on the grounds, among others, that it was by default when they had answers on file, and was rendered at a time when without fault on their part the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

attorneys representing them in the defense of the suit were unable to be in the court to present and urge meritorious defenses set out in the motions. The facts relied upon to excuse the failure of the attorneys representing the respective appellants to be present in the court when the case was reached for disposition are set out fully in the motions, and, briefly stated, were: That the cause was pending for trial in the county court of Hale county, sitting at Plainview; that by an agreement between all the parties concerned said cause had been set down for trial in said court on Monday, April 20, 1908; that appellants' attorneys resided in Amarillo, distant about 76 miles from Plainview; that only one train a day was operated over the only line of railroad between Amarillo and Plainview; that for five months prior to April 12, 1908, the schedule time of the departure of said train from Amarillo for Plainview had been 2:50 p. m.; that said attorneys were accustomed to said schedule, having frequently had occasion to travel on the train so scheduled to leave Amarillo; that on said April 12, 1908, the time of the departure of said train from Amarillo for Plainview was changed from 2:50 p. m. to 2:30 p. m.; that by taking passage on the train out from Amarillo on the afternoon of April 19, 1908, said attorneys could have reached Plainview before the convening of the court on April 20, 1908, and, had they not been ignorant of the fact that the time of the departure of said train from Amarillo had been changed, they would have taken passage on the same and would have been present when said cause was reached for trial on said April 20, 1908; that said attorneys, under the mistaken belief that no change had been made in the time of the departure of said train, with the intention and for the purpose of taking passage thereon to Plainview there to represent appellants in the defense of said cause when the same should be reached on said April 20, 1908, on April 19, 1908, went to the depot of said railroad in Amarillo, reaching said depot at about 2:40 p. m., in ample time to have taken said train if the time of its departure had not been changed; that on their arrival at said depot said attorneys learned that said train had already departed for Plainview and then for the first time learned that the time for its departure had been changed, as stated; that on said afternoon of April 19, 1908, it was raining at Amarillo, and for several days prior thereto it had been raining in the section of the country lying between Amarillo and Plainview; that said rains so affected the dirt roads between the two places as to render it impossible, after they learned that said train had left for Plainview, for said attorneys by traveling over them to have reached said court in time to be present when said cause was dis-

posed of; that repeated efforts by telephone and telegraph were made by said attorneys during the afternoon of April 19th, after they learned said train had gone, and on the morning of April 20th, to explain to the attorneys at Plainview representing appellee and to the court the circumstances which had prevented appellants' said attorneys from taking passage on said train and to arrange for a postponement of action in said cause until they could reach Plainview on the train due to leave Amarillo on the afternoon of April 20th; and that said attorneys did take passage on said train due to leave Amarillo on the afternoon of April 20th, reaching Plainview at about 7 p. m. of that day, when they learned that the judgment by default had been rendered.

From the foregoing statement we think it must be apparent that without fault on their part appellants were deprived of an opportunity to present their defenses and to have the cause disposed of by a judgment on its merits. It must also be apparent that they used proper diligence in presenting their motions to have the judgment by default against them set aside. It is not apparent from anything in the record that it would have been unjust to appellee to have granted the motions. Therefore it appears that, independent of any strict legal right appellants may have had to have the judgment vacated (*Sevier v. Turner* [Tex. Civ. App.] 33 S. W. 294), they had shown an equitable right which should, we think, have been recognized by the court. In refusing to recognize it we think the court failed properly to exercise the discretion belonging to it as such. *Springer v. Gillespie* (Tex. Civ. App.) 56 S. W. 369; *Dowell v. Winters*, 20 Tex. 797; *Sedberry v. Jones*, 42 Tex. 10; 6 Enc. Plead. & Prac. p. 201.

The judgment therefore will be reversed, and the cause will be remanded for a new trial.

REED v. SAMPSON et al.†

(Court of Civil Appeals of Texas. March 24, 1909. Rehearing Denied April 21, 1909.)

1. CORPORATIONS (§ 596*)—DISSOLUTION—FORFEITURE OF CHARTER.

Rev. St. 1895, tit. 21, art. 680, provides that a corporation is dissolved, first, by the expiration of the time limited in its charter; and, second, by a judgment of dissolution rendered by a court of competent jurisdiction. Article 681 provides that every corporation shall commence active operations within three years after filing its charter, and in default thereof it shall be dissolved, and its charter become void. *Held*, that article 681 was not self-executing, and that the failure of a corporation to commence active operation within three years did not ipso facto dissolve it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2386, 2387; Dec. Dig. § 596.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 26, 1909.

2. CORPORATIONS (§ 592½*)—CHARTER—FORFEITURE—STATUTES—CONSTRUCTION.

Act April 23, 1907 (Laws 1907, p. 811, c. 164), § 4, subd. 5, providing that, where a corporation created under title 21 of a general law of the state shall fail to commence active operations within three years after filing its charter, the charter is thereby forfeited, and it is dissolved, reaches future omissions alone, and cannot be relied on as a basis for forfeiture for past omissions on the part of the company.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 592½.*]

Appeal from District Court, Travis County; Geo. Calhoun, Judge.

Action by M. H. Reed against Mrs. M. G. Sampson and others. From a judgment dismissing the case, plaintiff appeals. Affirmed.

Cochran & Penn, for appellant. Gregory & Batts and Geo. S. Wright, for appellees.

RICE, J. Appellant brought this suit against Mrs. M. G. Sampson, a feme sole, Ernest Nalle, Joseph Nalle, and W. H. Badger for the partition of certain lands described in his petition, alleging that plaintiff and defendants were all stockholders in the West Texas Ranch & Cattle Company, a corporation chartered under the laws of this state; the right to so partition being predicated upon the ground that said corporation had failed to commence active operations within three years after filing its charter, whereby it had become dissolved. All of the defendants, except Mrs. Sampson, made default. She answered by demurrers and exceptions to appellant's petition, and the suit was dismissed on the ground that the petition failed to show a cause of action against her, or any of the defendants. The said petition specifically alleged that appellees Ernest Nalle and Joseph Nalle, with the other defendants, on the 23d of July, 1900, filed in the office of the Secretary of State a charter, under the provisions of title 21, Rev. St. 1895, of this state, for the purpose of creating a corporation to be known as the West Texas Ranch & Cattle Company, the object of which, as stated in its charter, was the raising, buying, and selling of live stock, and whose authorized capital stock was \$43,100, divided into shares of \$100 each. Said corporation was to continue for a period of 50 years, its principal office being in Austin, Tex. It was further alleged that all of the incorporators, together with the said Badger, were, at the time of filing said charter, the owners of all the stock of a Kentucky corporation, which had theretofore obtained a permit to do business in the state of Texas, and had acquired, and was then the owner of, the land sought to be partitioned, and that said West Texas Ranch & Cattle Company was formed for the purpose of acquiring and holding the lands so owned by said Kentucky corporation, which were taken over at an agreed valuation of \$43,100, and that

the incorporators of the Texas company took stock in it in the same proportion as their prior holdings in the Kentucky corporation, and that the stock in the new company was held at the time of trial as follows, to wit: Mrs. M. G. Sampson, 219 shares, Ernest Nalle, 100 shares, Joseph Nalle, 1 share, M. H. Reed, 110 shares, and that 1 share had never been issued, but belonged equally to Ernest Nalle and W. H. Badger. It was further alleged that, notwithstanding the new company was formed for the purpose of raising, buying, and selling live stock, it had not, at any time since the filing of its charter, been so engaged, but upon the contrary, had simply held its lands and rented the same out from time to time, except that it made sales of a few small parcels thereof. It was further alleged that said company was not indebted. The appellee Mrs. Sampson challenged the sufficiency of said petition generally and specially, on the ground that it did not appear therefrom that the plaintiff and defendants were tenants in common of the land, but it did appear that they were merely the owners of stock in an existing corporation, which owned lands, and were therefore not entitled to partition. The demurrers of Mrs. Sampson were sustained, and, the plaintiff having elected to stand on his petition, the case was dismissed, from which judgment this appeal is prosecuted. The foregoing statement is substantially taken from appellant's brief.

Appellant challenges the correctness of the judgment of the court below, first, on the ground that it erred in holding that plaintiff's petition showed no cause of action against Mrs. Sampson, or any of the other defendants; second, that said court erred in not holding that the facts set out in said petition showed that the failure of the West Texas Ranch & Cattle Company to commence active operations within three years after the filing of its charter with the Secretary of State had the effect of dissolving said corporation, and of rendering its charter void, and in not holding that, by reason of such failure to commence active operations, the property belonging to said corporation devolved upon plaintiff and its other stockholders, as tenants in common, entitling plaintiff to partition as prayed. Appellant relies upon article 681, tit. 21, Rev. St. 1895, as sustaining his contention, which reads as follows: "Every corporation created under this title or any general law of this state, shall commence active operations within three years after filing its charter with the Secretary of State, and in default thereof said corporation shall be dissolved, and its charter become void." Appellees by their first proposition insist that said provision of the statute is not self-executing, but that the corporation in question continues to exist

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

until the expiration of the time limited in its charter, or until dissolved in a direct proceeding brought by the state for said purpose.

It is confessed by counsel for appellant that they have been unable to find any construction of this statute by our courts. Therefore the question presented is an open one in this state; but they contend that a somewhat similar provision of the Revised Statutes has been construed in the case of *Bywaters v. Railway Co.*, 73 Tex. 624, 11 S. W. 866, and seek to apply the principle therein announced by analogy to the question here involved. In that case it was held that the following language, embraced in article 4278, Rev. St. 1879, was self-executing, to wit: "If any railway corporation organized under this title shall not, within two years after its articles of association have been filed and recorded as provided by this title, begin the construction of its road, and construct, equip and put in good running order at least ten miles of its proposed road, and if any such railroad corporation, after the first two years from the date of its organization, shall fail to construct, equip and put in good running order at least twenty additional miles of its road each and every succeeding year until the entire completion of its line, such corporation shall in either of such cases forfeit its corporate existence, and its powers shall cease as far as it relates to that portion of said road then unfinished and shall be incapable of resumption by any subsequent act of incorporation." Under this statute it was held that a failure to begin the construction of its road within two years after the filing of its articles of association worked a forfeiture, and thereby, ipso facto, determined its corporate existence, and that said failure on its part was a defense that could be urged by a stockholder to a suit brought by it for the enforcement of an unpaid balance due on his shares of stock. It will be noted that the expression "that upon the failure on the part of the corporation to do the acts therein named, that it should forfeit its corporate existence, and its powers shall cease as far as it relates to that portion of said road then unfinished, and shall be incapable of resumption, etc., by any subsequent act of incorporation," differs materially from the language used in article 681, because the words used in said article 4278, in themselves, denote a termination of the existence of said corporation for a failure to perform, while in the present statute it seems only to furnish ground for dissolution in the event of such failure. And from the language used in the said statute, as construed in *Bywaters v. Railway*, supra, it must have been the intention of the Legislature to make the failure on the part of the company to operate as a limitation to the period of its existence. But the language of the statute now under consideration differs

from that construed in the case of *Bywaters v. Railway Co.*, supra, in that respect, in that it only declares that, in the event of default on the part of said corporation in commencing active operations within three years from the filing of its charter, the same shall be dissolved and its charter become void. This language does not indicate to our minds that it was intended to be considered as anything more than a cause for dissolution of the corporation, and that the Legislature did not intend, on account of default on the part of said corporation, to thereby, ipso facto, dissolve the same. Article 680, Rev. St. 1895, provides that a corporation is dissolved, first, by the expiration of the time limited in its charter; and, second, by a judgment of dissolution rendered by a court of competent jurisdiction.

We are strengthened in this conclusion by the opinion of our Supreme Court in *G. & S. A. Ry. Co. v. State*, 81 Tex. 572, 17 S. W. 67, wherein it was held that in an act of the Legislature, which provided for the forfeiture of the charter of said railroad company in the event it should fail to build to the city of San Antonio by a certain time, said words provided a ground of forfeiture, but that the manner must be by judicial proceeding instituted directly for that purpose; and, while approving the doctrine announced in *Bywaters v. Railway*, supra, it held that it had no application to the case then before the court, and distinguished said cases, saying that: "We doubt if any case can be found in which the words 'shall forfeit its charter,' or 'its charter shall be forfeited,' have been construed to provide a forfeiture which is to take effect by the mere happening of a contingency. In that connection the term 'forfeit' has been imbued with a technical signification, and is the word universally used in charters for prescribing the grounds upon which a judicial forfeiture may be claimed. This is illustrated by the article of the Revised Statutes above cited (article 4278), and article 4280 in the same chapter. Article 4278 provides that upon the failure of the railways organized under that title to build certain sections of the road as therein provided, the corporation shall 'forfeit its corporate existence and its powers shall cease so far as it relates to that portion of said road then unfinished, and shall be incapable of resumption by any subsequent act of incorporation.' Article 4280 provides that any railway corporation that shall neglect to make its annual report as required by law, after being notified by the comptroller, 'shall forfeit its charter.' The change in the language clearly shows the intention of the Legislature. By the former article it intended to provide a forfeiture, without judicial action, for a failure to complete so many miles of railway within stated periods. By the latter the intention was to prescribe merely a ground

of forfeiture, which the state could enforce, should it so elect, by a direct proceeding in a court of justice."

In discussing this subject Mr. Cook, in his work on Corporations (volume 2 [6th Ed.] § 688), says: "Frequently the charter of a railroad corporation requires it to complete its road, or a certain number of miles of road, within a certain time, when the charter expressly declares that for the failure to comply with this requisite the corporate powers and existence shall cease. There is a strong line of decisions to the effect that such a provision as this forfeits the charter absolutely upon noncompliance, and that no decree of the court is necessary to effect that forfeiture. But this drastic and dangerous construction of charters does not commend itself to law and justice. It adds one more to the perils which are attached to all great corporate enterprises. Even in New York, where the above doctrine seems to have had its origin, the courts are inclined to limit its application. The New York courts have held that a provision in a charter that, unless certain things are done within a certain time, the company shall forfeit the rights acquired does not work a forfeiture ipso facto, and that a provision in the charter that, unless work shall be commenced within two years, 'all rights and privileges granted hereby shall be null and void' is not self-executing, and a judgment of the court is necessary before forfeiture takes place; and the weight of authority, as well as logic and public policy, favor such a rule. It is no defense to condemnation proceedings that the railway company had not commenced work within the time fixed by statute, nor expended the capital required by statute. A statute that, after a year's suspension of business, the franchise shall be deemed surrendered, and the corporation adjudged dissolved, is not self-executory, but requires the judgment of the court." This text is supported by many authorities of American courts.

In Morawetz on Private Corporations (volume 2, § 1015) it is said: "The charter of a corporation does not expire by reason of the omission or commission of acts on the part of the company constituting sufficient ground for declaring a forfeiture, but the franchises continue in full force until the penalty of forfeiture is claimed by the state granting the franchise, and this can be done only through a proper legal proceeding, by which the cause of forfeiture is judicially ascertained. Thus it was held by the Court of Appeals of New York that the failure on the part of a railroad company to comply with the provisions of the law requiring the company to build a portion of its road in a certain time would not, of itself, put an end to its legal existence. Earle, J., in delivering the opinion, said: 'These conditions were probably not complied with. They were conditions for the noncompliance with which

the sovereign power could claim a forfeiture of the company's charter, but a cause of forfeiture cannot be taken advantage of, or enforced, against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation, and the government creating the corporation can alone institute the proceedings, and it can waive a forfeiture; and this it can do expressly, or by legislative acts recognizing the continued existence of the corporation.'" The same author further says in section 1023: "A charter of incorporation may be granted upon the express condition that the corporation formed under it shall perform some act within a prescribed time after having become incorporated; and a failure to comply with the prescribed condition may cause a cessation of the company's franchise, and subject it to a judgment of dissolution. Thus, if the charter of a corporation provides that its capital must be paid in, or that its work must be constructed, within a certain time after the time of incorporation, a failure to comply with the prescribed condition will be a sufficient ground for declaring a forfeiture." In the notes to the case of the State v. Atchison R. R. Co., 8 Am. St. Rep. 165, may be found an interesting collection of cases supporting the proposition above announced.

In the case of Utah N. & C. Ry. Co. (C. C.) 110 Fed. 879, wherein a statute of Nevada somewhat similar to the one under consideration was before the court, it is said: "It is argued by defendants that because of the failure on behalf of this corporation to do the acts therein required within the time therein specified, its right became ipso facto void, that by the terms of the statute the forfeiture clause was self-operative, and became of full force by the lapse of the time mentioned; and that no steps or proceedings on the part of the sovereign power to make it complete or effective were at all essential. There are numerous cases where, upon the particular facts thereof, it has been held that a statute, creating a corporation which declares that, unless the corporation performs certain acts within a prescribed time, its corporate existence and powers shall cease, or its powers and franchises shall terminate, executes itself. But the fact is that this question is always made dependent upon the special facts, the character of the corporation, and the legal construction to be given to the particular statute. The general rule is that the question whether a railroad corporation authorized by the state has forfeited its corporate rights and franchises cannot be raised in any collateral proceeding, and can only be taken advantage of by the sovereign power which created the corporation, because it is its privilege alone to question the right of the corporation to act under its franchise. The state may waive the conditions, or enforce them, if it sees fit to do so. When the continued life of the

corporation is made by the charter or governing statute to depend upon the performance of a condition subsequent, the nonperformance of the condition is not an *ipso facto* forfeiture, but is a mere ground of forfeiture, of which the state can avail itself, or which it can waive at its pleasure. So that, unless the state takes advantage of the ground of forfeiture in a proceeding by quo warranto, or otherwise, to oust the corporation of its franchise, the existence of the corporation upon such a ground cannot be collaterally called in question. The Supreme Court of the United States has uniformly held, in construing various acts of Congress containing similar provisions to the act of 1875, that the failure to complete the road within the time limited is treated as a condition subsequent, not operating, *ipso facto*, as a revocation of the grant, but as authorizing the government itself to take advantage of it and forfeit the grant by judicial proceeding, or by an act of Congress resuming title to the lands."

In the case of *Bybee v. Oregon & California R. R. Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305, will be found a full discussion of the doctrine under consideration, and which supports the views here announced; and in this case the court, in discussing the New York cases which seem to hold a contrary doctrine to the view above expressed, said: "In these cases the legislative act did not avoid the grant upon the nonperformance of the condition subsequent, but declared that the corporate existence and powers of the company to act were at an end. In other words, it fixed a time for the expiration of the charter, and when that time arrived the corporation lost its power to act, or to do any business beyond such as was necessary in the process of winding up. It is not so much a cause of forfeiture as a loss of legal entity; or, as expressed in the language of the Court of Appeals in the case of *Transit Co. v. City of Brooklyn*, 78 N. Y. 524: 'In case of noncompliance the act itself ceases to have any operation, and all the powers, rights, and franchises thereby granted were deemed forfeited. There was to be, not merely a cause of forfeiture, which could be enforced by an action instituted by the Attorney General, but the powers, rights, and franchises were to be taken and treated as forfeited and determined. At the end of the time limited the corporation was to come to an end, as if that were the time limited in its charter for its corporate existence.' More directly in point is the case of *Oakland Railroad Company v. Oakland*, 45 Cal. 365, 13 Am. Rep. 181. In this case an act of the Legislature granting a corporation the right of way to lay a street railroad track provided 'that if the provisions of this act are not complied with, then the franchises and privileges herein granted shall utterly cease and be forfeited.' A breach of this condition was held, *ipso facto*, to forfeit the franchises of the

corporation. A distinction is drawn in this case between forfeiture at common law, which did not operate to divest the title of the owner until by proper judgment, in a suit instituted for that purpose, the rights of the state had been established and a forfeiture declared by statute, in which case the title to the thing forfeited vests immediately in the state upon the happening of the event for which the forfeiture is declared. The doctrine of these cases has not been universally accepted, however, and in several states, notably Massachusetts, it has been distinctly repudiated. Thus, in *Briggs v. Canal Company*, 137 Mass. 71, the act of incorporation of a canal company provided that, if a certain amount were not expended in the actual construction of the canal within four months from the passage of the act, the 'corporation shall thereupon cease to exist,' and, further, that if a certain other amount were not deposited by the company with the treasurer of the commonwealth within the same time, the corporation should thereupon cease to exist. It was declared in the opinion of the court to be 'too well settled to admit of discussion that a corporation can be judicially determined to have ceased to exist only in a suit to which the commonwealth is a party. The act of incorporation is a contract between the commonwealth and the corporation. Whether the corporation has complied with the conditions is a question of fact to be judicially determined. The commonwealth may waive a strict compliance with the terms of the act, and may elect whether it will insist upon a forfeiture, if there has been a breach of condition.'"

In the case of *City Council v. Railroad Co.*, 51 S. C. 129, 28 S. E. 145, it is held that a corporation is not *ipso facto* dissolved by an act of nonuse or misuse, which is a cause of forfeiture; but in such case the forfeiture of its corporate franchise must be judicially determined. In the case of *New York & Long Island Bridge Co. v. Lennox*, 148 N. Y. 540, 42 N. E. 1088, it is said that the question of whether a forfeiture clause in an act of incorporation is or is not self-executing depends wholly on the language employed by the Legislature, but that "it requires strong and unmistakable language to authorize the courts to hold that the Legislature intended that the forfeiture of a corporate existence should be effected without judicial proceedings on the intervention of the Attorney General." See the following cases in support of the same doctrine: *Morrison v. Forman*, 177 Ill. 427, 53 N. E. 73; *Day v. O. & L. C. R. R. Co.*, 107 N. Y. 129, 13 N. E. 765; *Brown v. Wyandotte & Southeastern Ry. Co.*, 68 Ark. 134, 56 S. W. 862.

Appellee suggests that this construction was acquiesced in by the Legislature, because by Act April 23, 1907, p. 311, c. 164, § 4, they made certain changes in articles 680 and 681, and, instead of providing two methods of dissolving a corporation, as theretofore existed,

four others were added, and in lieu of article 681 it substituted subdivision 5, reading as follows: "Where a corporation created under title 21 of a general law of this state, shall fail to commence active operations within three years after filing its charter with the Secretary of State, its charter is hereby forfeited and it is hereby dissolved." By contrasting the two provisions it clearly appears that the Legislature intended to make the failure to commence active operations within three years, of itself, effect a forfeiture, and apt words were used to declare such purpose; and, since no judicial construction has been given to this article, this legislative construction is highly persuasive. In *Rich v. Kyser*, 54 Pa. 89, it was held that the fact that words in a statute differ from those in a prior statute on the same subject is an intimation that they are to have a different, and not the same, construction. So it would seem that the Legislature, by the change in the statute, recognized that the same was not self-executing, but by its amendment made it so, and must have deemed said amendment as necessary for the accomplishment of said purpose. We, therefore, from a review of these cases, and the doctrine established by them, conclude that the language used in article 681, Rev. St. 1895, and relied upon by appellant, was a condition subsequent, and was only a ground for the forfeiture, but was not self-executing, and did not, on account of the failure of said corporation to commence active operations within a period of three years, ipso facto, dissolve the same, but that a judicial determination of such failure must be had in order to have that effect, and therefore the demurrer was properly sustained.

Appellant in this case pleaded the act of April 23, 1907, which provided for additional grounds of forfeiture, and which used language which would seem to imply that a failure to commence business within a period of three years would, ipso facto, forfeit the charter of such corporation. With reference to this act we are inclined to believe that the same must be construed to reach future omission alone, and cannot be relied upon as a basis for forfeiture for past omissions on the part of the company.

Believing that no error has been shown in the proceedings of the court below, its judgment is affirmed.

KEY, J., did not sit in this case.

BAUM v. DANIELS.

(Court of Civil Appeals of Texas. April 15, 1909.)

1. USURY (§ 146*)—"USURIOUS INTEREST"—RECOVERY—STATUTES—"UNLAWFUL INTEREST."

Rev. St. 1895, art. 3104, provides for forfeiture of all interest stipulated in written con-

tracts, where the rate exceeds that permitted by law, and Rev. St. 1895, art. 3106, as amended by Acts 1907, p. 277, c. 143, declares that, if usurious interest shall be received or collected on any contract, the person paying the same may recover from the person receiving it double the amount of such usurious interest, in any court having jurisdiction thereof in the county of defendant's residence, or in the county where such usurious interest shall have been received or collected, etc. *Held*, that under Const. art. 16, § 11, as amended in 1891, declaring that all contracts for a greater rate of interest than 10 per cent. per annum shall be deemed usurious, etc., the term "usurious interest" should be construed to mean "unlawful interest," and hence was not limited to the excess over the lawful rate, but included all the interest received and collected under a contract providing for more than 10 per cent.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 437; Dec. Dig. § 146.*]

2. USURY (§ 100*)—APPLICATION OF USURIOUS PAYMENTS.

Where a contract stipulates for interest in excess of 10 per cent. per annum, all interest payments on final settlement will be applied to extinguish the principal debt.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 219; Dec. Dig. § 100.*]

3. USURY (§ 117*)—NATURE OF CONTRACT—EVIDENCE.

Evidence *held* to warrant a finding that plaintiff gave his note for 18 per cent. more than he actually received in money when the loan was made, the stipulation for interest at 10 per cent. being from the maturity of the notes only, and that the transaction was usurious.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 117.*]

4. USURY (§ 138*)—PENALTIES—INTEREST.

Under Rev. St. 1895, art. 3106, authorizing a recovery of double the amount of usurious interest paid, plaintiff cannot recover interest on the usurious payments until after judgment rendered, when interest is authorized by article 3105, under the rule that no interest can be recovered on penalties in the absence of statutory authority.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 138.*]

5. USURY (§ 142*)—ACTION FOR USURY—NATURE.

An action to recover double the amount of usurious payments of interest authorized by Rev. St. 1895, art. 3106, is a civil action; the judgment rendered being a civil recovery, and not a conviction of a crime.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 142.*]

6. USURY (§ 102*)—USURIOUS PAYMENTS—RECOVERY.

One who pays usurious interest, in the absence of a statutory provision, may recover the excess over the legal rate, and interest on the amount so paid from the date of the payment.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 241-258; Dec. Dig. § 102.*]

7. APPEAL AND ERROR (§ 1151*)—EXCESSIVE JUDGMENT—REFORMATION.

That a judgment for double usurious interest payments was excessive by the amount of interest awarded would not necessitate a reversal and remand of the cause, but the judgment would be reformed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Navarro County Court; C. L. Jester, Judge.

Action by S. Daniels against I. Baum. Judgment for plaintiff, and defendant appeals. Reformed and affirmed.

R. S. Neblett and Simkins & Simkins, for appellant. Richard Mays, for appellee.

HODGES, J. This suit was instituted by the appellee against the appellant, under the provisions of article 3106 of the Revised Statutes of 1895, to recover double the amount of interest paid on certain loans of money made at a usurious rate. The testimony shows that interest in different sums was paid on different dates during the two years next preceding the institution of the suit; that the rate of interest charged and received was 18 per cent. per annum. The loans upon which they were paid were evidenced by notes payable to appellant upon certain dates specified, and providing for interest at the rate of 10 per cent. per annum from maturity. It is shown that the interest was always paid in advance. This was done in some instances by deducting the amount of the interest at the rate mentioned from the sum expressed in the note, and delivering to the appellee the difference. In other instances Baum, the appellant, would give a check for the entire amount, and when this was cashed by the appellee, the interest would be paid to Baum from that sum. The case was tried before a jury, resulting in a verdict in favor of the appellee for the amount sued for, together with interest at 6 per cent. per annum, computed from October 30, 1905, the date when suit was filed.

It is claimed by the appellant that the act of 1907 (Laws 1907, p. 277, c. 143), amending article 3106, radically changed its leading characteristics, and in effect practically repealed the provision allowing the recovery of double the amount of all the interest received and collected under a usurious contract. Before the amendment article 3106 read as follows: "If usurious interest as defined by the preceding articles, shall hereafter be received or collected, the person or persons paying the same, or their legal representatives may by action of debt, instituted in any court of this state, having jurisdiction thereof, within two years after such payment, recover from the person, firm or corporation receiving the same, double the amount of the interest so received or collected." After being amended it read as follows: "If usurious interest ('as defined by the preceding articles' omitted) shall hereafter be received or collected upon any contract, either written or verbal, the person or persons paying same, or their legal representatives, may by action of debt, instituted in any court ('of this state' omitted) having jurisdiction thereof in the county of defendant's residence, or in the county where such usurious interest shall have been received, or collected, or where

said contract has been entered into, or where parties paying the same reside when such contract was made, within two years after such payment, recover from the person, firm, or corporation receiving the same, double the amount of such usurious interest (in lieu of 'the interest so received and collected')." Appellant also claims that, as the law now stands, it only permits one who pays interest under a usurious contract to recover double the excess he pays above the legal rate, and not double the entire interest paid; that the words "such usurious interest," which the amended statute uses in lieu of the words "the interest so received and collected" as used before amendment, evidenced an intent on the part of the Legislature to restrict the sum that might be recovered in penal actions to double such excess. This, of course, is based upon the assumption that the words "such usurious interest," in the amended article, mean the excess over the rate which may lawfully be charged and collected. It is true that no person can have a vested right in a penalty given by statute; and repeal of the law upon which the penalty is founded, at any time before a final judgment is rendered, destroys the right of action. This is too elementary to call for citation of authorities. It also follows that any modification of the penal statute restricting the right of recovery to an amount less than that originally permitted is equally effective in diminishing to that extent the amount for which judgment can be rendered. The question here is, Do the words "such usurious interest," used in the amended act, mean all of the interest received on a contract providing for an unlawful rate, or only the excess over that which may lawfully be charged and collected? In short, what does the phrase "usurious interest" mean?

It will be observed that prior to the amendment the article referred to used the language "if usurious interest, as defined in the preceding articles," etc. This language had the effect of limiting the right to recover double the interest collected to that received on a written contract, because, under the preceding articles, no other class of contracts, which provided for a greater rate than that allowed, is declared unlawful. The omission of that clause from the amended article enlarges, rather than restricts, the meaning which may be given the words "usurious interest" as now used, and permits recourse to any authoritative source for the purpose of ascertaining the sense in which it is used. We must therefore regard the term "such usurious interest," as employed in the latter portion of that article, as also partaking of the enlarged definition thus permitted, and as being used in the usually accepted sense. When thus disengaged from the conventional restriction imposed under the old article, "usurious interest" should be held to mean "unlawful interest." The prohibition against

charging a rate of interest in excess of 10 per cent. per annum is found in article 18, § 11, of the Constitution, as amended in 1891. It says: "All contracts for a greater rate of interest than ten per cent. per annum shall be deemed usurious," etc., and enjoins upon the Legislature the duty of providing appropriate pains and penalties for its enforcement. This provision of the Constitution has been held to be self-enacting. *Quinlan's Estate v. Smye*, 21 Tex. Civ. App. 156, 50 S. W. 1069; *Roberts v. Coffin*, 22 Tex. Civ. App. 127, 53 S. W. 597; *Watson v. Alken*, 55 Tex. 536. The last-mentioned case was decided before the Constitution was amended. The Constitution, as it existed at the time of this decision, provided that in the absence of contract the rate of interest should not exceed 8 per cent. per annum, and authorized parties by contract to agree upon a rate not to exceed 12 per cent. per annum. It then declares: "All interest charged above this last-named rate shall be deemed usurious, and the Legislature shall at its first session provide appropriate pains and penalties to prevent and punish usury." Under that provision usurious interest was the excess over what might be lawfully charged. This will account for the holding of the courts, in some of the cases cited by the appellant, in support of his contention. But under the Constitution as it now stands all contracts are usurious which provide for a rate in excess of 10 per cent. per annum. We think it necessarily follows that the contractual rate of interest is denounced as being usurious when it exceeds 10 per cent. per annum. The Constitution does not here, as it did before its amendment, undertake to separate the excess from the lawful rate, but declares the contract unlawful by reason of the fact that it calls for the payment of a rate in excess of that permitted. The vice of usury permeates the contract, and taints the entire rate of interest, even if it does not go farther. But the latter question is not here involved, and we do not intend to express an opinion on it. Under the decisions of this state, prior to the act of 1907, amending article 3106, it was held that double all of the interest received and collected, under a written contract providing for a rate in excess of 10 per cent. per annum, might be recovered in suits for the penalty. *Boerner v. Traders' Nat. Bank*, 90 Tex. 443, 39 S. W. 285; *Smith v. Chilton*, 90 Tex. 447, 39 S. W. 287. That construction of the statute had become settled, and was the accepted law at the time the act of 1907 was passed. Had the Legislature entertained a purpose to limit the right of recovery in future to double the excess only, it would certainly have used language conveying that meaning, and about the construction of which there could have been no reasonable grounds for controversy. Especially do we think this would have been the case when its accomplishment was within easy reach, by the use of simple words to that effect, after the judicial construction

theretofore given the article. There was nothing in this amended article which implied a purpose, on the part of the Legislature, to relieve the condition of those who might violate the usury law. On the contrary, it removed the restrictions theretofore limiting the meaning to be given the words "usurious interest," made the penalty applicable to all contracts, whether written or verbal, which provided for a rate in excess of that permitted by law, and adjusted the venue of actions for penalties to suit the greater convenience of those who wished to bring such suits. All this indicated a fixed purpose to increase, rather than to ameliorate, the rigors of the law upon this subject. It is also significant that article 3104, which provided for a forfeiture of all interest stipulated in written contracts where the rate exceeded that permitted by law, was left in full force. It rarely happens in usurious contracts that the excess charged over 10 per cent. per annum is such that double its amount would equal the entire interest stipulated in the contract. It would charge the Legislature with a strange inconsistency, or an unaccountable oversight, to hold that it intended to limit the sum that might be recovered in a penal action to less than that which is expressly forfeited under a plea of usury. There would be no occasion to confer the right to maintain such an action unless the purpose be to add something to an existing remedy.

It has uniformly been held by our Supreme Court that, when a contract stipulates for a rate of interest in excess of 10 per cent. per annum, all interest payments will, upon a final settlement, be applied to the extinguishment of the principal of the debt. *Inter Bldg. Ass'n v. Blering*, 86 Tex. 476, 25 S. W. 622, 26 S. W. 39; *Western Bank & T. Co. v. Ogden* (Tex. Civ. App.) 93 S. W. 1102. This is permitted upon the ground that the contract for the interest is in violation of law, and cannot be enforced. In other words, the entire interest contracted for is usurious. We, therefore, hold that the rate of interest contracted and paid was usurious, and double that sum could be recovered. *G. & H. Inv. Co. v. Grymes*, 94 Tex. 609, 63 S. W. 860, 64 S. W. 778; *People's Ass'n v. Kellar*, 20 Tex. Civ. App. 616, 50 S. W. 186; *Smith v. First Nat. Bank*, 42 Neb. 687, 60 N. W. 866; *Watt v. First Nat. Bank*, 76 Minn. 458, 79 N. W. 509; *Waldner v. Bowden State Bank*, 13 N. D. 604, 102 N. W. 169, 3 Am. & Eng. Ann. Cas. 847, and notes.

Appellant insists that the contracts under which the various amounts of interest were paid were verbal, were never put in writing, and, that being shown by the evidence, there was error in rendering judgment against him for the full sum sued for. According to the testimony of appellee, Daniels, he had an arrangement with the appellant, Baum, for the latter to let him have money along as he needed it, and for which he was to pay Baum 18 per cent. per annum. When he

needed money he went to Baum for it, and Baum wrote out the notes, which Daniels signed, and he would then give Daniels either the money, or a check upon some bank for it. The interest was invariably taken out by Baum in advance. Daniels always, so he says, paid Baum the interest before he got any of the money. He thus testifies: "I always paid the interest in advance out of the money I got from him; sometimes he would take it out himself. If he did not take it out, I gave him the money when I cashed the check. At the various and sundry times I went to see Baum for money, the amount of interest was not discussed between us; that had all been mentioned to start with." Baum denied having any general understanding with Daniels about the rate of interest he was to receive. He testified: "All my transactions with Daniels were in writing. When he got any money from me, I took his note calling for 10 per cent., and he paid me 8 per cent. on a verbal contract afterward. There was no contract by which he was to pay me 18 per cent. per annum." Again, he says: "Each transaction came up by itself. For instance, when the man came to me he was hard up, and wanted \$200 or \$300, or \$500, whatever it might be. I would ask him how much he wanted, and how long, and he would tell me, and I would write out a note for the amount, bearing 10 per cent., and of course I charged 8 per cent. extra. I did that under a verbal contract or agreement." This was as near as Baum ever came to testifying as to any specific verbal contract upon which he made his usurious loans. The notes which he took from Daniels were offered in evidence, and all of them showed that they bore interest at 10 per cent. from maturity. This is in substantial contradiction of Baum's statement that the notes provided for 10 per cent., and that 8 per cent. was paid extra, and supports Daniels' statements that the interest was paid in advance. Baum admitted that his agreement with Daniels to pay him interest at the rate of 18 per cent. was made before the notes were signed or the checks written. The practical effect of the transactions between the parties was that Daniels gave his note for 18 per cent. more than he actually received in money when the loan was made, and the stipulation for interest was 10 per cent. from the maturity of the notes. This conclusion, we think, is amply supported by the testimony of Baum himself. The device resorted to was too plain and obvious to require a submission of the issue to the jury, and the court would have committed no error had he given a peremptory instruction in favor of the plaintiff in the case.

We think, however, that there was error in that portion of the court's charge where he directed the jury, should they find in favor of the appellee, to include interest upon the amount which they found, at the rate of 6 per cent. per annum from the date suit was filed, October 30, 1905. The statute giving the remedy upon which this suit was based is to an extent penal in its nature, and by its terms fixes the sum that may be recovered at double the usurious interest collected. No interest can be recovered on penalties in the absence of some statutory provision to that effect. *McCreary v. Morristown Nat. Bank*, 109 Tenn. 134, 70 S. W. 821; *Newton First Nat. Bank v. Turner*, 3 Kan. App. 352, 42 Pac. 936; *Higley v. Beverly First Nat. Bank*, 26 Ohio St. 75, 20 Am. Rep. 759. The rule is otherwise after the judgment is rendered. In this state all judgments bear interest from the date of rendition. Rev. St. 1895, art. 3105. This also seems to be the rule in other jurisdictions. 22 Cyc. p. 1520. Notwithstanding the fact that the penalties generally have for their purpose the infliction of some punishment upon the wrongdoer, still an action for its recovery is a civil suit, and the judgment rendered is a civil recovery, and not a conviction for a crime. In the civil action for a penalty punishment of the offender is not the sole object sought to be accomplished. Compensation to an aggrieved party may, and does frequently, form a part of the purpose of the statute. For that reason judgments rendered in such cases fall within the class of those upon which the statute allows interest.

It is true that one who pays a usurious rate of interest may, in the absence of any statutory provision, maintain a suit to recover the excess over the legal rate, and he may also recover interest on the amount so paid from the date of payment. *Bexar Bldg. Ass'n v. Robinson*, 78 Tex. 163, 14 S. W. 227, 9 L. R. A. 292, 22 Am. St. Rep. 36. But the statutory remedy here given includes this interest on the excess, and more; and, when the aggrieved party elects to pursue the statutory remedy, his recovery must be limited to the statutory measure. The error committed, however, can be cured by a reformation of the judgment, and will not necessitate a reversal and remand of the case. The judgment of the district court will therefore be so reformed as to award a recovery in favor of the appellee for the sum of \$873.60, with interest thereon at the rate of 6 per cent. per annum from the date of the judgment in the trial court, and all costs incurred in the trial court. The costs of this appeal are adjudged against the appellee.

INTERNATIONAL & G. N. RY. CO. v. WILLIAMS.

(Court of Civil Appeals of Texas. April 8, 1909.)

1. APPEAL AND ERROR (§ 1002*)—FINDINGS—CONCLUSIVENESS—CONFLICTING EVIDENCE.
A jury finding upon conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR.

In an action against a carrier for damages caused by the ejection of plaintiff's wife, and for loss of time to plaintiff caused thereby, any error in submitting the issue of loss of time without proof of the value and amount thereof was cured by requiring plaintiff to remit a sum sufficient to cover that item of damage.

[Ed. Note.—For other cases, see Appeal and Error; Dec. Dig. § 1062.*]

3. CARRIERS (§ 382*)—EXCESSIVE DAMAGES—BREACH OF CONTRACT—CONTRACT OF CARRIAGE.

Plaintiff, after purchasing a ticket for the passage of his wife and child, went to the baggage room to check her baggage, and, because of the baggageman's delay in checking it, the train left before plaintiff could give his wife her ticket. Plaintiff's wife explained the circumstances to the conductor, and requested that she be carried as far as her money would take her, and not put off at the next station, because negroes were not permitted to stop there, but on reaching that station the conductor told her that was the place for her to get off and she remained there at the station for about four hours, when she returned on another train to the place from which she started without extra charge, the conductor of that train having been requested to return her free. She was subjected to no harsh treatment or special annoyance in being compelled to leave the train, except that resulting from having to wait at the station. *Held*, that a verdict for plaintiff of \$350 was excessive, and should be reduced to \$100.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1490; Dec. Dig. § 382.*]

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Action by Mose Williams against the International & Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, unless plaintiff remits a part of the verdict.

Spoons, Thompson & Barwise, for appellant. Parker & Parker and McCart, Bowlin & McCart, for appellee.

HODGES, J. This action was instituted by the appellee, Mose Williams, against the appellant to recover damages claimed by him as having resulted from his wife's being ejected from one of the appellant's trains. It appears from Williams' testimony that he had carried his wife and child to the appellant's depot in Ft. Worth, and there procured tickets for them to be carried over the appellant's line to Calvert. He gave his wife the ticket for the child, and she and the child boarded the train, but he reserved her ticket

for the purpose of having her baggage checked. He claims that he went promptly to the baggage room for that purpose, but, through the negligence of the baggage agent, did not procure a check for her trunk until after the train had left; that by reason of the conduct of the baggageman in negligently delaying the checking of the trunk, he did not have the opportunity to give his wife her ticket. He further testified that immediately after the train left he notified the ticket agent of the situation, and requested him to telegraph to the next station, notifying the conductor of the reason why his wife did not have her ticket; that the ticket agent agreed to do so, but negligently failed to send any such message; that if any was sent, it was too late to reach the agent at the next station, which was 10 miles distant, until after the train had passed and his wife had been ejected. The wife testified that when the conductor came through taking up tickets she told him the situation, and requested that she be carried as far on her trip as her money, amounting to \$3.70, would pay for; that she also requested the conductor not to put her off at Everman, the next station, because of the fact that she understood negroes were not permitted to stop there, and that by going to the station beyond Everman she could meet friends of her own race. She claims that the conductor gave her no definite answer as to what he would do, but when they reached Everman he told her to get off, which she did, and remained in the depot at that place until 11:10, when she returned on the next train to Ft. Worth, where she was again met by her husband. It is agreed by the parties that the telegram containing the information requested by the plaintiff in this suit was sent, but was not delivered to the agent at Everman on account of a failure to get in communication with him. It was, however, delivered to the conductor at the next station beyond Everman, but after plaintiff's wife had been compelled to leave the train. The testimony as to the negligence of the baggageman in checking the trunk, and of the ticket agent as to sending the telegraphic notification to the conductor, is conflicting; but, the jury having found for the appellee, those issues were resolved in his favor. The appellee sued for \$10,000 damages for the annoyance and humiliation suffered by his wife in being compelled to leave the train, and for \$25 for his own loss of time. The jury returned a verdict for \$350 damages. On a motion for a new trial the court required the appellee, as a condition for overruling that motion, to remit \$150 of the amount recovered. This was done and the motion overruled.

Error is here assigned because the court submitted the issue of loss of time by the appellee, in the absence of any proof of the value and amount of time lost. This error,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

if any, we think, was cured by the remittitur required by the trial court.

It is also contended that the verdict is still excessive, even after the remittitur in the court below. We think this contention is correct. The evidence does not show that appellee's wife received any harsh treatment, or was subjected to any special annoyance or injury in being compelled to leave the train at Everman. The conductor merely told her that this was the place for her to get off. It is true she says that the child with her was sick; that she had to carry it in her arms; but she testifies to no facts showing that any situation existed which subjected her to any annoyances other than that which would naturally result from having to wait at the station. It was in the daytime, and she was only required to remain at Everman about four hours. She was carried back to Ft. Worth without any extra charge for railroad fare, the conductor of that train having been notified of her situation, and requested to permit her to return without collecting any fare. We think a judgment for \$100 would be ample to compensate the appellee for all the damages sustained.

The remaining assignment of error is without merit.

The judgment of the district court will be reversed, and the cause remanded, unless the appellee shall, within 20 days from this date, file in this court a remittitur remitting \$100 of the amount adjudged in his favor upon the final disposition of the case in the trial court.

CHICAGO, R. I. & G. RY. CO. et al. v. JONES.†

(Court of Civil Appeals of Texas. March 25, 1909. Rehearing Denied April 22, 1909.)

1. APPEAL AND ERROR (§ 664*)—RECORD—VARIANCE BETWEEN STATEMENT OF FACTS AND BILL OF EXCEPTIONS.

An agreed statement of facts will control. In case of a variance between the statement of facts and the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2858, 2859; Dec. Dig. § 664.*]

2. CARRIERS (§ 229*) — CARRIAGE OF LIVE STOCK—INJURIES—DAMAGES.

The measure of damages to a shipment of horses, injured in transit by negligent delay and rough handling, is the difference between the market value of the horses at their destination, in the condition in which they would have arrived but for the carrier's negligence, and their market value in the condition in which they actually arrived.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 963, 964; Dec. Dig. § 229.*]

3. EVIDENCE (§ 474*) — OPINION EVIDENCE — MARKET VALUE.

Market value is largely a matter of opinion; and a witness acquainted with the market value of property at a particular place is competent to state his opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2217; Dec. Dig. § 474.*]

4. EVIDENCE (§ 472*) — OPINION EVIDENCE — INVADING PROVINCE OF JURY.

The opinion of a witness as to the market value of horses at the point of their destination if they had been transported properly, and had arrived there without unnecessary delay, is not objectionable as invading the province of the jury.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 472.*]

5. EVIDENCE (§ 474*) — OPINION EVIDENCE — COMPETENCY OF WITNESS.

A raiser, breeder, and dealer in horses at a town, who saw a shipment of horses there, and who was acquainted with the market value there of such horses, was competent to testify as to the difference in the market value of the horses in the condition in which they arrived at the town and the condition they should have arrived had the carrier exercised proper care.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2217; Dec. Dig. § 474.*]

6. CARRIERS (§ 230*) — CARRIAGE OF LIVE STOCK—NEGLIGENCE—INSTRUCTIONS.

Where, in an action against a carrier for negligent delay in transporting horses, the court charged that negligence was doing something that a person of ordinary prudence would not have done, or the failure to do something that a person of ordinary prudence would have done, an instruction authorizing a recovery if the carrier negligently failed to transport the horses with proper dispatch, etc., was not objectionable as failing to give the jury a guide as to how long it should have taken to transport the horses.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.*]

7. CARRIERS (§ 230*) — CARRIAGE OF LIVE STOCK—NEGLIGENCE—INSTRUCTIONS.

Where, in an action against the initial carrier for negligent delay in transporting horses, the court charged that the measure of damages was the difference in the market value of the horses at the point of destination in the condition in which they arrived, if such condition was caused by the negligence of the carrier, and what would have been the market value of the horses had there been no negligent delay in the transportation, and that the carrier was not responsible for any injury the horses suffered after their delivery to the connecting carrier, an instruction authorizing the jury to find for the shipper such damages as he sustained, etc., was not erroneous for failing to limit the jury by any legal rule.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.*]

8. CARRIERS (§ 230*) — CARRIAGE OF LIVE STOCK—NEGLIGENCE—INSTRUCTIONS.

Where, in an action against the initial carrier for negligent delay in transporting horses, resulting in the death of some of the horses, there was nothing to show that had the horses lived they would not have been transported by the connecting carrier to their destination with proper care and dispatch, and that the time required for transportation by the connecting carrier was from three to six hours, and there was nothing to show that, if the horses had been so transported by the connecting carrier, their market value would have been depreciated, an instruction authorizing a recovery on account of the horses that died, based on their market value at the point of destination in the condition they should have been in had there been no negligent delay in the transportation, was not erroneous as making the carrier pay for depreciation necessarily received while transported by the connecting carrier.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court June 2, 1909.

8. CARRIERS (§ 76*) — INJURY TO PROPERTY SHIPPED—RIGHT OF SHIPPER.

A shipper may recover for injuries to the property covered by his contract of shipment with the carrier, for which the latter is liable, though the shipper did not own the property.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 265; Dec. Dig. § 76.*]

Appeal from District Court, Jack County; J. W. Patterson, Judge.

Action by C. W. Jones against the Chicago, Rock Island & Gulf Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

N. H. Lassiter, Robert Harrison, and Stark & Cox, for appellants. Sporer & McClure, for appellee.

WILLSON, C. J. December 5, 1906, appellee delivered to the Chicago, Rock Island & Gulf Railway Company, at Jacksboro, Tex., for transportation over its line of road, and over the Chicago, Rock Island & Pacific Railway Company's line of road to Pueblo, Colo., 29 head of horses, consigned to J. H. Jones at La Junta, Colo., a station on the Atchison, Topeka & Santa Fé Railway. The horses should have reached their destination within three or four days from the time they were received by the Chicago, Rock Island & Gulf Railway Company at Jacksboro. On account of its negligence and the negligence of the Chicago, Rock Island & Pacific Railway Company the horses did not reach Pueblo until December 14th, where one of them died, and the others did not reach La Junta until December 15th. As a result of the negligence of said Chicago, Rock Island & Gulf Railway Company and said Chicago, Rock Island & Pacific Railway Company in delaying the carriage of the horses, and in roughly handling while transporting them, one of the horses died en route, and the others were injured, and appellee thereby was damaged in the sums found by the jury, and adjudged in appellee's favor by the court below.

The action of the court in admitting as evidence certain testimony of the witness Jones is made the basis of appellants' first assignment of error. There is a discrepancy between the question propounded to the witness and the grounds of the objection to it as stated in the statement of facts, and the question and grounds of objection to it as stated in the bill of exceptions. In appellants' brief the ruling is presented as it is shown by the latter. But the statement of facts is an agreed one, and we should allow it to control in disposing of the assignment. *Bryan Press Co. v. H. & T. C. Ry. Co.* (Tex. Civ. App.) 110 S. W. 100. With reference to the value of the horses at La Junta, according to the statement of facts, the question was: "What was the market value of these horses at that time if they had been transported properly, and had arrived there

without any unnecessary delay?" The grounds of appellants' objection to the question were that "it calls for the opinion of the witness, is hearsay, is not the proper measure of damages, and invades the province of the jury." The answer of the witness was: "I think they were worth \$100 per head, if they had arrived there in proper condition." From other testimony given by the witness it appeared that he had been engaged all his life in breeding, growing, and handling horses; that he had shipped horses from Jacksboro to La Junta; that he was acquainted with the horses in question, and their condition at the time they were shipped from Jacksboro; that they were then in good condition; and that he was acquainted with the value of such horses in La Junta. We do not think the court erred in refusing to exclude as evidence the answer of the witness. The measure of appellee's damages was the difference between the market value of the horses at La Junta in the condition in which they would have arrived there but for appellants' negligence and their market value in the condition in which, by reason of such negligence, they did arrive there. *G. & S. F. Ry. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 110. The fact that they were not to be transported by appellants all the way to their destination did not change the measure of appellee's damages as stated. *E. T., V. & G. Ry. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 494. Market value is largely a matter of opinion, and it was not error to permit the witness to state his opinion as to the market value of the horses at La Junta had they arrived there in proper condition; it appearing that he was acquainted with the market value at that place of such horses. *T. & P. Ry. Co. v. Donovan*, 86 Tex. 378, 25 S. W. 10. The answer did not "invade the province of the jury." It merely stated the opinion of the witness as to the market value of the horses at La Junta, if they had arrived there in "proper condition." Whether they did arrive there in that condition or not was left, so far as the answer of the witness was concerned, without suggestion one way or the other, to the jury.

Appellee asked his witness McGowen the following question: "Do you know what was the difference in the market value of the said horses in the condition they arrived and the condition they should have arrived?" Over appellants' objection the witness was permitted to answer: "If these horses were shipped in good condition, and the shape I saw them in when they arrived here, the difference in their market value would have been at least \$50." By their second assignment of error appellants complain of the refusal of the court to exclude as evidence the answer of the witness. The grounds urged in the motion to strike out the answer of the witness were that it "is hearsay, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

province of the jury. The witness testified that he was a "raiser, breeder, and dealer in horses" at La Junta, that he saw the horses in question on the morning after they had been unloaded at La Junta, and that he was acquainted with the market value there of such horses. Without determining whether or not the answer, had it been objected to on other grounds, should have been excluded, we hold the court did not err in refusing to strike it out on the grounds stated in the motion.

The court instructed the jury as follows: "If you find and believe that the plaintiff shipped the horses in controversy over the lines of the defendant and connecting carriers from Jacksboro, Tex., to La Junta, Colo., and if you believe from the evidence that the defendants, their agents, or employes, by reason of negligence, failed to transport the horses with proper dispatch, and if you believe that by reason of the negligence of the defendants, their agents, or employes the horses were on the cars longer, on the way to La Junta, than they should have been, and if you believe, by reason of the horses being longer in the cars on the way than they should have been, and that thereby the horses were damaged as charged in the plaintiff's petition, without fault or negligence on the part of the agent of the plaintiff, who went with said horses, you will find for plaintiff such damages as you find plaintiff sustained. And on the measure of damages you are charged that, if the horses were damaged, as charged, by the negligence of the defendants in transporting the horses from Jacksboro, Tex., to Pueblo, Colo., where they were delivered to the connecting carrier, and if by reason of such negligence on the part of the defendants some of the horses died, the plaintiff would be entitled to recover, on account of the horses that died, what would have been the market value of such horses at La Junta in the condition they should have been in had there been no negligent delay in transporting the horses from Jacksboro to Pueblo." Appellants insist that the instructions were erroneous because (1) the jury thereby were told to find a verdict against appellant "if the horses were negligently kept on the cars longer than they should have been, leaving the jury without any guide as to how long the horses should have been on the car"; (2) the jury thereby were told "to give the plaintiff such damages as they find the plaintiff sustained, and they are not limited in their inquiry or decision by any legal rule or direction"; and (3) the court thereby, in instructing the jury as to the measure of appellee's damages on account of the horse which died at Pueblo, assumed that said horse "would not have been in any wise injured or depreciated in value by the shipment over the Santa Fé from

from Pueblo to La Junta. As to the objection first mentioned, it should be said that in other portions of his charge the court instructed the jury that "negligence" was "doing something that a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do something that a person of ordinary prudence would have done under the same or similar circumstances." This definition, we think, furnished a guide for the jury in determining from the circumstances as shown by the testimony how long the horses should have been kept on the car. As to the second objection, fairly construed, we think the instruction meant, and the jury must have understood it to mean, that they would find for appellee only such damages as they might find he had sustained by reason alone of appellants' negligence in delaying the transportation of, and roughly handling, the horses. In another portion of the court's main charge the jury were instructed, as to the horses which reached La Junta alive, that if they were injured as the result of appellants' negligence, the measure of his damages would be the "difference in their market value at La Junta at the time they arrived there and in the condition they were then in (if such condition was caused by the negligence of the defendant) and what would have been the market value of said horses at said place at the time they should have reached La Junta in the condition they should and would have been in on reaching said La Junta had there been no negligent delay in transporting the horses from Jacksboro to Pueblo." And in still another portion of the charge the jury were instructed that appellant would not be responsible for any injury the horses might have suffered after they were delivered to the connecting carrier at Pueblo, and that they should not consider any such injury in determining the amount of damages they might find in appellee's favor. Construing the portion of the charge objected to in connection with the other portions thereof to which we have referred, we do not think it could have operated to mislead the jury in the respect urged. As to the third and last objection specified above, it may be remarked that there is nothing in the record tending to show that had the horse lived he would not have been transported by the connecting carrier from Pueblo to La Junta with proper care and dispatch. Nor is there anything in the record tending to show that, if he had been so transported, his market value thereby would have been depreciated. We do not think it should be assumed that the horse, had he lived and had he been transported with proper care and dispatch from Jacksboro to Pueblo, "necessarily" would have been so injured by

being transported from Pueblo to La Junta as to depreciate his market value. The record shows that the time required to make the trip from Pueblo to La Junta was from three to six hours. In the absence of evidence to the contrary we think it would not be improper for the court and jury to assume that the market value of a horse in proper condition to make the trip would not be depreciated if he should make it, and if while making it he should be handled with due care.

It appeared from the evidence that, while appellee as the owner thereof contracted for and delivered the horses to the Chicago, Rock Island & Gulf Railway Company for transportation, he in fact did not own several of the number. Appellants requested the court to instruct the jury that he was not entitled to recover damages on account of injuries suffered by the horses he did not own. The refusal of the court to so instruct the jury is complained of in appellants' fifth assignment of error. It has been repeatedly held that the shipper is entitled to recover for injuries to the property covered by his contract with the carrier, for which the latter is liable, notwithstanding the shipper did not own the property. *Ry. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509; *Ry. Co. v. Klepper* (Tex. Civ. App.) 24 S. W. 568; *Ry. Co. v. Barnett* (Tex. Civ. App.) 26 S. W. 783; *Parks v. Ry. Co.* (Tex. Civ. App.) 30 S. W. 708.

We have considered the remaining assignments of error presented in appellants' brief, and think they should be overruled.

The judgment is affirmed.

MIDLAND COUNTY v. SLAUGHTER et al.
(Court of Civil Appeals of Texas. April 22, 1909.)

APPEAL AND ERROR (§ 373*)—BONDS—NECESSITY.

A county may not prosecute an appeal without first giving an appeal bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2001; Dec. Dig. § 373.*]

Appeal from District Court, Lubbock County; L. S. Kinder, Judge.

Action by Midland County against C. C. Slaughter and others. From a judgment for defendants, plaintiff appeals. Dismissed.

Caldwell & Whittaker, Geo. R. Bean, and A. H. Kirby, for appellant. G. G. Wright and K. R. Craig, for appellees.

LEVY, J. The appellant sued the appellees in trespass to try title, and from a judgment rendered against it has brought the case up by appeal.

The appellees have filed a suggestion that this court is without jurisdiction to hear and determine this appeal, for the reason that no appeal bond was filed by appellant in

this cause. We are not aware of any exception under which a county may prosecute an appeal without first giving bond.

This court has therefore no jurisdiction of the case, and it must be dismissed. *Free-stone County v. Bragg*, 28 Tex. 91; *Uvalde County v. City of Uvalde* (Tex. Civ. App.) 31 S. W. 327.

SANTA FE TOWNSITE CO. v. NORVELL.
(Court of Civil Appeals of Texas. March 24, 1909. On Rehearing, April 28, 1909.)

1. JURY (§ 14*)—ACTIONS FOR INJUNCTION—JURY TRIAL.

In a suit for a mandatory injunction to compel obedience to a decree that defendant open a public highway across its property, it was not error to grant plaintiff a jury trial on the ground that the power to grant or refuse such relief is in the court alone, for the facts upon which the right to such injunction depended, if disputed, created an issue which it was the right of either party to have determined by a jury as in other cases of disputed facts.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 14.*]

2. INJUNCTION (§ 130*)—VERDICT—CERTAINTY.

A verdict in a suit for a mandatory injunction to compel obedience to a decree that defendant open a public highway of the first class across its property, that defendant had failed to construct a highway of the first class, and as described in the decree, while it might have gone into detail and specified each particular in which defendant had failed, should be construed as a finding that there had been a failure in all particulars, and, as so construed, is sufficient.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 130.*]

On Motion for Rehearing.

3. INJUNCTION (§ 189*)—DECREE—FORM.

A decree in a suit for mandatory injunction to compel obedience to a decree that defendant open a public highway across its property, granting such relief, should incorporate the provision of the latter decree directing the highway to be opened in a direct line as nearly as practicable without removing houses or encountering other immovable obstacles.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 189.*]

4. INJUNCTION (§ 5*)—GROUNDS OF RELIEF—ENFORCEMENT OF DECREE.

Though a decree that a party open a public highway across its property made no provision for the contingency of noncompliance, the court is not powerless to extend relief and a mandatory order will lie.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 5.*]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Suit by W. J. Norvell against the Santa Fe Townsite Company. Decree for plaintiff, and defendant appeals. Decree amended, and, as amended, affirmed.

Dies, Singleton & Dies, for appellant. Jno. L. Little, for appellee.

JAMES, C. J. The petition of Norvell alleged a decree of the district court of Hardin

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

its property, beginning at a certain point, thence in a direct line as nearly as practicable without encountering houses or other immovable obstacles to crossing of a certain public road and the Santa Fé Railroad immediately west of the depot at the station of Silsbee; said highway to be clear of obstruction for vehicles and pedestrians, with necessary bridges or crossings over any intervening water courses, ditches, etc., and to be done immediately. Petitioner alleged that defendant had wholly failed and refused to comply with said decree, and he prayed for a mandatory injunction to compel obedience to the same. Defendant pleaded that it had complied with the decree.

The issue made at the trial was submitted to the jury in this manner: That, if the jury found from the evidence that defendant had substantially complied with the terms of the decree, they were to find for defendant. But, if they found that it had not complied with said decree, to find in favor of the plaintiff and to say: "We, the jury, find that the defendant, the Santa Fé Townsite Company, has not complied with the terms of the decree of September 26, 1906, in the following particulars, to wit [setting out in full the particular or particulars wherein you find the defendant has failed to comply with said decree of September 26, 1906]; and therefore we find for plaintiff." They returned this verdict: "We, the jury, find that the defendant, Santa Fé Townsite Company, has failed to comply with the terms of the decree of September 26, 1906, in the following particulars, to wit: The defendant Santa Fé Townsite Company has failed to comply with their contract to construct a road of the first class and as described in the decree of September 26, 1906, across the defendant's land. Therefore we find for plaintiff." Upon this the court entered judgment commanding defendant within 30 days to open a public highway 60 feet in width across its property between the points stated in the original decree, and as the same is described therein.

The first assignment of error is that the court erred in granting plaintiff a jury trial, because the relief asked was a mandatory injunction, and the power to grant or refuse such relief is in the court alone. We overrule this assignment as manifestly without merit. The original decree was an agreed one which simply determined the obligation of defendant to open immediately the highway over its property. The matter in controversy here was not the violation of an injunction involving contempt, but the determination of the right to a mandatory injunction to enforce performance of the duty imposed by said decree. The facts upon which the right to such injunction depended, such as the failure vel non to perform the terms

cases or disputed facts.

We here set forth the other assignments of error: "Second assignment of error: The verdict of the jury in this case was not responsive to the charge of the court. The court charged the jury that in case they found that the defendant had not complied with the judgment of September 26, 1906, in reference to opening the road, that they should then find and set out in full the particular or particulars in which the defendant had failed to comply with said decree of September 26, 1906. The jury in its verdict found that the defendant had not complied with the terms of said decree, but failed to specify in what particular or particulars it so failed."

Third assignment of error: "The verdict of the jury was not sufficiently definite or certain to authorize or warrant the judgment entered in this cause, nor to warrant or authorize any judgment or decree in said cause."

Fourth assignment of error: "The court erred in its judgment wherein the defendant was ordered to open a road diagonally across its property and different from the road already opened, because the verdict of the jury fails to specify whether defendant had failed to comply with the 1906 judgment in matter of location or manner of opening road."

Fifth assignment of error: "The court erred in rendering judgment as was done in this case, because it was contended by defendant, and there was testimony to support such contention, that defendant had opened a road located so as to comply with judgment of September 26, 1906, and it was contended by plaintiff, with testimony to support such contention, that the road so opened was not the required width, etc. It was also contended by plaintiff, with testimony to support the contention, that the road so opened by defendant was not located so as to comply with said decree. And it cannot be determined from the verdict rendered what the jury found as to these issues; nor what kind of judgment would comport with such verdict."

Under all these assignments appellant presents this proposition: "A verdict is bad if it finds only a part of that which is in issue, or if it is so indefinite or uncertain as to require speculation on the part of the court to determine its true and full meaning." The principle embodied in the proposition is not fairly applicable to the verdict in this case. True, the verdict might, in response to this charge, have gone more into detail, and specified each and every particular in which defendant had failed, but the verdict, as we construe it, and as the trial judge evidently construed it, is a finding that there had been failure in all particulars. From the briefs of both parties we understand that a road of

terms of the decree of September 20, 1900, and also whether or not the road so opened by defendant was 60 feet wide and clear of obstructions," etc. The question, then, was whether that road complied with the terms of the decree, and we take it that the verdict should be considered and construed as having reference to the road that had been opened, or attempted to be opened, when it states that defendant had not complied with the terms of the decree. The finding was practically that such road was not a road of the first class, and that it was not as the road was described in the decree. Appellant in his fifth assignment of error admits that the evidence was broad enough to cover such a finding. The assignment states "that it was contended by plaintiff with testimony to support the contention, that the road so opened by defendant was not located so as to comply with said decree." And "that it was contended by plaintiff, with testimony to support such contention, that the road so opened was not the required width," etc.

The judgment is affirmed.

On Rehearing.

We find that there is no difference in the course of the straight line in passing through appellant's property, as defined in the original decree and in the recent decree. We find, however, that the present decree differs from the original one, in that the latter commanded the street to be opened in a direct line "as nearly as practicable without removing houses or encountering other immovable obstacles," and the decree now omits this limitation. Such direct line would pass through blocks 29, 27, 23, and 20 of appellant's property. It was admitted by appellant at the trial that there were no houses on blocks 29, 27, and 23; but there was evidence that there were houses on lots 1 and 2 in block 20 through which lots such direct line would pass. Altogether we take it that it could not have been assumed as an uncontroverted fact (if the court proceeded upon that theory) that there were no houses or other immovable obstacles in the path of such straight line. Consequently we think the qualification should have been incorporated in the recent decree, and the decree will be reformed in this respect. We do this also for the reason that plaintiff did not seek to change the terms of the decree. The enforcement, and not a reformation of the decree, was the purpose of this suit. It appears to us that the judgment (as we amend it) is the correct one upon the evidence.

The map showing the direct route and also the route which was opened shows that the latter did not attempt to conform to any

upon lots in the straight route except upon lots 1 and 2, in block 20, and these lots were situated about where the line would terminate near the railroad crossing and really presented no obstruction; and the route otherwise was not impracticable. Under these circumstances, it is clear that what had been done was not a substantial performance, but a bold evasion, of the decree, and plaintiff was entitled to relief.

As the original decree was entered, appellant assumed, and was charged with, the duty to open the street across its property in the particular manner. The decree made no provision for the contingency of noncompliance. It was expected that it would be complied with; it being an agreed decree. The courts are not powerless to extend relief in such cases. We know of no other form of relief available in such a case than that of a mandatory order.

Decree reformed, and motion overruled.

WOMBLE et al. v. HARSEY et al.

(Court of Civil Appeals of Texas. April 14, 1909.)

1. JUDGMENT (§ 17*)—NECESSITY OF PROCESS. A judgment obtained without service of process was void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 25; Dec. Dig. § 17.*]

2. MORTGAGES (§ 420*)—FORECLOSURE—JURISDICTION.

A decree foreclosing a real estate mortgage in the county court was void for want of jurisdiction.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1251; Dec. Dig. § 420.*]

3. JUDGMENT (§ 455*)—INVALIDITY—ENFORCEMENT—INJUNCTION.

Where a void decree foreclosing a mortgage on land was obtained in the county court, that court might enjoin its enforcement regardless of the amount of damages sought to be recovered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 860; Dec. Dig. § 455.*]

Appeal from Hardin County Court; H. N. Vickers, Judge.

Suit by T. J. Womble and another against W. F. Harsey and another. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

John L. Little, for appellants. B. L. Aycock, for appellees.

FLY, J. T. J. Womble and wife, L. M. Womble, sued W. F. Harsey in the county court of Hardin county, alleging as follows: "That heretofore, to wit, on the 21st day of May, 1906, defendant herein recovered a judgment over against plaintiff T. J. Womble

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

William Davis survey, in a certain suit styled *W. F. Harsey v. T. J. Womble*, No. 199 on the docket of the county court of Hardin county, Tex., which decree was entered of record in the minutes of said court in volume 1, pages 175 and 176, and to which reference is hereby made for further and more particular description."

Plaintiffs allege that said decree was wrongfully entered, and is void for this:

"(1) That in said suit No. 199, above mentioned, that said plaintiff T. J. Womble, who was defendant in said suit No. 199, was never served with citation or otherwise therein, and was never required to answer therein and never accepted service therein, and never at any time before said judgment, nor after the same until recently, had any notice of said judgment; and he was not legally before the court, and said court was without jurisdiction to try said cause, and said judgment rendered in said cause No. 199 is therefore void and inoperative.

"(2) It appears from said petition and judgment in said cause No. 199 that said suit was brought for the purpose of foreclosing a lien on land described in plaintiff's cause No. 199, and this court was without jurisdiction to try said cause or enforce said lien, as was therein recovered, since the district court alone has jurisdiction exclusively to enforce liens upon land, and any judgment rendered in said proceedings is not within the jurisdiction of the county court, and therefore void and inoperative."

This was followed by an allegation that a writ of execution had been issued under the judgment and personal property belonging to the wife had been levied on and advertised for sale, and certain damages were set up for the seizure of the property.

The prayer was as follows:

"That this court issue a writ of injunction to be forthwith issued upon such terms as may be prescribed by the court, commanding and restraining to said W. F. Harsey and the sheriff, W. W. McConnico, and all others acting by, through, or under them or either of them, directly or indirectly, from making said sale of the merchandise herein set out and advertised, and upon final hearing said injunction be made permanent.

"(2) That the judgment heretofore mentioned in cause No. 199 be set aside and vacated, and held for naught.

"(3) That the merchandise hereinbefore mentioned be decreed the property of plaintiff L. M. Womble.

"(4) That the said plaintiffs have judgment in the manner set out for the damages to said goods, loss of profits, and the injury to

tion of the court, and claimed to have purchased the goods at a sale made after this suit was instituted under an execution issued out of the district court, and filed a motion to dissolve the injunction and dismiss the suit on the following grounds: "Comes defendant Harsey by attorney, and moves to dissolve the temporary injunction herein, because it appears that since the injunction was granted the subject-matter of the suit no longer belongs in any event to plaintiff L. M. Womble, for which the writ was granted, and for her exclusive benefit; because this court has no jurisdiction of the amount claimed as damages, which is all that possibly remains in controversy; because there is no other party to the suit; because there is no equity in the bill, the petition stating no cause of action, and the said judgment in cause No. 199 is not set out in its legal effect nor in *hæc verba*; because the answer of this defendant denies fully the supposed equities of the bill; because there appears to be another suit pending in the district court of Hardin county between the same parties and involving the same issues, and both courts cannot have jurisdiction. Wherefore defendant prays that the injunction be dissolved, and that defendant have his judgment for statutory damages and costs against plaintiffs and their sureties on the injunction bond. And that the petition be dismissed." That motion was sustained, and from that order this appeal was perfected.

If it be true that the judgment under which the execution was issued was obtained without service, and was obtained in a suit brought in the county court to foreclose a mortgage on land, the judgment was void and should have been enjoined, whether Mrs. Womble had any place in the suit as a party or not. The judgment had been obtained in the same court in which the injunction was sought, and the county court had the authority to issue the injunction no matter how small the amount of damages sought to be recovered. *Dean v. State*, 88 Tex. 290, 30 S. W. 1047, 31 S. W. 185. The power of the county court to restrain an execution issued by it is not questioned by appellees.

The judgment is reversed, and cause remanded.

WRIGHT et al. v. HOOKER et al.

(Court of Civil Appeals of Texas. April 2, 1909.
Rehearing Denied April 29, 1909.)

1. COURTS (§ 104*)—OPINIONS—NECESSITY.

The Court of Civil Appeals is not required by the statute to render written opinions in af-

firmed cases which cannot be taken to the Supreme Court by writ of error.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 353; Dec. Dig. § 104.*]

2. PLEADING (§ 403*)—DEFECTS—CURE BY SUBSEQUENT PLEADING.

The trustee in bankruptcy of the maker of a note sued the payee for \$700 paid by the maker while insolvent within four months of the adjudication in bankruptcy. The payee alleged the execution of the note by the maker, and a third person as surety, and prayed that the third person be made a party, and that, if judgment was rendered against the payee, he should have judgment over against the third person for the amount recovered by the trustee. The third person answered, and alleged that the payee compromised the matter with the trustee by paying \$500, and agreeing to pay all costs, and that it would be inequitable for the payee to recover of the third person any sum paid to adjust the matter. *Held*, that the defect in the payee's pleading, so far as it sought recovery from the third person, was cured by the third person's answer, authorizing the court to render judgment in favor of the payee against the third person for the amount paid in the settlement of the case, together with the costs.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 403.*]

3. PRINCIPAL AND AGENT (§ 179*)—KNOWLEDGE OF AGENT—EFFECT.

Where an agent of the payee of a note received a payment from the maker with knowledge of the insolvency of the maker, the payee was chargeable therewith, though the agent learned of the maker's insolvency prior to the beginning of his agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 686; Dec. Dig. § 179.*]

4. APPEAL AND ERROR (§ 1028*)—HARMLESS ERROR.

Where the correct judgment was rendered on the undisputed evidence, any error of procedure was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.*]

Appeal from Nacogdoches County Court; C. D. Mims, Judge.

Action by Edgar W. Hooker, trustee of J. Wright, against E. A. Blount, in which Dan Wright and others appeared as parties defendant on the application of defendant E. A. Blount. From a judgment for plaintiff against defendant Blount, and in favor of defendant Blount against the codefendants, the latter appeal. Affirmed.

Ingraham, Middlebrook & Hodges, for appellants. H. B. Short and S. W. Blount, for appellee.

PLEASANTS, C. J. At a former day of this term we affirmed the judgment of the court below without a written opinion. Appellants have filed a motion requesting that we prepare and file a written statement of our conclusions of fact and law upon the questions presented by the record. While the statute does not require the Courts of Civil Appeals to render written opinions in affirmed cases which cannot be taken to the Supreme Court by writ of error, in deference to request of counsel we will briefly state the nature of the case and the reasons which

controlled us in concluding that the judgment of the court below should be affirmed. *Tucker & Co. v. Freigberg & Kahn* (Tex. Civ. App.) 101 S. W. 837.

The suit was brought by Edgar W. Hooker, trustee of the bankrupt estate of J. Wright, to recover from E. A. Blount the amount paid him by said Wright on a note held by Blount, which was executed by the said Wright as principal, and upon which appellants were sureties or indorsers. The ground upon which recovery was sought was that the payment to Blount was made by Wright after he became insolvent and within four months of the date upon which he was adjudged a bankrupt, and that Blount received such payment with knowledge of Wright's insolvency. Blount answered, denying any knowledge of the insolvency of Wright at the time of said payment, and alleging the execution of the note by Wright and the appellants herein, and prayed that they be made parties, and, in event of judgment against him, that he have judgment over against the appellants for the amount recovered by plaintiff.

The appellants answered in the court below by general exception and general denial and various special exceptions and pleas; one of said pleas being as follows: "And now come the said defendants, and say that they have been informed and believe that since the institution of this case the plaintiff in this case and the defendant E. A. Blount have settled, adjusted, and compromised this matter—that is, the matters involved in this suit—by the said E. A. Blount paying the sum of \$500 and agreeing to pay all costs, and so charges the facts to be upon their information and belief, and they further say it would be unjust and inequitable for the defendant Blount to recover of them at all, and anyhow he ought not to because he only asks to recover in the event plaintiff recovers against him, and the plaintiff now has no cause of action against the said Blount, or to recover of them any other sum than that which he has paid to adjust said matter and these facts they are ready to verify."

The evidence is undisputed, and establishes the following facts: Wright was insolvent at the time he paid the note held by Blount, and was adjudged a bankrupt within less than four months thereafter. The agent of Blount to whom the money was paid knew of Wright's insolvency at the time the payment was made, but Blount had no personal knowledge thereof. The amount paid Blount by Wright in satisfaction of the note was \$700. After this suit was brought, Blount compromised with the appellee Hooker by paying him \$500 in full settlement of his claim for \$700, and agreeing to pay the costs of suit. After this com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

promise was made, there was no amended pleading filed by Blount, and the case went to trial upon the pleading before set out. Upon this state of the pleadings and evidence the trial judge instructed the jury to return a verdict in favor of Hooker against Blount for his costs, and in favor of Blount against the appellants for \$500 and interest at 10 per cent. from date of the payment of said amount by Blount to Hooker, and for all costs of suit. A verdict was returned as directed and judgment rendered accordingly.

It is very earnestly insisted by counsel for appellants that the verdict and judgment cannot be upheld because they are not supported by the pleadings. We do not think this contention is sound. It is true that the appellee Blount only asked to recover of appellants the amount which appellee Hooker might recover against him, and it may be that, notwithstanding he pleads the facts fully as to the execution of the note and the liability of the appellants to him thereon for whatever portion of the money paid him by Wright he would be required to return to the trustee in bankruptcy, he would not under his pleadings be entitled to recover against appellants any sum not expressly adjudged to Hooker in this suit. But we think the plea of appellants before set out, in which the facts of the compromise are fully stated and judgment is asked to be rendered against them, in event they are held liable at all, only for the \$500 paid by Blount in compromising the claim of Hooker supplies the deficiency in Blount's pleadings. The undisputed evidence shows that Blount was liable to Hooker for the full amount of the \$700 paid him by Wright, and, having paid \$500 in settlement of said amount, appellants, who were bound to him for the whole amount due on said note, are clearly liable for the \$500 so paid by him. The answer of appellee Blount contains a prayer for general relief, and the facts pleaded by him and by the appellants, and shown by the undisputed evidence establish his right to the relief granted by the judgment.

It is further contended by appellants that the knowledge of Blount's agent of the insolvency of Wright at the time the note was paid, having been acquired prior to his agency, and not while he was acting in such capacity, cannot be imputed to his principal. It is true that the agent first learned of Wright's insolvency before he received the note for collection, but the evidence leaves no doubt of the fact that at the time Miss received the money from Wright he knew of the insolvency. If he knew the agent existed at the time he acted for his principal, it is immaterial that he had no knowledge prior to the beginning of the

agency. *Fire Association v. Compress Co.* (Tex. Civ. App.) 109 S. W. 1184; *Hooker v. Blount*, 44 Tex. Civ. App. 162, 97 S. W. 1083.

None of the assignments are meritorious. In our opinion no other judgment than the one rendered could have been properly rendered upon the evidence, which was undisputed, and therefore any error of procedure which may have occurred on the trial became immaterial, and the judgment of the court below was therefore affirmed.

Affirmed.

SAN ANTONIO & A. P. RY. CO. v. HODGES et al.

(Court of Civil Appeals of Texas. March 10, 1909. Rehearing Denied April 28, 1909.)

MASTER AND SERVANT (§ 296*)—DEATH OF SERVANT—DISCOVERED PERIL—INSTRUCTIONS.

An instruction that if, after defendant's fireman saw deceased on the track, and discovered that he was in imminent peril a sufficient time before he was struck to have signaled the engineer to stop, and the engineer, had the signal been given, could by the use of the means at his command have prevented the accident, defendant would be liable notwithstanding decedent's contributory negligence, was not objectionable because it required the exercise of more than ordinary care to prevent injuring deceased after discovering his perilous situation.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 296.*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by Mrs. F. F. Hodges and others against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff and defendant appeals. Affirms his pleadings.

A. W. Houston, R. J. P. assurance that he Thomas, for appellant declared, he would not

the jury. After a confer-

plaintiff and his counsel, the

KEY, J. In an open court that, owing to peculiar financial situation in Houston, defendant could not comply with the demand, and that he could give no tonnage of the money being forthcoming, seek thereupon the judge instructed the jury to return a verdict for defendants, which the jury did. This action of the court is made the basis of appellant's first assignment of error.

The only question necessary for us to decide in disposing of this appeal is whether the action of the court in instructing a verdict for defendant was proper under the circumstances stated. A decision of this question necessarily involves the inquiry whether the tender of performance by plaintiff in his pleadings without the payment of the agreed purchase price into court was sufficient to entitle the case to go to the jury. Whatever may be the rule in other jurisdictions, it seems to be settled by decisions of the courts of this state that, in cases to enforce specific performance of contracts to

*For other cases see same topic and section in lieu

not caused by a risk assumed by him nor by inevitable accident, but was caused by the negligence and wrongful conduct of the defendant; and that, as a result of his death, the plaintiffs sustained pecuniary injury to the extent awarded by the verdict. There was testimony before the jury sufficient to support the findings referred to, and they are here adopted by this court, and the first and second assignments of error, which assail the verdict of the jury and complain of the refusal of a requested instruction directing a verdict for the defendant, are therefore overruled.

On the subject of imminent danger and discovered peril, the court instructed the jury as follows: "If you believe from the evidence that after the defendant's fireman on said engine first saw deceased upon the track in front of said car that he discovered deceased would probably not get off the track before the car reached him, and was in imminent peril of being struck by said car, a sufficient length of time before he was struck to have signaled the engineer to stop the engine, and that said engineer (after receiving such signal, had it been given) could then have, by the use of the means at his command, stopped said engine and car after said fireman had discovered that deceased was in such peril, if you so find, before said injuries which caused the death of deceased were inflicted upon him, then you will find for the plaintiffs (although you may believe that the deceased was guilty of negligence himself in not discovering the approach of said car, or getting off said track, as charged above, or ~~the~~ ^{his} guilt of negligence in any of the re-

Error, ~~Ca~~ ^{as} mentioned in special charges given,

Appeal from Near of being injured thereby C. D. Mims, Judge. which he assumed in action by Edgar W. with the defendant; Wright, against E. A. Blount, who signaled the Wright and others appeared as discovered that defendant on the application of defense off the A. Blount. From a judgment for breaching against defendant Blount, and in favor of defendant Blount against the codefendants, under latter appeal. Affirmed.

Ingraham, Middlebrook & Hodges, for appellants. H. B. Short and S. W. Blount, for appellee.

PLEASANTS, C. J. At a former day of this term we affirmed the judgment of the court below without a written opinion. Appellants have filed a motion requesting that we prepare and file a written statement of our conclusions of fact and law upon the questions presented by the record. While the statute does not require the Courts of Civil Appeals to render written opinions in affirmed cases which cannot be taken to the Supreme Court by writ of error, in deference to request of counsel we will briefly state the nature of the case and the reasons which

the discovery of imminent peril has been more fully discussed and developed by our Supreme Court, and it is now well settled by that court that the rule of law is substantially as stated in the charge complained of and this and other courts have followed the later decisions. *Railway v. Conn* (Tex. Civ. App.) 100 S. W. 1021; *Railway v. Murray* (Tex. Civ. App.) 99 S. W. 149; *M., K. & T. Ry. Co. v. Stone*, 23 Tex. Civ. App. 106, 56 S. W. 935; *H. & T. C. Ry. Co. v. Wallace*, 21 Tex. Civ. App. 394, 53 S. W. 78; *I. & G. N. Ry. v. Jackson* (Tex. Civ. App.) 90 S. W. 920; *St. L. S. W. Ry. Co. v. Jacobson*, 23 Tex. Civ. App. 150, 66 S. W. 1114; *T. & P. Ry. Co. v. Staggs*, 90 Tex. 461, 39 S. W. 295; *T. & P. Ry. Co. v. Bredow*, 90 Tex. 30, 36 S. W. 410; *G., C. & S. F. Ry. Co. v. Lankford*, 88 Tex. 503, 31 S. W. 355; *M., K. & T. Ry. Co. v. Magee*, 92 Tex. 621, 50 S. W. 1013; *I. & G. N. R. Co. v. Sehn*, 11 Tex. Civ. App. 386, 33 S. W. 560; *St. L. S. W. Ry. Co. v. Bishop*, 14 Tex. Civ. App. 504, 37 S. W. 766; *I. & G. N. R. Co. v. Munn* (Tex. Civ. App.) 102 S. W. 444; *North Texas Traction Co. v. Mullins* (Tex. Civ. App.) 99 S. W. 435; *St. L. S. W. Ry. Co. v. Summers* (Tex. Civ. App.) 111 S. W. 213; *H. & T. C. R. R. Co. v. Finn* (Tex. Civ. App.) 107 S. W. 100; *T. & P. Ry. Co. v. Patterson* (Tex. Civ. App.) 102 S. W. 140; *Johnson v. T. & G. Ry.* (Tex. Civ. App.) 100 S. W. 207; *De Palacios v. Rio Grande Ry.* (Tex. Civ. App.) 45 S. W. 612.

There are other assignments of error addressed to the charge of the court, and to the refusal of requested instructions, all of which are overruled. The court's charge was reasonably full and fair, and many instructions requested by appellant were given, and, when considered together, we hold that appellant has no ground of complaint in the particulars pointed out in its brief.

This disposes of all the questions presented for decision, and, finding no reversible error, we conclude that the judgment should be affirmed, and it is so ordered.

Affirmed.

FORDTRAN v. DUNOVANT et al.

Supreme Court of Civil Appeals of Texas. March 25, 1909. Rehearing Denied April 22, 1909.)

BLOOMING PERFORMANCE (§ 97*)—GOOD FAITH IN DILIGENCE—TENDER OF CONSIDERATION.

In a vendee's suit for specific performance, tender of performance by plaintiff in his time being supported by proof without payment had he purchase money into court is sufficient to amount him to go to the jury, and, on a finding of facts favorable to him, he is entitled to a decree within a reasonable time to be fixed in was decree he shall pay the amount due.

appellee's note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 100.

Appeal from District Court, Harris County; Wm. P. Hamblen, Judge.

Action by W. B. Fordtran against Miss A. A. Dunovant and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Masterson, Atkinson & Masterson, for appellant. Hogg, Gill & Jones and Baker, Botts, Parker & Garwood, for appellees.

McMEANS, J. This suit was instituted by appellant, W. B. Fordtran, against the appellees, Miss A. A. Dunovant and R. S. Autrey, to enforce specific performance of a contract to convey two lots of land in the city of Houston.

Appellant in his amended petition alleged, in substance, that Miss Dunovant, being the owner of the property in question, on October 23, 1905, entered into a contract in writing with him by which she agreed and obligated herself to sell the same to him, with the understanding that she was to accept from him vendor's lien notes for \$17,000, the price agreed on, and for which notes appellant agreed to give her \$17,000 in cash without discount, said sum to be paid on or before November 1, 1905, at the Houston National Bank upon the delivery of a deed conveying said property, and that said contract did not expire until the 2d day of November, 1905, and that the sale of said property was to be closed and consummated by that date. He further pleaded that on the 1st day of November, 1905, he requested Miss Dunovant to execute and deliver to him a deed conveying said property to him, and tendered and offered to pay her in cash the consideration agreed upon, but that Miss Dunovant wholly failed and refused to deliver said deed or to receive and accept the money tendered, but that a few days later, on November 9, 1905, she sold the property to appellee Autrey, who purchased the same with full knowledge of appellant's contract and his rights thereunder. The petition contains this further allegation: "Plaintiff further makes known to the court that he still makes good his tender of \$17,000 in cash, and here and now tenders the same to defendants, or to the one of them which may be entitled to receive the same, in discharge of the obligation imposed upon him by said agreement, and in payment of said property, and that he has always been ready to make said payment; but, should the court be of the opinion that this plaintiff should pay interest thereon, he, in that event, tenders interest on said sum, and at such a rate as the court in its judgment and discretion may adjudge that he ought to pay." Miss Dunovant answered by general denial, and specially pleaded that, if the alleged agreement of October 23, 1905, was made, it had by consent of both parties been set aside and canceled, and that a new and different agreement had been made by them in lieu

thereof; that, if any such contract as that alleged by plaintiff was ever made, it was not supported by a valid consideration; and that although not recognizing the right of plaintiff to a conveyance of said property under the contract of October 23, 1905, she nevertheless on November 9, 1907, and again on November 13, 1907, and since the filing of the suit, tendered to the plaintiff a deed to and immediate possession of the property, and agreed to pay the court costs in this suit, she having for this procured a deed back to her from her codefendant R. L. Autrey and his wife, but that plaintiff on each occasion refused to accept such deed and pay said money; that she not only tendered said deed, but on each occasion offered to sign any proper deed that plaintiff might prepare. And she pleaded such tender and her demand for payment in bar of plaintiff's right to recover. Defendant Autrey pleaded that he had purchased the property from Miss Dunovant after he had ascertained that plaintiff had no claim thereto, and he adopted her answer in so far as it set up the cancellation of the contract of October 23, 1905. The pleadings of all the parties were at great length, but it is believed that the substance of the same as above set out will be sufficient to an understanding of the points upon which this opinion is based. A jury was impaneled to pass upon the issues of fact. The plaintiff offered testimony tending to prove his cause of action, and the defendants offered evidence tending to establish the grounds of their defense. When the introduction of evidence was concluded, the trial judge in open court called upon plaintiff and his counsel to pay or tender into court the purchase money referred to in his pleadings, or to give the court some assurance that he could pay it, else, he declared, he would not submit the case to the jury. After a conference between plaintiff and his counsel, the latter announced in open court that, owing to the peculiar financial situation in Houston, plaintiff could not comply with the judge's demand, and that he could give no assurance of the money being forthcoming, whereupon the judge instructed the jury to return a verdict for defendants, which the jury did. This action of the court is made the basis of appellant's first assignment of error.

The only question necessary for us to decide in disposing of this appeal is whether the action of the court in instructing a verdict for defendant was proper under the circumstances stated. A decision of this question necessarily involves the inquiry whether the tender of performance by plaintiff in his pleadings without the payment of the agreed purchase price into court was sufficient to entitle the case to go to the jury. Whatever may be the rule in other jurisdictions, it seems to be settled by decisions of the courts of this state that, in cases to enforce specific performance of contracts to

convey lands, no actual tender of the agreed consideration need be made, and no tender other than an offer in the pleadings is necessary to entitle the case to go to the jury on the facts. The plaintiff having pleaded tender of the purchase money, and having offered evidence tending to prove a previous tender and offer to perform the contract according to its terms, it became the duty of the court to submit the case to the jury; and, upon a finding by the jury of the facts favorable to the plaintiff, the court should have granted him the relief prayed for, provided that within a reasonable time, to be fixed in the decree, he shall make payment of the amount due, and, failing in this, his right would cease. *Kalklosh v. Haney* (Tex. Civ. App.) 23 S. W. 421; *Spann v. Stern*, 18 Tex. 556; *Ward v. Worsham*, 78 Tex. 180, 14 S. W. 453; *Gardner v. Randell*, 70 Tex. 457, 7 S. W. 781; *Moore v. Brown* (Tex. Civ. App.) 103 S. W. 244. It follows, therefore, that the court erred in refusing to submit the case to the jury under the circumstances, and instructing a verdict for the defendants. And it would seem a harsh exercise of the court's discretion in case of the determination by the jury of the facts favorable to a recovery by plaintiff to require an immediate payment of the purchase money, but the court should fix a reasonable time, in view of existing conditions, within which the plaintiff is required to comply with the decree.

For the error indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

HAMBURGER & DREYLING v. THOMAS.
(Court of Civil Appeals of Texas. March 31, 1909. Rehearing Denied April 28, 1909.)

1. BROKERS (§ 54*) — CONTRACT OF EMPLOYMENT—AUTHORITY CONFERRED.

Where defendants in writing appointed plaintiff their agent to sell the lands described for not less than \$12,000, plaintiff to have any sum in excess of that amount for which he sold the property out of the first payment, defendants agreeing to furnish an abstract showing a clear title to the purchaser, plaintiff, in order to entitle himself to compensation, was bound within the period of his agency to procure a purchaser able, ready, and willing to buy on the very terms stipulated.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.*]

2. VENDOR AND PURCHASER (§ 3*)—"OPTION."

An option to purchase real estate is a contract by which the owner agrees with another that the latter shall have the right to buy the property within a specified time, but the owner does not thereby sell the property, nor agree to do so, but merely sells the right or privilege to buy at the election of the opposite party.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 3; Dec. Dig. § 3.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5000-5002; vol. 8, p. 7789.]

3. VENDOR AND PURCHASER (§ 3*) — OPTION DISTINGUISHED FROM SALE.

The owners of certain real estate at the instance of their broker executed a writing reciting that they had that day sold to B. for a specified cash consideration certain described land which they obligated themselves to convey to B. on his paying the purchase money less the sum receipted for, defendants further agreeing to furnish an abstract of title, and, if the title was not good in B.'s opinion, to return the earnest money, but, if the title in his opinion was good and the property was not taken within 10 days after delivery of the abstract, the earnest money should be forfeited to defendants and their broker equally as liquidated damages. *Held*, that such agreement was a contract of sale, and not a mere option.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 3; Dec. Dig. § 3.*]

4. VENDOR AND PURCHASER (§ 342*)—CONTRACT OF SALE—BREACH BY VENDORS.

Where the damages to a vendee in case of the vendors' breach of the contract for the sale of land on the vendee tendering performance were not stipulated, the vendee had his election either to enforce specific performance or recover such damages as he had sustained.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 1019; Dec. Dig. § 342.*]

5. VENDOR AND PURCHASER (§ 342*)—FAILURE OF TITLE—RIGHTS OF VENDEE—DAMAGES.

Where a contract for the sale of land provided for a restoration of the purchase money in case the title was not good in the vendee's opinion, the vendee on determining that the title was defective could recover the earnest money so paid with interest and any special damages incurred by reason of having been induced to make the contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 342.*]

6. BROKERS (§ 57*)—DIFFERENT CONTRACT BY PRINCIPAL—EFFECT ON BROKER'S COMPENSATION.

Where a broker had contracted for a specified compensation for procuring a customer on certain terms, and he procured a purchaser who agreed to purchase under terms differing from those the broker was authorized to make, and such terms as modified were agreed to by the principal by his entering into a written contract of sale with the purchaser embodying them, the broker could recover his stipulated compensation, if, through his principal's failure to comply with the conditions he had undertaken to perform, the contract was not consummated.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

7. BROKERS (§ 61*)—RIGHT TO COMPENSATION—FAILURE OF TITLE.

Where an owner holding himself out as having a good title employs a broker who procures a purchaser, and a binding contract of sale is made between the owner and the purchaser, providing for a good title or a title good in the purchaser's opinion, and the purchaser thereafter refuses to take the title because it is defective in his opinion, the broker is still entitled to his commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 77, 78, 92, 93; Dec. Dig. § 61.*]

8. BROKERS (§ 64*)—COMPLETION OF CONTRACT—PURCHASER'S ABILITY.

Where a broker has procured a purchaser acceptable to the seller and an enforceable written contract is made between them, the broker's

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Where a land contract required the vendors to furnish an abstract showing a good title in the opinion of the purchaser, or, if the title should not be good in his opinion, to return the earnest money, and the title was rejected and would have been rejected by lawyers generally, whether the abstract showed a good title in fact or whether the sellers had title to the land by limitation was not material to the right of the vendor's brokers to commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 77, 78, 92, 93; Dec. Dig. § 61.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by William W. Thomas against Hamburger & Dreyling. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Lockett, for appellants. S. H. Bra-shear, for appellee.

NEILL, J. This suit was brought by ap-pellee against appellants to recover the sum of \$1,500 claimed to be due him by ap-pellants under the contract set out in our conclusions of fact for effecting a sale of the tract of land mentioned therein to Jas. A. Baker, Jr., upon terms, though different in some respects from those embodied in the contract, which were accepted by the ap-pellants, as shown by the written agreement ex-ecuted by them and Baker on December 8, 1905, which agreement is also incorporated in our conclusions. The defendants answered by general and special exceptions to plain-tiff's petition and a general denial, and pleaded specially that, in addition to a clear record title to the premises, their title there-to was perfect under the several statutes of limitation; that, if their title was in any way defective, plaintiff knew of such defect, undertook to make the sale under his con-tract with them with full knowledge of such defect, and took the risk of a sale being de-feated by reason thereof; and that, if the plaintiff ever complied with his contract in finding and procuring a purchaser ready, willing, and able to buy, he afterwards, with-out defendants' consent, released such pur-chaser from his contract, etc. Defendants' exceptions to plaintiff's petition were over-ruled, and the case was tried before a jury to whom special issues were submitted, and upon the verdict returned judgment was en-tered in favor of the plaintiff for the amount sued for, principle, and interest.

Conclusions of Fact.

The contract between plaintiff and defend-ants is as follows: "Houston, Texas. Sept. 5th, 1905. Wm. W. Thomas, Houston, Texas. You are hereby appointed sole agent to sell the following described property, to wit: The

(now occupied by George Raphael) for the sum of twelve thousand (\$12,000.00) ⁰⁰/₁₀₀ dollars, on terms as follows: For all cash or any other terms desired by purchasers, if same are satisfactory to us. The time for which this exclusive agency shall run is four months from date hereof, expiring January 5th, 1906. It is agreed that should said Wm. W. Thomas sell the above-described property within the time given, he shall receive what-ever sum in excess of \$12,000.00 he may sell property for out of the first payment made by purchaser. An abstract of title up to date of sale and clear title to purchaser to be furnished by the undersigned. Taxes paid to December 31, 1905, inclusive. No plat to be placed of record until expiration of this agreement. $\frac{1}{4}$ cash balance 1, 2 & 3 years 6% interest or [erased before signing]. Ham-burger & Dreyling. Accepted: Wm. W. Thomas."

This is the contract of sale effected by Thomas to James A. Baker, Jr.: "Houston, Texas, December 13, 1905. Received of James A. Baker, Jr., through the hands of W. W. Thomas the sum of one thousand (\$1,000.00) dollars as part payment of the purchase money for the following described property situated on the south side of Buf-falo Bayou, in the city of Houston, Harris county, Texas, to wit: The westerly one-half of ten-acre lot 37 of the Jas. S. Holman sur-vey (less that part heretofore sold by us to Raiford, now occupied by George Raphael, and comprising about two lots), together with all improvements thereon, which property we have this day sold to said Baker, his heirs and assigns for the full sum of thirteen thou-sand five hundred (\$13,500.00) dollars cash. Upon payment of the purchase money, \$13,500.00, less the amount herein receipted for, we agree to convey or cause to be conveyed to the said Baker by good and sufficient warranty deed the above described property. We hereby agree to furnish within ten days from this date a complete abstract of the above described property certified to date. If the title to said property is not good in the opinion of the said Baker, then the \$1,000.00 herein receipted for shall be returned to him, but if the title to said property in his opinion is good and said property is not taken within ten days from delivery of complete abstract of title of the property to him, then the \$1,000.00 herein receipted for shall be forfeited to W. W. Thomas and our-selves equally as liquidated damages, and this receipt shall then be null and void, and all parties herein named released. In the event the title to said property is approved by said Baker, we agree to convey the same

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to him upon payment of the purchase money by deed containing covenants of general warranty. The said Baker shall also have the right at his election to waive any defects that may be found in the title to the property and accept a deed from us for the same, upon payment by him of the purchase money. Witness our hands in duplicate the day and year first above written. [Signed] L. A. Hamburger. Gus Dreyling. Jas. A. Baker, Jr."

The execution of these written instruments is undisputed.

The findings of the jury upon the special issues submitted to it are as follows: (1) The defendants did not furnish Baker with evidence of such possession of the property as would give title by limitation; (2) that the plaintiff procured the execution by James A. Baker of the contract dated December 13, 1905; (3) that defendants L. A. Hamburger and Gus Dreyling agreed to and signed said contract of December 13, 1905; (4) that Baker examined the title on the abstracts furnished by Hamburger & Dreyling, and, upon such examination, found the title thereto was not good in his opinion; (5) that Hamburger & Dreyling never produced any evidence to Baker showing the title to be good in his opinion; (6) that at the time the title was examined by Baker such title, by reason of such failure to show a good judgment, was not such a one as that it would have been approved in the opinion of lawyers generally; (7) that at the time and after Baker examined said title he was able, willing, and ready to pay the agreed price and take the land, if the title had been good in his opinion; (8) that at the time and after Baker examined said title he was able, willing, and ready to pay the agreed price and take the land if the title had been such that it would have been approved in the opinion of lawyers generally; (9) that Hamburger & Dreyling did not furnish or offer to furnish Baker any evidence that John Fitzgerald was a resident or citizen of Texas at the time the judgment was rendered against him in favor of Lee Pennington; and (10) that Hamburger & Dreyling did not offer to furnish Baker any evidence of title except that contained in the abstracts which had been offered in evidence.

In explanation of the two last special findings of the jury, we will say that the abstract of title furnished by the plaintiffs to Baker showed a complete chain of title from the sovereignty of the soil down to themselves; i. e., if the link, which consisted of a deed to W. R. Baker made by virtue of an execution sale upon a judgment rendered in the district court of Harris county, Tex., in 1852, in favor of Lee Pennington against John Fitzgerald personally, it appearing from the abstract that service on Fitzgerald was obtained by publication, it not being shown (the record in the case being lost) whether

Fitzgerald was either a resident or citizen of the state of Texas, was good, and it was because this link might not be good that James Baker declined to consummate his purchase, his opinion being that, if at the time Fitzgerald was sued he was a nonresident of the state of Texas, his title was not divested by virtue of the sheriff's deed made to W. R. Baker by virtue of the sale made under execution issued on said judgment.

The special issues were submitted by the court after a charge correctly enunciating the principles of law applicable to the facts pertaining to them; and, as the evidence fully warrants the jury's findings upon all of them, we adopt and make the verdict our findings of fact upon such issues, which are the only ones controverted.

Conclusions of Law.

The principles of law which are deemed applicable by appellants' counsel to the case are presented under numerous assignments of error, urged with great ability, and supported by a wealth of authorities. Appellee's counsel, while not combating the principles of law contended for by appellants nor the soundness of the authorities urged in support of them, contends that the principles of law urged by their counsel are inapplicable to the case; and has presented in reply the principles of law he deems applicable, adduced numerous authorities in support of them, and has presented them with such force as to convince this court that appellants are wrong and he is right in all his contentions. While it would be pleasing to the writer to take up and discuss seriatim the numerous propositions and counter-propositions advanced by counsel for either party under the several assignments, unfold the authorities cited in support of them, and give at length the reasons which have induced the court to conclude against appellants and hold with the appellee, the time he can give to the disposition of this appeal denies him the pleasure of the labor; nor is it deemed necessary by the court to a proper disposition of the case that it should be done; for it is thought that an analysis of the contract between appellants and appellee and of the one between them and Baker, both of which are embodied in our conclusions of fact, and an exposition of the law applicable to them and to what was done under them by the parties to this action and by Mr. Baker, will cover every question raised by the assignments essential to a proper disposition of the case and demonstrate that it was correctly disposed of in the court below. By the instrument of September 5, 1905, the defendants appointed the plaintiff their exclusive agent for the period of four months from its date to sell the lands described therein for not less than \$12,000; it being agreed that, if Thomas should sell the property within the period of

his agency, he should have whatever sum in excess of \$12,000 he sold the property out of the first payment made by the purchaser, appellants agreeing to furnish an abstract of title up to date of sale and clear title to purchaser. The meaning of this agreement is too clear for construction. Citation of authorities is unnecessary to show that, to entitle the plaintiff to the compensation stipulated for effecting a sale alone under the authority conferred by it, he must have within the period of his agency procured a purchaser able, ready, and willing to buy upon the very terms stipulated. Looking to this writing alone, Thomas could do nothing which it did not expressly authorize. It was his letter of attorney, and all the power he had was written in it. If, without more, he did anything short of or beyond it, such acts, while they might in certain events render him liable for damages, would not bind the defendants, or adversely affect anyone else. It is equally apparent that the other writing, incorporated in the conclusions of facts, had it been made between the plaintiff and Baker without the approval or acquiescence of the defendants, would show such an excess of or departure from his authority by Thomas as to render the instrument inoperative and absolutely void. If such were the case, it would bind neither defendants nor Baker, nor could plaintiff recover anything for doing what he had no authority whatever to do. But such is not the case. The writing, though procured by the plaintiff, was executed by the defendants themselves as well as by Baker. That it is an executory contract of sale based upon a valid consideration is apparent from the face of the writing. We say it is an executory contract of sale because it recites the payment by Baker and the receipt by Hamburger & Dreyling of \$1,000 as part payment of the purchase money for the land. After the description then follows this declaration: "Which property we [L. A. Hamburger and Gus Dreyling] have this day sold to said Baker, his heirs and assigns, for the full sum of * * * \$13,500 dollars cash." Then follows the stipulation of the defendants' obligation to convey the land to Baker upon his paying the purchase money of \$13,500, less the sum receipted for. Then follows the stipulation of defendants' agreements to furnish abstract of title, and that, if title to the property is not good in the opinion of Baker, they will return the \$1,000 they received from him, and that, if the title in his opinion is good and the property is not taken within 10 days from delivery of complete abstract of title, then the \$1,000 receipted for shall be forfeited to Thomas and defendants equally as liquidated damages, etc.

This is not a mere "option," by which is meant a contract by which the owner of property agrees with another person that he

shall have the right to buy his property within a certain time. By this the owner does not sell his property nor agree to sell it, but sells simply the right or privilege to buy at the election of the other party. *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; *Hopwood v. McCausland*, 120 Iowa, 218, 94 N. W. 469; *McMillan v. Philadelphia Co.*, 159 Pa. 142, 28 Atl. 220. But, as is before said, it is a contract of sale. It shows a contract which, upon its breach by either party, the other can enforce. If, in the opinion of Baker, the title was good, and he failed to take the land, the \$1,000 paid by him was forfeited to defendants and Thomas as liquidated damages. "Liquidated damages for what?" Why, simply for Baker's breach of the contract in failing to take the land. The damages to either party for its breach could be fixed by a stipulation in the contract, though the damages to the other was not. *Beauchamp v. Couch* (decided by this court on the 17th inst.) 117 S. W. 924. The damages to Baker which might have ensued from a breach of the contract on the part of Hamburger & Dreyling in failing to make him a deed of conveyance upon his tendering performance of his part of the agreement not being stipulated in the contract, he could have, at his election, either enforced specific performance of the contract or recovered such damages as he may have sustained. But, the defendants having failed to furnish an abstract showing a title good in Baker's opinion, he was under the agreement entitled to a restoration of the part of the purchase money he had already paid. This he could have recovered with interest, and such special damages as he may have incurred by reason of having been induced to enter into the contract had there been no stipulation for its return. *Clifton v. Charles* (Tex. Civ. App.) 116 S. W. 120.

What, then under the law and facts, were plaintiff's rights as against the defendants by reason of their failure to consummate their contract of sale with Baker? As has been seen, he was their exclusive agent at the time they signed the contract with Baker as the purchaser of the land to sell the same upon terms stated in the writing creating such agency; that, though the terms of the sale he effected with Baker differed materially from those expressed in his appointment, the defendant agreed to the alteration of the terms by signing the contract of sale; that the terms which fixed the amount of plaintiff's compensation in the event the sale was consummated in accordance with the contract with Baker were in no way changed, altered, or affected thereby; that Baker was able, ready, and willing to buy the land upon the terms agreed upon, if in his opinion the abstract furnished showed a title which was good; that the abstract furnished did not show a title which in his opinion was good; that his opinion was real and founded upon

such opinion was such as any good lawyer would have formed without further data than was disclosed by the abstract; that Baker would have, in fact, completed his purchase had the defendants complied with their agreement showing a title to the land which was good in his opinion; and that the compensation for plaintiff's services under his contract of agency for procuring Baker as a purchaser able, ready, and willing to buy the land upon terms agreed to by the defendants would, had it not been for defendant's failure to comply with their agreement to furnish an abstract showing a title good in Baker's opinion, have been \$1,500. If Baker had arrived at the opinion that the title was good and refused to take the land, plaintiff's compensation would have been \$500 of the \$1,000 paid by Baker as part of the purchase money, which was stipulated should, in such event, be forfeited to defendants and him as liquidated damages. This is stipulated in the contract between defendants and Baker, and shows that defendants recognized plaintiff as the procuring cause of the contract of sale. Can it, then, be said that, if the contract of sale had been fully consummated by the parties, plaintiff would not have been entitled to any compensation at all for procuring the purchaser? To put the question is to answer it in the negative. How, then, would the amount of his compensation have been determined? Clearly by his contract of agency, which entitled him to whatever excess of \$12,000 he sold the property for. The rule seems to be well settled that where a real estate broker has contracted for a certain compensation for procuring a customer to purchase on certain terms and conditions, and he procures a purchaser who agrees to purchase under modified terms and conditions differing from those the agent was authorized by his principal to make, and such terms, as modified, are agreed to by the owner of the property by his entering into a written contract of sale, embodying the modified terms and conditions, with the purchaser, the broker is entitled to his compensation as stipulated in his contract of agency, if through the failure of his principal to comply with the terms and conditions he has undertaken on his part to perform and comply with the contract of sale is not consummated. *Graves v. Bains*, 78 Tex. 94, 14 S. W. 256; *Conkling v. Krakauer*, 70 Tex. 739, 11 S. W. 117; *Hahl v. Wickes*, 44 Tex. Civ. App. 76, 97 S. W. 838; *McDonald v. Cabiness* (Tex. Civ. App.) 98 S. W. 943; *Id.*, 100 Tex. 615, 102 S. W. 721; *West v. Thompson* (Tex. Civ. App.) 106 S. W. 1134; *Stewart v. Mather*, 32 Wis. 344; *Gilder v. Davis*, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398; *Lockwood v. Halsey*, 41 Kan. 166, 21 Pac. 98; *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 884, 38 Am. St. Rep. 683; *Smith v.*

and brings the seller and purchaser together, and a definite and binding contract is entered into between them to consummate the sale upon the terms and price agreed to by the seller, if the title is good, the broker is entitled to his commissions, although no sale be effected because of a defect in the title. *Brackenridge v. Claridge*, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593; *Albritton v. First Nat. Bank*, 38 Tex. Civ. App. 614, 86 S. W. 646; *Berg v. Street Ry.*, 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929; *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 313; *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391. We apprehend that the same principle is applicable when the seller contracts with the buyer to furnish him an abstract showing a title good in the latter's opinion, and it proves, as in this case, not to be good in his opinion. There was no fraud, coercion, or undue influence practiced or exercised by Thomas upon the defendants alleged or proved as an inducement for their entering into the agreement to furnish an abstract showing a title good in the opinion of Baker. This stipulation in the agreement was purely voluntary on their part. They were free to make it a part of their obligation or not, just as they pleased. But, having made it, they were liable for the consequences of its breach. *Watkins Ld. Co. v. Thetford*, 43 Tex. Civ. App. 536, 96 S. W. 72; *Leuschner v. Patrick* (Tex. Civ. App.) 103 S. W. 664. Under the decision just cited it made no difference, so far as the broker was concerned, after he had procured a purchaser acceptable to the seller and a written contract of sale had been entered into by them, whether the purchaser was able to pay for the land or not, for in either event the agent was entitled to his commission. It would seem a fortiori that in this case, after the defendants had entered into the written contract with Baker, it would make no difference to Thomas whether they were able to furnish Baker with an abstract showing a title good in his opinion or not. As to their ability to conform to this condition was a matter for them, and not Thomas, to determine. He had procured a purchaser able, ready, and willing to buy upon terms agreed upon by the parties, and was no more responsible for defendants' inability to comply with their undertaking than he would have been if Baker had been unable to perform his. In either event, plaintiff would be entitled to his compensation. It made no difference whether the abstract showed a good title or whether defendants had title to the land by limitation or not; for, if it was not good in Baker's opinion, he could refuse to take the land and recover the part of the purchase money he had paid. *Greer v. International Stockyards*

Co., 43 Tex. Civ. App. 370, 96 S. W. 79; Smith v. Lander (Tex. Civ. App.) 106 S. W. 703.

Hence we conclude that under the law and facts the plaintiff had the right as against defendants to recover of them the \$1,500 sued for. The judgment of the district court in Thomas' favor for such sum being in accordance with such right, and there being no error assigned which would authorize its reversal, it is affirmed.

McMILLION v. COOK.

(Court of Civil Appeals of Texas. April 7, 1909.
Rehearing Denied April 28, 1909.)

1. TRIAL (§ 251*)—INSTRUCTIONS—DIVISION OF COMMISSION—THEORY OF CAUSE.

Where plaintiff's petition pleaded an express contract to pay plaintiff one-half commission on the sale of certain real estate, defendant was not entitled to have the cause submitted on the theory of implied contract and quantum meruit.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 251.*]

2. WITNESSES (§ 357*)—IMPEACHMENT—GENERAL REPUTATION.

A question asked a witness as to whether he was acquainted with defendant's general reputation for truth and veracity in the community, counsel stating that by general reputation he meant the general opinion in the community in the range of defendant's acquaintanceship, was intelligible and substantially proper.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 357.*]

3. WITNESSES (§ 358*)—IMPEACHMENT—CROSS-EXAMINATION OF IMPEACHING WITNESS.

Where an impeaching witness was asked concerning defendant's general reputation for truth and veracity, defendant's counsel was entitled to cross-examine the witness concerning the basis of the witness' opinion before he had been permitted to testify that defendant's reputation was bad.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 358.*]

4. TRIAL (§ 412*)—WAIVER OF ERROR.

Error in the court's refusal to permit the immediate cross-examination of an impeaching witness, before permitting the witness to testify that defendant's reputation was bad, was waived where defendant's counsel made no attempt to cross-examine the witness when an opportunity was afforded him to do so.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 412.*]

5. WITNESSES (§ 358*)—CROSS-EXAMINATION—COLLATERAL MATTER.

Where a witness had testified to impeaching circumstances against defendant, and stated that the witness and defendant had always been on good terms until defendant had told a lie on witness' son, a further question asked, as to what it was defendant had told that was a lie, was immaterial and collateral.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 358.*]

6. WITNESSES (§ 355*)—IMPEACHMENT—CROSS-EXAMINATION.

A witness, after testifying against defendant's general reputation for truth and veracity, stated on cross-examination: "When I say I am acquainted with his reputation for truth and

veracity, and that it is bad, I base my judgment on what other people say. In fact it is because he did not tell me the truth just that one time." *Held*, that the court did not err in refusing to strike out the witness' testimony on the ground that it was based on his own knowledge.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1154-1156; Dec. Dig. § 355.*]

7. TRIAL (§ 103*)—RECEPTION OF EVIDENCE—EXCEPTIONS—FORM.

A bill of exceptions to the exclusion of testimony should state what it was expected the witness would answer, and the objections to the testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 256; Dec. Dig. § 103.*]

8. WITNESSES (§ 357*)—IMPEACHMENT—GENERAL REPUTATION.

The question: "Are you acquainted with his (defendant's) general reputation for truth and veracity out there? I mean general reputation, what the people generally say about him?"—was not objectionable as calling for the opinion of the public about plaintiff in any and all matters, and not as to truth and veracity merely.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 357.*]

Appeal from Montague County Court; Geo. S. March, Judge.

Action by J. W. Cook against G. W. McMillion. Judgment for plaintiff, and defendant appeals. Affirmed.

Speer & Weldon, for appellant. W. S. Jamaeson, for appellee.

JAMES, C. J. The petition of J. W. Cook states a case of an express contract on the part of appellant to pay him one-half of a certain commission in the sale of certain real estate. Plaintiff alleged that defendant was agent for the sale of the land and agreed with plaintiff that if plaintiff found a purchaser he would pay plaintiff a sum of money equal to one-half of his 5 per cent. commission, and that plaintiff found and brought him a purchaser who bought the land, etc.

The action being based upon allegation of an express agreement and for a stipulated sum, appellant had no right to a submission of a case upon the theory of implied contract and quantum meruit. Consequently the charge complained of by the eleventh assignment was not incorrect.

The first assignment of error is overruled. The witness Young was asked the question: "Are you acquainted with his (appellant's) general reputation for truth and veracity in that community, and by his general reputation I mean the general opinion in the community in the range of his acquaintanceship?" The proposition in the brief is that: "When this question was asked, appellant's counsel believed the witness would attempt to respond with an answer based upon some other opinion in the neighborhood than that of appellant's general reputation for truth and veracity and should have been permitted to cross-examine the witness as to what

he proposed to base his opinion upon, before permitting him to testify that his general reputation was bad." The question put to the witness could not be understood otherwise than as an inquiry into the general reputation of the party, or general opinion of the party, in the community of the party's residence or acquaintanceship. The question was in intelligible and substantially proper form. Appellant's proposition relied on is above stated. The proposition is a correct one, and it was error to refuse to allow counsel the opportunity at that time to test his qualification. The rule of practice is well settled in this state, for to allow the witness to give the testimony and permit counsel to develop the witness' disqualification only in a cross-examination after the testimony is in would, as stated in *Johnson v. Brown*, 51 Tex. 77, place the party at the disadvantage of having an impression prematurely made on the minds of the jury, which neither the charge of the court nor the remarks of counsel could entirely remove. See, also, for rule, *Clapp v. Engledow*, 72 Tex. 256, 10 S. W. 492. But should the judgment be reversed for such error, when it appears that counsel failed to make any cross-examination whatever of the witness? If he had done this, and developed what he expected he would have developed through a preliminary examination, he might have had the testimony of the witness stricken out by the court, and at all events the result of the trial might have been different. It seems to us that where a party is placed at a disadvantage by an erroneous ruling of the court, and he possesses some means calculated to avoid the consequences of the ruling, he ought not to be heard to complain of it where he has made no effort to make use of such means. We therefore overrule the assignment.

Second assignment: The proposition is: "Witness T. H. Lawrence had testified to impeaching circumstances against appellant and had stated he and appellant had always been on good terms until the latter had told a lie on his son, and then appellant should have been permitted to ascertain more about the transaction to the end that the jury might determine whether or not witness' animosity for appellant and his knowledge of this old transaction had induced him to swear that appellant's reputation for truth and veracity was bad." What was sought to be asked the witness was: What was it that defendant had told on him that was a lie? It appears that the witness had testified in chief against defendant's general reputation for truth and veracity, and it was upon cross-examination by appellant that he testified as stated in the proposition. What the lie consisted of was immaterial and collateral, and the court did not err in refusing to allow the further inquiry.

Third assignment: The same witness, Lawrence, testified upon cross-examination: "When I say I am acquainted with his reputation for truth and veracity, and that it is bad, I base my judgment upon what other people say and what I know. In fact, it is because he did not tell me the truth just that one time." Thereupon counsel moved to have the impeaching testimony of Lawrence withdrawn from the consideration of the jury, which request was refused. The entire testimony of the witness should be considered. He did testify upon cross-examination that he based his impeaching testimony on what other people said, and upon what he knew himself. The additional statement, "In fact, it is because he did not tell me the truth that one time"—may have had reference to what he himself knew. At any rate, taking all this witness stated on his cross-examination, it did not so distinctly appear that he was testifying solely from his individual opinion that it would have justified the court in striking out his testimony.

The fourth assignment is overruled. The bill of exceptions upon which it is founded does not state what the objection to the testimony was, which was sustained, nor does it undertake to state what it was expected that the witness would answer.

We overrule the fifth and sixth assignments. The remarks attributed to the trial judge, exhibiting impatience with counsel, ought not and cannot fairly be supposed to have had any influence upon the jury's performance of their duty.

We regard the question objected to by the seventh assignment, to wit: "Are you acquainted with this defendant's general reputation for truth and veracity out there? I mean by general reputation what the people generally say about him"—as untenable. This question, taken in its entirety, is clearly not subject to the objection interposed to it: That it called for an answer as to the opinion of the public about defendant in any and all matters, and not as to truth and veracity merely.

We overrule the eighth and ninth assignments.

Affirmed.

TEXAS & P. RY. CO. v. SHAWNEE COTTON OIL CO. et al.†

(Court of Civil Appeals of Texas. April 10, 1909. Rehearing Denied May 1, 1909.)

1. CARRIERS (§ 207*) — FAILURE TO CARRY FREIGHT TENDERED—EXCUSE—SUFFICIENCY.

A carrier contracting to carry live stock cannot excuse a breach of the contract by proving inability to furnish cars because of unusually heavy traffic.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 226; Dec. Dig. § 207.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 19, 1909.

2. CARRIERS (§ 207*) — FAILURE TO CARRY FREIGHT TENDERED—EXCUSE—SUFFICIENCY.

A contract between a carrier and a shipper stipulated that the carrier should receive empty cars of another carrier and deliver them to the shipper for the reception of the freight. The carrier notified the shipper to get his freight ready for shipment. The carrier failed to deliver the cars, and the shipper sustained damages. *Held*, that the carrier was liable for breach of contract, though there was an unexpected movement of freight and a shortage of cars in which to ship the same.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 226; Dec. Dig. § 207.*]

3. CARRIERS (§ 13*)—DISCRIMINATION — “UNJUST DISCRIMINATION.”

To constitute “unjust discrimination” under Sayles’ Ann. Civ. St. 1897, art. 4574, prohibiting unjust discrimination, defined to be undue or unreasonable preference to any particular shipper, a preference must be given to one shipper over shippers of similar freight under similar circumstances, and a contract binding a carrier to receive cars of another carrier and deliver them to a shipper for the reception of his freight is not invalid as creating an unjust discrimination, in the absence of evidence that the contract gave the shipper a preference over shippers of other similar freight, who could secure cars from other carriers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 21–24; Dec. Dig. § 13.*]

4. APPEAL AND ERROR (§ 265*)—FINDINGS OF FACT—FAILURE TO MAKE FINDINGS—EXCEPTIONS—REVIEW.

The failure of the court to make special findings of fact requested will not be considered on appeal where no exception was taken thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1538; Dec. Dig. § 265.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by the Shawnee Cotton Oil Company and another against the Texas & Pacific Railway Company and others. From a judgment for plaintiffs, defendant the Texas & Pacific Railway Company appeals. *Affirmed*.

W. L. Hall and T. B. McCormick, for appellant. Looney & Clark, for appellees.

BOOKHOUT, J. This was a suit brought by appellee, Shawnee Cotton Oil Company, against the Texas & Pacific Railway Company, the Missouri, Kansas & Texas Railway Company, and the Missouri, Kansas & Texas Railway Company of Texas to recover damages alleged to have been sustained by a shipment of cattle made by the plaintiff over the lines of the defendant railways between Iatan, Texas, and Shawnee, Okl., during the month of December, 1906. The plaintiff alleged that on or about November 27, 1906, it owned 878 head of two and three year old steer cattle, which it desired to ship to Shawnee; that the Texas & Pacific Railway Company claimed that, owing to a rush of business, it could not immediately furnish cars for the shipment, and, as plaintiff was desirous of an immediate shipment to prevent deterioration if not immediately transported, it arranged with the Missouri, Kansas &

Texas Railway Company of Texas to furnish the necessary cars to the Texas & Pacific Railway Company, and that these two companies agreed and arranged with the plaintiff by that means to at once and within a reasonable time furnish and have at Iatan the necessary cars to transport the cattle, and that said companies failed and refused to comply with said arrangement, and did not have the cars at Iatan until December 19th, when 20 cars were furnished, and until December 21st, when 10 additional cars were furnished; that, relying on said understanding, the plaintiff at once got his cattle ready, but that, on account of the failure of the defendants to furnish the cars as agreed, it was kept waiting from time to time, not knowing when the cars would arrive, and being required to keep a man in charge at expense, and that, by reason of these facts, the cattle deteriorated in their market value \$2 per head, and its agent cost it in expense \$100; that the defendants handled the shipments as partners; and that in the transportation a number of head of the cattle were killed or injured. Plaintiff prayed for a judgment against all of the defendants for the damage incident to not delivering the cars, and for the loss of two head of cattle the sum of \$1,985, and against the Missouri, Kansas & Texas Railway Company, and the Missouri, Kansas & Texas Railway Company of Texas it claimed an additional damage for the injuries to the shipment en route, \$377.

Defendant the Texas & Pacific Railway Company, after exceptions and a general denial and a denial of partnership, pleaded that, at the time demand was made upon it for cars, it was unable immediately to comply with said demand, because at that time there existed throughout the country the most serious congestion of traffic that had occurred in a great many years, if, in fact, such a congested condition of traffic throughout the country had ever occurred before; that the conditions which prevailed upon the Texas & Pacific Railway were similar to those throughout the country; that during the fall of 1906 there was a shortage of cars due to the unprecedented movement of freight over its entire line and over the lines of connecting carriers, and there was such an unprecedented offering of freight of all kinds at all stations along the lines of said defendant's road that, with the utmost care, it could not promptly handle the freight that was offered, and was compelled on account of such unprecedented condition to furnish the various shippers shipping facilities as fast as it could, but in the order in which freight was offered and applications for cars were made; that this condition was generally known throughout the country and was known to the plaintiff, and that defendant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

did not enter into a contract or agreement with the plaintiff or any of its codefendants to receive cars from the Missouri, Kansas & Texas, and immediately place the same at Iatan for the use of plaintiff in making the shipment. It denied that it received said cars from the Missouri, Kansas & Texas Railway Company with such understanding, or that it was advised by said company that said cars were delivered to it for said purpose, but alleged that it was receiving and using all of the cattle cars it could get, either of its own or from connecting carriers, to fill orders which were on file at the time at various stations on its line, and that it uniformly adhered to the rule to furnish such cars in the order of their application, and that it did not and would not have agreed to receive cars to be immediately placed for the plaintiff out of their regular order ahead of others who had previously filed application or demand for cars. It denied that it in any manner induced the plaintiff to bring these cattle into Iatan prior to the time it was able to furnish cars for these shipments; that the congested condition was known to the plaintiff and to the Missouri, Kansas & Texas Railway Companies; and that this defendant did, in fact, furnish said cars as soon as possible, and in the order of the plaintiff's application with reference to other applications on file at the time the plaintiff's demand for cars was made. The Missouri, Kansas & Texas Railway Company and the Missouri, Kansas & Texas Railway Company of Texas filed answers similar to the answer of the Texas & Pacific Railway Company. A trial resulted in a judgment for plaintiff against the Texas & Pacific Railway Company for the sum of \$1,756 damage to the cattle on account of delay in delivering the cars and \$57 expense of the plaintiff's agent at Iatan awaiting the arrival of cars, and \$54, being the value of 2 head of cattle killed en route on said defendant's line, and a judgment in favor of the plaintiff against the Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company in the sum of \$351, being the value of 13 head of cattle killed by injuries received on the lines of said companies between Ft. Worth and Shawnee. The Texas & Pacific Railway Company only appeals.

The cause was tried by the court without the intervention of a jury. The court filed conclusions of fact, wherein he found that the Texas & Pacific Railway Company made the contract for the shipment of plaintiff's cattle substantially as set out in the petition. Appellant in various assignments complains of this finding. We have carefully examined the evidence, and are of the opinion that it is amply sufficient to support the finding. The appellee owned 878 head of cattle near Iatan, which he desired to ship to Shawnee, Oklahoma. The appellant being unable be-

cause of rush of business to furnish cars in which to ship said cattle, appellee arranged with the Missouri, Kansas & Texas Railway Company of Texas to furnish 81 stable cars in which to load and ship cattle from Iatan to Shawnee. The evidence shows that appellant agreed to receive said cars for such purpose, and did actually receive the same on November 27th, and started them west from Ft. Worth on November 27th and 28th, and after said arrangement had been made appellant notified appellee on November 27th that it had received the cars and would take them out at once for the cattle and for appellant to at once get its cattle in readiness to be loaded, and that, acting on this arrangement, appellee did, in fact, get the cattle, and had them near Iatan in readiness to be loaded. Appellant wholly failed to deliver any car or cars at Iatan until December 19, 1906, at which date it had there 20 cars, into which were loaded 528 head of plaintiff's cattle, and on December 21, 1906, it had at Iatan 10 more cars into which were loaded the remainder of the cattle, being 350 head. Appellant contends that a carrier is not liable for inability to promptly accept and carry all freight tendered to it if there arises an unexpected press of business for the prompt handling of which its facilities are inadequate, provided the carrier could not have reasonably anticipated and provided against such situation by a timely and corresponding increase of its facilities. There is authority to support this contention. *H. & T. O. R. Co. v. Smith*, 63 Tex. 326. This, however, could not relieve appellant if there was an express contract between appellant and appellee for the shipment of the cattle.

In the case of *G. & S. F. Ry. Co. v. Hume Bros.*, 87 Tex. 219, 27 S. W. 112, our Supreme Court in disposing of a contention, the same as that made by appellant in this case, said: "If the agent of the railroad company made a contract with plaintiffs or their agent to furnish cars at a given time to transport the cattle, then the fact that the shipment of cattle over the line of the railroad at that time was so great that it did not have cars sufficient to enable it to furnish the cars contracted for would constitute no defense to the action for the breach of that contract." In the case of *Southern Kansas R. R. Co. v. Morris* (Tex. Civ. App.) 99 S. W. 433, Judge Stephens, speaking for the court of the Second district, said: "The court did not err in holding that the answer pleading an unusual volume of business as an excuse for not complying with the contract presented no defense. The case was not one of failure to furnish cars within a reasonable time after application had been made for them, but of failure to furnish cars at a given time according to contract." And in the more recent case of *San Antonio & Aransas Pass*

Railway Co. v. Timon (Tex.) 114 S. W. 792, the shipper went to an agent of the railway company, and informed him that his cattle would be ready for shipment on a certain day, and requested the agent to have cars at his station at that time to ship cattle in, and the agent replied, "All right." The Supreme Court held that this was sufficient to show acceptance of the offer to ship on the day named and a contract on the part of the railway company to have cars at its station on the day named by the shipper, and that the railway company was liable in damages for injury sustained by reason of failure to furnish the cars on the day specified by the shipper in his offer. See, also, *Cross v. McFaden*, 1 Tex. Civ. App. 461, 20 S. W. 847; *Railway Co. v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 917; *Railway Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 831. Having held that there was an express contract between appellant and appellee, whereby appellant agreed to receive from the Missouri, Kansas & Texas Railway Company of Texas at Ft. Worth 81 empty stable cars and deliver them to appellee at Iatan in which to ship the cattle and gave notice to appellee to get his cattle ready for shipment, the appellant was liable for a breach of this contract, notwithstanding the unexpected movement of freight and the shortage of cars in which to ship the same.

There was evidence showing a congestion of freight upon the line of the Texas & Pacific Railway Company during the months of November and December, 1906, and a shortage of cars on the part of the company in which to ship the freight. It was because of such shortage that appellee procured cars from the Missouri, Kansas & Texas Railway Company, in which to ship his cattle. The appellant received these cars and agreed to forward same to Iatan. At the time no suggestion was made of any shortage of motive power; nor does the answer of the company set up a shortage in motive power to handle all freight tendered to it. The answer only sets up a shortage of cars in which to ship the cattle. With proper motive power the cattle could be shipped from Iatan to Ft. Worth in 24 hours. The appellant contends that if a carrier is suffering from a heavy congestion of traffic and press of business, so that it cannot promptly accept and handle in due order all of the freight that is being tendered for shipment, during the continuance of such conditions, shall contract to carry freight for a customer out of its regular order and ahead of others of its customers having prior right, such contract so made is illegal and cannot be enforced, and, if breached by the railway company, affords the party with whom it was made no right of action that the courts will enforce. If the contract amounted to an unjust discrim-

ination against other shippers having live stock to be shipped over appellant's railroad, and who had furnished cars in which to ship the same and who were similarly situated as appellee, then it was unlawful, and would not be enforced. *Sayles' Ann. Civ. St.* 1897, art. 4574. But the evidence must show an unjust discrimination as defined by the statute to make it unlawful. *H. & T. C. Ry. Co. v. Stewart*, 1 White & W. Civ. Cas. Ct. App. § 1246; *H. & T. C. Ry. Co. v. Rust & Dinkins*, 58 Tex. 107; *Hoover v. Penn. R. R.*, 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 58. To be an unjust discrimination, the evidence must show a preference given to appellee over shippers of live stock who had furnished the cars in which the same were to be transported. There was no evidence that any other shipper of live stock furnishing his own cars had priority over appellee.

Complaint is made by appellant of the court's failure to make certain specific findings of fact. The record shows a request by appellant for certain special findings of fact, but does not show that any exception was taken to the court's failure to make such findings. The motion for new trial complains of the finding that appellant contracted and agreed to accept the 81 cars from the Missouri, Kansas & Texas Railway Company, and informed plaintiff to get the cattle in readiness to be shipped. But no complaint is made therein of the court's failure to make special findings on the issues submitted by appellant. There was no bill of exception taken and preserved in the record complaining of the court's failure in this respect. It is held that the failure of the court to file conclusions of fact when requested will not be considered on appeal without a bill of exception taken before the adjournment of court. *Landa v. Heerman*, 85 Tex. 1, 19 S. W. 885.

Finding no reversible error in the record, the judgment is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. CHILTON et al.†

(Court of Civil Appeals of Texas. Dec. 5, 1908.
Rehearing Denied May 1, 1909.)

1. EVIDENCE (§ 501*)—OPINIONS—EXAMINATION—QUESTIONS—FOUNDATION.

Where, in an action for damages to land by impounding water by the negligent construction of a railroad embankment, plaintiff testified that the land had been cleared and in cultivation for several years before the overflow, and was in fine condition and under crop when overflowed, a question as to what the land was worth if it was cleared and in a high state of cultivation was not objectionable on the ground that the hypothesis on which it was based was not supported by the evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court June 2, 1909.

is the difference between the market value of the land immediately before and immediately after the injury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 140; Dec. Dig. § 125.*]

3. DAMAGES (§ 174*)—EVIDENCE—ADMISSIBILITY.

In an action for injuries to land in May, 1905, where the only evidence that the conditions affecting its value on March 14, 1906, were the same as immediately after the overflow, was testimony of a witness that there had been practically no change in the "value of the land" in that neighborhood from May, 1905, to March, 1906, testimony as to the value of the land on March 14, 1906, was properly excluded.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 174.*]

4. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action against a railroad for damages caused by impounding water by the negligent construction of an embankment so as to flood plaintiff's land, where there was no evidence that the damages were caused from any other cause than the failure of defendant to provide sufficient openings in its roadbed to pass the water, an instruction that if defendant constructed its bed so as to impound the waters of the stream, and the roadbed broke and caused the overflow of plaintiff's land, was not on the weight of the evidence for excluding any other issue than the impounding of the water.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 439-466; Dec. Dig. § 194.*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by A. S. Chilton and another against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Affirmed.

Thomas & Rhea, for appellant. Turney & Lewis, for appellees.

TALBOT, J. The appellees, A. S. and A. J. Chilton, brought this suit against the Missouri, Kansas & Texas Railway Company of Texas, the appellant, to recover damages caused by overflow of their land during the year 1905; said land being situated in what is known as "Five-Mile creek bottom," about nine miles south of Dallas. It was alleged by plaintiffs that the natural flow of the water in Five-Mile creek was in a southeasterly direction, but, by reason of the negligent construction of appellant's railroad embankment across said stream and the valley thereof in not providing sufficient openings through same for the water to pass in high water, the flow of the waters had been changed from its natural course and caused to back up against and on the west side of said embankment, causing same to break on the 13th of May, 1905, precipitating the waters over the land of plaintiffs, washing same, and damaging said lands to the extent of \$3,110. The defendant pleaded the

defense that he held notes on the land, aggregating \$1,000 without interest, which notes were secured by vendor's and mortgage liens on the land, and that, by reason of the facts pleaded by plaintiff, intervenor's security had been impaired to the extent to which land had been damaged by the overflow, and asked that judgment be rendered for such injuries against the defendants, and that the court set aside to intervenor such part of the damages awarded as might seem just and right. The trial before a jury resulted in a verdict in favor of the plaintiff for the sum of \$1,250, and judgment was thereupon entered by the court in favor of the plaintiffs, and against the defendant in the said sum of \$1,250, directing that the same when collected be paid into the registry of the court, to be applied two-thirds to the indebtedness of the intervenor, R. G. Phillips, and the balance to plaintiffs' attorneys. From this judgment the appellant prosecutes this appeal.

It is assigned that the trial court erred in refusing to grant appellant's motion for a new trial because the verdict of the jury is excessive. This assignment should not, in our opinion, be sustained. The evidence was amply sufficient to warrant the amount of the verdict. Indeed, a verdict for a larger sum would have been justified by the testimony.

J. M. Hagler, a witness for the plaintiffs, was asked the following question: "Well, Mr. Hagler, if the land had been cleared as you say it was, and it was in a high state of cultivation, clean and clear, what would you say the piece of land would be worth?" Appellant's counsel objected to this question on the ground that there was no evidence in the case to justify the hypothesis upon which the question was based. The objection was overruled and the witness permitted to answer: "It was worth from \$70 to \$75 per acre." We think there was no error in this ruling of the court. Plaintiffs had testified that their land had been cleared and in cultivation for several years before the overflow, that at the time of the overflow there was a nice crop on the land, and it was in fine condition. This testimony found in the record is sufficient to meet the appellant's objection and show the correctness of the court's ruling. We have examined the authorities cited by counsel for appellant in support of their position and believe they are not in point.

We are also of the opinion there was no error in refusing to permit the witness Thigpen to testify to the value of plaintiffs' land on March 14, 1906. This witness, it appears, did not see the land after it was cleared and put in cultivation, nor until about one year

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

after the overflow and injury to it. The measure of damages in such case is the difference between the market value of the land immediately before and immediately after the injury. By the evidence excluded the appellant sought to show the value of the land nearly one year after the damage complained of was done, without showing that the conditions affecting its value were the same as they were just after the overflow. It is true the witness Thigpen stated that "there had been practically no change in the value of the land in that community since May, 1905, to March, 1906"; but without further evidence that the conditions affecting the value of plaintiffs' land were practically the same on March 14, 1906, as they were just after the injury, its value at the latter date would not furnish the proper criterion for determining plaintiffs' damages.

Appellant's fourth assignment complains of the following charge: "If you find and believe from the evidence that the defendant so built and constructed its roadbed across Five-Mile creek and the bottom lands adjacent thereto, in such a manner as to obstruct and impound the waters of said stream, and said embankment broke, and the flood caused thereby flowed over and across plaintiffs' lands and injured said land, you will find for the plaintiffs. If you find for the plaintiffs, you will affix the damages at such sum as you may find to be the difference between the reasonable market value of the land before the injury, if any, and immediately after the injury, if any." The objection to this charge is that it is upon "the weight of the evidence, in that it excludes any other issue than the mere impounding of the waters," and instructed a verdict for plaintiffs if the jury should find that defendant's embankment obstructed and impounded the waters of the stream, thereby ignoring the question of what might have been the proximate cause of such obstruction and impounding. The objection is not well taken. It was a statutory duty imposed upon appellant to construct in its roadbed such necessary culverts and sluices as the natural lay of the land at the point in question required for the necessary drainage thereof, and a violation of this duty rendered it liable for such damages as plaintiffs sustained as a result thereof. The charge complained of very fairly submits those issues to the jury, and we fail to find any substantial evidence in the record tending to show that any other cause than the failure of appellant to provide its roadbed with sufficient openings for the passage of the water proximately contributed to the damage done the plaintiffs' property. In other words, we fail to find any evidence raising an issue as to the proximate cause of the injury to appellees' property, and the charge quoted was sufficient. The charge was in no respect upon the weight of the evidence.

The contention that the evidence was sufficient to justify the conclusion that the drift accumulated in the creek bed above the railroad embankment, or that the ditch cut by the Trinity Rod & Gun Club, changed the surface waters of Five-Mile creek, and "impounded the waters of said creek against the embankment of defendant," and proximately contributed to cause plaintiffs' damage, is not sustained. We think the evidence conclusively shows that neither the said drift nor this ditch in any way contributed to cause the overflow resulting in the injury to plaintiffs' land. For this reason the court correctly refused appellant's requested charge, made the basis of its fifth assignment of error, submitting such an issue.

The evidence warranted the conclusion that the rainfall was not unusual and unprecedented. The material allegations in plaintiffs' petition were sufficiently established to justify the verdict of the jury, the issues raised were fairly submitted, and the judgment will be affirmed.

Affirmed.

DALLAS TRUST & SAVINGS BANK v. STORY.

(Court of Civil Appeals of Texas. April 3, 1909.
Rehearing Denied May 1, 1909.)

MORTGAGES (§ 298*)—INTEREST—EFFECT OF PAYMENT OF PRINCIPAL.

A mortgage creditor, who collected on the policy after destruction of the improvements more than enough to extinguish the principal of the debt, could not collect more interest than that which had accrued at the date of the collection of the policy; but a creditor entitled to receive the amount of interest notes as commissions for negotiating the loan might retain such amount, notwithstanding his collection of the policy.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 850; Dec. Dig. § 298.*]

Appeal from District Court, Dallas County; W. M. Holland, Judge.

Action by Millard Story against the Dallas Trust & Savings Bank. From a judgment for plaintiff, defendant appeals. Affirmed.

Cockrell & Gray, for appellant. R. L. Porter, for appellee.

RAINEY, C. J. On November 23, 1905, the appellee borrowed from appellant the sum of \$3,500, for which he agreed to pay 8 per cent. interest per annum. Five promissory notes were executed by appellee and made payable to the order of H. A. Kahler, four of which were for \$300, each, and the other for \$2,300; said notes falling due December 1, 1906, December 1, 1907, December 1, 1908, December 1, 1909, and December 1, 1910, respectively, bearing 6 per cent. interest per annum, payable semiannually. At the same time appellee executed to appellant ten notes

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

first notes. A first and second mortgage on real estate situated in the town of Mexia, Tex., were executed to secure the payment of said notes; the first mortgage to secure the payment of the first five notes, and the second to secure the other ten notes. The improvements on said property were insured against fire, and the policy made payable to H. A. Kahler, or to the legal holder of said notes, as their interest might appear. The first mortgage provided that, in case said improvements were destroyed by fire, "the said H. A. Kahler, or other legal holder of said bond shall have the right to apply the moneys collected from the insurance in payment of the debt secured, whether due or not." It was further provided that if default was made in the payment of taxes, premiums of insurance, or charges of any kind, at the option of the holder, "the moneys due on said bond and for advances as aforesaid may be collected by a sale under this mortgage or by suits in the courts of Dallas county, or otherwise, as H. A. Kahler, or other legal holder of said bond may elect." The second mortgage provides, among other things: "If default shall be made in the payment of the above-described notes for \$291.55, or of the notes or bonds secured by the first mortgage aforesaid, or if default should be made in the compliance of any of the terms or conditions of said first mortgage, which are hereby adopted and made a part of this instrument, then the whole sum hereby secured shall become due and payable at the election of the holder hereof." In the early part of 1907, the improvements on said property were destroyed by fire, and on April 10, 1907, appellant collected \$3,500 on the insurance policy and appropriated said insurance to said debt. At this date appellee had paid the notes that had fallen due, and he was owing a balance of \$3,200, not including future interest. The holder of the first series of notes not then paid agreed to accept payment if interest was paid up to June 1, 1907, that being the next interest paying period, and cancel the notes. The appellant, the holder of the ten notes given for the 2 per cent. interest, demanded a greater sum than said notes would amount to on April 10, 1907, claiming that the 2 per cent. for which said ten notes were given represented the commissions it was to receive for negotiating the loan. Appellant offered to compromise by making some reduction of the amount that it claimed to be due, but appellee refused to settle on that basis and brought suit for \$207.57, with 6 per cent. interest per annum thereon from April 10, 1907, claiming that much was wrongfully withheld from him by appellant out of the

interest thereon at 8 per cent. up to June 1, 1907.

The contention of appellant that the 10 notes were given for its commissions in negotiating the loan, and therefore it was entitled to retain the full amount of their face value, does not necessarily follow from the evidence. If the contract had been that appellant was to receive said amount as its commissions for negotiating the loan, then we think it would be entitled to retain said amount; but under the evidence the court was authorized in concluding that such was not the contract entered into. It is true, Mr. Bregg, vice president of the bank, testified, in substance, that the bank in like transactions took a second mortgage to cover pay for services, attorney's fees, and expenses of examining the property, and to pay commissions to the correspondent or agent through whom the business comes, etc. This was doubtless Mr. Bregg's conception of the contract and prompted the drawing of the contract in the form it was; but there seems to be no evidence that appellee knew at the time of making the contract that the loan was being made for some one else, and that said 10 notes were executed for the bank's commissions. On the other hand, appellee testifies, in substance: That the contract for the loan of the money was made with the bank, the rate of interest to be 8 per cent. per annum, and when drawing up the paper he objected to signing the papers in the form as drawn up; but they told him it was their form and the way they loaned all their money. That at the time he was not informed that other parties were interested in the loan, and, having contracted for the money, he signed in accordance with their request. That Mr. Bregg told him after the fire that the 10 notes were the bank's commissions. The notes on their face specify they were given for a part of the interest on said loan, and until after the fire said notes were treated as part of the interest.

The conclusion, under the facts, being authorized that said 10 notes were given for part of the interest, then, did the bank have the right to retain the amount thereof then not due out of the insurance money collected by it? The fire insurance policy covering the mortgaged property which was burned, and enough thereof being collected and applied to the extinguishment of the principal of the debt as per the terms of the mortgage, no greater amount of interest was collectible than had accrued at the date of the collection of said insurance. *Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024, 12 L. R. A. 93, 23 Am. St. Rep. 332.

The court allowed the appellant interest

**DALLAS CONSOL. ELECTRIC ST. RY. CO.
v. CHASE.**

(Court of Civil Appeals of Texas. April 10,
1909. Rehearing Denied May 1, 1909.)

**1. JURY (§ 2*)—SUMMONING JURY—STATUTES
—VALIDITY.**

Acts 30th Leg. 1907, p. 269, c. 139, providing for a particular jury system for all counties having a city containing a population of 20,000 or more according to a census, is not unconstitutional.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 15; Dec. Dig. § 2.*]

2. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—EVIDENCE—INSTRUCTIONS.

Where the petition in an action for injuries to a street car passenger alleged that as plaintiff was alighting from the rear platform some projection on the step caught in his clothing and threw him to the ground, and there was no contention that any projection was on the platform as distinguished from the step, and the evidence showed that the passenger was thrown while attempting to alight, an instruction that, if there was some projection on the platform or steps which caught the passenger as he was alighting, he was entitled to recover, etc., was not misleading as presenting the issue of negligence as to a projection on the platform as distinguished from the step.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1326; Dec. Dig. § 321.*]

3. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries to a street car passenger, the evidence showed that he was thrown to the ground while attempting to alight, and there was no contention on the trial that any projection was on the platform as distinguished from the step, which was a part of the platform, an instruction authorizing a recovery if there was some projection on the platform or steps which caught the passenger as he was alighting, causing him to fall, was not erroneous as submitting two issues, thereby making it impossible to tell from the verdict on which issue the jury found.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1326; Dec. Dig. § 321.*]

4. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.

The fact that the court in its charge repeated a former part of the charge on the right of recovery was not objectionable as singling out particular facts and impressing the jury with their importance, where the court repeated several times the issue of contributory negligence, and when the charge, considered as a whole, did not give undue prominence to plaintiff's side of the cause.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 703; Dec. Dig. § 295.*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by Joseph Chase against the Dallas Consolidated Electric Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

RAINEY, C. J. This suit was brought by appellee to recover of appellant damages on account of personal injuries sustained by him while he was attempting to alight from one of appellant's cars. The petition alleged, among other things, that defendant was duly incorporated under the laws of Texas; "that, while he was a passenger on one of the defendant's cars, he gave the defendant notice that he wished to alight therefrom, and thereupon said car checked its speed, and plaintiff went to the rear platform to alight from said car, and as the car had passed the usual and customary place for alighting at Harwood street and as the speed of the car had been checked, and believing the conductor's signal indicated that he should get off, plaintiff proceeded to alight from said car while it was going at a slow rate of speed, but, as he was in the act of alighting, some projection on the step of the car was caught in the hem of plaintiff's pants, whereby he was hung as he was alighting, and violently thrown to the ground, and crippled, bruised, and injured, which said injuries were more specifically set out in the petition; that the projection, the nature and character of which plaintiff had no means of knowing, and which he had not discovered, was negligently left on said step and made same unsafe for passengers, and said negligence on the part of defendant was the direct and proximate cause of the injuries received by plaintiff." The defendant answered by general denial and plea of contributory negligence. A trial resulted in a verdict and judgment for plaintiff in the sum of \$1,500. The allegations of plaintiff's petition were supported by the evidence, and the jury were warranted thereby to render a verdict for him.

The first assignment of error complains of the action of the court in overruling appellant's motion to quash the jury panel for the week. The jury for the week were drawn under Acts 30th Leg. 1907, p. 269, c. 139, known as the "Jury Wheel Law." The contention urged is that said law is unconstitutional, and therefore inoperative. This contention is not well taken. *Railway Co. v. Danforth* (Tex. Civ. App.) 116 S. W. 147.

The next complaint is that the court erred in the following paragraph of his charge, viz.: "If, through the negligence of defendant, there was some projection on said car on the platform or steps thereof which caught in plaintiff's pants as he was alighting therefrom and caused him to fall, and receive the alleged injuries complained

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

model was negligent on his part in so doing." The objection to said charge is that it has the "effect of presenting to the jury the issue of negligence with reference to a projection upon the platform of defendant's car in the absence of any allegation or claim in plaintiff's petition that there was any projection upon the platform of the car or any defect in such platform." The petition alleges that "plaintiff went to the rear platform to alight from said car, * * * and, as he was in the act of alighting, some projection on the step of the car caught in the hem of plaintiff's pants," and threw him to the ground. There seems to have been no contention on the trial that any projection was on the platform as contradistinguished from the step. Some witnesses speak of appellee's going out on the platform and alighting from the car, etc.; others speak of the step of the car, etc. The step is a part of the platform, and under the evidence, which shows that he was thrown while attempting to alight, it is immaterial whether he was thrown from the platform or step, as the jury could not possibly have been misled by the charge. Nor are the facts such that the charge submits two issues, which makes it impossible to tell from the verdict upon which issue the jury found.

Complaint is made of the charge on the ground that it repeats a former portion of the charge on the right of recovery, which had the effect of singling out particular facts and impressing the jury with the importance of same. The appellee could with equal propriety urge the same objection to the charge, as the court repeated several times the issue of contributory negligence.

When the charge is considered as a whole, there was no such undue prominence given to plaintiff's side of the cause, as that it worked injury to defendant.

Finding no reversible error in the record, the judgment is affirmed.

BOESCH v. TEXAS CENT. R. CO.

(Court of Civil Appeals of Texas. April 3, 1909.
Rehearing Denied May 1, 1909.)

RAILROADS (§ 351*)—ACCIDENTS AT CROSSING —INSTRUCTIONS.

In an action for injuries to an occupant of a buggy at a crossing caused by the unnecessary noise of the engine frightening the horses, an instruction that plaintiff could not recover if the employees on the engine did not see plaintiff in his perilous position is too restricted, since it is the duty of the employees to use ordinary care to discover the position of parties who intend to cross the track and are near enough for their horses to be frightened.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1199; Dec. Dig. § 351.*]

ment for defendant, plaintiff appeals. Reversed and remanded.

V. L. Shurtleff and W. E. Spell, for appellant. Collins & Cummings and J. A. Kibler, for appellee.

RAINEY, C. J. Mrs. Boesch and companions were riding in a buggy on a street in the town of Whitney, and when they approached within 30 or 40 feet of the point where the railroad track crosses said street they saw a train approaching and stopped their horse for the train to pass. It is alleged that, when the train reached the crossing, the engineer negligently caused steam to escape from the engine, causing a loud and unusual noise, which frightened the horse and caused it to run away and injure Mrs. Boesch. The defendant plead a general denial and contributory negligence on the part of plaintiff. A trial resulted in a verdict and judgment for the railroad.

It seems the engine passed over the crossing, going west, and stopped, and then immediately began backing east. There is no controversy that the engine in crossing west made more noise than was customary and necessary in the operation of trains, but there was a sharp conflict whether the horse became frightened and ran from the sight and noise of the engine when it first reached the crossing going west, or when it backed east, at which time appellant's witnesses claim the engine emitted steam. Upon the question of the care devolving upon the railroad under the circumstances, the court gave a special charge requested by the railroad, as follows: "Notwithstanding you find and believe from the evidence that the engine of the defendant did emit steam and frighten the horse which was being driven by Mrs. Boesch at the time and place alleged in plaintiff's petition, yet if you further believe that the engineer in charge of said engine did not see plaintiff and her companions in the buggy south of the defendant's track at the crossing of said track on Colorado street in the town of Whitney as shown by the evidence, and that the fireman or other servant or employé of defendant on said engine at the said time and place did not discover the perilous position of plaintiff (wife) and the other occupants of the buggy in question, if you find their position was perilous, in time to have informed or advised the engineer in charge of such engine of their said position in time for such engineer by the use of the means at hand to have prevented the accident in question, then and in such event the plaintiff cannot recover in this case, and you will

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

return a verdict for defendant." The giving of this charge is assigned as error; the contention, in effect, being that the question was not whether the engineer saw the parties in the buggy, but was it the duty of the engineer to use ordinary care to discover said parties, and not cause the engine to make an unusual and unnecessary noise?

Whether or not it is the duty of the employes of a railroad company in operating a train in approaching a crossing at a public street to anticipate the nearness thereto of parties driving or riding horses that might become frightened at the train seems not to have been directly passed upon by our Supreme Court. We understand the duty to be to use care to prevent colliding with one attempting to cross the track, and to desist from making a noise when it is discovered that a horse near the track has become frightened. The charge of the court limiting the care of the employes to whether or not they saw the parties at the time was too restricted. In our opinion the rule is that such employes, in approaching and while crossing the street, should use ordinary care to discover the position of parties who intend crossing the track and are near enough for the horses they are driving or riding to become frightened at the train. The rule here stated accords with the following authorities, viz.: *Railway Co. v. Pendery*, 14 Tex. Civ. App. 60, 36 S. W. 793; *Railway Co. v. Bellew*, 22 Tex. Civ. App. 264, 54 S. W. 1079.

We have considered all the other assignments of error and find no error therein.

For the erroneous instruction above indicated, the judgment is reversed, and cause remanded.

LA BRIE v. CARTWRIGHT.

(Court of Civil Appeals of Texas. April 7, 1909.)

1. VENDOR AND PURCHASER (§ 242*)—BONA FIDE PURCHASER—BURDEN OF PROOF.

Where a person purchased from heirs land which had been previously deeded to a third person by the ancestor, the burden was upon a person claiming title through the heirs to show that the purchaser from them was a purchaser for value without notice of the prior conveyance.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 603; Dec. Dig. § 242.*]

2. VENDOR AND PURCHASER (§ 229*)—"BONA FIDE PURCHASER"—NOTICE—FACTS PUTTING ON INQUIRY.

A bona fide purchaser is one who has in good faith paid a valuable consideration without notice of adverse rights of another, and though a purchaser of land did not have actual notice of a prior conveyance to a third person, if he had knowledge of any fact or circumstances sufficient to put a prudent man upon an inquiry which, if prosecuted with ordinary diligence, would have led to actual notice, he was charged

with knowledge which might have been thereby acquired.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 477; Dec. Dig. § 229.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 825-830; vol. 8, p. 7591.]

3. VENDOR AND PURCHASER (§ 229*)—BONA FIDE PURCHASER—NOTICE—FACTS PUTTING ON INQUIRY.

Where a fact is known sufficient to put a purchaser upon inquiry as to his grantor's title, he cannot close his eyes to it and excuse himself from pursuing the inquiry by taking the opinion of an attorney upon an abstract of the record title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 477; Dec. Dig. § 229.*]

4. VENDOR AND PURCHASER (§ 245*)—BONA FIDE PURCHASER—QUESTION FOR JURY.

Whether a purchaser of land purchased without notice of a prior conveyance thereof to a third person *held* to be for the jury under the evidence.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 612; Dec. Dig. § 245.*]

5. TRESPASS TO TRY TITLE (§ 45*)—INSTRUCTIONS—CONSTRUCTION—PRIOR CLAIM AND PRIOR DEED.

In trespass to try title, where it appeared that defendant claimed under a "prior deed" of the land which was the only "prior claim" involved, the "prior claim" was referable to "prior deed," where used in a charge that notice to a subsequent purchaser of a prior deed could have been given by knowledge of facts which would have put an ordinarily prudent man upon inquiry which, if prosecuted with ordinary diligence, would have led to actual notice of the prior deed, or by knowledge of another person of the prior claim if he were found to be the purchaser's agent; the terms as used being practically synonymous.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 67; Dec. Dig. § 45.*]

6. PRINCIPAL AND AGENT (§ 180*)—NOTICE TO AGENT AS NOTICE TO PRINCIPAL—APPLICATION OF RULE.

The doctrine that a principal is chargeable with notice of facts known to his agent is based not only upon the fiction of identity, but also upon the fact that it is the agent's duty to communicate his knowledge to his principal and the presumption that he has performed his duty, and the rule does not apply if an agent, with knowledge respecting the title to land in which he had a personal interest by reason of an agreement whereby he was to receive a share of the purchase price, sold the land to his principal, as his interest would likely lead him to conceal his knowledge.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 689; Dec. Dig. § 180.*]

Appeal from District Court, Sabine County; W. B. Powell, Judge.

Trespass to try title by J. D. La Brie against M. C. Cartwright, the Texas Loan Agency, and others. From a judgment for defendant Cartwright and for plaintiff against defendant loan agency, plaintiff and defendant loan agency appeal. Reversed and remanded.

Woods & Kerr, S. M. Johnson, and Goodrich & Synnott, for appellants. Greer, Minor & Miller, for appellee.

NEILL, J. On June 30, 1905, J. D. La Brie sued M. C. Cartwright and a number

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
118 S.W.—50

of other persons, as the heirs of Matthew and Amanda Cartwright, in trespass to try title to recover 600 acres out of the northeast corner of the north half of the Isaac Powell league situated in Sabine county, Tex. The plaintiff also made the Texas Loan Agency and W. A. Polley, under whom he claims by general warranty deeds, parties defendant, and prayed judgment against them on their warranties, in the event of his failure to recover the land. All the defendants who were sued for the land disclaimed any title or interest in it except the appellee, M. C. Cartwright, who answered by a plea of not guilty. The Texas Loan Agency answered plaintiff's petition by a general demurrer, and W. A. Polley, though cited, failed to answer at all. The case was tried before a jury, and the trial resulted in a judgment against the plaintiff for M. C. Cartwright and in favor of the plaintiff against the Texas Loan Agency and W. A. Polley on their warranties. The plaintiff and the Texas Loan Agency have both appealed from the judgment.

As we shall reverse the judgment on account of an error in the charge, only so much of the evidence as may be necessary to expose the questions considered and to show the grounds upon which the judgment is reversed will be presented or discussed. Isaac Powell, the original grantee, conveyed to John Cartwright and his son, Matthew Cartwright, the north half of the Isaac Powell league, by deed dated July 4, 1838. The title of this part of the survey afterwards became vested in Robert G. Cartwright, another son of John Cartwright, and it is agreed by the parties to this action that he is the common source of title under which they both claim; the defendant M. C. Cartwright derailing his title from a deed of R. G. Cartwright, and the plaintiff claiming his under a deed from R. G. Cartwright's heirs to H. G. Damon. The deed from R. G. Cartwright, through which defendant claims, conveyed the north half of the league to the first Matthew Cartwright. This deed was dated November 22, 1845, and filed for record May 12, 1846, and, the records having been destroyed in 1875, was again filed for record on July 12, 1889, at 2 o'clock p. m. All the other heirs of Matthew C. Cartwright, the first, and his wife, Amanda, conveyed 794 acres of the Isaac Powell league, including the 600 acres in controversy, to Matthew C. Cartwright, who is the defendant in this suit, by their deed dated August 20, 1904, which was filed for record September 25, 1905. It is admitted that plaintiff was a purchaser for value. The only question is: Did H. G. Damon purchase for value in good faith and without notice or knowledge of the prior deed from Robert G. Cartwright to Matthew Cartwright. So much of the evidence bearing upon this question as is necessary to be considered will be stated in considering the assignments of error to which it is pertinent.

Conclusions.

1. The first assignment of the appellant La Brie, which is adopted by his coappellant, is: "The court erred in charging the jury in the fourth paragraph of its charge, as follows: 'The evidence shows that said Damon paid a valuable consideration for said land. The issues therefore to be determined by you are: Did he pay said consideration in good faith without notice of the prior deed for said land from R. G. Cartwright to Matthew Cartwright. In order for said Damon to have been a purchaser in good faith, it was necessary for him to exercise reasonable diligence in making inquiry as to the title he was acquiring—that is, such diligence as an ordinarily prudent man would have exercised under the same circumstances—and, if he had knowledge of facts that would have provoked inquiry on the part of an ordinarily prudent man, the law charged him with the duty of following up such inquiry with ordinary diligence, and with knowledge of all the facts which such an inquiry would have disclosed; and, if he failed to do so, he was not a bona fide purchaser for value without notice, provided you further believe that, had he made such inquiry, he would have been led to actual notice of facts, which, if followed up, would have disclosed the existence of the prior deed from R. G. Cartwright to Matthew Cartwright.' First, because plaintiff established the fact beyond controversy that Damon had no actual knowledge of the prior deed from R. G. Cartwright to Matthew Cartwright, and, second, because plaintiff established the fact beyond controversy that H. G. Damon had no knowledge, actual or otherwise, of any fact or facts which would put him on inquiry, and which would have led him to actual notice of the prior deed from R. G. Cartwright to Matthew Cartwright."

The error insisted upon by the proposition under the assignment is, as we construe it, that the paragraph of the charge embodied in the assignment submits an issue not raised by the evidence, and that the grounds upon which the insistence is urged are: (1) That Damon had an abstract of title to the land submitted to his attorney, Kirby, which showed that at the time he purchased and paid the consideration the record title was in his vendors; (2) and that the evidence shows that at the time of his purchase he (Damon) had no knowledge of the deed from Robert G. Cartwright to Matthew Cartwright executed November 22, 1845, nor of any fact which would have put him upon inquiry which would have led to the discovery of said deed—that therefore he was an innocent purchaser for value.

Damon having purchased subsequent to the date of the deed from Robert G. Cartwright to Matthew Cartwright, the burden was upon plaintiff to show that he (Damon) was a purchaser for value, without notice of such prior conveyance. Unless the evidence upon the

issue was of such probative force that no fair-minded man could reach any other conclusion from it than that he was such purchaser, it was the duty of the trial court to submit it to the jury. A "bona fide purchaser" is one who has in good faith paid a valuable consideration without notice of the adverse rights of another. In other words, he must be a bona fide purchaser for value without notice. It may be conceded that the evidence conclusively shows that Damon did not have actual notice of the prior conveyance; but, if he had knowledge of any fact or circumstances sufficient to put a prudent man upon inquiry which, if prosecuted with ordinary diligence, would lead to actual notice, he was charged with knowledge which might have been acquired by such diligence. In view of this principle, can it be said from the evidence, as a matter of law, that Damon had no knowledge of any fact or circumstances which would put him on notice of the prior conveyance by Robt. G. Cartwright? If not, then it was a matter of fact for the jury, and not the court to decide.

Laying aside for the present the question, to be considered under another assignment, whether S. M. Johnson in negotiating the sale was acting in the matter as Damon's agent, we will inquire whether there are any facts or circumstances shown by the evidence of which Damon had knowledge, which the jury might find were such as would have put a prudent man upon inquiry, which, if followed up with due diligence, would have led him to the knowledge of the fact of the prior conveyance under which the appellee claims the land in controversy. In pursuing this inquiry we will consider, *pro hac vice*, that Johnson was, as appellants claim, the agent of the heirs of Robt. G. Cartwright with a power of attorney from them to sell the land, and was acting only as their agent under the power of attorney in negotiating the sale to Damon. It is undisputed that this power was coupled with an interest in the land, entitling Johnson to one-half of the proceeds of the sale. This fact was known to Damon, for, when a deed was tendered him executed by Johnson as attorney in fact for the heirs, Damon refused to accept it, but demanded, in lieu of it, a deed from the heirs in person. He knew when the deed from the heirs, executed by them in person, in accordance with his demand, was tendered to and accepted by him, that Johnson was to receive one-half of the purchase money. Can it be said as a matter of law that this fact alone was not, in and of itself, sufficient to put a prudent man upon inquiry? We think not. It is a matter of common knowledge that men of common sense and ordinary business capacity, when they believe they have a good title to property, do not give away half of it, or of the proceeds of its sale to another merely in consideration of his making a sale. If, then, with a knowledge of the fact that John-

son was to recover half of the proceeds of the sale, might not the jury have found from all the facts and circumstances shown by the evidence that prudence required Damon to make further inquiry as to his vendors' title to the land, and that, if he had prosecuted the inquiry with ordinary diligence, he would have found that the ancestor of his vendors had conveyed the land to Matthew G. Cartwright, under whom appellee claims, and that consequently they had no title to convey? We think such might have reasonably been their finding.

Damon, upon the supposition that Johnson was acting solely for himself and as agent for Robert G. Cartwright's heirs, must be regarded as dealing with him at arm's length. In such event, to his mind would naturally have been suggested this inquiry: "Why is it, if Robert G. Cartwright's heirs have title to this land, Johnson is to receive one-half of the proceeds of sale for inducing me to buy it? I must inquire of them the cause of this." Upon making such inquiry of them, can it be said, in view of their testimony, as a matter of law that he would not have obtained the information, which their testimony shows, that, until Johnson came to them and asked them to make him the power of attorney, they had never claimed the land, had never paid taxes thereon, had always thought that Robert G. Cartwright had sold it, but that Johnson persuaded them to execute the power by representing that the record of deeds of the county where it lay showed that they owned the property, and that he ought to have a half interest in it for his services in finding the land for them? Following up this inquiry, he would probably have ascertained that the appellee and those under whom he claims had been assessing it as their property and paying taxes upon it from a date prior to Robert G. Cartwright's death, and by asking the appellee he would have found out that he was the owner of the land. When a fact is known, sufficient to put a subsequent purchaser upon inquiry, he cannot close his eyes to it and excuse himself from pursuing the inquiry by taking the opinion of an attorney upon an abstract of the record title. If this could be done, the rule that whatever is sufficient to put a party upon inquiry, etc., is notice, would be rendered nugatory.

Again, the evidence shows that after the deed, dated November 22, 1845, of Robert G. Cartwright to Matthew Cartwright, under which appellee claims, was re-recorded, Damon, notwithstanding he testified that he was a purchaser for value in good faith without notice of appellee's title, immediately offered to buy the land from the owner at \$2 per acre. Why did he do this, if he had purchased in good faith without notice of appellee's title?

From this, the jury have reasonably reached the conclusion that he had notice of ap-

pellee's title when he bought from Robert G. Cartwright's heirs, else he would not have made the offer to purchase the land from the appellee. The jury did not have to believe Damon anyway, and the facts and circumstances surrounding the transaction are not such as bear convincing proof that he was a bona fide purchaser without notice.

2. The second assignment of error is: "The court erred in its charge wherein it instructed the jury in words as follows: 'At the time Damon purchased said land from the heirs of R. G. Cartwright, the deed from R. G. Cartwright to Matthew Cartwright was not of record. Hence, if Damon had notice of such deed, you are instructed that it must have been otherwise than by the record. This could have been given to Damon in either one of three ways: (1) By actual knowledge thereof prior to the payment of the purchase price by him for the land; (2) by knowledge of any fact or facts sufficient to put an ordinarily prudent man upon inquiry, which, if prosecuted with ordinary diligence, would have led to actual notice of the prior deed from R. G. Cartwright to Matthew Cartwright, prior to the payment by said Damon of the purchase price for said land under his said deed; (3) by the knowledge of Silas M. Johnson of the prior claim of Matthew Cartwright, and those having his title to the land in controversy, provided you believe from the evidence that said S. M. Johnson was the agent of said H. G. Damon to make said purchase for him (Damon).' First, because defendant Cartwright failed to establish the fact that Silas M. Johnson was the agent of H. G. Damon in purchasing the land in controversy. Second, because Silas M. Johnson's knowledge, if any he had, of the prior claim of Matthew Cartwright, or those having his title, was not notice to H. G. Damon, actual or otherwise, of the prior deed from R. G. Cartwright to Matthew Cartwright."

The first proposition advanced is: "'Prior claim' and 'prior deed' are not synonymous terms, are not idem sonans, and do not mean one and the same thing."

That the terms are not idem sonans is self-evident, and that they are not necessarily synonymous, nor mean the same thing, is apparent; but when all the evidence, as well as the agreement of the parties, shows that appellee's "prior claim" is "under a prior deed," the terms, as used in the charge of the court, are practically synonymous and are of the same meaning, or rather, the term "prior claim" is necessarily referable to appellee's "prior deed," and can mean nothing else in this case.

The second proposition is: "If Silas M. Johnson was the agent of H. G. Damon in purchasing the land in controversy, then his knowledge of a prior claim, or of the deed from Robt. G. Cartwright to Matthew Cartwright, could not be imputed to Damon,

since it was clearly shown by the evidence in the case beyond dispute or controversy that Johnson had a personal interest in the land sold to Damon, and any knowledge acquired by him of the deed from Robt. G. Cartwright to Matthew Cartwright would have advised him of an adverse title to the title which he and the heirs of Robt. G. Cartwright were offering for sale to Damon, and, such being the case, it will be presumed that Johnson would not communicate any such knowledge to Damon, since it would be adverse and antagonistic to his own interest and the interest of the heirs of Robt. G. Cartwright, and the rule that the principal is chargeable with knowledge of all facts that come to the knowledge of his agent while acting within the scope of his agency does not apply when the agent has a personal interest in the matter which would likely lead him to conceal his knowledge from his principal."

We can see no escape for appellee from this proposition, for the doctrine that a principal is chargeable with notice known to his agent is based, not only upon the fiction of identity, but also upon the fact that it is the duty of the agent to communicate his knowledge to his principal, and the presumption that he has performed his duty. No such presumption can arise, however, where the agent is dealing with the principal in his own interest, or where for any other reason his interest is adverse to his principal, so that it is to his own interest not to communicate the knowledge to the principal. In such a case the general rule, that notice to an agent is notice to his principal does not apply. *Harrington v. McFarland*, 1 Tex. Civ. App. 292, 21 S. W. 116; *Kauffman v. Robey*, 60 Tex. 311, 48 Am. Rep. 264; *Texas Loan Agency v. Taylor*, 88 Tex. 47, 29 S. W. 1057; *Allen v. Garrison*, 92 Tex. 546, 50 S. W. 835; *Cooper v. Ford*, 29 Tex. Civ. App. 253, 69 S. W. 487; *Clark & Skyles on Agency*, § 485; *Mech. Ag. § 723*. It is undisputed that Johnson had a half interest in the land and received such an interest in the proceeds of the sale of the same which he effected to Damon. Therefore, even if it should be conceded that he was Damon's agent in procuring his purchase of the land from the heirs of Robert G. Cartwright, his knowledge, if any he had, of the prior deed to Matthew Cartwright or the claim of appellee to the property, or of any fact sufficient to put him on inquiry, could not, under the principle of law stated, be imputed to Damon. In this view it can make no difference upon whom was the burden of proving Johnson was Damon's agent in purchasing the land, for it relieves the case of such an issue by rendering it immaterial whether such agency existed, as in no event could Johnson's notice of the deed under which appellee claims be imputed to Damon.

3. This also disposes of the third, seventh, eighth, ninth, tenth, and eleventh assign-

ments, and all the propositions under them, in appellant's favor.

4. There being evidence, as we have held in considering the first assignment of error, tending to show that Damon had notice of the deed under which the appellee claims, or at least of such facts and circumstances as would put him upon inquiry, and such deed being of record when La Brie, as well as his vendor, Polley, bought the land, the plaintiff could only recover by proving that Damon was a bona fide purchaser without notice of such deed. Hence the court did not err in refusing to instruct the jury to return a verdict for La Brie. We therefore overrule the fourth assignment of error.

5. From what we have said in considering the first and fourth assignments of error, it follows that, had it not been for the error in the charge exposed by the second assignment of error, there would have been no error in the court's refusing to grant a new trial upon the ground that the verdict was contrary to the law and the evidence.

6. The evidence, the admission of which is complained of in the eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth assignments of error, was, we think, admissible, in connection with other facts and circumstances, as tending to show that Damon had notice of the prior conveyance under which appellee claims, and that the principle that declarations of a vendor, made after he has conveyed the property, cannot be introduced to disparage his title, has no application to any of the evidence referred to in these assignments.

On account of the errors indicated, the judgment is reversed, and the cause remanded.

SCHNEIDER et al. v. SCHNEIDER et al.
(Court of Civil Appeals of Texas. April 21, 1909.)

1. APPEAL AND ERROR (§ 193*)—REVIEW—EXCEPTION NOT PRESENTED AND RULED ON BELOW.

Where the record on a writ of error does not show that an exception to plaintiffs' petition, that it appeared from its face that the cause of action alleged was barred by limitations, was raised below, an assignment of error as to sustaining the exception cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1226; Dec. Dig. § 193.*]

2. APPEAL AND ERROR (§ 909*)—REVIEW—PRESUMPTIONS—SUFFICIENCY OF EVIDENCE.

Where there is neither a statement of facts nor conclusions of fact in the record, it must be presumed in favor of the judgment that the evidence sustained a plea of limitations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3875; Dec. Dig. § 909.*]

3. APPEAL AND ERROR (§ 194*)—EXCEPTION NOT MADE BELOW—SUFFICIENCY OF PLEA.

Where defendant pleaded that the cause of action accrued more than 13 years before

commencing suit, which would cover the longest period embraced by any statute of limitation, and there was no exception on the ground that it did not specify a particular statute, the sufficiency of the plea cannot be called in question for the first time on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1241; Dec. Dig. § 194.*]

Error from District Court, Guadalupe County; M. Kennon, Judge.

Suit by Edward Schneider and others against William Schneider and others. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

Dibrell & Mosheim, for plaintiffs in error. Seidemann & Short, for defendants in error.

NEILL, J. This suit was brought on March 3, 1908, by plaintiffs in error, as heirs of B. Schneider, deceased, against defendants in error, William Schneider and others, for a partition of the property, both real and personal, of the decedent's estate. Among others, plaintiffs' petition contains these allegations: "That the personal property belonging to the estate of the said B. Schneider consists of the sum of \$800, with interest thereon from January 1, 1895, at the rate of 6 per cent. per annum now in the possession of the defendant Wm. Schneider, who from said time has held, and now holds, said sum of money in trust for said estate." The defendant William Schneider answered by a special exception to the part of the petition containing said allegations, upon the ground that it appears therefrom that plaintiffs' cause of action accrued more than 13 years before this suit was instituted, and is barred by the statute of limitation. He then pleaded that plaintiffs' cause of action accrued more than 13 years before the suit was commenced, in bar of the action. It does not appear from the record that the special exception of this defendant was ever presented to or acted upon by the court. The case was tried without a jury, and, as to the \$800 claimed by plaintiffs from William Schneider, its judgment is as follows: "This day came the parties by their attorneys, and then came on to be heard the defendant's William Schneider's plea of limitation to that portion of plaintiffs' petition alleging an indebtedness due the estate of B. Schneider, deceased, by said William Schneider for the sum of \$800, with interest from January 1, 1895, at the rate of 6 per cent. per annum, being heard, it is the opinion of the court that the law is for said defendant, and that said alleged indebtedness is barred by the statute of limitation. It is therefore considered by the court that the said plea of limitation be, and the same is hereby, sustained, and that plaintiffs take nothing by their suit against William Schneider as to said \$800." As this is the only part of the judgment

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the exception to plaintiffs' petition, that it appeared from its face that the alleged cause of action against William Schneider was barred by the statute of limitation, was presented to and ruled upon by the court, the first assignment of error, which complains of the court's sustaining such exception, cannot be considered.

2. As there is neither a statement of facts nor conclusions of fact of the trial judge in the record, it must be presumed in favor of the judgment that the evidence was sufficient to warrant the court in sustaining the defendants' plea of limitation to plaintiffs' action against William Schneider for the \$800 he was sued for. If it should be conceded that plaintiffs proved such amount of money was once held for, or due by, William Schneider, as trustee, to the estate of B. Schneider, deceased, still it cannot be said, in the absence of a statement of facts, that such trust was not repudiated, and knowledge of its repudiation brought home to the plaintiffs in time to bar their action.

3. Since the defendant pleaded that plaintiffs' cause of action accrued more than 13 years before the commencement of this suit, which would cover the longest period of time embraced by any statute of limitation, and there was no exception to the plea on the ground that it did not specify any particular statute, the sufficiency of the plea cannot now, for the first time, be called in question.

There is no error in the judgment, and it is affirmed.

**40-ACRE SPRING LIVE STOCK CO. et al.
v. WEST TEXAS BANK & TRUST CO.**

(Court of Civil Appeals of Texas. April 7, 1909. Rehearing Denied May 5, 1909.)

**APPEAL AND ERROR (§ 169*)—PRESENTATION
BELOW—NECESSITY.**

Under Sayles' Ann. Civ. St. 1897, art. 2989, as amended by Acts 30th Leg. 1907, p. 206, c. 107, § 2, authorizing an appeal to the Court of Civil Appeals in civil suits wherein a temporary injunction is granted, provided a transcript shall be filed with the clerk of the Court of Civil Appeals not later than 15 days after entry of the order granting the injunction, and section 3, providing that it shall not be necessary to brief the case on appeal, and permitting it to be heard on the bill, answer, and evidence below, contemplates that the errors assigned on appeal shall have been raised below, and error not brought to the attention of the court granting the injunction will not be reviewed unless it is fundamental.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

Stock Company and others. From a decree granting a temporary injunction, defendants appeal. Affirmed.

See, also, 111 S. W. 417.

Dowell & Dowell, for appellants.

RICE, J. This is an appeal from an order granting a temporary injunction under article 2989, Sayles' Ann. Civ. St. 1897, relating to injunctions, as amended in 1907 (Acts 1907, p. 206, c. 107). On the 10th of February, 1909, the West Texas Bank & Trust Company, a private corporation, filed suit in the district court of Travis county against the 40-Acre Spring Live Stock Company, a private corporation, and also against John Dowell, Frank Heierman, Will A. Hall, and John Tom Hall, the last two composing the firm of Hall Bros., substantially alleging that about the 24th day of June, 1907, in the district court of Bexar county, it recovered judgment against John Dowell and said 40-Acre Spring Live Stock Company, for the sum of \$39,035.13, with a decree foreclosing a deed of trust and vendor's lien on certain tracts of land fully described in said petition, and that thereafter it sued out an order of sale in said cause, directed to the sheriff of Travis county, commanding him to seize and sell said described tracts of land, and that in pursuance thereof said sheriff did, about the 19th of October, 1907, seize said tracts of land by virtue of said order of sale, and advertised the same for sale, and did thereafter sell two of said tracts of land, describing them, but did not sell the remaining tracts mentioned in said order of sale, for the reason that he and the plaintiff in said judgment were enjoined from further executing said writ by an injunction issued out of the district court of Travis county, in a certain suit pending therein wherein Frank Heierman was plaintiff and Geo. Matthews, sheriff, and others, were defendants. It was further alleged in said petition, upon information and belief: That the defendants had entered into an arrangement with Hall Bros, whereby they were to enter upon the remaining tracts of land, and cut and remove the timber growing thereon, and that in pursuance of said agreement they had entered upon said premises and had cut and appropriated a large portion of the timber thereon to their own use and benefit, and were continuing to cut and remove said timber from said tract of land; that its said judgment theretofore obtained in the district court of Bexar county against said 40-Acre Spring Live Stock Company and John Dowell was still unsatisfied, save and except the price-bid for said two sections of land sold, as above

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stated, amounting in the aggregate to the sum of \$640, and except as to \$4,209 received from the sale of certain personal property; that both said 40-acre Spring Live Stock Company and John Dowell were insolvent; that said remaining tracts of land were insufficient to satisfy the balance of said judgment; that it was unable to state whether said Heferman or Hall Bros., or either of them, were financially able to respond in damages for said trespass upon said premises; that it had no adequate remedy at law; and that, unless restrained by order of the court, defendants would cut, dispose of, and waste said timber so as to render plaintiff's judgment of little value. Wherefore it prayed for a temporary writ of injunction restraining them from further trespassing thereon, etc. On the 11th of February, 1900, the court, upon consideration of said application, granted said temporary injunction as prayed for upon the plaintiff's filing bond, and the same was duly issued in accordance with said order. On the 20th of February the defendants gave notice of appeal from this order, filing an appeal bond, as required therefor. There was no motion to dissolve, nor was any answer filed by the defendants, and nothing whatever done by them in the court below, except to give notice of appeal, as above stated, and to thereafter file their assignments of errors.

Sections 2 and 3, p. 207, c. 107, of the Acts of the 30th Legislature, 1907, amending article 2989, tit. 56, of the Revised Civil Statutes, read as follows:

"Sec. 2. Any party or parties to any civil suit wherein a temporary injunction may be granted or dissolved under any of the provisions of this title in term time or in vacation, may appeal from the order or judgment granting or dissolving such injunction to the Court of Civil Appeals having jurisdiction of the case; provided, the transcript in such case shall be filed with the clerk of the Court of Civil Appeals not later than fifteen days after the entry of record of such order or judgment granting or dissolving such injunction.

"Sec. 3. It shall not be necessary to brief such case in the Court of Appeals or Supreme Court, and the case may be heard in said courts on the bill and answer and such affidavits and evidence as may have been admitted by the judge granting or dissolving such injunction; provided, the appellant may file a brief in the Court of Appeals or Supreme Court upon furnishing the appellee with a copy thereof not later than two days before the case is called for submission in such court, and the appellee shall have until the day the case is called for submission to answer such brief."

The questions raised by appellants' several assignments of error, in effect, amount to a general demurrer and special exceptions, by

which the sufficiency of the petition for injunction is questioned. We think that the statute above quoted contemplated that some action must be taken in the court below calling in question the correctness of the proceedings before this court would be justified in undertaking to revise its action. Here there was no question raised in the trial court by the defendants, nor any ruling made which defendants seek to have reviewed, except the bare question as to the right of the court below to grant the injunction upon the petition. The errors assigned are such as, in our judgment, may be waived where no objection has been urged in the court below, as in the present instance, and must be so held; and, unless it appears that fundamental error has been committed by the court below in granting the injunction in the first instance, we are constrained to believe that we have no authority to revise the action of that court; and, believing that no such error appears in the record, its judgment is affirmed.

Affirmed.

KERR et al. v. BLAIR.

(Court of Civil Appeals of Texas. April 21, 1900.)

1. JUDGMENT (§ 622*)—RES JUDICATA—GROUNDS OF SET-OFF.

Defendant had sued plaintiffs for damages for breach of a threshing contract, in which suit plaintiffs denied the breach and pleaded facts showing that the damage, if any, was due to causes over which they had no control and to the fault of defendant. No set-off on account of goods sold or for services performed was pleaded. Defendant recovered in that suit a judgment for \$500 damages, but neither the verdict nor the judgment disclosed that it was for the difference between defendant's damages and the balance due on plaintiffs' account. *Held*, that such judgment was not res judicata of plaintiffs' action on the account.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136; Dec. Dig. § 622.*]

2. JUDGMENT (§ 720*)—RES JUDICATA—VERDICT.

That a jury improperly considered plaintiffs' account against defendant, which was not pleaded in determining the amount of defendant's damages in a prior action, did not make the verdict conclusive against plaintiffs' right to maintain a subsequent suit against defendant on the account.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 720.*]

3. JUDGMENT (§ 717*)—RES JUDICATA—"MATTER IN ISSUE."

The "matter in issue" in a former action as to which the judgment is res judicata is that on which plaintiffs' cause of action is based, and which defendant denies by his pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1248; Dec. Dig. § 717.*]

For other definitions, see Words and Phrases, vol. 5, p. 4415.]

4. TRIAL (§ 141*)—DIRECTION OF VERDICT.

Where the correctness of the account sued on was admitted, the only defense pleaded being

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that of *res judicata* which was not proved, the court should have directed a verdict for plaintiffs.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 836; Dec. Dig. § 141.*]

Appeal from Matagorda County Court; Jesse Matthews, Judge.

Action by John A. Kerr and another against W. L. Blair. Judgment for defendant, and plaintiffs appeal. Reversed and rendered.

Gaines & Corbett, for appellants. Linn, Conger & Austin and W. S. Holman, for appellee.

McMEANS, J. The appellants sued the appellee for \$306.53 as the balance due upon an open account for goods, wares, and merchandise sold by them to appellee and for services performed by them for him, and for 6 per cent, per annum interest thereon from January 1, 1906. The defendant answered by general denial and by plea of former adjudication, which is in the following language:

"And for further answer herein defendant says: That heretofore, to wit, on the 16th day of June, A. D. 1906, in cause No. 2,641, in the district court of Matagorda county, Tex., wherein W. L. Blair was plaintiff, and Kerr Bros., a firm composed of John A. Kerr and Andrew Kerr (the plaintiffs in this cause), were defendants, a final judgment was rendered for the plaintiff therein against the said defendants therein; that in said cause the matters herein sought to be tried and disposed of were litigated and fully and finally determined against plaintiffs herein; that in said cause, and upon the trial thereof under the pleadings of the plaintiffs herein (defendants in said cause), in said cause contained, the plaintiffs contested, tried, and proved before the jury and submitted the issue herein contained to said jury for their determination therein, and the evidence supporting the plaintiffs' cause of action herein was in said cause submitted to the jury, and the jury in said cause in their verdict thereon considered the same in connection with all the other evidence and facts and thereafter awarded verdict for the plaintiff therein, W. L. Blair; that thereafter the said verdict was duly returned into court and was by the court duly accepted, and thereafter on the said 16th day of June judgment in behalf of plaintiff for the sum of \$500 was duly by the court entered on said verdict; that by the said judgment the issues in this cause were and have been once duly and finally litigated, and the said judgment was appealed by, and said appeal prosecuted by, defendants therein to the Court of Civil Appeals for the First Supreme Judicial District of Texas; that said cause and judg-

ment was affirmed by said court aforesaid, and said judgment is now final as to the parties by the affirmance of said judgment in said court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, Tex.; that by reason of the premises the said judgment is *res adjudicata* of the matters in controversy herein, and the said issues so pending herein were involved and adjudicated in said cause and in another court; and that thereby the plaintiffs herein are fully estopped and precluded from trying or enforcing any right of action herein against this defendant, if any they have, which is denied."

By his first supplemental answer, appellee further pleaded as follows: "That the cause of W. L. Blair v. J. A. Kerr et al., referred to in the first amended original answer of the defendant herein, was a suit for damages by W. L. Blair, plaintiff therein, against the defendants therein, the plaintiffs in this suit, for damages, for a breach of contract and failure to thresh the rice crop of this defendant Blair. That in said cause the defendants therein, J. A. Kerr et al., the plaintiffs in this cause, filed pleas of general denial and various special pleas in bar of plaintiffs' cause of action, which said pleadings covered and contained allegations and subject-matter sufficient in every respect to warrant the trial court and to compel the trial court to admit in evidence all such matters and things between the parties thereto as would defeat in whole or in part the plaintiff's cause of action therein and reduce the amount of the recovery as claimed by him, the plaintiff, in his said petition. That upon trial of said cause the court, in accordance with the law under the pleadings, admitted the testimony of the defendants, Kerr et al., of the value of the services rendered by them in the part performance of their contract as set out and pleaded in this cause and sued for herein, and the same was adduced before the jury by the plaintiffs herein, and the same was considered by the jury in arriving at their verdict so rendered in said cause. That not only did the plaintiffs herein (being defendants in the aforesaid cause) plead by general denial, but in addition thereto by special plea set up and alleged the partial performance of the contract to thresh this plaintiff's rice to his satisfaction, and the remaining injuries sued for were caused by wet weather and the plaintiff Blair's own negligence. Plaintiff shows that on the trial admissibility of the evidence of the value of the services of plaintiff in partially threshing Blair's rice was not only passed upon and adjudicated by the district court of Matagorda county as matter of law, but the said evidence was adduced before the jury by plaintiff herein over objection and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

was considered by said jury in settling the issues of said cause by their verdict."

The case was tried before a jury, and a verdict was rendered for appellee, upon which a judgment was duly entered. Appellants' motion for a new trial having been overruled, they bring this case before us on appeal.

Appellants' twelfth and thirteenth assignments of error are as follows:

"Because the court erred in rendering judgment in favor of the defendants, because the undisputed testimony showed that the plaintiffs were entitled to recovery unless the account was settled by the judgment in cause No. 2,641 in the district court of Matagorda county, Tex., styled *W. L. Blair v. J. A. Kerr et al.*, or *Kerr Bros.*, and because the undisputed evidence showed that cause No. 2,641 in the district court of Matagorda county, Tex., did not involve the same issues as were involved in this cause.

"Because the court erred in rendering judgment in this cause in favor of the defendant, the undisputed evidence showing that the plaintiffs' cause of action was true and correct, and that the amount due had never been paid, and the pleadings and judgment in the cause of *W. L. Blair v. Kerr Bros.*, in the district court of Matagorda county, which were depended upon by the defendant to show a former adjudication of the issues involved in this cause, plainly show that the issues involved were not in any manner identical."

The appellee, Blair, testifying in his own behalf, admitted the account sued on to be correct in every particular, and that, unless his plea of former adjudication was sustained, he owed appellants the \$306.53 sued for. He said: "I am not disputing the correctness of the account, taken as a whole, both debits and credits; but my sole contention is that this was settled by the judgment in cause No. 2,641 in the district court, styled *W. L. Blair v. Kerr Bros.*" In support of his plea of *res adjudicata*, the appellee offered in evidence: (1) The original petition in cause No. 2,641 in the district court; (2) the original answer of the defendants in said cause; (3) the judgment; and (4) the opinion of the Court of Civil Appeals rendered on appeal of said case. The petition of Blair in said case sets up a cause of action for damages against *Kerr Bros.* for breach of a contract to thresh a certain part of his rice crop, alleging his damages at \$2,103.80. In their answer *Kerr Bros.* denied that they breached their contract, and set up facts to show that the plaintiff's damage, if he sustained any, was not due to fault upon their part, but to causes over which they had no control, and to the fault of Blair. The answer does not remotely set up, in offset to plaintiff's demand, the account herein sued upon, or otherwise make mention of it. It was in no manner put in issue, and the amount due by Blair to *Kerr Bros.* could not, under the

pleadings in that case, have been legally adjudicated and determined. The judgment was based on a verdict in favor of Blair for \$500, and does not on its face or otherwise show that the amount of the verdict and judgment was the difference between Blair's damages and the balance due on *Kerr Bros.*' account. The charge of the court was not introduced in evidence, but it appears from the copy of the opinion of the Court of Civil Appeals which was introduced (see 105 S. W. 548) that the measure of damages submitted in the charge, in case the jury should find damages for Blair, was the value of the rice injured and destroyed as it stood in the field, etc., which reasonably precludes the idea that the jury was permitted to offset against the damage any balance in *Kerr Bros.*' favor against Blair. It is true that the account could have been pleaded in that case and settled by the verdict and judgment, but it is certain that it was not pleaded and thus made an issue in the case; and if, as appellee contends, and as the testimony of certain jurors who sat in the trial of that case tends to prove, the jury took the account into consideration and allowed Blair only the difference between the amount of his damages and *Kerr Bros.*' account, they acted without warrant of law, and their verdict would not be *res adjudicata* of the account sued on in this case, because the matter was not put in issue by the pleadings.

In *Nichols v. Dibrell*, 61 Tex. 541, the rule is broadly stated to be "that the decision of a court of competent jurisdiction is conclusive not only as to the subject-matter determined, but as to every other matter which the parties might have litigated," etc. The rule is less broadly stated in the later cases, prominently among which may be mentioned: *James v. James*, 81 Tex. 380, 16 S. W. 1087; *Norton v. Wochler*, 81 Tex. Civ. App. 524, 72 S. W. 1025; *Land Mortgage Co. v. Macdonell*, 93 Tex. 398, 55 S. W. 737; *Linberg v. Finks*, 7 Tex. Civ. App. 396, 25 S. W. 789. In *James v. James* it is said: "It is a general rule, having its foundation in sound reason, that the former judgment or litigation relied on as having adjudicated the matter and as a bar to further proceedings should have involved and determined the same vital issue, or that such issue or question should have been fairly within the scope of the pleadings. The 'matter in issue' is that upon which the plaintiff's cause of action is based, and which the defendant denies by his pleadings. *Vaughan v. Morrison*, 55 N. H. 582. It can only be conclusive of such matters as was essential to be determined before the judgment could be rendered" (*Phillipowski v. Spencer*, 63 Tex. 607), and is not conclusive as to collateral issues or any matter which must be inferred from it." See, also, *Crebbin v. Bryce*, 24 Tex. Civ. App. 532, 60 S. W. 587.

The conclusions we have reached obviate the necessity of passing upon the other as-

rence to appellants' suit, and as no other defenses to plaintiffs' suit were urged, and as the correctness of the account sued on was admitted, the court should have instructed a verdict for the plaintiffs.

The judgment of the court below will be reversed, and, this court proceeding to render such judgment as should have been rendered by the court below, it is ordered that judgment be here rendered in favor of appellants and against appellee for the sum of \$306.53, with 6 per cent. per annum interest thereon from January 1, 1906, and all costs incurred in the court below as well as in this court.

Reversed and rendered.

HERMANN v. ALLEN.

(Court of Civil Appeals of Texas. April 9, 1909. Rehearing Denied May 6, 1909.)

1. INJUNCTION (§ 261*)—WRONGFUL INJUNCTION—MEASURE OF LIABILITY.

Where defendant, by injunction, withheld from plaintiff a building which defendant knew plaintiff could have rented for \$100 to \$350 a year had he been permitted to remove it, and interest at 6 per cent. on the value of the building would not have exceeded \$21, plaintiff's measure of damages by reason of such wrongful injunction was the rental value of the building, and not the interest on its value.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 609; Dec. Dig. § 261.*]

2. INJUNCTION (§ 261*)—WRONGFUL INJUNCTION—DAMAGES—WITHHOLDING PREMISES.

Where defendant wrongfully refused to permit plaintiff to remove a house which plaintiff was entitled to, and later obtained an injunction restraining such removal, plaintiff, on the injunction being dissolved, was entitled to recover damages from the date of defendant's refusal and not from the date of the writ; his right not being impaired by his attempt to remove the building without defendant's consent.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 261.*]

3. JUDGMENT (§ 664*)—RES JUDICATA—ISSUES DETERMINED—REVERSAL ON APPEAL.

Plaintiff sued defendant to restrain his removal of a house from certain land belonging to defendant, in which action defendant pleaded both his right to remove and his damages by the alleged wrongful injunction, which he sought to recover. A judgment was rendered perpetuating the injunction without passing on the question as to whether defendant had sustained damages. On appeal the judgment was reversed, the court holding that defendant was entitled to the possession of the house and that the injunction was improvidently issued; the only question presented being defendant's right to possession. *Held*, that the reversal destroyed the effect of the judgment as *res judicata* of defendant's claim for damages, nor was the judgment on appeal conclusive of that question which was not considered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1175, 1176; Dec. Dig. § 664.*]

the parties, and it did not appear that the determination of the appeal was delayed thereby, the judgment perpetuating the injunction having been reversed, defendant in a subsequent suit for wrongful injunction was not thereby deprived of the right to recover damages for the detention of the property withheld by the injunction prior to the final judgment on the appeal.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 261.*]

5. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS.

Assignments of error which are not propositions in themselves, and are not submitted as propositions nor followed by propositions and statements, will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

6. JUDGMENT (§ 720*)—RES JUDICATA—ISSUES.

The controlling issue in an injunction suit was whether defendant had notice of a contract under which a building in controversy was placed on plaintiff's premises. That action was to restrain defendant, who had purchased the building, from removing it, and required a determination of the issue of notice in order to authorize a judgment for defendant which was returned. *Held*, that the question of damages for defendant's failure to make certain repairs on plaintiff's property adjoining the building removed, as required by such contract having been necessarily determined in the injunction suit, the judgment therein was *res judicata* thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

7. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS—REQUEST FOR PROMPT VERDICT.

A verbal request by the judge after delivering his charge that the jury bring in a verdict as speedily as possible, but that they should not in any degree hasten their deliberations, was not objectionable, there being no intimation that the verdict was returned in undue haste, or that the case was not fully considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

8. NEW TRIAL (§ 103*)—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

Where, in an injunction suit to restrain the removal of a building, it was immaterial whether any evidence was offered by defendant on his claim for damages for the detention of his building by plaintiff in a subsequent suit by the original defendant for wrongful injunction, newly discovered evidence consisting of the statement of a stenographer who took down the testimony in the injunction suit that defendant therein testified as to the rental value of the building was not ground for a new trial.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 103.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by L. W. Allen against George H. Hermann. Judgment for plaintiff, and defendant appeals. Affirmed.

George H. Breaker, for appellant. Fisher, Sears & Campbell, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of injunction was issued and was decided in the lower court in favor of the plaintiff therein, the appellant in this suit, but, upon appeal to this court, the judgment of the lower court was reversed and judgment rendered in favor of the appellant, the appellee herein. Allen v. Houston Ice & Brewing Company et al., 44 Tex. Civ. App. 125, 97 S. W. 1063.) The Houston Ice & Brewing Company and A. C. Binz and C. E. Settegast were made defendants in the original petition, but plaintiff dismissed his suit as to them. The petition alleges, in substance, that on the 19th day of April, 1905, plaintiff was the owner of a store building in the city of Houston situated on land belonging to appellant, and had the right to remove said building from said premises; that he made demand upon appellant for the possession of the building, which was refused, and, upon his attempting to remove same, appellant procured the issuance of a writ of injunction, and thereby prevented him from removing said building and kept same in appellant's possession from the 19th day of April, 1905, to the 20th day of February, 1907; that said writ of injunction was wrongfully and illegally sued out by appellant, and that the plaintiff was damaged thereby in the sum of \$550, the rental value of the building for the time it was so wrongfully withheld from him by appellant; that while said building was so wrongfully held by defendant he destroyed or permitted the destruction of shelving and counters therein belonging to plaintiff and of the value of \$74, a porch and gallery of the value of \$8.50, and sashes and window panes of the value of \$1.20; that by reason of said injunction plaintiff lost the use during the time aforesaid of certain tools and appliances with which he was preparing to remove the building at the time the injunction was served upon him; and that the reasonable rental value of same for the time they were so withheld from him was the sum \$882. He also claimed damages for loss of wages paid his sons and other hired hands for assisting him in the work of removing said building, all of which work had to be performed the second time, and was therefore lost to plaintiff, as a result of the issuance and service upon him of said writ of injunction; the amount so claimed being itemized as follows: Wages of son Mac (10 days at \$2 per day), \$20; wages of son Vernon (10 days at \$3 per day), \$30; hire of other men, \$17. Recovery was asked for the full amount of the damages above set out.

The defendants' answer contains a general demurrer, special exceptions, and general denial, and special pleas of res adjudicata and in reconvention for damages caused defendants' property by plaintiff in the removal of said building. The plea of res adjudicata

plaintiff against defendants in this cause. In cause No. 36,498 the Houston Ice & Brewing Company et al. v. Lorenzo W. Allen et al., mentioned in plaintiff's petition, on pages 4 and 5 of the answer filed by the defendant L. W. Allen in that case, who is plaintiff in this cause, said L. W. Allen alleged and pleaded as follows: 'Defendant further represents that, by reason of his being enjoined from moving said building, he has been compelled to keep idle subject to the termination of this action one team with wagon and driver, at an expense of \$4.50 per day, one carpenter, at an expense of \$2 per day, four pair trucks, cribbing and other moving appliances, at an expense of \$6 per day, and has lost his own time, reasonably worth \$2.50 per day, all for the term of 60 days, to his damage in the sum of \$900, for which he prays judgment against plaintiffs and their bondsmen on their injunction bond; that he has also been deprived of the use of his said building for the term of two months, to his reasonable damage in the sum of \$50, for which he also prays judgment. This defendant here now makes offer to do all equity in the premises that to this honorable court may seem meet and proper, and to fully conform to the orders of this court. Wherefore, premises considered, this defendant prays that it will dissolve said temporary writ of injunction heretofore granted herein, and that he may recover of plaintiffs his damages aforesaid, together with all costs, and defendant further prays, but in the alternative only, that, in the event said injunction is perpetuated, it will be conditioned upon the plaintiffs' paying to this defendant the amount secured by his mechanic's lien upon said building, together with his costs of foreclosing the same, and defendant prays for all such other and further relief to which he may be entitled.' On the trial of said cause No. 36,498, the Houston Ice & Brewing Company et al. v. L. W. Allen et al., in the district court of Harris county, Tex., the defendant L. W. Allen introduced evidence to sustain his said allegations as above quoted, and the plaintiffs introduced evidence in rebuttal thereto. The trial court in the final judgment rendered in said cause considered said evidence, and refused to allow the defendant L. W. Allen the damages prayed for by him in his pleading above quoted. In the judgment reversing and rendering the cause entered by the Court of Appeals, said court last above named affirmed the decision of the lower court in its finding as to defendant Allen's plea for damages. Wherefore, these defendants say that plaintiff ought not to have and maintain this action against the defendants, and these defendants therefore pray that they go hence without day, and have judgment against plaintiff for their costs." The plea in re-

tioned obligating himself, is permitted to remove the building to repair any damage to defendants' property caused thereby, and was so obligated by the terms of the contract under which the building was placed upon defendants' property. The damages claimed by this plea are itemized and aggregate the sum of \$200. The trial in the court below by a jury resulted in the following verdict, in accordance with which judgment was rendered against appellant:

"We, the jury, find each separate item as directed by the court as follows:

Rental of building, per month	\$12 50	\$275 00
Counters and shelving.....	20 00	20 00
Gallery	5 00	5 00
Sash and lights.....	1 20	1 20
Wages for son Mac, 1 day and 1 night.....	5 00	5 00
Wages for son Vernon, 1 day and 1 night.....	7 50	7 50
For labor raising house.....	17 00	17 00
Rental for tools.....		100 00
		<hr/>
		\$430 70

"We, the jury, find for plaintiff as per item above, \$430.70.

"[Signed] Fred Burke, Foreman."

The evidence shows that plaintiff on the 19th day of April, 1905, became the owner of a building situated on premises in the city of Houston belonging to the defendant. After his purchase of the building, he demanded of defendant the possession of same in order that he might remove it to premises owned by him. Defendant refused to give him possession of the building, claiming the right to hold same as security for the payment of ground rents due him by plaintiff's predecessor in title under the contract by which the building had been placed on defendant's premises. In August, 1905, plaintiff, without the consent of defendant, entered upon the premises, took possession of the building, and began preparing it for removal to his own premises a few blocks distant. While engaged in this undertaking, he was on August 5, 1905, restrained from removing the building by writ of injunction obtained by defendant in an injunction suit brought by him in the district court of Harris county. Upon the trial of this suit, judgment was rendered in the lower court perpetuating the injunction, but upon appeal to this court that judgment was reversed on October 25, 1906, and judgment rendered in favor of plaintiff herein dissolving the injunction, and decreeing that plaintiff in said suit take nothing thereby. An application for writ of error prosecuted by the defendant from this judgment was refused by the Supreme Court. The mandate from this court in said injunction suit was returned to the district court of Harris county on February 8, 1906. In the answer filed by plain-

building, he has been compelled to keep idle, subject to the termination of this action, one team, with wagon and driver, at an expense of \$4.50 per day, one carpenter, at an expense of \$2 per day, four pair trucks, cribbing, and other moving appliances, at an expense of \$6 per day, and has lost his own time, reasonably worth \$2.50 per day, all for the term of 60 days, to his damage in the sum of \$900, for which he prays judgment against plaintiffs and their bondsmen on their injunction bond; that he has also been deprived of the use of his said building for the term of two months, to his reasonable damage in the sum of \$50, for which he also prays judgment." Upon the trial of said cause in the district court no evidence was offered in support of this plea. In that suit, as before shown, the lower court perpetuated the injunction, and upon the appeal to this court the only issue presented and passed upon was whether the injunction was properly granted. After the record in the injunction suit had been filed in this court, a motion was filed by the appellant to have the submission of the appeal postponed until the fall term, 1906, of this court. This motion was agreed to by appellee's counsel. The case was decided in this court on October 25, 1906. There is no evidence that the granting of this motion in any way delayed the submission of said appeal; it not being shown that it would have been reached for submission in regular order before that date. The evidence sustains the verdict of the jury as to the amounts of the several items of damages found.

The first assignment of error complains of the refusal of the trial court to instruct the jury that the measure of plaintiff's damages for loss of the use of his building during the time it was withheld from him by defendant was 6 per cent. interest upon the value of the building. This charge was properly refused. It is well settled that the ordinary rule for the measure of damages for conversion of property is its value and legal interest thereon from the date of its conversion, and under this rule, where the property is returned, the measure of damage for its detention would be interest on its value. It is, however, equally well settled that this rule should not be applied in all cases. The purpose in fixing the amount of damages being primarily to award compensation for the injury, it necessarily follows that the rule by which damages are to be measured depends largely upon the facts of the particular case, and, in cases of conversion, it has been often held that the value of the use of the property should be allowed as compensation for its detention. *Endel v. Norris*, 15 Tex. Civ. App.

142, 39 S. W. 606; *Hudson v. Wilkinson*, 45 Tex. 453; *Oraddock v. Goodman*, 54 Tex. 588; *Waller v. Hall* (Tex. Civ. App.) 46 S. W. 82. The application of the ordinary rule of interest on the value of the property would give plaintiff in this case no adequate compensation. The evidence shows that he could have rented his house, if he had been allowed to remove it by appellant, for from \$100 to \$350 per year, and that 6 per cent. interest on the value of the house would not exceed \$21 per year. Appellant had actual notice of the fact that appellee intended to rent the house if he was permitted to remove it, and was charged with notice of its reasonable rental value, and it would be manifestly unjust to hold that, notwithstanding he had knowingly caused plaintiff to suffer this loss, he should only be required to pay as compensation therefor the inadequate amount of 6 per cent. interest on the value of the house.

The second assignment complains of the refusal of the court to instruct the jury that plaintiff's claim for damages accruing prior to the issuance of the writ of injunction could not be allowed. There was no error in refusing this instruction. The conversion of the house by defendant occurred when he refused to permit plaintiff to remove it, and plaintiff was entitled to recover damages for its detention from that date, and this right was not lost or impaired by his attempt to remove the building without defendant's consent.

Under his third assignment, appellant complains of the refusal of the court to give a special charge requested by him limiting plaintiff's right to recover damages sustained by him to such damages as occurred after November 11, 1905, the date of the judgment in the district court in the injunction suit. The proposition advanced under this assignment is that under the pleadings in the injunction suit plaintiff herein might have recovered all damages which had been caused him up to the trial of said suit by the wrongful detention of his property by the defendant, and, no damages having been awarded him by the judgment of the district or of this court in said suit, his claim for same is *res adjudicata*. The question presented by this assignment is not free from doubt, but we have reached the conclusion the defendant's plea of *res adjudicata* was not sustained by the evidence. The general rule is that a judgment as between the parties to the cause in which it is rendered is *res adjudicata* of all issues determined by said judgment, or that might have been determined under the pleadings in the cause in which the judgment was rendered. Of course, the judgment of the district court perpetuating the injunction, had it remained in force and effect, would have been conclusive of plaintiff's right to recover damages for the detention of his property, re-

gardless of whether such damages had been claimed in his answer in that suit, because his right to damages depended wholly upon his right to the possession of the property. The trial court having found in that suit that plaintiff was not entitled to the possession of the property, it became unnecessary to pass upon the question of whether he had sustained damages by reason of its detention by defendant, and the record in that case shows that that question was not determined. Upon appeal to this court, the only question presented was plaintiff's right to the possession of the property, and, while the case might have been remanded for trial upon the issue of damages, no such request was made in this court by either party, and judgment was here rendered upon the sole issue of plaintiff's right to the possession of the property. We think the case of *Watkins v. Junker*, 4 Tex. Civ. App. 629, 23 S. W. 802, determines the question presented by this assignment adversely to appellant's contention. The judgment of this court reversing the judgment of the court below destroyed the effect of that judgment as *res adjudicata* of plaintiff's claim for damages, and we do not think our judgment on said appeal was *res adjudicata* of that claim because it was not passed upon in considering said appeal, as affirmatively appears from our judgment, and upon the case presented in this court by the assignments of error and briefs of the parties it could not have been passed upon.

There is no merit in the fourth assignment of error, which complains of the refusal of the court to give a special instruction requested by appellant instructing the jury not to allow plaintiff any damages for detention of his property prior to the final judgment in this court on the appeal in the injunction suit. This assignment is predicated upon the contention that by the motion to postpone the submission of the appeal in the injunction suit plaintiff was responsible for delay in determining his right to the possession of the property, and for the delay thus caused defendant could not be held liable for damages for such detention. The contention is wholly without merit for two reasons: First, because, if any delay was caused by the motion to postpone the submission of the appeal, said motion having been agreed to by the defendant, any delay in the determination of the case caused thereby could not be charged solely or primarily to the plaintiff, and there is nothing in the agreement to indicate that either party thereto intended that the motion should have any effect upon the rights of the parties in the subject-matter of the suit; and, second, because there is nothing in the record to indicate that the granting of this motion delayed in the least the determination of the appeal in said case.

The fifth, sixth, seventh, and eighth assignments, which complain of errors in the

charge of the court, are without merit, and are overruled without discussion.

The ninth and twelfth assignments are not followed by propositions and statements as required by the rules, and for that reason cannot be sustained.

What we have before said in discussing the fourth assignment disposes of the questions presented by the thirteenth and fourteenth assignments, and they are overruled.

The fifteenth assignment is not a proposition in itself, and is not submitted as one, and no proposition is submitted thereunder as required by the rules, and for this reason it should not be sustained.

The sixteenth assignment complains of the ruling of the trial court in sustaining objections of plaintiff to an estimate made by H. N. Jageman, a carpenter, of the costs of certain repairs upon appellant's property adjoining the building removed by appellee. In answer to appellant's claim for damages caused by the removal of said building, appellee pleaded the judgment in the injunction suit as *res adjudicata* of such claim. In the contract under which the building was placed upon appellant's property by appellee's predecessor in title, it was expressly stipulated that, when the owner of the building should remove same, he would be required to repair any damage to appellant's property caused by such removal. The controlling fact issue in the injunction suit was whether appellee herein had notice of this contract at the time he purchased said building, and the decision in that case necessarily required the determination of that issue in favor of appellee. The question of damages for failure on the part of appellee to comply with the provision of that contract having been determined in said injunction suit, it follows that, in so far as the offered evidence tended to establish appellant's claim for such damage, appellee's objection thereto on the ground that the claim thereby sought to be established was *res adjudicata* was properly sustained.

The question raised by the seventeenth assignment has been disposed of by what we have before said in discussing the first assignment.

There is no merit in the eighteenth assignment, which complains of the action of the court in verbally requesting the jury, after delivering his charge, to "bring in a verdict as speedily as possible consistent with their duties." The trial judge qualifies the bill of exception taken to his action in making this request by the following statement: "This bill is signed with the explanation that there were many cases pressing for trial, and I am always desirous of avoiding, if possible, the necessity of summoning talesmen. I said to the jury that I would be glad if they would arrive at a conclusion as soon as was consistent with careful delibera-

tion, but that they should not in any degree hasten their deliberations in order to return quickly, but carefully discuss all the facts. As the jury was out several hours, I hardly think the suggestion worked any injury." We do not think it at all probable that this request by the court could have injuriously affected any right of the appellant, there being no intimation in the record that the verdict was returned in undue haste, or that the case was not fully and carefully considered by the jury before they agreed upon the verdict.

The nineteenth assignment is without merit, and is overruled without discussion.

The twentieth assignment cannot be sustained. If the motion for new trial on the ground of newly discovered evidence was sufficient in other respects, the alleged evidence set out in the motion was not material, and for that reason, if for no other, the court did not err in overruling the motion. Under our views upon the question of *res adjudicata*, as expressed in discussing the third assignment of error, it was immaterial whether any evidence was offered by plaintiff herein in the injunction suit on his claim for damages for the detention of his building by the defendant. The newly discovered evidence for which the new trial was asked was the statement of the stenographer who took down the testimony upon the trial of the injunction suit that plaintiff testified in that suit as to the rental value of his building. As before said, we do not think this evidence was material.

There is no error presented by the record which requires a reversal of the judgment of the court below, and it has therefore been affirmed.

Affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. et al.
v. PATTON.

(Court of Civil Appeals of Texas. April 3, 1909.)

1. TRIAL (§ 191*)—INSTRUCTIONS—EVIDENCE TO SUPPORT.

Where there was evidence contrary to an allegation that plaintiff's automobile had been totally destroyed in transportation over the lines of connecting carriers, a charge assuming that such allegation had been proved beyond controversy was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

2. CARRIERS (§ 180*)—CONNECTING CARRIERS—LIMITED LIABILITY.

Where each of several connecting carriers participating in the transportation of an automobile had legally restricted its liability to damage done on its own line, a charge that two of the carriers had contracted to transport the machine to destination, and were liable for failure to deliver it there in good order, was erroneous.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815-828; Dec. Dig. § 180.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. CARRIERS (§ 193*)—CONNECTING CARRIERS—INJURY TO GOODS—DEMURRAGE.

Where one of several connecting carriers, when sued for damages to an automobile, set up a claim for demurrage, it was entitled to have such claim submitted to the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 193.*]

Appeal from Jack County Court; Sil Stark, Judge.

Action by C. W. Patton against the St. Louis Southwestern Railway Company and others. Judgment for plaintiff, and defendants other than the Chicago, Rock Island & Gulf Railway Company appeal. Reversed and remanded.

E. B. Perkins, Daniel Upthegrove, Spoons, Thompson & Barwise, and R. M. Rowland, for appellants. Nicholson & Fitzgerald, for appellee.

DUNKLIN, J. The St. Louis Southwestern Railway Company and the St. Louis Southwestern Railway Company of Texas have appealed from a judgment rendered against them by the county court of Jack county in favor of C. W. Patton for \$337.50 as damages to an automobile. The machine was shipped from Cleveland, Ohio, and consigned to plaintiff Patton at Jacksboro, Tex. The Vandalla Railway Company and the Pennsylvania Railway Company carried it to East St. Louis, Ill., from whence it was shipped to Texarkana by the St. Louis Southwestern Railway Company, which for convenience will be called the "Foreign Cotton Belt Company." The St. Louis Southwestern Railway Company of Texas, hereinafter designated the "Texas Cotton Belt Company," transported it from Texarkana to Ft. Worth, Tex., and at the station last named tendered it to the Chicago, Rock Island & Gulf Railway Company, hereinafter called "Rock Island Company," for shipment from Ft. Worth to Jacksboro, but the machine was then in a damaged condition, and by reason thereof the last-named company refused to accept it, unless the Texas Cotton Belt Company would prepay or guarantee \$88.50 freight charges on the machine from Cleveland to Jacksboro. This demand was refused, and the machine was left in Ft. Worth in possession of the Texas Cotton Belt Company. All the railway companies above mentioned were made parties defendant in plaintiff's petition. The verdict of the jury was in favor of the Rock Island Company, and also in favor of the two Cotton Belt Companies on their pleas over against the Vandalla and Pennsylvania Railway Companies for \$314.50. The trial court instructed the jury that, if they should find a verdict against the two Cotton Belt Companies, the measure of plaintiff's damages which should be allowed against these defendants would be the reasonable value of the automobile at

Jacksboro, Tex., in the condition it should have arrived at Jacksboro, less the legal freight charges on the shipment. This charge assumed, as a fact proven beyond controversy, that the damage to the machine while in transit over those two railways had totally destroyed its value as alleged in plaintiff's pleadings; but, as evidence was introduced to the effect that such contention was untrue, the charge was error which will require a reversal of the judgment. In the charge the jury were told, in effect, that if they believed that the machine was shipped from Cleveland, and consigned to plaintiff at Jacksboro, and if the Texas Cotton Belt refused to prepay or guarantee to the Rock Island \$88.50 freight charges, and refused to deliver the machine to plaintiff at Jacksboro, and if the automobile was in a damaged condition at the time it was tendered to the Rock Island, then the two Cotton Belt Companies would be liable. Appellants complain that such instruction was substantially a charge that the two Cotton Belt Companies had each agreed to ship the machine to Jacksboro, and owed the duty so to do. From this charge it would seem that such was the theory of law adopted by the trial court; and, in view of another trial, we deem it proper to suggest that it is incorrect. The undisputed evidence shows that by contract each company handling the machine limited its liability to damage done on its own line. To so contract was a legal right to each company, and none of the companies was under any legal duty to prepay or guarantee the entire freight charges on the machine. The Texas Cotton Belt Company claimed demurrage charges on the machine, and this claim should have been submitted to the jury, but the court failed to submit it.

For the errors indicated above, the judgment of the trial court is reversed, and the cause remanded.

WEATHERFORD, M. W. & N. W. RY. CO. et al. v. WHITE.†

(Court of Civil Appeals of Texas. April 1, 1909.
Rehearing Denied April 29, 1909.)

1. APPEAL AND ERROR (§ 1043*)—REVIEW—HARMLESS ERROR—DENIAL OF CONTINUANCE.

The appearance of witnesses before the closing of the hearing of evidence cured any error in the refusal of a continuance because of their absence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4121; Dec. Dig. § 1043.*]

2. CARRIERS (§ 303*)—INJURY TO PASSENGERS—SETTING DOWN PASSENGERS—CARE REQUIRED.

A carrier is bound to exercise a high degree of care for the safety of passengers disembarking from the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1224; Dec. Dig. § 303.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court June 2, 1909.

3. APPEAL AND ERROR (§ 1043*)—PREJUDICE—DENIAL OF CONTINUANCE.

Where it was practically undisputed that plaintiff, an aged woman with weak eyesight, was injured while alighting from defendant's train because of defendant's negligence in failing to provide a stepstool to break the distance from the last step to the ground, which was from 18 to 30 inches, and that plaintiff while stepping from the car was thrown to the ground and injured because of the long step, defendant was not prejudiced by the denial of a continuance for the absence of a witness, who would have testified that plaintiff did not "slip and tumble or fall" from the car or its steps to the ground, but just went down "as she stepped off."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4121; Dec. Dig. § 1043.*]

4. EVIDENCE (§ 471*)—OPINION—STATEMENT OF FACT.

Where plaintiff's left leg had become shorter than the other because of the injury, her answer that she believed she was injured for life was not objectionable as an opinion of a nonexpert.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

5. DAMAGES (§ 228*)—AMOUNT—REMITTITUR.

A remittitur of the amount claimed for medical attendance and medicine obviated any error in the submission of such elements of damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 576-579; Dec. Dig. § 228.*]

6. DAMAGES (§ 216*)—INSTRUCTION—FUTURE SUFFERING.

An instruction that the jury could award plaintiff damages for future suffering only in case they found from the evidence that plaintiff would continue to suffer in the future from such injuries, and then award such sum as the jury might believe would fairly compensate plaintiff for such suffering as "she would undergo in the future," was too favorable to defendant in the use of the words "she would undergo," instead of "as she would reasonably and probably undergo."

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 216.*]

7. NEGLIGENCE (§ 3*)—"UTMOST CARE."

A charge, defining "utmost care" to be such a degree of care as would be exercised by a very careful, prudent, and competent person under the same or similar circumstances, was proper.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7250, 7251.]

8. COSTS (§ 234*)—COSTS ON APPEAL—ALLOWANCE.

Where there was error requiring a remittitur to cure, the costs of the appeal would be taxed against appellee.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 892; Dec. Dig. § 234.*]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by Sallie White against the Weatherford, Mineral Wells & Northwestern Railway Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

By her petition the appellee sought to recover damages for personal injuries received while a passenger disembarking from the passenger train of the appellant, claimed to have been occasioned to her by the negli-

gent failure of the appellant to furnish and provide a stepstool for her assistance, and in failing to render her personal assistance in her descent from the bottom step of the car to the platform, a distance of about 30 inches, at the station of her destination; she being an old and feeble lady and of weak eyesight, which fact was known to the employees of appellant in charge of the train at the time. The appellant answered by general denial and contributory negligence. The case was tried to a jury, and in accordance with their verdict a judgment was rendered in favor of the appellee.

Without setting out the evidence in detail, substantially it shows that the appellee, a woman 70 years old and with weak eyesight, was a passenger on the appellant's passenger train for her home at Mineral Wells, Tex. When the train stopped at its regular station at Mineral Wells, the passengers thereon proceeded to alight from its several coaches; the conductor assisting the passengers to alight at one coach, and the porter at another coach. The coach the appellee was riding in was a vestibule coach, and occupied the third place from the front of the train. When the train stopped the appellee followed a part of the crowd of passengers in front of her to the rear end of the car she was riding in; a fellow passenger carrying her grip. The rear door of the vestibule car she was riding in was open, and she, on reaching its platform, proceeded to alight from the same. The porter of the train was standing in about six or eight feet of the platform appellee was then on and at the steps of the next car behind the car she was alighting from, and the porter saw her alighting. After reaching the bottom step of the platform of the car, the appellee proceeded to make the descent therefrom to the platform of the station, which was the ground, prepared and used by the appellant as the place for its passengers to alight. In making the descent from the bottom step of the car to the ground, and by reason of the distance of this step of the car to the ground, which was not known or appreciated by the appellee at the time, and there being no stepstool, she was overbalanced, and as her foot reached the ground it careened under the weight of her body and threw her forward to the ground. All the evidence agrees with the testimony of the conductor and porter that "there was no footstool at the place she fell," and that no employé was there to or did assist her in alighting from the car. By her fall to the ground, and as a result thereof, appellee suffered serious injury to her hip and leg. The jury found on these facts in favor of the appellee, and we think the evidence sufficient to sustain their verdict and to warrant the finding which we make, that appellant was guilty of negligence toward the appellee, as claimed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of damages allowed her, except as to the medical and medicine bills claimed in the petition.

H. C. Shropshire, for appellants. E. H. Bennett, Albert Stevenson, E. B. Ritchie, and J. T. Jones, for appellee.

LEVY, J. (after stating the facts as above). By the first assignment of error, it is contended that the court erred in overruling the first application for continuance for the term for the want of the evidence of the three witnesses named. It appears from the record that the three witnesses who had been subpoenaed to attend and testify for the appellant, and for whose absence at the time the first application for continuance was made, appeared in the courtroom by process of the court before the trial had ended and before the plaintiff and the defendant had finished introducing their evidence. Two of the witnesses testified in the case after making their appearance. The appearance of the witnesses before the closing of the hearing of evidence operated, we think, to relieve any error in overruling the said application for continuance for the term, because no injury could be held to have resulted from the particular ruling. The second application made in the case for continuance for the term, the overruling of which is complained of in the second assignment of error, was an equitable application addressed to the sound discretion of the trial court; and unless it could be held in the light of the entire record that the court, in the exercise of its discretion, erred to the injury of appellant's right, this court could not reverse the judgment of the trial court. The second application for continuance for the term was made during the trial of the case for the want of the evidence of the witness Mabry, who, it is alleged, after appearing as a witness in the case, and during the trial of the case, and without the knowledge and consent of appellant, who had him subpoenaed as a witness, got on the train and left, without testifying, for Colorado, Tex. The application states what the witness would testify to in the case. On the motion of appellant for a new trial, appellant contended that the overruling of the second application was error, and the appellee contested the same and attached the affidavit of said witness as to his testimony, which reads, after omitting formal parts: "That on the 9th day of June, 1907, he came into Mineral Wells on the noon train from Weatherford, on which Miss Sallie White, the plaintiff was a passenger. That affiant got off of the east platform of the coach that Miss Sallie is supposed to have fallen from, though affiant did not see her fall, but after affiant had gotten off he heard an exclaima-

ground, rather, on one leg, and some persons were trying to lift her up, and this was the first he saw of her and all that he saw, except she was carried into the depot. Affiant did not see her fall, and does not know how she came to fall." In reply to the contest, the appellant attached a letter written by the witness to the superintendent of appellant, of date January 2, 1908, which reads: "In reply to your letter to me under date of December 27th regarding an accident resulting in personal injury to Miss Sallie White on or about May 11, 1907, I wish to say that I was standing on the platform when the train pulled in, and noticed a number of trainmen assisting passengers in alighting from a number of coaches, at least three or more. I also noticed one quite elderly lady get off a coach where there was no one to assist her. This party, after alighting on the platform and standing perfectly still for several seconds, and as she was about to step forward, seemed to collapse and sank to the ground. I am quite positive that she did not fall down immediately upon putting her feet on the platform. I hurried to where the lady was on the ground, and assisted her to arise. Other than this I know nothing." For the purpose of the assignment of error presented, it may be assumed that the witness would testify as stated in the application for continuance.

The legal contention that could arise in regard to the ruling of the court on the second application is that the appellant was, without fault or negligence on its part, deprived of material evidence in defense of the case. Could it be said that any injury resulted to appellant because of the absence of the testimony of the witness? To discharge the duty that appellant owed appellee, its passenger, in this case, it was incumbent upon it to exercise a high degree of care for her safety in disembarking from the car. The practically undisputed evidence warrants the conclusion that this duty was not discharged. Appellant's conductor and porter and all the witnesses agree that there was a considerable distance intervening between the station platform and the bottom step of the car, and that there was no stepstool there to assist her in alighting. The precise distance from the step to the platform is in conflict as to whether it was 18 inches or 30 inches. That appellee, in making the descent unassisted from the bottom step of the car to the platform, and because of the long step to be taken by her, was thrown to the ground, is made positive and clear. That injury was occasioned to her by the fall on the ground cannot be questioned from the evidence in the record. The rear door and the vestibule of the coach she was riding in were open, and she followed passengers in her car going

have provided against the same by informing her, or by having the vestibule doors closed. The platform of the car being the place to alight from, and the door of the same, as well as the vestibule, being opened, was, in the absence of notice to her, an invitation to alight therefrom at that place, and was a place that the appellant could reasonably have known passengers would alight from. In this light of the record, the evidence of the absent witness must be considered. It would appear that the witness would testify, as set out in the application: "That, at the time the accident to plaintiff is alleged to have occurred he, the said witness, was standing on the platform of the defendant's depot at Mineral Wells and saw plaintiff alight from the train; (1) that plaintiff did not slip and stumble or fall from the bottom step of the car to the ground, (2) or from any of the steps of said car to the ground, or (3) from said train to the ground, in any manner whatever." Appellee did not claim in her evidence that she did "slip and stumble or fall" from the step of the car as she was going down the steps of the car. She testified: "There was no footstool at the alighting place, and no employé there to assist me down. I cannot say that I stepped off of the steps. I fell off. When I discovered there was no footstool, and the crowd moved, I tried to descend myself and threw my hand around and tried to hold on, and my body broke loose, and I went down on my knee under me. From the lower step of the car to the ground I think was from 2½ to 3 feet." This evidence is made clearer on her cross-examination by appellant, when she says: "I made my step on the last step and seen there was no stool and went too far, overbalanced, to catch myself, and swung around. I didn't stumble or fall as I went down to the steps. I was overbalanced." It is evident that the appellee's only claim in the evidence was that, because of the intervening distance between the step of the car and the platform of the station, and in making the long step to reach the platform, she was overbalanced, and because thereof fell to the ground. The conductor said: "I didn't see her as she stepped on the ground. A lady took hold of her arm, and I went up and asked her what the trouble was. And I asked her how she fell, and she said she stepped out on the ground and her leg gave way and struck her knee on the ground."

The porter of the train said: "I was probably six or eight feet east of the steps of the car and in front of the chair car. I saw the lady in the act of going down to the ground. I was helping passengers off when I saw the lady fall." The witness Denton said: "When I first saw the lady, she was standing on the platform on the east side of the car. She

down as she stepped on." As the appellee made no such claim as to the cause of her injury as outlined in the application, the evidence of the absent witness would not have affected the result of the case or have been material to any issue. The further portion of the evidence of the absent witness as claimed by appellant was "that plaintiff alighted from the train in safety and without injury therefrom, and after alighting from the train in safety and standing upon the platform perfectly still for several seconds, and as she was about to step forward, seemed to collapse and sank to the ground, and was afterwards assisted to arise by the witness and others, and that her injuries, if any, were not caused by any slipping, stumbling, or falling from the train in any manner." That appellee did fall on the ground was conclusively shown, and all the witnesses agree to that fact. If she was injured by the fall to the ground as the evidence shows, and the injury was due to the negligence of the appellant, as the evidence conclusively shows, then it could not reasonably be ruled that reversible error was committed in this case in overruling an application for the want of evidence going to show that after making the long step to the platform the appellee, on reaching the platform, stood "perfectly still for several seconds, and as she was about to step forward seemed to collapse and sank to the ground, and was assisted to arise."

By the third assignment of error, it is contended that the court erred in the admission of certain evidence. While it is the proper and correct practice for the witness to state the facts and let the jury draw the proper deductions arising therefrom, it could not be held, we think, in this case, under the evidence, that the question and answer complained of constitute reversible error. The answer of the witness was not a bare conclusion or belief not founded on facts or observed data, but was founded upon personally observed data. All the physicians agreed in their evidence that the appellee's left leg had become an inch shorter than the right. One of the physicians testifying for the appellee said, "I think she will remain more or less crippled as long as she lives," and on cross-examination by the appellant said, "I do not think she will ever recover entirely." The two other physicians do not say that the injury was not permanent. That her left leg was shorter than the other, and had become so from the injury, was a fact within her knowledge, and was an apparent and external injury. When she answered that she believed the injury was for life, she but stated a fact known as well to laymen as to experts. If a finger or hand is cut off, a layman could as well know that it would not grow back

The appellee having filed a remittitur for the amount claimed in the petition for medical attention and medicine, the error in this respect contended for in the fourth and fifth assignments is relieved. A remittitur is a complete answer to the error. *Insurance Co. v. Herbert* (Tex. Civ. App.) 106 S. W. 421. The remaining contention in the fourth assignment, as to the court's charge, cannot be sustained, as it is favorable to appellant. Before the jury could award appellee damages for future suffering, the jury were required by the charge to find "from the evidence that the plaintiff will continue to suffer in the future from such injuries," and then to award "such a sum of money paid now as you may further believe from the evidence will fairly compensate the plaintiff for such suffering as you find from the evidence she will undergo in the future." Appellee, and not the appellant, could complain that the charge was burdensome in requiring a finding of the suffering to be such as "she will undergo," instead of "as she will reasonably and probably undergo" in the future.

The charge, in defining and restricting "utmost care" to be "such a degree of care as would be exercised by a very careful, prudent, and competent person under the same or similar circumstances," placed upon the term used the proper limitation, and, as thus qualified and restricted, the instruction was not error.

The main charge of the court fairly and affirmatively submitted the issue to the jury admitting of a finding for the appellant on the issue of negligence if it had not been guilty of negligence, and the seventh assignment is overruled. The court charged as a corollary of a finding for appellee, "if you do not so find and believe from the evidence, your verdict will be for the defendant."

The eighth and ninth assignments are overruled. There is evidence to sustain a finding of negligence and to support the amount of the verdict.

The case was ordered affirmed; but, as there was error which required a remittitur to cure, the costs of this appeal will be, and are, here taxed against the appellee.

UNKNOWN OWNER v. STATE.

(Court of Civil Appeals of Texas. April 17, 1909.)

1. TAXATION (§ 642*)—DELINQUENT TAXES—LIEN—FORECLOSURE—CITATION.

A proceeding against the unknown owner of land to foreclose a delinquent tax assessment as authorized by Laws 1897, p. 138, c. 103, § 15, is a special proceeding in which the citation

Dec. Dig. § 642.*] other cases, see Taxation,

2. TAXATION (§ 643*)—DELINQUENT TAXES—COLLECTION—STATUTES.

Gen. Laws 1905, p. 317, c. 129, § 2, provides that no tax collector shall be allowed credit for lists of delinquent or insolvent taxpayers as provided by Rev. St. 1895, art. 5170, until he makes oath in writing that he has exhausted all resources to collect the taxes under specified statutes. *Held*, that such provision had no reference to fees to which the collector is entitled in suits to collect delinquent taxes under such act, and hence a petition for such relief was not defective for failure to allege that the tax collector had performed the duties prescribed in section 2.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 643.*]

3. APPEAL AND ERROR (§ 709*)—ASSIGNMENTS OF ERROR—EXCLUSION OF EVIDENCE.

An assignment that the court erred in refusing to hear evidence in support of a motion to tax the costs will not be reviewed where the bill of exceptions does not set out the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2949; Dec. Dig. § 709; Costs, Cent. Dig. § 813.]

Appeal from District Court, Martin County; James L. Shepherd, Judge.

Action by the State of Texas against the alleged Unknown Owner of certain land to foreclose a tax lien. From a judgment for the state, defendant appeals. Affirmed.

R. N. Grisham and Jno. B. Howard, for appellant. A. L. Green and S. J. Isaacs, for the State.

CONNER, C. J. This suit was brought by the state of Texas, acting through its county attorney, against the alleged "unknown owner" of lot 6 in block 5 in the town of Stanton, Martin county, for the sum of \$10.99 taxes and the further sum of \$26.50 penalty, interest, and costs. The trial, which was before the court without a jury, resulted in a judgment in favor of the state with foreclosure of tax lien and order of sale as prayed for.

The objections urged to the citation in the first assignment are not maintainable. This was a special proceeding under the delinquent tax law of 1897, which prescribed the form of citation to be issued in cases of this character, and the citation in the record substantially conforms therewith. See section 15, c. 103, p. 138, Laws 1897; *State v. Unknown Owner* (Tex. Civ. App.) 103 S. W. 1116. It is not required therefore that the citation should have stated the file number of the suit, as provided by article 1214 of the Revised Statutes of 1895, or to have included a statement of the amount of costs as given in the petition; it being the rule that the special rather than the general law shall control. *Hash v. Ely* (Tex. Civ. App.) 100 S. W. 980;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the appellant demurred. The objection pointed out, that it is not alleged that the tax collector had performed the duties prescribed by the act of 1905, is entitled to no weight. This act (see Gen. Laws 1905, p. 317, c. 129, § 2) has reference evidently to credits to which the tax collector is entitled for his lists of delinquent taxpayers, as provided by Rev. St. art. 5170, and not to the fees he is entitled to receive in suits, such as this, for the collection of taxes.

The assignment to the court's action in overruling special exceptions Nos. 1, 2, 3, 4, 5, and 6, embracing different questions, is too general for consideration, and that complaining that the court refused to hear evidence in support of appellant's motion to tax the cost must be overruled on the ground that the bill of exception fails to set out the evidence offered so that we may judge of its character.

There are numerous other assignments of error, some of them apparently presenting important questions; but they are such as cannot be considered in the absence of a statement of facts, and we, having on a former day struck out the statement of facts presented in this cause, must overrule them.

No reversible error having been shown, we order an affirmance of the judgment.

TEXAS & P. RY. CO. et al. v. DEAN.

(Court of Civil Appeals of Texas. April 22, 1909.)

1. RAILROADS (§ 446*)—ACCIDENT AT CROSSING—FAILURE TO GIVE SIGNAL—QUESTION FOR JURY.

In an action against a railroad company for killing a mule which had escaped from a lot and had gone on a crossing, where it appeared that the company's agents in charge of the train failed to blow the whistle or ring the bell in approaching the crossing, it could not be said as a matter of law that the failure was not the cause of the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1640; Dec. Dig. § 446.*]

2. RAILROADS (§ 425*)—INJURIES TO ANIMALS ON TRACK—LIABILITY OF RAILROAD.

Where a railroad employed persons to make a grade crossing, it was not liable for injuries to a horse used in the work, caused by getting its shoe hung on a spike standing about two inches above the flange of the rail, where it did not appear that the condition could not have been plainly discernible by any one making a casual inspection of the place.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 425.*]

Appeal from Midland County Court; Charley Gibbs, Judge.

Action by W. L. Dean against the Texas & Pacific Railway Company and others. Judgment for plaintiff, and defendants appeal. Reformed and rendered.

covered a judgment against the appellant for the aggregate sum of \$400 for the death of a mule and an injury to a horse. It is claimed that the mule was killed by being negligently struck and run over by one of the appellant's trains. The sufficiency of the evidence to support the finding of negligence is challenged by the different assignments of error. It is shown that the mule escaped from a lot and was upon a crossing where a road commonly used by the public crossed the appellant's track, and that the appellant's agents in charge of the train failed to blow the whistle or ring the bell in approaching the crossing, in the manner required by law. The court found that this failure caused the collision and resulted in the injury. We cannot, as matter of law, say that this finding is not correct. *Railway Co. v. Red Cross Stock Farm*, 22 Tex. Civ. App. 114, 53 S. W. 834; *Railway Co. v. Kilman*, 39 Tex. Civ. App. 107, 86 S. W. 1050. Appellee sued for \$250 as the value of the mule.

The injury to the horse occurred at a different time and place. It seems that appellee's father had been employed by the railway company to make a grade crossing over its line at a point on its right of way which had previously been fenced. For what purpose this was to be made is not shown. It is shown that the crossing was to be constructed by filling on each side of the track with dirt, for which scrapers and teams were employed. The appellee's team was being used by his father in the performance of the work, and was at the time being driven by an employé hired by his father. When the first scraperful of dirt was being moved, and in driving the team across the track, one of the horses got his shoe hung on a spike standing about two inches above the flange of the rail. The spike had not been observed by any of the parties, and was not observable when standing on the ground on the north side of the rail, the direction from which the track was approached by this team on that occasion. There is nothing to indicate but what it might have been observed by even a casual inspection by one going upon or close to the track. The horse was injured in such a way that it is claimed he was rendered practically worthless, and appellee alleged his value to be the sum of \$150.

We do not think the evidence showed any negligence on the part of the railway company to support a judgment for the last-named amount. The parties employed were engaged to make the crossing safe and convenient for both man and beast who might have occasion to use it, and it could not be expected that the railway company would by some other agency do a part of that work in

advance. Furthermore, this object which caused the injury was necessarily plainly discernible by any one who would undertake to make even a casual inspection of the place where the work was to be done.

The judgment of the county court will be reformed, and judgment here rendered in favor of the appellee against the appellant for \$250 only as the value of the animal killed at the crossing. The costs of this appeal will be adjudged against the appellee.

DAYTON LUMBER CO. v. STOCKDALE.
(Court of Civil Appeals of Texas. March 30, 1909. Rehearing Denied April 22, 1909.)

1. TRIAL (§ 139*)—TAKING CASE FROM JURY—QUESTIONS OF FACT.

It is not error to direct a verdict for plaintiff, where defendant's evidence is so weak that it raises only a surmise or suspicion of the existence of facts sought to be established in support of the offset pleaded by him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

2. PRINCIPAL AND AGENT (§ 69*)—LIABILITIES AS TO THIRD PERSONS—FRAUD OF AGENT.

An agent's contract is not a fraud on his principal because the agent owns an interest in the property to be used in performing the work and rents his interest to the contractor for a monthly rental to be paid whether the property is used or not.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 130; Dec. Dig. § 69.*]

3. PARTIES (§ 52*)—NEW PARTIES—APPLICATION.

A pleading filed by defendant on the day of trial, asking that its agent be made a party, comes too late.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 83; Dec. Dig. § 52.*]

4. APPEAL AND ERROR (§ 500*)—RECORD—RESERVATION OF QUESTIONS FOR REVIEW.

An assignment complaining of the overruling of a motion to bring in a new party cannot be considered when the record fails to show that it was presented to the court or was overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2295; Dec. Dig. § 500.*]

5. CONTRACTS (§ 349*)—EVIDENCE AS TO TERMS—CUSTOM.

Testimony of a party to a parol contract for hauling logs as to what stipulations it was customary to insert in such contracts generally is inadmissible to prove that the stipulation was also embraced in the contract in question.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1783; Dec. Dig. § 349.*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Action by E. A. Stockdale against the Dayton Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Stevens & Pickett, for appellant. Marshall & Marshall, for appellee.

McMEANS, J. The appellee, E. A. Stockdale, instituted this suit against the appel-

lant, Dayton Lumber Company, upon a stated account for \$805.80 as a balance due him for hauling logs to appellant's tram railroad, and for the further sum of \$337.50 as damages for time lost by appellee through the alleged breach of a contract on the part of appellant to furnish appellee steady work, and for the further sum of \$120, the value of time lost by appellee by reason of delays caused by appellant in compelling appellee to move his logging outfit to places distant from the place he engaged to operate. These last two items were not allowed by the court, and no further reference need be made to them. Appellant answered by general denial and pleaded specially that about February 1, 1907, it made a verbal contract with appellee to haul to its spur tracks all timber cut into logs on a certain tract of land, and that for such hauling he was to receive \$1.80 per 1,000 feet, and that by the terms of said contract appellee agreed to haul first the logs on said land situated furthest from the track, leaving those nearest thereto for the last haul, but that appellee, in violation of said contract, hauled first the logs nearest the spur, and then without excuse abandoned the contract and refused to haul the remaining logs on the tract, leaving thereon logs amounting to 276,577 feet, which it was necessary for appellant to have hauled, and that it was forced to pay \$2.50 per 1,000 feet to have this done, thus being required to pay 90 cents per 1,000 feet more than the cost to it would have been had appellee performed his contract, or an additional cost to appellant of \$248.92, which it pleaded in offset to appellee's account. Appellant further pleaded that one W. H. McGregor, its agent who made the contract for hauling with appellee, was its woods and logging superintendent and had complete control and management of the hauling of its timber and of the work done by appellee under said contract, and that after appellee abandoned said work appellant learned that McGregor, at the time of making said contract, and while acting as agent for appellant, was jointly interested with appellee in the contract, owning one-half of the teams, wagons, etc., used by appellee in hauling, and that this contract of McGregor was a fraud upon it for which the contract should be canceled. Upon the conclusion of the testimony the court peremptorily charged the jury to return a verdict for appellee for \$805.80, the amount of the stated account, with 6 per cent. per annum interest thereon from November 1, 1907, and in obedience to the instruction such a verdict was returned, and judgment for appellee accordingly entered. The case is now regularly before us on appeal.

By its first assignment of error, appellant complains of the action of the court in in-

structing a verdict for appellee, because, it contends, there was ample evidence to show that appellee had contracted to haul all the timber off a specific tract of land, and, having failed to complete the contract, appellant was entitled to an offset in the sum it had been compelled to pay for having the remaining timber hauled over and above the price which it had agreed to pay appellee therefor.

The evidence was undisputed that appellant owed appellee for hauling logs a balance of \$805.80. It was also undisputed that at the time appellee ceased to haul there remained on the tract 276,577 feet of timber, and that this amount was hauled by W. S. Williams, under a contract with appellant, for which Williams received \$2.50 per 1,000 feet. As to the contract between appellant and Stockdale, the testimony is as follows:

Stockdale testified: "The contract I had was as follows: I was to haul logs at so much (\$1.60) per 1,000 feet to their tram road, and was to be paid monthly. I never had any contract to clean up any job at all. I was supposed to haul logs at so much per 1,000. My logs was delivered on the tram road and they were scaled, and my account was credited with it. Mr. McGregor scaled the logs. There was no understanding, during this time, between me and Mr. McGregor, or any persons of the Dayton Lumber Company, that I was to engage in cleaning up any certain amount of ground. I was just merely hired by the company to haul timber at so much per 1,000 feet. I never had a contract to haul all the timber on tract 5 or 5A. I was to get \$1.60 for anything they gave me to haul. I don't know how close some of this timber was to the tract that I hauled on No. 5. I think the timber was about a mile wide, and they run a spur as near the center as they could, and it was about one-half mile on each side. They were to cut the timber, and I was to haul it. Some of this timber was right close to the track, and I got \$1.60 per 1,000 feet for that, and \$1.60 for that furthest from the track. I could haul and quit a month, if I wanted to. I could haul that right by the track and get \$1.60 for it and quit. There was no agreement that I was to haul until I had completed all hauling. Mr. McGregor made this contract with me. He was superintendent for the company at that time. He had no interest at all in that contract with me, but he had an interest in the teams I was running. He owned one-half of the teams, and I rented the teams from him at \$125 a month. I worked them after he left, but up to that time he was superintendent. My intention was to clean up the spur, but the condition of the ground kept me from it, but I had no contract with the Dayton Lumber Company that I would clean up the spur, or any particular tract of land."

McGregor, the logging superintendent of

appellant, testified: "In my capacity as agent of the Dayton Lumber Company, I entered into a contract with Mr. E. A. Stockdale, with reference to him logging the timber on the company's plant. That contract was: We were to pay him \$1.60 per 1,000 feet to haul logs and deliver them on skids. At the time I made the contract with him, he was not to furnish any particular part of any particular job—that is, he was not to clean up any ground—and there was nothing said as to that. I left employment of the Dayton Lumber Company the 1st of November, 1907. I owned one-half interest in the stock that Mr. Stockdale operated then; that is, in the mules. I rented to Mr. Stockdale my interest in the stock at so much per month. He was to pay me \$125. I had no interest in the contract that Mr. Stockdale made with the Dayton Lumber Company, and was not a party to it in any way. I also had interest in Foster's teams. That is the same Foster that was hauling there adjoining Stockdale. I received \$125 for my mules and oxen."

L. Fouts, superintendent and manager of appellant, testified: "Mr. McGregor held the position of superintendent of the woods and logging during that time. I do not know anything about the contract he made with Mr. Stockdale, only what he told me. He reported to me he had made a contract with Mr. Stockdale and Mr. Foster to pay them \$1.60 per 1,000 feet for any logs delivered on any spur track we might build. With reference to the work he done in October—he was hauling to what we call spur No. 5A; was to haul practically all of it—I can't say that Mr. McGregor told me that Stockdale was to haul all the timber at \$1.60 per 1,000 feet delivered on the spur. As to what I know about Stockdale having to finish up any particular cut, it is understood that a man has to finish up his cut before he leaves it; but I do not know what contract McGregor made with Stockdale about that, only what McGregor reported to me; I do not know that McGregor did make such report to me; that is, that Stockdale was to finish up any particular cut. Well, I don't think McGregor did report to me on the contract he made with Stockdale."

The only evidence in the record claimed by appellant to be contradictory of the testimony above set out is that of the witness Williams, to whom McGregor and Stockdale sold the teams and logging outfit, to the effect that at the time of his purchase Stockdale said that it was understood that he (Stockdale) was to clean up the rest of spur No. 5; and the testimony of appellee that he was notified by appellant after he quit hauling on December 9th to complete the hauling on the tract or he would be charged up with the cost, that he was not ready to begin work on the date he was notified, as it was impossible for him to have done the work with the mules, and the reason he did

a few days in November and also a few days in December, and crippled several of his mules, and he thought he would wait until the ground dried, and that he had intended to haul all the logs on the tract, that he would have done so, but it was impossible to get his mules in the woods, but that he did not have any contract to "clean up the job." The most that can be said of the evidence, relied upon by appellant as raising the issue of a contract on the part of appellee to haul at the contract price all the logs on the specific tract, is that it raises only a surmise or suspicion of the existence of facts sought to be established in support of the offset pleaded by appellant, but its probative force is so weak that in legal contemplation it falls short of being "any evidence" from which the jury could reasonably infer the existence of the alleged fact; and that court did not therefore err in instructing a verdict for appellee. *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059; *Wills v. Ice Co.*, 39 Tex. Civ. App. 483, 88 S. W. 265; *Murphy v. Railway Co.* (Tex. Civ. App.) 96 S. W. 941. The assignment is overruled.

By its third and fourth assignments, appellant contends that the action of the court in instructing a verdict for appellee was erroneous for the further reason that the testimony proved that McGregor, appellant's agent, was individually interested in the contract made by him as such agent with Stockdale, and that his interest was of such nature as to amount to a fraud on his principal and to render the contract void. Without discussing the principle involved in the proposition, the assignment is overruled on the ground that there is not sufficient evidence in the record to raise the issue. Both Stockdale and McGregor testified positively that the latter had no individual interest whatever in the contract. The testimony relied upon by appellant to sustain its contention is that prior to the making of the contract McGregor owned a half interest in the teams and logging outfit with which Stockdale did the work, and McGregor rented to Stockdale his part of the property for the consideration of \$125 per month; the agreement being that Stockdale should pay him said sum regardless of whether the property should be used or not. This agreement was not inconsistent with any duties McGregor owed to his principal, nor did it make him a party in interest with Stockdale in the contract, or place him in an adverse or antagonistic attitude toward his principal.

The fifth assignment, which complains that the court erred in overruling appellant's motion to make McGregor a party, is overruled. The pleading by which he was sought to be made a party, not having been filed until

was overruled.

The defendant offered to prove by McGregor that in making contracts with Rice and Harrell for hauling logs it was stipulated that the logs furthest away from the tracks should be hauled first, leaving those nearest the track to be hauled last, and also offered to prove by the witness Fouts, the appellant's general manager, that it was customary to insert such stipulations in hauling contracts generally. An objection to the introduction of this evidence was sustained. The evidence was sought to be introduced as a circumstance to prove that such a stipulation was also embraced in the contract with appellee, Stockdale. It was the positive evidence of both Stockdale and appellant's agent, McGregor, who made the contract with him, that the contract contained no such provision; and, the proof being uncontradicted on this point, testimony as to what stipulations it was customary to insert was not admissible for the purpose for which such evidence was offered; and if this was not so, and had the testimony been admitted, we do not think the evidence, together with other circumstances admitted, would have been sufficient to raise the issue that Stockdale's contract contained such a provision. The assignments raising the point are overruled.

There being no reversible error in the record, the judgment of the court below is affirmed.

Affirmed.

HOGSETT v. NORTHERN TEXAS TRACTION CO. et al.

(Court of Civil Appeals of Texas. April 3, 1909. Rehearing Denied May 1, 1909.)

1. JURY (§ 136*)—PEREMPTORY CHALLENGES—NUMBER.

Each defendant is entitled to six peremptory challenges when there is a controversy between them, although they have a common ground of defense against plaintiff's demand.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 609; Dec. Dig. § 136.*]

2. APPEAL AND ERROR (§ 499*)—RESERVATION OF GROUND OF REVIEW—OBJECTIONS—EVIDENCE.

An assignment of error complaining of the admission of evidence will be overruled when no objection or exception appears in the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2297; Dec. Dig. § 499.*]

Appeal from District Court, Tarrant County; W. T. Simmons, Judge.

Action by J. W. Hogsett against the Northern Texas Traction Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Orrick & Terrell, for appellant. Capps, Cantey, Hanger & Short, for appellees.

CONNER, C. J. On February 20, 1909, we dismissed the appeal herein for want of a final judgment, but the record has since been so corrected as to avoid the objection stated, and we therefore set aside the order of dismissal and proceed to a disposition of the case upon the assignments of error presented.

The action was instituted by appellant against the appellee the Northern Texas Traction Company because of an alleged false accusation of theft from the person of D. G. Chapman, one of the traction company's conductors, while appellant was a passenger on a street car in the city of Ft. Worth, and upon which charge he suffered arrest, humiliation, etc. It was alleged that the acts of the conductor were done during the discharge of his duties and had been ratified by the street railway company. The defendant replied by a general denial and a plea over against Chapman, the conductor, on the ground, in substance, that such act, if tortious, was of such character as rendered him liable over to the company for such sum as might be rendered against it. Chapman answered by general denial and a special plea of the truth of the charge because of which appellant sued.

In the first assignment appellant insists that: "The defendant herein and the cross-defendant herein together should have been allowed only six peremptory challenges." Aside from the fact that the record indicates a want of timely objection to the action now complained of, we think the assignment completely answered by the case of *National Bank v. S. A. & A. P. Ry. Co.*, 97 Tex. 201, 77 S. W. 410. Here, as in the case referred to, there was a controversy between the defendants notwithstanding their common ground of defense against the plaintiff. They therefore were entitled to six peremptory challenges each.

Sterling P. Clark was permitted to testify to the good character of appellee Chapman, which is now objected to in the second assignment of error as "irrelevant and immaterial and as an attempt to corroborate a witness whose credibility had not been attacked and who had in no way been impeached." As an explanation to the bill, the court adopts the stenographer's report of the proceeding, from which it clearly appears that appellant's objection to this testimony was sustained; but upon the suggestion of counsel for appellant that "I want to see the case develop," and an appeal by the witness that he was compelled to leave the city, the court permitted the witness to answer, indicating that, if the testimony did not become material, it could be eliminated. After which we find no further objection or exception whatever, and upon this ground we overrule

the assignment. *Burton v. Anderson*, 1 Tex. 93; *Norell v. Phillips*, 46 Tex. 162; *Sheldon v. Benavides*, 60 Tex. 673.

The third and last assignment undisposed of complains of appellant's answer upon cross-examination as a witness to the effect "that he had taken a prominent part in politics before the Terrell election law went into effect, but had not done so since." We have carefully considered the stenographic report of the cross-examination pertaining to the complaint, and fail to find that objection was made to the particular testimony made the ground of the assignment, and the assignment must therefore be overruled.

The case upon the merits seems to be one of conflicting evidence, and, having found no reversible error as assigned, we affirm the judgment.

GRAY et al. v. TRIBUE et al.

(Court of Civil Appeals of Texas. April 8, 1909. Rehearing Denied May 6, 1909.)

1. BILLS AND NOTES (§ 527*)—PAYMENT—EVIDENCE.

Proof that a note about 18 years old was in possession of the maker after date of payment and was marked paid, together with date of payment, and by whom made, prima facie showed that the maker had paid it.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1847-1855; Dec. Dig. § 527.*]

2. VENDOR AND PURCHASER (§ 184*)—VENDOR'S LIEN—PAYMENT OF PRICE—EFFECT.

Where the purchase-money note was paid by the purchaser, the legal title to the land became vested in him.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 355; Dec. Dig. § 184.*]

3. JUDGMENT (§ 251*)—CONFORMITY TO ISSUES.

Where, in partition for a lot 209 feet by 209 feet, and to remove a cloud on the title thereof, the petition described the land, and defendants filed a cross-petition for 109 feet by 209 feet off of the west side thereof, the pleadings were sufficient to authorize the court to enter judgment for defendants for the lot described in the cross-petition.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 437; Dec. Dig. § 251.*]

4. JUDGMENT (§ 251*)—ISSUES.

Where, in partition and for the removal of a cloud on the title, defendants disclaimed as to part of the land and claimed ownership to the balance, and plaintiffs took a nonsuit, the only issues which remained were those which related to the cross-action and answer thereto, and the court could not enter judgment for plaintiffs for the part disclaimed.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 437; Dec. Dig. § 251.*]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by Harriett Gray and others against Wilkins Tribue and others, in which defendants W. R. Hurley and another filed a cross-petition. From a judgment for defendants W. R. Hurley and another on their

cross-action, plaintiffs and the other defendants appeal. Affirmed.

M. D. Priest and Ben. M. Terrell, for appellants. Flournoy, Smith & Storer and Marten & Smith, for appellees.

LEVY, J. The plaintiffs in the court below, in their suit for the partition of a lot of land 209 by 209 feet, which they claimed to own in common with the defendants in the case, alleged that the appellees W. R. Hurley and John Rea were asserting some sort of a claim to the land, which was a cloud on the title, and prayed that they be cited and the title be quieted. The defendants, except appellees, answered and adopted the pleadings of the plaintiffs. The appellees answered disclaiming any interest or claim as to the lot except 109 by 209 feet off of the west side of the same, and as to this pleaded not guilty, and, in a cross-action asserting title to the part not disclaimed and pleading their claim of title thereto, prayed for affirmative relief. Upon the call of the case for trial before a jury, the appellants applied for a continuance, which was by the court overruled, whereupon they asked the court for a nonsuit, which was granted, and the case proceeded to trial upon the cross-action of the appellees. After hearing the evidence, which was principally documentary, the court gave a peremptory instruction to the jury to find in favor of appellees for the 109 by 209 feet claimed by them in their cross-action, and judgment was entered in accordance with the verdict.

With Frank Tribue as the agreed common source of title of all the parties to the suit, appellees showed title by regular and consecutive transfers in writing to them, and which deeds were duly recorded. Frank Tribue, the ancestor of all the parties defendant, and the common source of title, died leaving a will under which all the premises in controversy were devised to Catherine Tribue, and which will was duly probated. Catherine Tribue conveyed all the property, by her deed of October 9, 1889, to J. Peter Smith, and in which a vendor's lien was expressly retained to secure the payment of part of the purchase money. Appellants claim by assignment of error that, there being no testimony showing that this vendor's lien note had been paid, the legal title remained in the vendor, and the court erred in directing a verdict for the appellees. As the record is before us there is sufficient proof of the payment of the note. The record, which is an agreed statement of facts, says: "That subsequently said J. Peter Smith paid off and satisfied a note which was introduced in evidence, of which the following is a copy"—and here the note was described as being of even date with the deed, for the same amount, and maturing

at the same time as called for in the deed, and duly signed by J. Peter Smith, the maker of the same. On the face of the note was stamped "Paid" by "Farmers' & Merchants' National Bank, Ft. Worth, Tex." The note being in the possession of the maker after the day of payment, and it being about 18 years old, and marked paid, and when and by whom paid, is prima facie evidence that the maker has paid it. 2 Greenleaf on Evid. § 527. The note having been paid by the vendee, the legal title became vested in him. *Stitzle v. Evans*, 74 Tex. 506, 12 S. W. 326.

Appellees show title to 109 by 209 feet off of the west side of the lot of land, and in their cross-action only claimed that specific portion of the lot. The court peremptorily instructed the jury, and so entered judgment, for appellees for the 109 by 209 feet. Appellants contend by assignment of error that the court erred in so doing, because there was no pleading to authorize a charge and a judgment for a specific portion of the property. We do not think that it could be held that the court erred in the matter complained of. The property in controversy on the cross-action was by proper construction of such pleading the 109 by 209 feet off of the west side of the lot of land previously described in the plaintiffs' petition. The description thus given was of a specific portion of the land, and it was that only for which the judgment was entered. It is further contended by assignment of error that, appellees having disclaimed as to the east half of the property, the court should have directed the jury to find, and have entered judgment, for appellants for the same. Appellants having taken a nonsuit as to their cause of action, all issues upon their pleadings, except such as related to the cross-action and answer thereto, were withdrawn and retired from the case with their order of nonsuit, and there remained before the court only the cross-action of appellees. The cross-bill only claimed title to a specific portion of the lot, and the title to this specific portion became and was the only issue in controversy on the cross-bill. Any controversy as to the east half of the lot having passed out of the case by the nonsuit of appellants, the court did not err in not charging the jury to find, and in not entering judgment thereon, for appellants for the east half.

We have considered the other assignments of error, and are of the opinion that the same should be overruled.

The motion made by the appellees to dismiss this appeal was, at a former day, ordered to be submitted along with the case and determined with the case. We have considered the motion, and think the same should be overruled. *Emerson v. Railway Co.*, 37 Tex. Civ. App. 110, 82 S. W. 1060.

The judgment was ordered affirmed.

CARRIERS (§ 286*) — PASSENGERS — PERSONAL INJURIES — CONDITION OF PREMISES — DUTY TO KEEP DEPOT OPEN.

Under Sayles' Ann. Civ. St. 1897, art. 4521, requiring every railroad to keep its depots lighted and warmed and open to all passengers not less than one hour before the arrival of all passenger trains, and making it liable for damages sustained by its failure to do so, a company would be liable for injuries to a passenger caused by not having its depot open within the required time at a flag station where it sold tickets and maintained a depot for passengers.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 286.*]

Appeal from District Court, Tarrant County; W. T. Simmons, Judge.

Action by T. A. Rumfield against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Smithfield is an unimportant place in Tarrant county on the line of the St. Louis Southwestern Railway Company, a few miles from Ft. Worth. It is so unimportant that the railroad company has established a rule that it will not stop its night passenger trains at the place unless some one flags them. Appellee, who lives a mile or two from Smithfield, had been summoned on a special venire in a criminal case to be tried in Judge Smith's court, and was very anxious to take the early morning train of February 5, 1906, so as to reach Ft. Worth in time for jury service. He did not know the exact hour when the train was due to pass through Smithfield, but knew it was some time very early in the morning. He walked over to the station, getting there about 5 o'clock a. m., but found the building dark and the door locked. He tried to arouse the sleeping agent, but failed. The weather was mighty cold, and he nearly froze while beating a path on the leeward side of the company's property. When he could bear it no longer, he renewed his efforts to get a friendly response from inside the building, and finally, after much kicking on the door and otherwise making a heap of racket, succeeded in waking the drowsy agent, who roared out: "Who in —— are you, anyway?" To this the appellee frankly admitted that he was mighty near froze and had come down there to go to Ft. Worth. At this juncture the evidence would warrant a finding that the agent tucked the covers more snugly about his shivering form, and in language more sulphurous than polite shouted back: "Well, ——, hit the road. I ain't in your way." Appellee steadily refused to do this (at least until the next term of the district court, when he appears to

arose, opened the station building, and lighted a fire only a few minutes before the arrival of the train. Appellee never got fully warm until he reached Ft. Worth, and had a long spell of sickness, traceable directly to the exposure of that morning. He sued the railroad company and the jury thought he was damaged \$460, and we are satisfied he was, for the company, though it has appealed, has not intimated that he was not injured that much. Of course, the foregoing is based on appellee's version of the affair. The company's agent remembers it differently. He testifies that he is not now in the employ of the company, but is visiting his parents in Eastern Texas; that it was no part of his duties under his employment to make this early train; that it was his duty to meet the 5:20 evening train, and to stay up at night for it if it should be late. This evening train was late on February 4th, and he had remained up until 12 o'clock, or possibly 1 o'clock, to meet it, and for that reason had lost sleep. He did not hear anybody at the depot door on the morning of February 5th until he got up, except about 5 o'clock, when some one rattled on the door, and he said: "What do you want?" The man said he wanted to go to Ft. Worth, and the witness said: "Don't tear the door down." He immediately got up and put on his breeches and opened the door. When he opened the door, a Mr. Newton came in, but appellee turned and walked off. Mr. Newton said he guessed he was huffy. This witness further said he had a fire in the depot that morning, and, when he got up, he put more coal on it. But we are satisfied, in view of the verdict, that this witness' recollection of the events of that morning is not as vivid as appellee's, and forbear further to discuss the testimony.

Spoons, Thompson & Barwise, for appellant. Smith & Latimore, for appellee.

SPEER, J. (after stating the facts as above). It is agreed that the case is one of first impression in this state, and the only insistence of appellant is, in effect, that it had a right to establish reasonable rules for the running of its passenger trains and the conduct of its business generally, and that, in the exercise of such right, it had made no provision for lighting and heating its depot building for the accommodation of persons desiring to take passage on its early morning train. The trial court thought it ought to be left to the jury to determine under all the circumstances whether or not appellant was negligent toward appellee, and so sub-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court June 2, 1908.

business in this state shall keep its depots or passenger houses in this state lighted and warmed and open to the ingress and egress of all passengers who are entitled to go therein for a time not less than one hour before the arrival and after the departure of all trains carrying passengers on such railroad, and every such railroad company for each failure or refusal to comply with the provisions of this article shall forfeit and pay to the state of Texas the sum of fifty dollars, which may be sued for and recovered in the name of said state in any court of competent jurisdiction, and shall be liable to the party injured for all damages by reason of such failure." Appellee's case falls fairly within this statute. The evidence shows that appellee not only permitted passengers to embark at Smithfield, but would sell them tickets at that place, permitting them to enter its station building, and otherwise treating them as passengers entitled to transportation on those trains. This is practically all appellant could do at any station except further to comply with the provisions of the article quoted as to lighting and heating its depot. The court, therefore, might have submitted only the amount of recovery, and certainly committed no error in submitting the issue of negligence to the jury.

The judgment is in all things affirmed.

STEVENSON v. CAUBLE.

(Court of Civil Appeals of Texas. April 3, 1909.)

1. VENDOR AND PURCHASER (§ 34*)—CONTRACT—CANCELLATION—FRAUD.

Where defendant was induced to buy land described in a deed on misrepresentation by plaintiff's agent that it was land which the agent had shown defendant, it was no defense to defendant's claim for a cancellation of the contract of sale and to recover purchase money paid that, after plaintiff had been shown the wrong land, plaintiff offered to show him the location of the land conveyed, but defendant declined to make any further examination, saying that he was satisfied with what he had seen.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 34.*]

2. VENDOR AND PURCHASER (§ 33*)—CANCELLATION—FRAUDULENT INTENT.

Where a vendor misrepresented the location of the land conveyed, and the vendee was induced to buy land inferior to that shown him, it was not incumbent on the vendee, in order to obtain a cancellation of the contract, to show that the misrepresentations were made by the vendor with a fraudulent intent, though the vendee so alleged.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 43; Dec. Dig. § 33.*]

the vendor, evidence that the representations were in fact made by the vendor's agent constituted a variance.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 43.*]

Appeal from District Court, Howard County; James L. Shepherd, Judge.

Action by G. C. Cauble against J. C. Stevenson. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Wagstaff & Davidson, for appellant. Jno. B. Littler and Morrison & Morrison, for appellee.

DUNKLIN, J. G. C. Cauble conveyed to J. C. Stevenson section 7 in block 33, Texas & Pacific Railway Company Survey, in Howard county, for a consideration of \$8,400, of which \$700 was paid in cash at the time the deed was executed, and the balance was evidenced by promissory notes, some of which were executed by Stevenson, and others, which were outstanding lien notes against the land, were assumed by him. Some of these deferred obligations were paid by Stevenson, but, upon his failure and refusal to pay others that matured, Cauble filed this suit in trespass to try title to recover the land. Stevenson filed his answer disclaiming any title to the land, also a plea over against Cauble alleging that, in the negotiations which culminated in the sale of the land, Cauble had shown him land other than that described in the deed and superior thereto in quality and value, and had fraudulently represented to him that the land so shown him was the land conveyed, that he was induced by such representations to accept the deed, and, by reason of the fraud so alleged, he prayed for a cancellation of the contract of sale and for recovery of the purchase money which he had paid to Cauble. Judgment was rendered in Cauble's favor for the land and denying to Stevenson any recovery on his cross-action. From the judgment refusing his cross-action, Stevenson has appealed, and, by his first assignment, challenges the correctness of the following instruction to the jury, given at plaintiff's request, to wit: "You are instructed that if you find and believe from the evidence in this case that the defendant was deceived by representations made to him about the section 7 or the location thereof, but you also find that, before he purchased, he was put upon inquiry as to the truthfulness of the said representations, he cannot recover therefor, if he failed to make investigation as to whether or not he had been actually deceived."

From the uncontroverted testimony it appears that, at the inception of the negotiations for the sale, Zack Stevens, Cauble's agent, went with the defendant to show him certain sections, including section 7 in controversy, owned by Cauble, for the purpose of making a sale to the defendant. On returning from their trip of inspection they stopped at Cauble's house, where defendant told Cauble he had decided to purchase section No. 7. Cauble and Stevens both testified that in this discussion some question arose as to whether or not Stevens was mistaken in the location of section 7 as he had pointed it out to defendant, that Cauble, who knew the correct location of section 7, then drew a plat of the land showing its true location and offered to take defendant out and show him the exact location of the corners of section 7, but that defendant declined to go or to make any further investigation to discover whether or not Stevens had made a mistake in attempting to point out section 7, saying he was satisfied with what he had seen. It seems that this testimony was the basis for the instruction complained of and quoted above, but in giving it we think there was error which requires the reversal of the judgment. *Labbe v. Corbett*, 69 Tex. 508, 6 S. W. 808; *Buchanan v. Burnett* (Tex. Civ. App.) 114 S. W. 406; *Conn v. Hagan*, 93 Tex. 338, 55 S. W. 823; *Land Mtg. Co. v. Pace*, 23 Tex. Civ. App. 237, 56 S. W. 377; *I. & G. N. Ry. v. Shuford*, 36 Tex. Civ. App. 263, 81 S. W. 1189; *Mitchell v. Zimmerman*, 4 Tex. 75, 51 Am. Dec. 717; 2 Pom. Eq. §§ 889, 892, 893, 895. In the case of *Labbe v. Corbett*, supra, the court, in holding that a misrepresentation as to the health of sheep, made by Corbett, who sold them to Labbe, the latter relying upon the truth of the representations, would support a plea of failure of consideration for the purchase price of the sheep, used the following language: "If the misrepresentation as to the health of the sheep was made by the appellee, this was known by him to be untrue, for he had testified that he knew the sheep were diseased; so we are relieved from the necessity of determining the effect of an innocent misrepresentation as to a matter, where the party to whom it is made has means to verify its correctness and fails to avail himself of them."

The principle announced in *Pomeroy's Equity*, supra, seems to be that when one by false representations of facts, although innocently made, induces another to enter into a contract, and such misrepresentations are made the basis for relief sought by the other, it is no defense to the prayer for such relief to show that the person deceived had the opportunity and means of correctly informing himself in the premises, unless it be further shown that he took some steps in making an independent investigation of the facts. In

presenting appellant's cause of action to the jury, after submitting the issue whether or not misrepresentations were made by Cauble to Stevenson as to the location of the land, the trial court used the following language: "And you further believe from the evidence that the representations made to Stevenson, if any, were made to induce Stevenson to buy the land, and were false and fraudulent, and were known to be false and fraudulent by the plaintiff at the time they were made, if they were made, and the defendant relied upon said misrepresentations," etc. Under the facts, and upon the authorities above noted, we believe that if the misrepresentations were made by Cauble as alleged by Stevenson, and if Stevenson was thereby induced to buy land inferior to that shown him, it would not be incumbent upon him to further show that Cauble made the misrepresentations with a fraudulent intent; and the fact that Stevenson alleged that such misrepresentations were fraudulent, as well as false, would not call for a different ruling, as contended by appellee. Stevenson alleged in his pleadings that the misrepresentations of which he complained were made by Cauble. Upon the trial he testified that the same were made by Zack Stevens, the agent of Cauble. Appellee objected to such testimony on the ground that it was at variance with appellant's pleadings. The objection was by the court overruled. Appellee then moved to exclude the testimony on the same ground, and this motion was overruled. By cross-assignments of error appellee questions the correctness of these rulings, and those assignments are sustained. *Lewis v. Hatton*, 86 Tex. 533, 26 S. W. 50; *Arndt v. Boyd* (Tex. Civ. App.) 48 S. W. 771; *Peyton v. Cook* (Tex. Civ. App.) 32 S. W. 781.

Judgment of the trial court is reversed, and the cause remanded.

MAURY et al. v. McDONALD et al.

(Court of Civil Appeals of Texas. April 3, 1909. Rehearing Denied May 6, 1909.)

1. GARNISHMENT (§ 113*)—INDEBTEDNESS—CONTRACT—CONSTRUCTION.

Certain garnishees contracted to purchase from defendants a half interest in a timber land contract under which defendants and the garnishees obligated themselves to pay \$90,000; the garnishees paying defendants \$15,000 and agreeing to pay P. the balance of the purchase money. The contract also provided that defendant should pay the garnishees interest on half of the payments so made to P., and that such payment should be returned when the land was sold. Defendants also gave the garnishees an option on defendants' half and provided that, if they should not exercise the same, the garnishees should loan defendants \$15,000 to be secured by a lien on the land payable when sold. A writ of garnishment was served June 6, 1907, and thereafter the garnishees loaned defendants the \$15,000 as agreed. *Held*, that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

garnishees were not indebted to defendants in any amount under such contract.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 232; Dec. Dig. § 113.*]

2. GARNISHMENT (§ 38*)—"EFFECTS."

A contract for the sale of an interest in timber lands provided that, if the garnishees did not exercise an option to purchase defendants' interest in the land, they should loan defendants \$15,000 to be secured by defendants' interest in the land and pay when the land was sold. A writ of garnishment having been served on June 6, 1907, the garnishees elected not to exercise their option, and on August 31st procured a draft payable to one of the garnishees for \$15,000, which he retained until September 13, 1907, when he indorsed and delivered it to defendants in performance of the contract. *Held*, that such draft while in the hands of the garnishee did not constitute "effects" in the hands of the garnishee belonging to the defendants subject to the writ.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 74; Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2320-2323.]

3. GARNISHMENT (§ 191*)—DISMISSAL—COSTS—"REASONABLE COMPENSATION."

Rev. St. 1895, art. 253, providing that, where a garnishee is discharged, the costs including reasonable compensation to the garnishee shall be taxed against plaintiff. *Held*, that "reasonable compensation" included a reasonable attorney's fee for services rendered to a garnishee in preparing and defending the garnishee's answer after it had been controverted.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 376; Dec. Dig. § 191.*]

For other definitions, see Words and Phrases, vol. 7, p. 5957.]

4. GARNISHMENT (§ 191*)—DISMISSAL—COSTS—ATTORNEY'S FEES—EVIDENCE.

On the dismissal of a garnishment, evidence *held* to warrant a finding that \$750 was a reasonable fee to be taxed in favor of the garnishees for the services of their attorney in filing and defending the garnishee's answer.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 375, 379; Dec. Dig. § 191.*]

5. TRIAL (§ 395*)—FINDINGS—CONSTRUCTION OF CONTRACT.

Where the court's findings construing a contract were based on the contract as written, the court was not required to make other findings based on oral testimony concerning its requirements.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 930; Dec. Dig. § 395.*]

6. TRIAL (§ 395*)—FINDINGS—CONFLICTING EVIDENCE.

Where the evidence is conflicting, the court is only required to find such facts as are deduced from such evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 931; Dec. Dig. § 395.*]

7. APPEAL AND ERROR (§ 1011*)—FINDINGS—REVIEW.

Where conclusions of the trial court deduced from conflicting evidence are not acquiesced in, they may be revised in a proper case from the statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

Appeal from District Court, Harris County; Charles B. Ashe, Judge.

Action by R. G. Maury and others against A. and R. McDonald, as garnishees. From a

judgment dismissing the garnishees, plaintiffs appeal. Affirmed.

Baker, Botts, Parker & Garwood, for appellants. L. B. Moody, for appellees.

REESE, J. This is an appeal from a judgment of the district court in favor of appellees, as garnishees, in a garnishment proceeding instituted against them by appellants in connection with a suit against F. Stallforth & Bro., Successors & Co., a partnership composed of Mrs. Stallforth, a feme sole, and G. Hemminghoffen, doing business under the aforesaid name. Defendants were residents of the republic of Mexico, and in the petition against them were alleged to be indebted to appellants in the sum of \$11,600 upon a contract in writing for commissions for the sale of certain timbered lands in Mexico. Defendants Stallforth & Co. were cited by personal service upon them in Mexico under the statute, and judgment by default was rendered against them for the amount sued for; the judgment, however, not to operate as a personal judgment against defendants, but only as a judgment in rem against whatever indebtedness on the part of the garnishees might be attached by the garnishment proceedings. At the same time a writ of garnishment was sued out against appellees which was executed upon each of them on June 6, 1907. In the application for the writ it was alleged that the persons named are indebted to the defendants, or have in their hands effects belonging to them. Each of the garnishees answered under oath fully denying that he was indebted to, or had effects of, defendants in his hands, and that he knew of any persons indebted, etc., and prayed to be discharged with his costs and attorney's fees. These answers were controverted, under oath, by appellants, who alleged as follows: "And controverting the facts set out in said answers, these plaintiffs show: That they have good reason to believe, and do believe, that the answers of the garnishees are incorrect, in that on the 1st day of June, 1907, the said Arch McDonald and R. McDonald, entered into a contract with defendant F. Stallforth & Bro., Successors & Co., by the terms of which they bound themselves to pay to the said defendants a sum exceeding in amount \$90,000 as the purchase price for what is known as the Pereyra tract of 142,000 acres of land situated in the northern part of the state of Durango, republic of Mexico, about 15 miles from the mining camp of Guanacevi. That on the 1st of June, 1907, the date of said contract, that there was due to one Abel Pereyra the sum of \$30,000 United States currency, on account of said land, which the garnishees obligated themselves to pay. That the said garnishees did not have with them at that time sufficient money to make said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

payment, and at said time the defendant F. Stallforth & Bro., Successors & Co., advanced to the garnishees herein the sum of \$15,000, which under the terms of said contract was to be repaid to the defendants by the garnishees on the 15th day of September, 1907. That of the total amount to be paid on said contract there had been paid at the time of the service of the writ of garnishment herein only the sum of \$15,000, being one-half of the first payment, which the said garnishees obligated themselves to pay to the said F. Stallforth & Bro., Successors & Co., leaving now due on said contract the sum of \$15,000, advanced by the said Stallforth to the said garnishees in addition to the balance due on the purchase price agreed upon between the parties. Plaintiffs show that the garnishees are now and have been since the writ herein was served upon them indebted to the defendant, or were indebted to said defendant at the time of the service of the writ of garnishment herein, a sum exceeding \$75,000, and they have effects of said defendants in their possession and had such when said writ was served on them."

The following issues were made up by the court:

"(1) Whether or not at the time of the service of the writ of garnishment upon the garnishees, or any time thereafter up to the date of filing the answers, the garnishees R. McDonald or Arch McDonald were indebted to the defendant F. Stallforth & Bro., Successors & Co.

"(2) Whether or not the said R. McDonald and Arch McDonald had in their hands or possession at any time between the date of the service of the writ of garnishment herein, and the date of the filing, of the answers herein, any effects of the defendant F. Stallforth & Bro., Successors & Co."

Upon trial without a jury judgment was rendered discharging the garnishees with their costs, including an attorney's fee of \$750, and from the judgment this appeal is prosecuted.

The trial court, upon request of appellants, prepared and filed, as a part of the record, conclusions of facts as follows:

"(1) I find that on June 1, 1907, R. McDonald entered into a contract with F. Stallforth & Bro., Successors & Co., in the republic of Mexico, by the terms of which the said McDonald acquired a one-half interest in a contract or purchase then existing between Stallforth and one Pereyra, covering a large tract of land in Mexico.

"(2) I find that at the time of the execution of the contract the said McDonald paid to Stallforth \$15,000, which Stallforth at once paid over to said Pereyra, together with \$15,000 more, making \$30,000, and covering the first payment due Pereyra under his contract with Stallforth.

"(3) I further find that said McDonald obligated himself by said contract to pay to Pereyra on November 1, 1907, and May 1,

1908, the remaining amounts on the total price, and that Stallforth agreed to pay McDonald interest at said 6 per cent. per annum, payable annually, upon one-half of the payments so made by McDonald to Pereyra; said one-half of said payments to be returned by Stallforth to McDonald when the land is sold.

"(4) I further find that Stallforth gave McDonald an option upon Stallforth's remaining one-half interest at \$1 per acre, good until September 15, 1907.

"(5) I further find that McDonald agreed that if he did not exercise said option he would lend Stallforth \$15,000 to be secured by lien upon Pereyra land aforesaid, upon which loan Stallforth agreed to pay interest at 6 per cent. per annum, payable annually, and to be repaid to McDonald when the land should be sold.

"(6) I further find that said contract between McDonald and Stallforth provided that, if either party should fail to comply with any of the obligations therein, the party so failing should lose whatever amount he had paid under said contract, and forfeit all rights thereunder.

"(7) I further find that said McDonald declined to exercise the option to purchase Stallforth's remaining one-half interest in the land.

"(8) I further find that on September 13, 1907, said McDonald loaned to Stallforth \$15,000, taking Stallforth's obligation therefor. By 'Stallforth,' wherever used in these findings, I mean F. Stallforth & Bro., Successors & Co.

"(9) I further find that the said R. McDonald has never at any time been indebted to said Stallforth.

"(10) I further find that Arch McDonald has never at any time been indebted to said Stallforth, and has never had any business transactions with Stallforth, except as agent for his father, R. McDonald.

"(11) I further find from the testimony of the witnesses produced before me, together with my own knowledge of the nature, character, and extent of the services rendered in this case by the attorney for the garnishees, that the sum of \$750 is a reasonable and proper allowance to the garnishees for the fees of said attorney, for services rendered and necessary to be rendered herein, including necessary advice furnished the garnishees since the service of the writ of garnishment herein concerning same."

No attack is made upon any of these findings as not supported by the evidence, by the assignments of error, and they are adopted by us as such. The findings of fact are based almost entirely upon a certain written contract between appellees and Stallforth & Co., dated June 1, 1907, which is as follows:

"First. Messrs. Stallforth & Bro., Successors & Co., grant and transfer to Mr. Roderick McDonald, who acquires it, the one-half interest, with the obligations which are

correlative to them, granted to them in a contract which they have entered into with Mr. Abel Pereyra, according to agreement executed the 24th of November, 1906, and which exists, deposited in the power of the notary public, Attorney Felipe Arellano, Jr., in this city, by which the said gentleman obligated himself to sell a tract of land situated in the district of Santiago, Papasquino, in the state of Durango.

"Second. Mr. McDonald will deliver to-day to Messrs. F. Stallforth & Bro., Successors & Co., the sum of fifteen thousand dollars, which they, with an equal sum which corresponds to the half of their rights, deliver to-day to Mr. Abel Pereyra, as first payment in accordance with the agreement which is mentioned in the preceding paragraph.

"Third. Mr. McDonald obligates himself to pay to Mr. Pereyra, one month before the date stipulated in said agreement, or be it by the first day of November of the current year, and the first of May, 1908, the remaining amounts on the total price; Messrs. F. Stallforth & Bro., Successors & Co., recognizing that they are to pay an interest of 6 per centum per annum upon the sum which corresponds to the half which they represent, from now on, in the rights granted them by said agreement, which they shall pay annually as it becomes due.

"Fourth. Messrs. F. Stallforth & Bro., Successors & Co., obligate themselves to sell to Mr. Roderick McDonald, who acquires the right to purchase it, the half of which they now represent under the rights derived from the aforesaid agreement, being the price of said sale at the rate of one dollar an acre of land, which he will have to pay them before the fifteenth day of September, next, in this city.

"Fifth. If Mr. McDonald should not make use of the right to purchase, which by the preceding clause he obtains, under the terms therein expressed, he obligates himself to lend to Messrs. F. Stallforth & Bro., Successors & Co., the fifteen thousand dollars which under this date they pay to Mr. Abel Pereyra, which sum these gentlemen will return to him with those referred to in the third clause of this agreement, this drawing interest at 6 per centum per annum, which will be paid annually as it becomes due. Which return shall be made when the land is sold.

"Sixth. If Mr. McDonald or Messrs. Stallforth should find a purchaser for the land, who shall offer a price of not less than ninety thousand dollars, he shall notify the other, and he, within the space of thirty days, counted from the date of said notice, shall sell his interest at that price, or purchase the other party's interest at the price offered by the purchaser.

"Seventh. If Mr. McDonald or Messrs. F. Stallforth & Bro., Successors & Co., should fail to comply with any of the obligations which this contract imposes, they shall lose, in favor of whomsoever might have received

them, the amounts which they might have delivered, and the rights which they have under this agreement.

"Eighth. The place for the fulfillment of this contract is fixed as this city. Therefore, the contracting parties submit themselves in an expressed manner, renouncing the jurisdiction of their domicile to the authorities of this district and state. This agreement shall be deposited in the hands of a notary in order that it be taken as a public instrument, at the request of any of the contracting parties.

"Additional: The contract executed by this agreement remains subject to its other natural condition, among others, that of the provisions of surety and indemnification."

By their first and second assignments of error appellants assail the judgment of the court on the ground that the contract showed that garnishees had obligated themselves to pay Stallforth & Co. the sums of money therein specified in consideration of the acquiring by them of an interest in the land referred to, and were indebted to Stallforth in an amount in excess of the claim, and further on the ground that the proof showed that Stallforth & Co. had advanced to appellees \$15,000 on June 1, 1907, to be repaid on September 15th, as shown by the witness Maury, in connection with the contract. These assignments are based almost entirely upon certain testimony of Maury, one of appellants, as to conversations between himself and each of the appellees, wherein they are claimed to have made statements as to the nature of the contract between themselves and Stallforth & Co., to the effect, in substance: That appellees, in consideration of being allowed to purchase a half interest in the land, on the same terms as Stallforth was to purchase from Pereyra, was to pay the entire purchase money, including a cash payment of \$30,000, Stallforth's one-half to be repaid to appellees when the land was sold; that when they met to close the trade appellees were not prepared to pay all of the \$30,000, and thereupon Stallforth & Co. advanced to them \$15,000 to enable them to make the cash payment, giving appellees an option until September 15, 1907, to purchase their half at \$1 per acre, at which time, if appellees did not buy Stallforth & Co.'s one-half, they were to pay Stallforth & Co. the \$15,000 so advanced by them to appellees. Appellees denied having made the statements attributed to them by Maury, and Maury himself testified: That he did not know that there was any substantial difference between what appellees told him about the contract, and the contract as it appeared to be set out in the written instrument; that there was no distinction in substance, but only in terms. At all events, the court found upon all the evidence that the contract was as set out in the written instrument, discarding Maury's testimony in so far as it tended to show that it was otherwise.

We must then accept the court's findings based upon the terms of the written contract, and especially is this true in consideration of the fact that appellees denied the statements attributed to them by Maury as to the terms of the contract. Coming then to the findings of the court, based upon the written contract, the facts are clearly established that no reference is made to any advance or loan of the \$15,000 by Stallforth & Co. to appellees, or a repayment of that loan, but that, as to the first payment of \$30,000, each party paid one-half; appellees giving \$15,000 to Stallforth & Co., and they paying it over to Pereyra with \$15,000 on their own account. Appellees further obligated themselves to pay to Pereyra, not to Stallforth & Co., the other portions of the purchase money. It seems perfectly clear to us that this amount which appellees were to pay to Pereyra did not constitute such an indebtedness from appellees to Stallforth & Co. as would be subject to garnishment at the suit of appellants. Appellees' rights depended upon this money being paid to Pereyra, in whom was the title to the land, and they protected themselves by the provision in the contract obligating them to pay the money direct to Pereyra. It is true that they obligated themselves to Stallforth & Co. to pay this money to Pereyra, but that did not give Stallforth & Co. the right to demand that the money be paid to them, and certainly no creditor of Stallforth & Co. could require that any of this money be applied to the payment of Stallforth's debt to him, which, under the forfeiture provisions of the contract, would have resulted in an entire loss to appellees not only of their bargain, but of the \$15,000 already paid.

As to the \$15,000, it may be that the agreement originally was that appellees were to advance the entire \$30,000 to make the first payment, and that, finding themselves unable to do so, they only paid \$15,000; but at this point the written contract comes in and settles the question as to the agreement between the parties. Nothing is said about a loan or advance by Stallforth & Co. to appellees, or any obligation on their part to pay the whole of the \$30,000. It simply appears that each party pays one-half out of his own funds. As to the \$15,000, the parties chose to put the matter in the shape of an obligation on the part of appellees to lend that amount to Stallforth & Co. to be repaid, with an interest, at 6 per cent., along with Stallforth's half of the other payments to be made by appellees to Pereyra, when the land was sold. This is the effect of the written contract, and by it must be determined the rights and obligations of the parties. It is not sufficient to change this obligation into one to pay \$15,000 owing by appellees to Stallforth & Co. that the obligation is to lend Stallforth & Co. "the \$15,000 which under this date they pay to Abel Pereyra." It was nevertheless an obliga-

tion to lend money at a prescribed rate of interest and upon prescribed terms of payment, with the correlative rights and obligations arising from such a contract, and not an obligation to pay that much money owing by appellees to Stallforth & Co., upon which a right of recovery, as for a debt, could be based. If appellees had failed or refused to lend the money, the contingency having arisen upon which they agreed to do so, they would have been liable to Stallforth & Co. at most, not for a debt due, but for damages for breach of a contract; the amount of such damages being the actual loss sustained by them by reason of such breach, as a proximate consequence thereof. Again there was no obligation on the part of Stallforth & Co. to borrow, or to accept the loan, at the stipulated rate of interest, and they might have declined to do so without violation of any provision of the contract. From this it follows that a judgment in the garnishment proceedings for the amount claimed by appellants would not have afforded appellees any protection whatever against a forfeiture of their rights under the contract. The court's findings of fact are, in effect, but its construction of the written contract, and it did not err in holding that appellees were not indebted to Stallforth & Co. in any amount, which could be reached by garnishment. The first, second, and third assignments of error, and the various propositions thereunder, are overruled.

It was made to appear that appellees decided not to accept Stallforth & Co.'s offer to sell his one-half of the land, but to lend him \$15,000, and procured a draft on New York for that amount payable to R. McDonald, which draft appellee R. McDonald had in his possession from August 31 to September 13, 1907, at which date it was indorsed and delivered to Stallforth & Co. in compliance with appellees' contract to lend them that amount. It is contended by appellants that this constituted "effects of Stallforth & Co. in the hands of the garnishees belonging to Stallforth & Co." and subject to the writ of garnishment. There is no merit in the contention. The fourth assignment of error, presenting the point, is overruled.

What we have said sufficiently disposes of the fifth, sixth, and seventh assignments of error, and the propositions thereunder, which are overruled.

The court heard evidence as to the value of the services of an attorney in filing the answers of appellees, and in representing them in resisting the garnishment proceedings, and allowed them \$750 as such attorney's fees. This action of the court is complained of by the seventh and eighth assignments of error; the first denying appellees' right to recover attorney's fees, and the second attacking the allowance therefor as excessive. The statute (article 253, Rev. St. 1895) provides that: "Where the garnishee is dis-

torney's fees. *Johnson & Co. v. Blanks*, 68 Tex. 496, 4 S. W. 557. Compensation is not to be limited, we think, to the value of the naked service of preparing the garnishee's answer, where the same is controverted, but must also include the value of legal services in resisting the writ, where it appears that the plaintiff has no cause of action against the garnishee. As said by the Supreme Court in the case cited: "That reasonable attorney's fees is a necessary expense in every case, we have no doubt. A person unskilled in the law is not to be expected to prepare a written answer under our statutes which would secure him from liability, although he owed nothing to the defendant in the original proceeding. Besides, many cases arise in which his liability is doubtful, and the advice and assistance of counsel are necessary to shield him from the danger of his having to pay his debt twice. Whatever else it may include, we are clearly of the opinion that the statute was intended to cover a reasonable fee to the garnishee for the services of an attorney in assisting him in the proceeding."

The cases cited by appellants in support of their contention are not in point. Appellees never at any stage of the proceeding became active litigants on their own account any further than the mere denial of indebtedness constituted them such, but confined themselves solely to resistance of appellants' claim that they were indebted to Stallforth & Co., or had effects of theirs in their hands. They sought only to prevent a judgment which they insisted, and the court found, would not have protected their interest in the matter of the contract referred to. In *Kelly v. Gibbs*, 84 Tex. 146, 19 S. W. 380, 563, the answer of the garnishee was controverted, and upon a trial of the issues thus formed he was unsuccessful. Upon this ground it was held that he was not entitled to recover costs. *Moursund v. Priess*, 84 Tex. 558, 19 S. W. 775, is to the same effect. In *Carlisle v. Sommer*, 61 Tex. 124, the answer of the garnishee was contested, and upon a trial of the issues the garnishee was successful. The court says that the trial court erred in rendering, at the time and under the circumstances that it did, a judgment against appellant for attorney's fees. We confess to an inability to understand fully what is here meant. If it supports appellants' contention, it is inconsistent with the later cases of *Johnson & Co. v. Blanks* supra, *Willis v. Heath*, 75 Tex. 124, 12 S. W. 971, 16 Am. St. Rep. 876, and other cases. *Eastham Bros. v. Blanchette*, 42 Tex. Civ. App. 205, 94 S. W. 441. The court heard

bers of witnesses examined, all lawyers, the evidence rather preponderates in favor of \$1,000 as a reasonable fee.

Maury testified as to certain statements made to him by appellees (which were denied by them), and also as to statements made to him by Ivonski, Stallforth's agent, having relation to the transaction between appellees and Stallforth & Co., and as to the contract between them growing thereout. Appellants requested the court to make specific findings (1) whether such statements were made, and (2) if so, whether the contract was as indicated by such statements or in the purported written contract. The court declined to do so, and appellants excepted and complain of the ruling by their ninth and tenth assignments of error. There was no error in the refusal of the court to make the findings requested. The matter constituted merely evidence introduced by appellants to show the nature of the contract. The finding of the court as to the terms of this contract, based upon the written contract, was all that was required. By such findings the court fully and clearly indicated its conclusion that the written instrument stated the contract between the parties upon which the issues were to be determined. Where the evidence is conflicting, the court is only required to find such facts as are deduced from such evidence. If such conclusions are not acquiesced in, they may in a proper case be revised from the statement of facts. Appellees testified that the written instrument represented the contract between the parties, and denied the statements attributed to them by Maury, and the court found in effect that this was true. This was all that was required.

What we have said sufficiently disposes, also, of the eleventh, twelfth, thirteenth, and fourteenth assignments of error, complaining of the failure and refusal of the trial court to make additional specific findings of fact. The assignments, and the several propositions thereunder, are overruled.

We find no error in the record, and the judgment is therefore affirmed.

Affirmed.

HOENCKE v. LOMAX.†

(Court of Civil Appeals of Texas. April 10, 1909. Rehearing Denied April 29, 1909.)

1. ADVERSE POSSESSION (§ 13*) — VACANT LAND — MISTAKE AS TO OWNERSHIP.

Where one enters on land believing it to be vacant, and intends to acquire it from the state,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

session, Cent. Dig. § 13; Dec. Dig. § 13.]
2. HUSBAND AND WIFE (§ 69½*) — ADVERSE POSSESSION—EFFECT OF COVERTURE.

Coverture subsequent to the beginning of adverse possession does not interrupt it.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 294, 300; Dec. Dig. § 69½.*]

3. TRESPASS TO TRY TITLE (§ 41*) — OUTSTANDING TITLE — EVIDENCE.

A grantor, through his predecessors in title, claimed title to 210 acres of land by adverse possession, and conveyed the whole tract by deed duly recorded. In a suit by the purchaser to try title, evidence was introduced that the grantor at one time paid taxes on 182 acres, and at another time taxes on 163 acres, and the grantor explained this on the ground that he had conveyed the rest of the tract, though no deed was introduced in evidence. *Held*, that the evidence was insufficient to show any outstanding title to the 210 acres as against the purchaser.

[Ed. Note.—For other cases, see Trespass to Try Title, Dec. Dig. § 41.*]

4. ADVERSE POSSESSION (§ 114*) — SUFFICIENCY OF EVIDENCE.

In trespass to try title to land, evidence held to sustain a finding that the grantors of plaintiff held title by adverse possession, both under the five and ten year statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 114.*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Trespass to try title by Annie Thompson Lomax against Emil Hoencke. From a judgment for plaintiff, defendant appeals. Affirmed.

Stevens & Pickett, for appellant. Jacob C. Baldwin, for appellee.

PLEASANTS, C. J. This is an action of trespass to try title, brought by appellee against appellant and other defendants to recover a tract of 210 acres of land situated in Liberty county and patented to the heirs of John Hartgraves. Plaintiff pleaded title under the five and ten year statute of limitation. The defendant, Hoencke, answered by general demurrer and plea of not guilty, and specially pleaded the coverture and minority of his vendors in answer to plaintiff's pleas of limitation. The other defendants failed to answer, and judgment was rendered against them by default. The cause between plaintiff and defendant, Hoencke, was tried without a jury, and judgment was rendered in favor of plaintiff.

The evidence shows that appellant has a complete chain of title to the land from the heirs of John Hartgraves, to whom the land was patented in 1862. In 1880 T. H. Tanner asserted claim to the land and put a few acres in a field. In 1882 or 1883 he built a

to the year 1902. On February 7, 1886, T. H. Tanner executed a deed conveying the land to his son, L. M. Tanner. This deed describes the land as the John Hartgraves survey of 210 acres, and also describes it by metes and bounds just as it is described in the patent. The deed was acknowledged on February 12, 1894, and duly recorded in the deed records of Liberty county on February 26, 1894. On March 16, 1907, L. M. Tanner and wife conveyed the land to appellee. When T. H. Tanner first went upon the land, he thought it was vacant land, and L. M. Tanner testified that he thought it was vacant public land at the time he bought it from his father in 1883 and did not know that he was buying the Hartgraves survey; that he intended to pre-empt it until he found out a year or two after his purchase that it had been patented to the heirs of Hartgraves. In May, 1894, L. M. Tanner married, and after his marriage he lived on the place until January, 1902. T. H. Tanner claimed the land at all times prior to the sale to his son, L. M. Tanner, and the latter held and claimed it as his own up to the time he conveyed it to appellee. He paid taxes on it from 1891 to 1906, inclusive, and in 1900 he redeemed it from tax sale to the state for taxes due thereon for the years from 1887 to 1889, inclusive. The receipt for 1899 shows that the taxes were paid on 182 acres of the land, and the 1906 receipt is for taxes on 163 acres. L. M. Tanner testified that the taxes were not paid on the entire tract because he had sold off a portion. The only deed of conveyance shown from him was the deed to appellee, which, as before stated, conveys the entire tract.

By his first assignment of error, the appellant complains of the judgment on the ground that it having been shown by the undisputed evidence that, at the time the Tanners took possession of the land, they thought it was vacant public land, no title by limitation could be acquired by their possession. The assignment is without merit. It is now settled that one can acquire title to the land of another by limitation, notwithstanding the fact that at the time he takes possession he believes the land to be vacant public land and intends to acquire it from the state. If he actually holds and claims the land against all the world except the state, his possession is adverse, and, if continued for the length of time required by the statute, will ripen into title. *Village Mills v. Manley* (Tex. Civ. App.) 94 S. W. 102; *Morgan v. White* (Tex. Civ. App.) 110 S. W. 491. This question, however, does not arise upon the facts of this case, because the evidence before set out shows that the adverse possession of L. M. Tanner contin-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

used for more than 10 years after he discovered that the land was not public land, and that it had been patented to the Hartgraves heirs.

The second assignment of error is as follows: "The court erred in rendering judgment for plaintiff, because the evidence shows that, during the time the plaintiff and those under whom she holds attempted to acquire title by limitation, the superior title to the property in controversy was held by the heirs of John Hartgraves, deceased, who were married women and minors, and that this defendant holds title under a part of said heirs, and that the other title is outstanding against the plaintiff." There is no evidence that appellant's predecessors in title were under disability at the time the adverse possession of Tanner began. Mrs. Bynum, one of the appellant's grantors, was married in 1888, but as the evidence shows she was born in 1860, and that the adverse possession of the land began prior to her marriage, her coverture did not affect the running of the statute. In explanation of the tax receipts for 1899 and 1906 showing that he paid taxes on 182 acres for 1899 and 163 acres for 1906, L. M. Tanner testified that he had sold a part of the land. This is the only evidence in the record of an outstanding title to any portion of the land, and we do not think it is sufficient to raise the issue. Having conveyed the entire tract to the plaintiff by deed, Tanner's statement that he had previously sold a portion of the land, no previous deed from him being shown, and no particulars as to what land was sold or to whom, or under what circumstances the alleged sale was made, is insufficient to show any outstanding title to the land.

The third assignment of error is as follows: "The court erred in rendering judgment for the plaintiff, because the evidence fails to show that the plaintiff has had continuous adverse possession of the property in controversy under the statute of limitations for the period of time and manner required to acquire a title by limitation, in that: (a) Said possession has not been continuous and adverse; (b) during the period of said possession the plaintiff and those under whom she holds recognized the land as vacant public domain; (c) the title to the same was in married women under coverture and in minors during said period of pretended occupancy and limitation." The facts before stated, which are undisputed, establish none of the contentions upon which this assignment is based, and it cannot be sustained. We think the evidence is clearly sufficient to show title in appellee under both the five and ten year statute of limitation.

There being no error in the record, the judgment of the court below is affirmed.

Affirmed.

KILGORE et al. v. JACKSON et al.

(Court of Civil Appeals of Texas. April 7, 1909. Rehearing Denied April 29, 1909.)

1. WORDS AND PHRASES—"NEAR."

"Near" means "adjacent to, close by, not far from." It is a relative term, and its precise import can only be determined by surrounding facts and circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4687-4690.]

2. COUNTIES (§ 34*) — REMOVAL OF COUNTY SEAT—GEOGRAPHICAL CENTER—CERTIFICATE.

Under Const. art. 9, § 2, authorizing a county seat to be removed to a place within five miles of the center of the county, and under Rev. St. 1895, art. 813, authorizing the county commissioner to issue a certificate designating the center of the county, a certificate, designating the center of the county at a point within the boundaries of a 320-acre survey, near the center of such survey, is not indefinite by the use of the word "near," since it would be impracticable to determine the exact spot.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 84.*]

3. COUNTIES (§ 35*) — REMOVAL OF COUNTY SEAT—GEOGRAPHICAL CENTER—ELECTIONS.

Const. art. 9, § 2, authorizes a county seat situated more than five miles from the geographical center of the county to be removed on a majority vote of the county electors to within five miles of the center, and a county seat to be removed to a place not the center on a two-thirds vote. Rev. St. 1895, art. 813, provides that the county commissioners on notification by the county judge that an election is to be held shall designate the geographical center of the county. Article 815 authorizes the judge to count the votes, and declare the result of the election. On notification by a county judge, the commissioners designated the center of the county as near the center of a 320-acre survey. An election was held, and the judge counted the votes, and made an order declaring the result of the election to be that the county seat be removed from W. to A., and the record showed nothing further. *Held*, that it could not be contended that the order was absolutely void because the judge acted as a court of limited jurisdiction, and the record should have shown that there was a determination that A. was within five miles of the geographical center as designated, since his jurisdiction to declare the result did not depend upon the existence of that fact.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 35.*]

4. COUNTIES (§ 35*) — REMOVAL OF COUNTY SEAT—ELECTIONS—GEOGRAPHICAL CENTER.

Neither was it permissible to render the order void for the judge to testify that in making the order he did not determine that A. was within five miles of the center designated, since his finding on a majority vote that the election resulted in favor of A. included a determination that it was within the limits, which determination, though not conclusive, could not be questioned where no evidence was introduced to show that A. was, in fact, not within five miles of the center.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 35.*]

5. COUNTIES (§ 34*) — REMOVAL OF COUNTY SEAT—DETERMINATION OF GEOGRAPHICAL CENTER.

Held, also, that the commissioners in designating the center of the county were not authorized to exclude from consideration in deter-

mining the center that part of the county covered by water, navigable or otherwise.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 34.*]

6. COUNTIES (§ 34*) — REMOVAL OF COUNTY SEATS — GEOGRAPHICAL CENTER — CERTIFICATE.

The certificate of land commissioners in fixing such center is conclusive, and evidence is inadmissible to show that the center so fixed is, in fact, not the geographical center.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 34.*]

7. COUNTIES (§ 35*) — REMOVAL OF COUNTY SEAT—ELECTIONS—GEOGRAPHICAL CENTER.

Held, also, that since, under the Constitution, a two-thirds vote was required to change a county seat to a place not within the five-mile limit, the finding of the county judge was not conclusive that A. was in fact within the five-mile limit, but, where no attempt had been made to show that A. was not within five miles of the center, the finding could not be attacked because no determination had been made that A. was within the limits.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 35.*]

8. JUDGMENT (§ 739*)—BAR—"ELECTION" CONTEST—ENJOINING THE ISSUANCE OF BONDS.

The word "election," as used in Rev. St. 1895, arts. 1804t, 1804u, authorizing a contest of an election to remove a county seat, means the act of casting and receiving the ballots from voters, counting ballots, and making return thereof; and hence an election contest is no bar to an equitable proceeding brought after the result of the contest to enjoin the issuance of bonds relating to the county seat removal, brought by parties other than plaintiff in the election contest, on the ground that the preparatory proceedings were void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1267; Dec. Dig. § 739.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2329-2335; vol. 8, pp. 7647-7648.]

Appeal from District Court, Chambers County; L. B. Hightower, Judge.

Suit by T. A. Kilgore and others against H. H. Jackson and others to enjoin the issuance of county bonds. From a judgment for defendants entered on a directed verdict, plaintiffs appeal. Affirmed.

Stevens & Pickett and J. R. Davis, for appellants. A. D. Lipscomb, for appellees.

REESE, J. In this case T. A. Kilgore and a number of other plaintiffs, property taxpayers of Chambers county, seek to enjoin the defendants, who are the county judge and four county commissioners of said county, from ordering an election to submit to the qualified voters of the county the questions of the issuance of bonds for the erection of a courthouse and jail, either in the town of Anahuac or in what is called the "Wilcox Addition" to said town, and from making any order whatsoever in regard to such bond issue. Plaintiffs also seek by mandatory writ to compel defendants to rescind their former order removing the county seat from Wallisville to Anahuac, and to return at once to Wallisville the public records, which had been removed to Anahuac, and to re-

establish the county seat at the former place. The suit is the aftermath of an election ordered and held in 1907 to determine whether the county seat of Chambers county should be removed from Wallisville, where it had been located for more than 40 years, to the town of Anahuac. At that election a majority of the votes cast—but not two-thirds—were in favor of the removal, and the result was accordingly so declared. There was a statutory contest of the election upon the grounds, among others, that the geographical center of the county had not been properly designated, and that Anahuac was not shown to be, and was not, in fact, within five miles of the geographical center of the county, which was necessary to authorize the removal by a majority vote. The contest was decided against contestants, and, upon appeal to this court, the judgment was affirmed. *Wallis v. Williams* (Tex. Civ. App.) 110 S. W. 785. In the present case it is alleged that the proceedings and the order of removal were void on the grounds, first, that the land commissioner did not, before the election was held and declared, or at any time, designate the geographical center of the county in the manner provided by statute, and which, it is alleged, was a condition precedent to such election and removal; second, that at no time was any evidence offered before the county judge or the commissioners' court in regard to the location of the geographical center of the county, or the distance of Wallisville or Anahuac therefrom, and no determination of this question was ever made by the county judge or the commissioners' court; and, third, that the town of Anahuac is, in fact, more than five miles from such geographical center, that less than two-thirds of said votes were for such removal. Defendants answered by general denial, general and special demurrers, and pleaded specially the proceedings and judgment in the contest proceedings in bar of the action. Upon trial with a jury, after the evidence and argument had been heard, the court charged the jury to return a verdict for defendants, which was done. From the judgment plaintiffs appeal.

By their first assignment of error, appellants bring in question the action of the court in instructing the jury to return a verdict for defendants, because, as set out in the assignment, the evidence offered, and that erroneously excluded, was sufficient to show that no valid election had been held, and that all acts of the county judge and commissioners' court in the premises were void. The first proposition under this assignment is based upon the alleged insufficiency of the certificate of the Commissioner of the General Land Office, designating the geographical center of the county as provided by article 9, § 2, Const., and article 813, Rev. St. 1895. The certificate of the commis-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sioner in proper form designated the center of the county "to be a point within the boundaries of the R. O. W. McManus 320-acre survey, near the center of said survey." The proposition turns upon the alleged indefiniteness of the designation as being "near" the center of the survey referred to; and it is insisted that this is not a sufficient compliance with the requirements of the law. "Near" is defined by Webster to mean "adjacent to, close by, not far from." "It is a relative term, and its precise import can only be determined by surrounding facts and circumstances." *Barrett v. Schuyler County Court*, 44 Mo. 202. The land commissioner is required to designate the center of the county "from the maps, surveys, and other data on file in his office." A moment's consideration of the sources from which he must get his information will suffice to show that it is not practically possible that the commissioner should determine with absolute accuracy the precise location of this point. Some certain square inch of ground is, in fact, the geographical center of the county, but the location of this point would be practically impossible of determination. Some margin must be allowed, and it was the intention of the law should be allowed, on this account. Appellants do not contend otherwise. Now we know that 320 acres is a piece of ground, if in a square form, approximately 1,240 yards square. Whatever the form relative to the area of the county it occupies a very small space. A point which would be in the ordinary meaning of the term be "near" the center of this relatively small space would, we think, be sufficiently definite for all practical purposes as a designation of the center of the county, taking into consideration the purpose for which the designation is made, and the means by which the land commissioner is required to determine the question. A more definite designation is not practicable.

The second proposition under this assignment is that appellants as taxpayers have the right to prosecute this action. We do not understand that this is questioned by appellees. The second assignment of error complains of the refusal of the trial court to admit evidence offered by appellants to the effect that at no time prior to ordering the election or declaring the result was any evidence offered before the county judge or commissioners' court in regard to the distance of Wallisville or Anahuac from the center of the county, and that it was never at any time determined that Anahuac was within five miles of the center of the county, or that Wallisville was more than five miles from such point. The election was ordered by the county judge and the returns made to him. He then counted the votes, with the result that there appeared to have been cast for Anahuac 390 votes and for Wallisville 244 votes. After tabulating the votes with the above result, the order of the coun-

ty judge adds: "Showing a majority in favor of removal to Anahuac of 146. And the result of said election is hereby declared against Wallisville and in favor of Anahuac." The proposition is stated under this assignment that the county judge in this matter was acting as a court of limited jurisdiction; and that it not appearing, from the face of the whole record, that the fact was found to exist that Anahuac was within five miles of the geographical center, which was essential to the exercise of his jurisdiction, his order was an absolute nullity. This view has been pressed upon the court by counsel for appellants, both in oral argument and by printed brief, evidencing diligent and extensive research, but we do not think the proposition sound in the application sought to be made of it here. The unsoundness of appellants' contention lies in the fact that the jurisdiction—that is, the power to hear and determine the matter—does not depend upon the establishment or the existence of the fact as to the distances from Anahuac and Wallisville to the center of the county. Nor was it essential to the jurisdiction of the county judge to declare the result in favor of Anahuac that it should have been established that Anahuac was within five miles of the center. The order for the election and the counting of the votes were jurisdictional facts, and, without these, it might be said that the county judge was without jurisdiction to declare the result, but his jurisdiction to declare the result in favor of Anahuac did not depend upon the existence of facts necessary to a proper decision of the question. If it were so, then the power to determine the existence or not of the fact would depend upon whether the fact existed. We cannot undertake to review the numerous authorities cited by appellants in support of this view of the law, but an examination of many of them show that they are fundamentally inapplicable to the case here presented.

Appellants' second proposition is that, before the county judge could have declared the result of the election in favor of Anahuac upon a majority vote, he must have determined that Anahuac was within five miles of the geographical center as designated by the land commissioner; that, if he did not do so, his order was void, and the court erred in refusing to allow appellants to prove this fact by the testimony of the county judge. We think it is a sufficient reply to this that a finding by the county judge upon a majority vote in favor of Anahuac that the result was in favor of Anahuac, and a judicial declaration of this fact necessarily included a finding of the fact that Anahuac was within five miles of the center of the county. He had the power to determine this question. It was necessary that he should do so in order correctly to determine the result of the election, and, having made the order which he could not properly have made unless the fact existed, he should not

not hold that this finding, even if it had been specifically and affirmatively embodied in the order was, or would have been, conclusive upon plaintiffs, but at least it was sufficient to throw upon them the burden of showing that the facts did not exist which authorized the removal upon a majority vote, and this they did not even attempt to do. No evidence was introduced nor offered tending to show that Wallisville was, or that Anahuac was not, within five miles of the geographical center. Appellants' contention rests, not upon the nonexistence of the facts, but upon the alleged failure of the county judge to make inquiry and determine their existence, and to embody in his order a specific finding as to those facts. What we have said disposes of the second proposition under this assignment. Whether any evidence was heard by the county judge or not, the declaration of the result in favor of Anahuac necessarily involves a finding that the facts necessary to such result existed.

We think it is of controlling significance that appellants did not attempt by evidence to contradict the existence of the facts necessary to authorize the removal on a majority vote in so far as such result depended upon the distance of Wallisville or Anahuac from the center of the county as designated by the land commissioner. Appellants offered testimony to show that, excluding all that part of Chambers county covered by the navigable waters of Trinity Bay, the center of the county was more than five miles from Anahuac, and also to show that, including this area, the center could not be located within the boundaries of the McManus survey. This evidence was excluded upon objection of appellees, to which appellants excepted; and the ruling is complained of by the third assignment of error. As to the first question presented, we think it is sufficient to say that the law makes no provision for excluding from consideration in determining the geographical center of the county that part of the territory covered by waters, navigable or otherwise, of the bay which, according to the boundaries of the county, as fixed by the Legislature, are within such territory. We doubt if it is possible for the land commissioner to determine from the maps, survey, and other data in his office the area covered by such waters. As to the second question, it seems to have been the intention of the provision of the Constitution and of the statute to make the certificate of the land commissioner conclusive as to the location of the geographical center. This seems to have been the view taken by the trial court in excluding the evi-

defendants, the certified copy of the official map of Chambers county, and the testimony of W. B. Gordor that Trinity (or Galveston) Bay is a body of navigable water over which shipping and commerce of various kinds is carried on.

Under the third, fourth, and fifth assignments of error appellants urge the following proposition: "A county seat cannot be removed to a place not within five miles of the center of the county if it has received less than two-thirds of the votes cast, and although the county judge has declared the result in favor of such place, and removal of county seat thereto has been ordered by the commissioners' court, the result so declared is void, and the attempted removal illegal, and proof is admissible to show that such place is more than five miles distant from the center of the county." We understand appellants' contention under this proposition to be that they should have been allowed to show, first, where the center of the county is located, regardless of the certificate of the land commissioner; and, second, that Anahuac is not within five miles of such point, and that, if such facts are shown, the order of the county judge must be held to be void. The meat of appellants' case seems to be embraced in this proposition. We do not think it sound. The most that can be said for appellants upon this point is that they might have shown that Anahuac was not, in fact, within five miles of the point designated by the land commissioner as the geographical center of the county—that is, that the finding of the county judge necessarily included in his declaration of the result was not conclusive on this point—but this fact appellants did not attempt to prove. We are not inclined to hold that the proceedings and judgment in the contest proceeding brought by parties other than plaintiffs in this case can be urged as a bar to the present proceeding. That was a special proceeding which could only be instituted by residents of the county. Articles 1804t, 1804u, Rev. St. We are inclined to think that the doctrine announced by the Supreme Court in *Norman v. Thompson*, 96 Tex. 250, 72 S. W. 62, applies to a contest of an election for the location of a county seat. The contest in that case was of a local option election under a statute relating alone to such elections. After quoting the statute (article 3397) the court says: "As used in the foregoing article, the term 'election' means the act of casting and receiving the ballots from the voters, counting the ballots, and making returns thereof. *State v. Tucker*, 54 Ala. 210. That is the meaning of the word 'election' in ordinary

usage, and it must be so construed; there being nothing in the law to suggest that the Legislature intended to use it in a different sense. On the contrary, wherever the word 'election' appears in the acts of the Legislature upon this subject, it seems to have in view those things to be done on the day of the election in contradistinction to the acts which are to be done preparatory to the election." It would appear that the word "election," as used in the statute under which the contest of this county seat election was instituted, was used in the same sense, and, if so, in such contest nothing could have been properly inquired into except what occurred on the day of election, and there could not properly have been adjudicated in that case the issues presented in the present case, which is an equitable action which can be prosecuted by any person affected in his property rights by the levy and collection of taxes for payment of the expenses alleged to be about to be unlawfully incurred by reason of the void proceedings resulting in the removal of the county seat. We think, however, that it is immaterial to the decision of this case, whether or not appellants are bound by the judgment in the contested election case. If that proceeding had never been instituted, still they have failed to show any ground for declaring the order of removal void. It may be remarked here, however, that it was made one of the grounds of the contest that Anahuac was more than five miles from the geographical center of the county, which was decided against contestants. It was held by this court (*Wallis v. Williams*, supra) that the burden of proof on this issue was upon contestants, but it was also held that the evidence submitted in that case was sufficient to establish that Anahuac was within five miles of the center.

The uncontradicted evidence shows that what is laid down on a plat, made out and recorded before the election was ordered or held, as the Wilcox addition to the town Anahuac, is, in fact, a part of what has been known as the town of Anahuac for 40 years or more. It is at this place, spoken of as Wilcox addition, that the commissioners' court propose to erect the courthouse and jail. The uncontradicted evidence shows that the post office, school, boat landing, business houses, and, in fact, what may be called the town of Anahuac, has always been, and is now, located on what is now this Wilcox addition, which has been known as "Anahuac." This testimony is undisputed, and goes back to a period before the Civil War. It leaves no room for doubt or question that this is the place to which the voters intended that the courthouse should be removed.

There is no merit in the seventh and eighth assignments of error, raising the

question of the right of the commissioners to place the court and jail on this "Wilcox addition." None of the assignments of error or the various propositions thereunder present any grounds for reversal; and the judgment is affirmed.

Affirmed.

TEXAS & P. RY. CO. et al. v. RANKIN.
(Court of Civil Appeals of Texas. April 22, 1909.)

1. CARRIERS (§ 230*) — CARRIAGE OF LIVE STOCK — CONNECTING CARRIERS — BURDEN OF PROOF — INSTRUCTIONS.

In an action against three connecting railroad companies to recover damages to a car load of native cattle not subject to quarantine regulations, diverted to and delayed at quarantine pens, the court instructed that, if the jury found that the initial carrier delivered the cattle to the intermediate carrier "in the usual and customary manner for the delivery of native cattle," the burden of proof was on the intermediate carrier to show by a preponderance of the evidence that it in turn delivered the cattle to the delivering carrier "in the usual and customary manner for delivering native cattle." Held, that the instruction was erroneous, as the burden was upon plaintiff throughout the trial notwithstanding the prima facie case made by plaintiff; such prima facie case not creating a presumption of negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 961, 962; Dec. Dig. § 230.*]

2. NEGLIGENCE (§ 121*)—BURDEN OF PROOF—RULE AS TO SHIFTING OF BURDEN.

The rule that where a plaintiff, on whom is cast the burden of affirmatively showing negligence, has shown such a state of facts as legally constitutes a prima facie case, defendant is then required to rebut the prima facie case or be cast in judgment, does not mean that such prima facie case creates a presumption of negligence on the part of defendant.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 224, 225; Dec. Dig. § 121.*]

3. CARRIERS (§ 228*) — CARRIAGE OF LIVE STOCK — ACTIONS AGAINST CONNECTING CARRIERS — INSTRUCTIONS.

In an action against connecting carriers for injuries caused by delivering the cattle at the wrong place, an instruction that the burden of proof is upon the initial carrier to show by a preponderance of testimony that it delivered the cattle to the consignee at their destination was error, as the burden of proof was on plaintiff to show the negligence of the carriers.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 968; Dec. Dig. § 228.*]

Appeal from Midland County Court; Chas. Gibbs, Judge.

Action by F. E. Rankin against the Texas & Pacific Railway Company and others. Judgment for defendant Missouri, Kansas & Texas Railway Company and against the other defendants, and they appeal. Affirmed as to the Missouri, Kansas & Texas Railway Company, and reversed and remanded as to the other defendants.

H. C. Hughes and Ed. W. Smith, for appellants. A. S. Hawkins, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

LEVY, J. The suit was brought against the three railroad companies for alleged damages to a shipment of two cars of steer cattle and one car of calves from Midland, Tex., to Kansas City, Mo. It was claimed by the appellee: That he directed the Texas & Pacific Railway Company in shipping the cattle from Midland, Tex., to bill the steer cattle to Kansas City, Mo., and the calves to Ft. Worth, Tex.; that the said company negligently disregarded said billing instructions and diverted one car of the steer cattle to Ft. Worth and shipped the other car of steer cattle and the car of calves to Kansas City, Mo.; that the car of steer cattle diverted to Ft. Worth were "native" cattle and not subject to quarantine regulations, and were so billed and known by appellants, and, after being negligently delayed at Ft. Worth for two days, were by the appellants finally carried to Kansas City, Mo., and there negligently unloaded in "quarantine pens," which fact lessened their value on the market.

The appellant the Missouri, Kansas & Texas Railway Company of Texas complains of the following portion of the court's charge to the jury: "If you find that the Texas & Pacific Railway Company delivered said steers to the Missouri, Kansas & Texas Railway Company of Texas in the usual and customary manner for the delivery of 'native' cattle, then the burden of proof is on the Missouri, Kansas & Texas Railway Company of Texas to show by a preponderance of the evidence that it in turn delivered said steers to the Missouri, Kansas & Texas Railway Company in the usual and customary manner for delivering 'native' cattle to said Missouri, Kansas & Texas Railway Company, and upon all other questions the burden of proof is upon the plaintiff to show by a preponderance of evidence his right to recover." The effect of the charge was to tell the jury that, if the Missouri, Kansas & Texas Railway Company of Texas did not prove "by a preponderance of the evidence" that it had delivered the cattle "in the usual and customary manner for delivering 'native' cattle" to its next succeeding carrier, a verdict should be returned against it. We think this was error in the case. The suit was one founded on negligence, and the burden was upon the appellee throughout the progress of the trial to prove the facts constituting the negligence alleged; and to require the appellant to prove "by a preponderance of the evidence" that it was not negligent in the respect charged was more onerous than authorized by the rules of law, and misleading to the jury. The very question of negligence in issue before the jury was that of causing "native" cattle not subject to quarantine to be wrongfully placed in "quarantine pens," thereby causing damages to appellee. Appellee argues, in effect, in support of the

charge given, that when the cattle were shown to have been received by the initial carrier in good condition and healthy, and were delivered at destination by connecting carriers in bad condition as diseased or "quarantine" cattle, it devolved the duty on the appellant to explain or justify the injury. Under such proof, as stated by appellee, it would be true as a legal contention that there was then devolved upon the appellant the duty, in the sense of being required to offer evidence, in order to escape liability to rebut the prima facie case thus cast on it by the proof of appellee. Such facts stated by the appellee would only be prima facie evidence, and not a presumption of law, that appellant caused the particular injury complained of. It is a rule of evidence, for the guidance of the parties in offering proof in a case and for the court and not the jury, that, where a plaintiff on whom is cast the burden of affirmatively showing the particular negligence alleged has shown such a state of facts as legally constitutes a prima facie case, the defendant is then required to rebut or controvert the prima facie case by evidence; otherwise he will be cast in the judgment. As said by the court in *Clark v. Hills*, 67 Tex. at page 149, 2 S. W. at page 361: "That a party does not shift to his adversary the burden of proof by making out a prima facie case is clear from what we have said, and is a well-settled principle." As said in the case of *Heinemann v. Heard*, 62 N. Y. 455: "During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient it may be to establish a prima facie case, and it is sometimes said that the burden of proof is then shifted. All that is meant by this is that there is a necessity of evidence to answer the prima facie case, or it will prevail. But then the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial." The authorities cited by the appellee in referring to the burden of proof do not undertake to lay down the rule that it is proper to instruct the jury, or that they should be instructed, that when a prima facie case is made out by the plaintiff the burden is then shifted to defendant to rebut same; but the cases undertake merely to state or announce a rule of evidence governing the burden of proof. It is not within the province of the court to so charge the jury on this rule of evidence as being on the weight of evidence.

The appellant the Texas & Pacific Railway Company complains of the court's charge in instructing the jury that "the burden of proof is upon the Texas & Pacific Railway Company to show by a preponderance of testimony that it delivered the calves in question in this suit to the consignees at

their destination." This was error. In order to recover on the contract of shipment it was essential for the appellee, in order to make out a case of liability, to show that there was a breach of the contract. Even if the appellant could be held to be an insurer by reason of diversion of shipping route, which we do not undertake to say one way or the other, the breach of the contract to deliver would still have to be proven by appellee.

There are other assignments of error based on the sufficiency of the evidence, which we think would require a reversal of the case; but as the questions may not be presented or arise on another trial, and in view of the disposition made of the appeal, we do not undertake to rule upon the same.

A judgment was rendered in favor of the Missouri, Kansas & Texas Railway Company, and they appear and ask an affirmation of the same in their favor, which is accordingly done. The case as to the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas is ordered reversed and remanded for another trial.

MT. MARION COAL MINING CO. v. HOLT et al.]

(Court of Civil Appeals of Texas. March 13, 1909. Rehearing Denied April 17, 1909.)

1. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK.

An employé who knows of the negligent act of his employer, and who appreciates the danger arising therefrom, assumes the risks of the situation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

2. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK.

A mine operator failed to construct an appliance to prevent water cars from being pushed into a shaft. An employé engaged in emptying the water cars was killed by falling into the shaft. He had worked around the mouth of the shaft for a number of months, and he knew that there was no appliance to prevent cars from falling into the shaft if pushed therein in the absence of the cage. There was nothing to show that it was the duty of the operators of the cage not to remove it while the employé was emptying the water cars. The absence of the cage was apparent to the employé if he paid any attention. *Held*, that the employé assumed the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

3. DEATH (§ 76*) — ACTIONS FOR DEATH — PROXIMATE CAUSE — EVIDENCE — SUFFICIENCY.

Where the evidence in an action for negligent death did not show the proximate cause of the accident, but left the same open to conjecture, there could be no recovery.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 94; Dec. Dig. § 76.*]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by Mrs. Ella Holt and others against the Mt. Marion Coal Mining Company. From a judgment for plaintiffs, defendant appeals. Reversed and rendered.

John W. Wray, for appellant. W. P. Gibbs, A. Stevenson, and E. B. Ritchie, for appellees.

CONNER, C. J. Appellee Mrs. Ella Holt is the surviving wife, and the remaining appellees are the surviving children, of James Holt, who on about April 30, 1904, fell into one of appellant's mining shafts, and as a result thereof was killed. They recovered a judgment in the sum of \$4,500, from which this appeal has been prosecuted.

Substantially the only question presented to us is the sufficiency of the evidence to authorize the submission of the case to the jury. Appellees thus state the evidence upon which the judgment rests:

"The shaft of defendant's mine was divided into two compartments by a heavy wooden partition; each being about 6x8 feet in size. There were two landings above the surface, one at the ground and one above, called the tippie; the latter being 15 or 18 feet above the former. At the top landing or tippie, the coal, slate, etc., were dumped, and at the ground or lower landing the water was dumped. The mouth of the shaft at the ground landing was fenced on three sides; the side where the water cars were taken off being open, and the fence being of pickets 1 by 4 in size and about 4 feet high. There were large pillars around the mouth of the shaft supporting the tippie, etc., above; also, guides at the sides of the shaft for holding the cage in position. The cages were 4-10 by 6-1, and consisted of a floor and top, the latter made of a solid flat sheet of iron, the floor and top being connected by iron rods at the four corners of the cage. And the roof is a little smaller than the floor, is flat, and is about 6½ feet from the floor. Witnesses Poole and Warren estimated that the roof was 7 or 8 feet above the floor. There was nothing visible about the cage when standing at the landing except the floor and the top, or bonnet. At the ground landing there was a flat sheet, made of iron, some 12x15 feet or more in dimensions, on which was a track corresponding to the track on the cage. According to the witness Warren, the box of the water car was about 6 feet long and 3 feet deep, and the cars about 3½ or 4 feet high, were built of 2-inch stuff and were heavy, especially when wet and soggy. Witness Brookline testified that the trucks of the cars were 12 inches in diameter, and that the cars were 22 inches deep, making a total height of 28 inches. Witness Poole testified that he had made some of the cars, and that they were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 19, 1909.

about 5 feet long and 24 or 25 inches deep and about 3 feet from the ground, and weighed 400 or 500 pounds. Witness Warren testified that it was his understanding that the boss had assigned to Holt the duty of emptying the water cars on the day he was killed. It was some time in the afternoon when he fell into the shaft. He had no regular line of duty, but did whatever was assigned to him to do. Brookline testified that Holt's duties at the time of his death were to take off the water and slate cars and dump them. The slate cars were dumped at the upper landing or tippie. Witness Geyer testified that he was the father-in-law of Holt, that Holt had been at work at appellant's mine more than a year, and that he had never seen him pulling off water cars at any time during that period.

"At the time Holt was killed, there were no bars or gates guarding the entrance to the mouth of the shaft. Witness Poole testified, among other things, as follows: 'Some two or three months before Holt was killed, I had a conversation with Mr. Whittsell, the superintendent, about the matter of putting up some protection there. We were working seven days in the week then, and I asked him one Sunday morning if he could not provide some way to get gates there at the opening where the cars were handled, for the protection of the people who worked about the mouth of the shaft. He told me that after we got to the coal he would fix it so that nothing would fall in. We were then within eight or ten feet of the coal. At the time of Holt's death, if there was any protection or gate there to keep anything from going into the shaft, I don't know it. There was a protection put up there after Holt fell in. I do not remember how long after Holt's death, but it was only a few days.' Witness Geyer testified that between Monday and Friday following Holt's death a bar was placed at the entrance of the shaft. Witness Walter Warren, weighing clerk for appellant at the time, testified that there were bars at the entrance of the shaft to prevent the cars from running back into the shaft when the cage was not in position, but did not know whether they were there the day Holt was killed or not, and that when the bar was in position nothing could go into the shaft, a car nor anything else. Witness Brookline, mine foreman of appellant at the time, testified, in substance, to the same facts; also, that the men had orders to close the gate every time they pull a car off the cage, even if the car is off only for a moment. Following the death of Holt, marks were found on the flat sheet where the accident occurred that appeared to have been made by Holt trying to hold back the car which was precipitated into the shaft. Witness Poole testified that they commenced about 4½ feet from the shaft and ended about three feet from it. Holt wore heavy miner's shoes with heavy roundhead-

ed tacks in them. James Holt testified that he examined the landing, etc., about three hours after Holt's death, and that the surface was slick and wet, and looked slippery. In returning the water car to the cage, Holt, or any one doing that work, would push the car, and would be more or less in a stooping position, and in pushing the car back to the shaft it would be between him and the opening. Witness Poole further testified as follows: 'It would be owing to what kind of a start a man gave the car, as to how much force it would take to stop it in returning to the cage. If he pushed it fast, he would have to hang on to it pretty hard to stop it. It has considerable weight and would be hard to hold. I am not sure about the track of this water car, but I think it was on a level all the way from the landing to the dumping place. I have sometimes used considerable effort to stop the car.' Further, that he had handled the water cars himself when not doing other work, and that at the time of the trial the company was not using the cars, but was using pumps instead."

After careful consideration we feel constrained to sustain appellant's first assignment of error, complaining of the court's refusal to give to the jury a special requested instruction to find for appellant. The only negligence alleged that has any support whatever in the evidence is the "failure of the defendant to construct a good and safe appliance or stops to prevent said water car from being pushed into said shaft." Assuming this to constitute negligence, the absence of such "appliance or stops" must have been perfectly obvious to the deceased. The evidence is undisputed that he had worked around the mouth of the shaft a number of months, and, if he never before was engaged in emptying water cars, he must have known, without greater experience than the day had afforded him, of the weight of the water car, the condition of the platform upon which it was operated at the surface, the fact that there were no stops, and that the car would inevitably fall into the mouth of the shaft if pushed therein in the absence of the cage. There is nothing in the evidence indicating that it was the duty of those operating the cage not to remove it while the deceased was emptying the water car, and its absence, with any degree of attention, must have been apparent to James Holt before the car fell. Indeed, actual knowledge of the absence of the cage is indicated by the hobnail marks on the flat iron sheet at the mouth of the shaft. The dangers arising out of this situation, it seems to us, were such as were apparent to any person of sound mind acting with due care, and of the experience the deceased was shown to have. So that we are forced to the conclusion that we must attribute to James Holt not only a knowledge of the facts relied upon as establishing negligence on appellant's part, but also knowledge

of the dangers arising therefrom. Hence, under a long line of decisions, he assumed the risks of the situation so known to him, and appellees are without right of recovery. See *Klutts v. Gibson Bros.*, 37 Tex. Civ. App. 216, 83 S. W. 404; *Smith v. Armour*, 37 Tex. Civ. App. 633, 84 S. W. 676; *Bryan v. Intr. Ry.* (Tex. Civ. App.) 90 S. W. 696; *T. & P. Ry. v. Bradford*, 66 Tex. 732, 2 S. W. 595, 59 Am. Rep. 639; *Railway v. Somers*, 78 Tex. 441, 14 S. W. 779; *Lake v. Furnace Co.* (C. C. A.) 160 Fed. 892; *Nat. Biscuit Co. v. Nolan*, 138 Fed. 12, 70 C. C. A. 436; *Railway Co. v. Burton* (Tex. Civ. App.) 115 S. W. 368; *Railway v. Hynson* (Tex.) 109 S. W. 930; *Ramm v. Railway* (Tex. Civ. App.) 92 S. W. 427, 428.

In addition to what we have above said, it is by no means clear from the evidence that want of stops for the water cars had any causal connection with James Holt's death. The fact that he fell into the shaft was not a necessary sequence of the car's fall. If he was in the exercise of ordinary care for his own safety, as we must attribute to him, certainly he would have let the car go and saved himself. There is nothing in the evidence to indicate that he was in front of the car, and thereby thrown in. It may have been that, without observing the absence of the cage, he gave the car considerable momentum, that some part of his clothing caught upon some projection of the car, and that he was thus dragged to his death. Or it may have been that the deceased did not observe the absence of the cage until the car was near the mouth of the shaft, and that in his effort to prevent the car from falling he slipped and fell in after it. But no person seems to have seen James Holt immediately preceding his fall, or to know just what he was doing, or how the unfortunate occurrence happened, so that it can only be conjectured, and the case on the issue of proximate cause seems to fall within the principle applied by our Supreme Court in the case of the *Tex. & Pac. Ry. v. Shoemaker*, 98 Tex. 451, 84 S. W. 1049.

On the whole we conclude that the court should have given the peremptory instruction requested, and that the judgment must be reversed and here rendered for appellant.

NORTHERN TEXAS TRACTION CO. v. HUNT.

(Court of Civil Appeals of Texas. March 13, 1909. Rehearing Denied April 10, 1909.)

1. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a requested charge embraced in the charge given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

2. STREET RAILROADS (§ 118*)—COLLISIONS—INSTRUCTIONS.

An instruction, in an action for injuries in a collision with a street car, authorizing a verdict for defendant on plaintiff's act in driving suddenly in front of the car proximately contributing to the injury, whether the act was negligently done or not, was properly refused.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 268; Dec. Dig. § 118.*]

3. STREET RAILROADS (§ 118*)—COLLISIONS—INSTRUCTIONS—CONFORMITY TO ISSUES.

Where, in an action for injuries in a street car collision, defendant limited the issue of contributory negligence to plaintiff's act in driving suddenly in front of the approaching car without looking or listening, an instruction submitting the phase of contributory negligence because of plaintiff's failure to look or listen for an approaching car after he went on the track was properly refused.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 268, 269; Dec. Dig. § 118.*]

4. STREET RAILROADS (§ 118*)—COLLISIONS—INSTRUCTIONS—CONFORMITY TO PLEADINGS.

In an action for injuries in a collision with a street car, a petition, which alleges that plaintiff was traveling to his home and was riding on the track or partly thereon, and an answer, which alleges that plaintiff was proceeding along the street near to the track, are sufficient to authorize an instruction submitting the question of plaintiff's driving in close proximity to the track.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 118.*]

5. APPEAL AND ERROR (§ 742*)—ASSIGNMENT OF ERROR—REVIEW.

An assignment that the court erred in giving a charge because of the absence of evidence on which to base it, not followed by any statement of the evidence, may be disregarded on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 742.*]

6. STREET RAILROADS (§ 118*)—COLLISIONS—INSTRUCTIONS.

Where, in an action for injuries in a collision with a street car, defendant pleaded and proved that plaintiff was guilty of contributory negligence in driving suddenly in front of the approaching car, an instruction authorizing a verdict for plaintiff on the issue of contributory negligence, if he at and just before the happening of the accident was in the exercise of ordinary care, referred to the act of his driving suddenly in front of the moving car and was justified by the pleadings and evidence.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 268; Dec. Dig. § 118.*]

7. STREET RAILROADS (§ 98*)—USE OF STREETS BY PEDESTRIANS—CARE REQUIRED.

A person need not always look and listen for approaching cars before going on a street railroad track, though in a given case ordinary care may require the exercise of such diligence; but the measure of ordinary care may be satisfied by the exercise of either the sense of hearing or sight.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 208; Dec. Dig. § 98.*]

8. STREET RAILROADS (§ 111*)—COLLISIONS—PETITION—EVIDENCE.

A petition, in an action for injuries in a collision with a street car, which alleged that the car was being propelled at the rate of 15 miles per hour in violation of a city ordinance forbidding a greater speed than seven miles an hour, was sufficient, in the absence of an ex-

MEASURE OF DAMAGES—INSTRUCTIONS.

An instruction, in an action for personal injuries, authorizing a recovery of such sum as the jury believed to be a fair and reasonable compensation for plaintiff's injuries, and that the jury in determining the reasonable compensation might consider the impairment, if any, plaintiff would suffer in the future, in the use of his arm injured in the accident complained of, correctly charged on the measure of damages, in the absence of any requested charge on the subject.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-553; Dec. Dig. § 216.*]

Appeal from District Court, Tarrant County; W. T. Simmons, Judge.

Action by Phineas W. Hunt against the Northern Texas Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Capps, Cantey, Hanger & Short, for appellant. McLean & Carlock, for appellee.

SPEER, J. Appellee recovered judgment against appellant for personal injuries received by being run over by one of appellant's street cars in the city of Ft. Worth, to revise errors in which judgment this appeal is prosecuted.

The grounds of negligence alleged and submitted were that the defendant company was operating its car at a speed in excess of the speed allowed by an ordinance of the city of Ft. Worth, and that its operatives were negligent in not keeping a lookout to discover the plaintiff and warn him of the approach of the car from his rear. In addition to the general issue, the defendant pleaded that plaintiff was guilty of contributory negligence in turning suddenly and sharply immediately in front of its moving car without looking or listening for its approach. It is well to note the following paragraphs of the court's charge, since objections are lodged against them, or they support the trial court's rulings in refusing requested charges:

"(6) Or if you should find and believe from the evidence that the plaintiff was driving with his horse and a buggy south on St. Louis avenue upon or in close proximity to defendant's track on said street on the occasion of said accident, and that the defendant's motorman in charge of one of its moving cars approached the plaintiff from his rear and failed to keep proper and sufficient lookout for persons who might be using said street as the plaintiff then was, and failed to give sufficient warning of the approach of said car (if you should find he did so fail to do in the respects last mentioned), and if you further find that such act or omission, if any, on the part of the said defendant's motorman, was negligence under the circumstan-

defendant under other instructions herein given you."

"(8) If you believe from the evidence that the plaintiff, without looking or listening for an approaching car from behind, drove suddenly on the track in front of said car and was guilty of negligence in so doing (if you believe he did so act), and that such negligence, if any, on his part proximately contributed to cause said accident to occur, then you will find for the defendant without regard to any other issue in the case.

"(9) If, on the other hand, you believe the plaintiff at the time or just before said accident happened did look or listen for an approaching car and did not drive suddenly in front of said car and was not guilty of negligence in these respects, and if you further believe that plaintiff at and just before the happening of said accident was in the exercise of ordinary care, then you will find against the defendant on its plea of contributory negligence of the plaintiff."

Appellant's first assignment of error is overruled because the requested charge on which it is based was sufficiently embraced in the charge already quoted, and because, for another reason, that it authorized a verdict for the defendant if the plaintiff's act in driving suddenly in front of defendant's car proximately contributed to his injury, whether such act was negligently done or not.

The second and third assignments are overruled because the phase of contributory negligence therein sought to be submitted was not raised by the pleadings in the case, the appellant having limited that issue to the act of appellee in driving suddenly in front of its moving car without looking or listening. It is nowhere alleged that appellee was guilty of negligence after he went on appellant's track in failing to look or listen for an approaching car.

Complaint is made of the sixth paragraph of the charge above quoted because it is said it was error to submit the question of appellee's driving in close proximity to the track when he had not pleaded such a case. Appellee's allegations on this point were "that plaintiff was traveling south to his home and was riding in his buggy as aforesaid on the track of said street railway, or partly on the same." But if this be not sufficient of itself to authorize the charge, the appellant itself nevertheless did plead "that plaintiff was proceeding south along said St. Louis avenue near to the tracks of this defendant on said street," etc. A buggy so near to the tracks of a street car company as to be struck by one of its cars, as appellee's was, is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidently in close proximity to the track, and the issue was therefore fully raised by the pleadings and evidence.

Appellant next insists that the court erred in the ninth paragraph of his charge in authorizing a verdict against it upon the issue of appellee's contributory negligence if he at and just before the happening of the accident was in the exercise of ordinary care; there being no evidence, so it contends, upon which to base such a charge. We would be justified in disregarding this assignment, seeing that it is not followed by any statement of the evidence from the record; but to consider it involves us in no difficulty, because appellant's interpretation of the charge is entirely too restricted. The time during which the charge requires appellee to have been in the exercise of ordinary care evidently refers to the act of his driving suddenly in front of appellant's moving car, as the issue was pleaded by appellant, and, as thus interpreted, the charge finds ample support both in the pleadings and the evidence. Nor can we say the charge is erroneous in permitting a verdict in favor of appellee if he looked or listened, instead of having required him to look and listen. We know of no law, either statutory or otherwise, that requires a person to look and listen for approaching cars before going upon a street railway track. In a given case ordinary care might require the exercise of such diligence, but, again, the measure of ordinary care might be satisfied by the exercise of either the sense of hearing or seeing. It is a question of fact and not of law at all.

There was no error in permitting appellee to introduce in evidence the ordinance of the city of Ft. Worth relating to the speed of street cars, since the general allegation of appellee's petition that appellant's street car was being propelled at the rate of 15 miles per hour, in violation of the ordinance of the city of Ft. Worth, which forbids and makes penal the running at a greater rate than seven miles per hour within the corporate limits of said city, was sufficient, especially in the absence of an exception.

Neither do we find any fault with the charge of the court as to the measure of damages. It merely authorized a recovery of such sum of money as the jury might believe to be "a fair and reasonable compensation" for appellee's injuries. We fail to see how any harm could come to appellant by the court's telling the jury that in determining this reasonable compensation they might take into consideration the impairment, if any, appellee would suffer in the future in the use of his arm. This in no wise violates the principle announced in *F. W. & D. C. Ry. Co. v. Morrison*, 93 Tex. 527, 56 S. W. 745, as we understand that decision. Abstractly, reasonable compensation is the rule of damages in all cases and can never be affirmative-

ly erroneous; but, if the measure is not sufficiently definite, the omission in the charge should be supplied by a requested instruction.

We find no error in the judgment, and it is, accordingly, affirmed.

TEXAS & PACIFIC COAL CO. v. KOWSIKOWSKI.

(Court of Civil Appeals of Texas. Feb. 13, 1909. Rehearing Denied March 13, 1909.)

1. NEGLIGENCE (§ 136*)—QUESTION FOR JURY.

Where the cause of injury is under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if proper care is used, it affords reasonable evidence that the accident arose from want of care, and the question of negligence should be submitted to the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 808; Dec. Dig. § 136.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTION FOR JURY—NEGLIGENCE ON PART OF MASTER.

Evidence, in an action for the death of a trapper by the derailment of coal cars in defendant's mine, held sufficient to make defendant's negligence a question for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1026; Dec. Dig. § 286.*]

3. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

A charge authorizing the jury to allow a father such sum for the death of his minor son as would fairly compensate him for the pecuniary loss sustained, though technically erroneous as placing no limitation as to the period of time for which recovery could be had for loss of services, was not prejudicial to defendant, where no special charge on the subject was requested, and the son's wages up to the time of his maturity could not have been less than the amount of the verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by Frank Kowsikowski against the Texas & Pacific Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John W. Wray, for appellant. W. P. Gibbs and E. B. Ritchie, for appellee.

CONNER, C. J. Appellee instituted this suit against appellant in the district court of Palo Pinto county, Tex., on the 22d day of October, 1907, alleging that appellant was operating a coal mine in Palo Pinto county, that his son was injured by derailment of coal cars caused by a defective switch, from which he died, that he was 16 years of age at the time, and contributed to the support of the family, etc., claiming damages in the sum of \$10,000. Appellant answered: (1) By general denial; (2) that plaintiff hired his son to appellant to perform the very duties he was engaged in at the time of his

death; (3) that in the performance of his duties the decedent gave the signal for the motorman going north to come; (4) that the derailing of the motor, resulting in the accident, was caused by the negligence of the decedent in not properly setting the switch; (5) that, if there was any defect in the switch, it was the duty of the decedent to give immediate notice, in which he failed. On the trial of the cause, the jury found for the plaintiff and assessed his damages at \$600, for which a judgment was rendered.

The principal question pressed upon us in appellant's behalf is whether under the evidence the court should have peremptorily instructed the jury in appellant's favor as it requested. It is insisted that "the evidence totally failed to establish negligence on the part of appellant." The deceased was engaged as a trapper in one of appellant's coal mines at Thurber. The coal as mined was loaded on cars drawn by an electric motor operated by a motorman along lateral tunnels, and thence along main tunnels which terminated at the hoisting point, where the loaded cars were taken to the surface, unloaded, and returned. The deceased was employed in the north main entry, which extends north and south. From this main entry along each side there were a number of lateral tunnels, and it was the duty of deceased, who was but about 16 years old, among other things, to observe approaching trains, to arrange the switches to and from the laterals, and see that no train from a lateral was allowed to enter the main tunnel while a train on the main tunnel was running or about to run to or from the hoisting point. The switches were constructed of adjustable iron points some 18 inches or 2 feet long, fastened at the larger end on the inner sides of the main track by a rod or spike driven into the wooden cross-ties. The points were loose and adjusted to the rails, working on the rod or spike as a pivot, by the hand of the trapper so as to keep the main track clear or to admit of an entrance from the laterals, as the occasion should require. At the time in question, the deceased was at the junction of the main entry and the third lateral tunnel on the west. On the lateral track a train of coal cars had approached and stopped within about six feet of the main track. At the southern terminus of the main entry, some 300 or 400 feet away, a train of coal cars was starting for the hoisting point. The deceased was observed doing something with the switch point that was adjustable to the east rail of the main track. It must have been defective or out of order in some way, as the deceased, after pounding or striking upon it several times with a rock or something, picked it up and dropped it in the middle of the track, then hurriedly turned to the west, and endeavored to do something, not shown by the evidence, with the

west switch point, when, to avoid the approaching train from the south, he jumped to the west at or near the front of the motor car standing on the lateral. He would thus have escaped injury, but for the fact that the train on the main line was derailed at this point, and the deceased was caught between the two motors and so injured that he died. The evidence fails to show affirmatively what, if anything, was wrong with the west switch point, or how long the east switch point had been out of order, or whether report of any defect had ever been made to the mine boss whose duty it was to repair. It also fails to show the speed of the train on the main track, save that the only eyewitness who testified said: "He come pretty quick." Nor does it affirmatively appear whether the deceased gave any signal, or whether the train on the main track gave any warning of its approach.

We are of opinion that the case on the merits is one falling within the rule applied in *Washington v. M., K. & T. Ry. Co.*, 90 Tex. 314, 38 S. W. 764. The rule as quoted and approved in the case referred to is that: "Where the particular thing causing the injury has been shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care." There can be no pretense that the derailment of appellant's train was such as would happen in the ordinary course of mining operations. It was clearly within appellant's power, if true, to have shown that the speed of the approaching train was no greater than usual, and hence could not have reasonably been expected to result in or contribute to the accident. If warning of the approaching train was given by the operating motorman, or if deceased saw or heard it in time to have given an answering stop signal, the motorman, or some other one or more of appellant's employees that the evidence shows were present, could doubtless have so testified. If, in fact, the defect in the east switch point had nothing to do with the derailment, as appellant contends, it could and should have been made plain. The evidence tends to show that, in order for the main track to be clear, it was necessary to have the switch point pressed away from the east rail, and the west switch point pressed closely to the west rail. Appellant made no effort to show that the switch points were so in position, and hence that the deceased was unnecessarily trying to adjust them. We cannot assume that he was acting without ordinary care beyond the scope of his duty. Nor did appellant offer any witness to show the actual condition of the west switch point before or after the

accident. Appellant's contention that it was without defect or want of repair rests alone upon a mere failure in the evidence to show otherwise. So with every other material contention made by appellant. They all, save when not refuted by evidence tending to show otherwise, rest upon mere inferences or upon mere silence on the subject. So that on the whole we think the evidence on the issue of appellant's liability required the submission of the case to the jury, and that in the absence of explanation, as in many particulars they are, the circumstances are sufficient to sustain the verdict and judgment.

The only further contention is that the court erred in giving the following charge on the measure of damages: "If, under the law as herein given you and the evidence submitted to you, you should find for the plaintiff, you will allow him such a sum of money, paid now, as will fairly compensate him for the pecuniary loss he has sustained in the death of the said Mike Kowalski." It is insisted that the charge is erroneous in that it placed "no limitation as to the period of time for which the plaintiff was entitled to recover for the loss of services of the deceased." If it be admitted that the charge quoted is technically erroneous, as under some circumstances it undoubtedly would be, we yet think it without prejudice in this case. Appellant requested no special charge on the subject, and it is undisputed that the deceased boy was but 16 years old at the time of his death. It is also further admitted that he had been receiving \$1.13 a day, which was placed to the credit of appellant, with whom the deceased was living. So that appellant, as the father, was undoubtedly entitled to recover, if entitled to recover anything, the wages of his son up to the time of his maturity, some four or five years hence, the present value of which, in the natural order of events, and without reference to prospect of increase in wages, could not have been less than the amount of the verdict and judgment in this case.

We conclude that the judgment should be affirmed.

FT. WORTH LIGHT & POWER COMPANY et al. v. MOORE.

(Court of Civil Appeals of Texas. April 8, 1909. On Rehearing, April 29, 1909.)

1. MASTER AND SERVANT (§ 217*)—INJURY TO EMPLOYE—ASSUMPTION OF RISK.

An experienced line man in the employ of a telephone company injured, while climbing one of its poles, by placing one hand on a messenger wire, which he knew to be grounded, and the other one on an iron step, in contact with which, as he could have seen, was an electric light wire of the city, which at such time should have been dead, but which was charged through

contact, at a distance, with the wire of a third company, owing to its negligence, assumed the risk from the negligence of the telephone company in not keeping the city wire away from the step, it being the rule with such electricians to deal with each wire as if it were charged, and he, though ignorant of the presence of electricity in the city wire, having equal facility with his master for knowing thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

On Rehearing.

2. APPEAL AND ERROR (§ 754*)—ASSIGNMENT OF ERROR — NECESSITY — REFORMATION OF JUDGMENT.

Though on the verdict plaintiff had a right to a judgment against both defendants, jointly and severally, for all the damages awarded, yet he, not having complained below of its being for part only of the damages against one defendant, and for the balance against the other, may not, on the judgment being reversed as to one defendant, have it reformed so as to be for the full amount against the other defendant, which, though perfecting appeal and filing assignments of error below, filed no brief in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 754.*]

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Action by John Moore against the Ft. Worth Light & Power Company and others. Judgment for plaintiff against the Southwestern Telegraph & Telephone Company and the Ft. Worth Light & Power Company, each of which perfected an appeal; that of the Telegraph and Telephone Company alone being prosecuted. Reversed as to the Telegraph & Telephone Company.

A. P. Wozencraft, William D. Williams, and D. A. Frank, for appellants. McLean & Carlock, for appellee.

HODGES, J. John Moore, plaintiff in the court below, filed this suit in the district court of Tarrant county against the Ft. Worth Light & Power Company, the Southwestern Telegraph & Telephone Company, and the city of Ft. Worth, claiming damages in the sum of \$25,000 for personal injuries alleged to have been sustained by him in July, 1907, while in the service of the Southwestern Telegraph & Telephone Company, and occasioned by certain concurrent acts of negligence on the part of all the defendants. The trial resulted in a verdict in favor of the appellee for the sum of \$4,000, which the jury apportioned as follows: Three thousand dollars against the appellant Southwestern Telegraph & Telephone Company, and \$1,000 against the Ft. Worth Light & Power Company. Separate appeal bonds were executed by each of these defendants, and assignments of error filed in the trial court; but the telephone company alone has filed briefs in this court.

The issue upon which we think this case should be disposed of is presented in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

first assignment of error, in which the sufficiency of the evidence to sustain the verdict and judgment is questioned. It is claimed by the appellant telephone company that the testimony of the appellee as to the conditions under which the accident occurred discloses a situation showing that he assumed the risk of the danger he encountered, and the consequent injuries therefrom. The testimony shows that on the morning of July 19, 1907, the appellee and another employé of the telephone company were sent out to put in a telephone near where this injury occurred. After they had ascertained that the occupants of the premises wanted the telephone, the appellee, of his own accord, began to ascend one of the telephone poles, for the purpose of making an inspection in connection with the work in which he was then engaged. This pole stood near the crossing of one of the streets in the city of Ft. Worth. There were many telephone wires running east and west strung to this pole. Iron spikes were driven into the north and south sides of the pole for use in climbing it. The city of Ft. Worth had two wires on the same side of the same street, also running east and west. The city wires were suspended from city poles, but were not attached to the telephone pole. They hung about 25 feet above the ground and below the telephone wires, one of the city wires passing on the north side of the telephone pole, and the other on the south side. A few inches outside of the city wires, and at the same level, two light and power wires, which did not belong to the defendant light and power company, also straddled the telephone pole, running parallel with the city wires. These light and power wires were suspended from the same pole which carried the city wires, but were not attached to the telephone pole. There was testimony from which the jury were justified in concluding that the city wire on the north side of the telephone pole was in contact with one of the iron steps about 25 feet above the ground, and that this contact had existed for some time before the accident, though how long it is not clear. The appellee ascended the telephone pole till he got about 25 feet from the ground, and had to swing himself partially to the south side in order to avoid contact with the city's north wire; the wire on the south side of the pole being farther off than on the other, and more easily permitting the passage of his body without contact.

In detailing the circumstances immediately attending the accident, the appellee testified: "I was going up this pole to test a pair of wires to connect this phone that we were going to put in. When this occurred I had not reached the place where I was going to do the work. I was just ordinarily like a man climbing a pole—one foot up, reaching up with my hand, you know, and climbing up. It was the right hand that I think came in contact with the live wire, and the left

hand was down about 18 inches on the next step below on the opposite side, against a messenger wire, the support of the cable—it is a heavy wire to hold up one of those cables, which is connected with the ground—and it was my right hand that grasped the other side or the opposite side. With my left hand I had hold of a step also, but this messenger wire was tied around the pole just above this step. I was holding to those steps to climb the pole. Those were the steps that were provided for that purpose. I didn't succeed in grasping the step with my right hand before I was shocked. I could not tell how I caught the wire, for just as I saw I had touched, you know—and that noise—and that is the last thing I remember. I don't know whether I grasped it, or what I done. I just reached up, and as I reached up I laid my hand on the step. This noise—I heard something like a bug passing my ear, and I fell. * * * I didn't know there was any wire resting upon that step at all. In climbing the pole those wires that were hanging there—there were four of them, two on each side of the pole—I was going up and faced toward the pole this way, and the wire on this side lay up near the pole. Those two and the two on this side swung off farther from the pole. They were two of the city's wires, and two of the electric light wires. The electric light wires of the power company was on the extreme side. The city wires was the near ones. One city wire was on this side, and one on this side; and those on this side of the pole were swung off something like a foot or more, while this lay up close to the pole, tolerably close, something like three or four inches. I could see that from the ground before I went to ascend the pole. Naturally, a man climbing a pole, where there are steps that way on one side of the pole, he will throw himself around and swing and reach that way in order to put himself up between the wires in the most space where he will keep himself as clear as much as possible, and that is the way I was; that was my position in going up this pole. When I went to pass up between the wires I swung myself around to the south side of the pole, and for that reason I could not see the step around here where I taken hold. * * * The messenger wire that the cable is on has got a connection to the ground, but it goes on probably a half mile before it gets to it, and before it gets to the office it has several connections to the ground. These connections are made to the ground all along. When I had hold of this step where the messenger wire was put just above it, my finger went against this messenger which was connected with the ground; that was my left hand. My right hand went up and taken hold of this step, with this city incandescent wire lying against, or which was lying against, the wire. The step I put my right hand on

was on the north side of the pole, and the other one was on the south side. The Citizens' wire was something like 15 or 18 inches away from the pole on each side."

The evidence from other sources tended to show that the city wire was in contact with the iron step on the north side of the pole, and that the insulation on that wire had worn off at the point of contact, and thus permitted a current from it to be communicated to the step. It was also shown that the city did not use its wires during the daytime, but only for purposes of illumination at night, and on this particular occasion the current for that purpose from the city's plant had been shut off, and there was no danger from contact with this wire, unless charged from some other and unauthorized source. Those city wires were therefore during the daytime supposed to be harmless, unless accidentally charged. There was testimony to show that on the day of this accident, and also the day previous, there was a contact between a wire of the Ft. Worth Light & Power Company and this city wire, some distance away from where this injury occurred. It resulted from the wire of the Ft. Worth Light & Power Company dropping from its fastening and lying across the city wire. The fall was caused by a wooden pin supporting a glass insulator rotting and giving way. In this way, it is claimed by the appellee, a current was communicated to the city's wire, and this was the cause of the shock received by him at the time, and caused him to fall.

As to his knowledge of the conditions existing at the time he was injured, and his duties under the circumstances, we gather the following from appellee's testimony: He was a man of mature years, and an experienced lineman; had been in the business about nine years, and was thoroughly familiar with all of the duties and responsibilities incident to the capacity in which he was then employed; had previously been an inspector, but was not then working as such. He was also fully acquainted with the system of wires among which he was called upon to work upon this occasion, and knew the conditions existing at the point where he fell, except that he disclaims any actual knowledge of the fact that the city wire was in contact with the iron step upon which he placed his right hand in climbing the pole. He had never climbed this particular pole before, but had seen others climb it in safety, and from that inferred that he could also climb it with safety. Before starting up the pole he could, and did, see the situation of the wires on each side of the pole, except as to the contact before mentioned. He saw the four wires which did not belong to the telephone company swinging loosely, and several feet below the telephone wires—two on each side of the pole he was to climb. He knew that two of them belonged to the

city, and the other two to the Citizens' Company, as it is called. He also knew the uses to which each system of wires was put; and there is nothing to indicate that he did not further know, in a general way, their respective routes and connections over the streets of the city. While he says he could not tell whether the city wire was lying on or against the iron step when he was standing on the ground, he admits that he could, and did, see that it was in very close proximity to it.

As to his duty in protecting himself against dangerous places, and inspecting the situation in which he was called to work, he says: "When I go out and repair a wire, it is my duty to see if I can get up a pole safely or not. It is my duty to see that it is safe for me to climb the pole. It is, of course, my duty, when I go out there to repair or put up a telephone in the manner in which I did on this occasion, to see whether it is safe for me to climb the pole or not. It is my duty, and no one else's; it is my own alone. And when things look safe to me, I go ahead. It is my duty to see that where I am going to work looks safe." Again he says: "It is considered by electricians that every wire is considered charged that you are liable to come in contact with. You are supposed to stay clear of all of them. In going up a pole amongst a lot of telephone or electric wires, in most cases you are to deal with each wire as if it were charged with electricity." He thus testified, in response to the question as to whether or not he could see the wire resting upon the pin or step upon which he was to put his hand: "Well, I say that I didn't see it. I didn't say that I could not have seen it; I simply say that I didn't see it. If I had climbed up there and crawled around the pole and looked in there, I could have seen it. I could not have seen it from where I was without I swung around the pole. I threw myself around far enough on the south side of the pole that I could not see the step, and yet that was a step which was immediately close to a hot wire, but that is not supposed to be a hot wire. It is capable of carrying a heavy current, and did carry a heavy current when it was in use, but it was supposed to be a dead wire in the daytime. I regarded it as dangerous, and swung out of its way. That is what I was trying to do. I swung out of its way to keep from hanging my clothes or tools and bothering me about climbing. I swung out of its way so, in case there was anything the matter with it, to keep it from coming in contact with me or hanging on my tools." Upon the same subject he again says: "At the time I got the shock I was still climbing up the pole, and I grasped the step with my right hand. The city's wire was lying against that step, or I suppose it was lying against it. Well, no suppose about it, for it was against it. Prior to the time I got the shock I didn't notice it

was lying against it. I didn't see it against it; but I knew it was close to it, though, or bound to be, for I could see that just from going up the pole; but I was not afraid to take hold of it. The city's wire was not charged in the daytime."

As to his knowledge and appreciation of the danger of the situation, he says: "When I saw it hanging there in that condition I knew that it was — that a man could possibly get hurt from it. Yes; I knew a man could possibly get hurt, unless he used ordinary care in swinging himself around as I did. The wires were not as close on the other side as on that side; they cleared the pole something like a foot. I was guarding myself against coming in contact with them on the south side. I was swinging myself around here." Again he says: "When it came time to go up there [meaning the pole], I went up, notwithstanding that I knew in advance that those wires were in the condition that I had thought previously was dangerous, but I was using all the care I could to keep from coming in contact with them. I didn't directly undertake by my own skill and care to avoid a danger which was obvious, and which I knew before I undertook to climb that pole. I climbed it because I seen those wires there, and they looked clear. I didn't know it was dangerous when I climbed it. I said that a man could possibly come in contact with it before, and coming in contact with hot wires is a dangerous thing; and there was a space where I could possibly come in contact with hot wires. I went up there, and undertaken to keep myself clear from the wire." In still another place he says: "I knew it was somewhat dangerous to an extent. Just from observation you could see that an accident could occur there. The way I taken chances on that was by seeing other men go through the same place. Of course a man takes chances to a certain extent. I taken the chances there in a certain way. That way was that I had seen other men ascending the same pole, and not get hurt; and yet just from observation, and from the way things had been going on, I thought it was safe, as it had been there so long to my knowledge. Q. I didn't ask you that; and you testified awhile ago that you thought it was dangerous, and you might get hurt there. A. I said that it looked dangerous, but, seeing other men go through there, it led me to believe it was safe." Appellee further testified that his left hand touched the messenger wire which was grounded some distance from that pole at the time. His right hand came in contact with the charged electric wire. He received a shock which caused him to fall from the pole. He says that, had he not made a closed circuit in that way, he would not have sustained any shock by his right hand coming in contact with the electric wire. And he further says that he did not look out for the messenger wire at

all; it was right down on the side where he was supposed to take hold.

We deem it unnecessary to narrate any of the testimony of any of the witnesses which tended to contradict the statements of the appellee. The injuries sustained by the fall form the basis of the suit. Inasmuch as we dispose of the case upon the first assignment of error, it will have to be done on the assumption that his testimony shows that he is not entitled to recover.

The acts of negligence here charged against the telephone company are that it failed to furnish the appellee with a safe place in which to work. Narrowed to a more specific detail, it charged the failure of the appellant to provide some suitable method for preventing the electric wires of the city from coming in contact with the step on the pole which the appellee climbed, and from which he fell. It is not contended that the city wires becoming charged with an electric current at this unexpected hour was due to the negligence of this appellant, but this dereliction is attributed to the Ft. Worth Light & Power Company, and was the basis for the judgment rendered against that company in the trial below.

The general rule that the master owes the servant the duty to exercise ordinary care to provide a safe place in which to perform his labor is too elementary to need discussion. It is also well settled that the servant cannot recover on account of a negligent failure of the master to perform this duty, when such failure is known to the servant, or could have been ascertained by him in the exercise of that degree of care and circumspection which an ordinarily prudent person would use for his own safety under the same or similar circumstances. *St. L. S. W. Ry. Co. v. Hynson* (Tex.) 109 S. W. 929; *T. & P. Ry. Co. v. Bradford*, 66 Tex. 732, 2 S. W. 595, 59 Am. Rep. 639; *Bonnet v. Ry. Co.*, 89 Tex. 76, 33 S. W. 334. We do not understand that counsel for appellee controvert this general proposition; but they insist that, in order to preclude a recovery by the servant, he must also know of the existence of the danger likely to result from such dereliction of the master, or that the danger must be so apparent that it would be seen and appreciated by a person of ordinary prudence. As an abstract question we may concede this to be correct. But it finds a practical application in cases where inexperienced servants sustain injuries from defective appliances or places of work, and where the facts show that they were incapable, by reason of their inexperience, of appreciating the peculiar dangers to which they were exposed. In cases of experienced employes the existence of the defect, or abnormal condition, is generally considered sufficient to indicate the dangers that may necessarily or probably result therefrom, and the knowledge of the latter will generally be presumed from the knowledge of the former. If

the servant be experienced in his particular line of work, he will be charged with a knowledge of such dangers as either necessarily or in the ordinary course of events are likely to result from the abnormal situation of which he knows. *T. & P. Ry. Co. v. Bradford*, supra; *Railway Co. v. Hynson*, supra; *G., C. & S. F. Ry. Co. v. Williams*, 72 Tex. 159, 12 S. W. 172; *Railway Co. v. Somers*, 78 Tex. 439, 14 S. W. 779; *Ray v. Hodge*, 74 N. H. 190, 66 Atl. 123; 1 Labatt on Master and Servant, pp. 669, 1162.

The facts here show that the appellee was an experienced lineman, having been engaged in the business nine years, and had worked in other departments of the telephone service. There is nothing to indicate that he did not have equal knowledge with that of any other employé in the service of the telephone company concerning the entire situation which confronted him on this particular occasion, and of the dangers that were likely to result from it. He saw the condition of the wires before he undertook to ascend the pole. If he did not at that time observe that the city wire was in actual contact with the iron step over which he had to pass, he undoubtedly did see that it was in such close proximity that contact was possible, and even highly probable. This was a circumstance sufficient to put him upon notice of that situation. He must have realized, then, according to his own admissions, that the situation was dangerous for one attempting to climb the pole to the telephone wires above; but, as he says, he was willing to take the chances, believing it safe because he had seen another some time before that pass through the same network of wires in safety. As he ascended the pole and came nearer the charged wire on the step, there was nothing except his own indifference that prevented him from observing the actual situation—that the wire was in contact with the step. He says he did not; but that alone will not absolve him from the duty of using his senses to discover what must have been in plain view. *Ry. Co. v. Hynson*, supra. If he did see it, or if his situation with reference to it was such that he could have seen it had he taken even ordinary precaution for his own protection, he cannot now excuse himself because he did not suspect the danger which he encountered. It was the contact of the wire with the step for which the telephone company in this instance is sought to be held responsible, and not for the unexpected current of electricity in the unused city wire. As to the presence of electricity in the wire, the servant had equal facilities with the master for knowing.

In the Bradford Case above referred to the court said: "If the master and the servant stand upon an equal footing with respect to knowledge of the danger, then in case of an accident as a result of the danger the master is exonerated." Here the appellee testified that he knew a wire was liable to fall on

the city's wire and communicate to it a current of electricity. If it was negligent on the part of the telephone company not to foresee and provide against such accidents as did in this case occur, it was also a lack of ordinary prudence on the part of the appellee, when he knew of the situation, not to anticipate the same results. We have discussed the question of knowledge on the part of the servant in this case upon the assumption that the appellant telephone company was guilty of the negligence charged, the finding of the jury being in favor of the appellee upon that issue. The principles of law considered and applied are those which govern the relative duties and rights of the master and servant under those conditions where the servant owes no duty to inspect, for the purpose of ascertaining whether or not the place in which he is required to labor is safe, beyond that which is imposed by the dictates of ordinary prudence. These are not applicable where, under the contract of employment, or the peculiar character of the service to be performed, the servant assumes, in whole or in part, the duty of inspection, either for his own safety alone or for the benefit of the master. When this is the condition under which he works, he cannot rely wholly upon the assumption that the master has provided him a safe place. It becomes a party of his duty to see that it is safe. 1 Labatt on Master and Servant, § 414. We think the testimony of the appellee justifies the conclusion that by the terms of his employment he assumed, to some extent at least, the duty of ascertaining for himself if the place in which he was required to work was safe for that purpose. He says that it was his duty, and his alone, to see that he had a safe place in which to work when he went out to perform that class of labor. If so, it is difficult to imagine a situation that would come more completely within the range of those of which he was expected to take notice than that here shown to have existed. It is but natural and reasonable to expect that a lineman, having to work in positions above the ground, difficult of access and removed from the ordinary opportunities for inspection, should be expected to rely less upon the presumption that the master had provided him a safe place, and more upon his own power and opportunities for observation. *Flood v. Western Union Tel. Co.*, 131 N. Y. 603, 30 N. E. 196; *McGorty v. Tel. Co.*, 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62; *Sias v. Consol. Lighting Co.*, 73 Vt. 35, 50 Atl. 554.

We think the evidence very conclusively shows that the appellee was under a greater duty to look out for his own safety in the places he was called upon to work than that which generally rests upon the servant. Whether the act of permitting the electric light wire of the city to remain in contact with the step be regarded as negligence on the part of the telephone company or not,

we think it was a situation of which the appellee under the circumstances assumed the risk. He either knew, or should have known, where he was placing his hands, and the wires with which he was likely to come in contact. Such a precaution was not only imposed by what he says was his duty to see that the place in which he was to work was safe, but by ordinary prudence as well.

Without passing upon any of the other assignments of error, we think that as to the appellant Southwestern Telegraph & Telephone Company this case should be reversed, and judgment here rendered in its favor. The case is therefore ordered reversed and rendered.

On Rehearing.

In the motion for a rehearing counsel for appellee insist that we erred in holding that appellee assumed the risk of the dangers incident to coming in contact with the wire, even if the evidence is sufficient to show that he knew the situation of the wires before and at the time he received the shock which caused him to fall. They contend that there is not sufficient evidence to support the conclusion that he knew of the presence of the danger which he encountered. We do not intend that the language used in the original opinion should be construed as going far enough to say that, because the appellee knew of the condition of the wires, he must necessarily have known of the lurking danger resulting from one of them being charged with a current of electricity. A knowledge of a situation does not always carry with it the knowledge of a danger. But it is not necessary, to rest the conclusion we have reached, that the appellee knew of the danger likely to result from the abnormal condition which confronted him, upon a knowledge of the condition alone. He testified that electricians considered all wires with which they came in contact as charged, and dealt with them accordingly. He further says that he regarded the situation as dangerous, and swung out of the way of the wire for the purpose of avoiding the danger. He did not purposely come in contact with it, but did so accidentally, and without observing its exact location on the iron step. Again, it is clear from his testimony that he would not have received the shock had he not, at the time he placed his hand upon the iron step, also put his other hand in contact with a messenger wire which he knew to be grounded. He was an experienced lineman, and knew all the dangers incident to coming in contact with charged wires; was fully acquainted with the power and dangers of the electric current. The only fact about this situation of which he can be heard to plead ignorance is that the wire with which he came in contact at the time carried a current of electricity; but this, we think, becomes unavailable in view of his admissions of the rule, recognized and observed by his class of workmen, to treat

all such wires as charged, and that at the time he swung himself around to the south side of the pole he was then undertaking to avoid contact with this wire for that very reason. It must be borne in mind that this current which caused his shock was not due to any negligence or conduct on the part of the appellant telephone company, or from any cause over which it had control. The conditions which produced it were as much within the knowledge of the appellee as that of the appellant company. Where the servant has equal knowledge with the master of the dangers incident to his work, he takes the risk upon himself if he goes on with it. *G., H. & S. A. Ry. Co. v. Lempe*, 59 Tex. 19. In the case cited the court said: "There are some circumstances which will vary these rules, or rather create exceptions to them, but the present case is not brought within any of such exceptions. One of these is where the defects in the machinery or the premises about which the servant is employed are obvious, but the danger is not apparent. In such cases the master is held liable because the master should have taken steps to ascertain whether the defects render them unsafe. *Wood on Mas. & Serv.* § 336. Of this character are all cases where there is some fault in machinery, or of a track of a railroad, which are as obvious to the servant as to the master, but which, from want of experience or knowledge on the part of the former, he cannot determine that the defect will be productive of danger to him. He may know that certain appliances usually connected with an engine are lacking, or that some of the rails of the track are warped or out of place, yet if he did not know, or could not reasonably have known, that in the one case there was imminent peril of an explosion, and in the other of the cars being thrown from the track, he could recover if injured by such accidents. On the other hand, if he knew, or should reasonably have known, that such defects would necessarily subject him to risk from such occurrences, he has no cause of action against his master. *Id.* § 355, and cases cited. The difference is between going into the service or continuing in it 'knowing that the instrumentalities employed are unsafe and dangerous,' and knowing that defects exist, but not that they necessarily render the employment of a perilous character. It is sought by appellee's counsel to bring this case within the above exception, and to that end he cited several reported cases; but, with the above distinction in view, all the authorities cited by him are easily explained, and rendered consistent with the law as announced in this opinion."

Here the appellee knew of the condition of the wires and their situation with reference to the pole, and knew that the wire which caused his shock belonged to the city, and the purposes for which it was employed; and he will also be presumed to know as

were generally dead during the daytime, they might not be so under any and all circumstances, and, further, that where wires belonging to other companies crossed the city's wires, just such accidents as did occur were likely to happen. There was no failure to perform any duty due from the master to the servant, in this instance, of which the appellee did not have full knowledge. He, therefore, stood in the attitude of knowing the negligence of the master, and had equal facilities with the latter of knowing all the dangers that would necessarily result from that situation. The motion for a rehearing is therefore overruled.

There is also a motion filed in this case asking that we reform and affirm the judgment of the trial court for the full sum of \$4,000 against the Ft. Worth Light & Power Company, one of the defendants below. The verdict rendered by the jury in the trial court was as follows: "We, the jury, find for the plaintiff, John Moore, judgment in the sum of \$4,000; \$3,000 against the Southwestern Telegraph & Telephone Company, and \$1,000 against the Ft. Worth Light & Power Company; and we find in favor of the defendant city of Ft. Worth." Upon this verdict judgment was rendered for the plaintiff as follows: "It is therefore ordered and adjudged that said verdict be in all things approved and made the basis of judgment herein, and that the plaintiff, John Moore, is entitled to recover damages, and does hereby recover, on account of his suit against the Southwestern Telegraph & Telephone Company and the Ft. Worth Light & Power Company, defendants, in the aggregate sum of \$4,000, of which amount \$3,000 shall be recovered against the Southwestern Telegraph & Telephone Company, and \$1,000 against the Ft. Worth Light & Power Company." The light and power company perfected its appeal, and filed assignments of error in the court below, but filed no brief in this court. It is stated in this motion that the light and power company had an agreement by which its appeal was to be considered as being presented in the brief of the telephone company, but no such agreement was filed in this court, nor were there any allusions to such made until after the decision of the case. It does not appear that the appellee made any effort in the court below to have the form of the judgment corrected and rendered as he seeks to have done in this court, nor is there any complaint by him in the record in any form of the judgment rendered. On the contrary, he appeared in this court by brief, and also in oral argument by his attorney, and asked for an affirmance of the judgment as ren-

any action upon our part is rendered wholly unnecessary. The appellee, however, has elected to treat it as restricting his right of recovery against each of the defendants according to the apportionment which the court undertook to make in following the verdict of the jury. Upon a verdict such as that here returned we think the plaintiff in the suit had the right to a judgment against both defendants jointly and severally for the entire damages awarded. *S. A. & A. P. Ry. Co. v. Bowles*, 88 Tex. 640, 32 S. W. 880; *San Marcos Electric Light & Power Co. v. Compton* (Tex. Civ. App.) 107 S. W. 1153. The question here presented is not whether the judgment should have been so rendered by the trial court, but whether at this stage of the proceedings this court has the right to reform and so render it. Had cross-assignments of error been presented by the appellee calling in question the correctness of the form of the judgment rendered, or the action of the court in refusing to reform and enter a joint judgment against both of the defendants jointly for the entire sum, we would then have been clothed with all the authority necessary to pass upon the question; but this was not done, and the question is for the first time raised by this motion, made after the case on appeal has been decided, and during the pendency of the motion for rehearing.

The only errors which this court can review are those presented by appropriate assignments or cross-assignments, or such as appear upon the face of the record. *Rev. St. 1895, art. 1014; Applebaum v. Bass* (Tex. Civ. App.) 113 S. W. 174, and cases cited. It has also been held that a codefendant cannot assign error unless he also appealed. *Anderson v. Silliman*, 50 S. W. 576. A party not appealing cannot have a judgment amended. *Succession of Thomas*, 114 La. 695, 38 South. 519; *Ware v. Couvillion*, 112 La. 43, 36 South. 220. The right to consider and correct fundamental errors, or such as appear upon the face of the record, is restricted to those only which affect the rights of the party who has appealed. All others are presumed to be satisfied with the judgment as rendered. The Supreme Court has the same right to consider errors appearing upon the face of the record as have the Courts of Civil Appeals. *Texas Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27. Yet in the *Bowles* Case above referred to, where that court was called upon to review a judgment presenting a similar situation, it was said: "The correctness of the judgment of the Court of Civil Appeals in awarding judgment against the defendants separately for \$5,000 each is not presented to this court

verdict is excessive, and the question is for the first time raised upon appeal, not having been called to the attention of the trial court, the error will be considered as having been waived. *Petri et al. v. First Nat Bank*, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657; *Simmons v. Rhodes* (Tex. Civ. App.) 27 S. W. 903. The Ft. Worth Light & Power Company, against which it is sought to have this judgment here rendered for an additional amount of \$3,000, has not prosecuted in this court the appeal which it perfected, and it may be that this failure was due to the fact that it was content with the judgment rendered against it, and relied upon the conduct of the appellee as a waiver of any further claim against it for damages.

We do not think this court has the right to do more than to affirm the judgment as rendered against the Ft. Worth Light & Power Company, which is accordingly done. In all other respects the motion is overruled.

RAPID TRANSIT RY. CO. v. EDWARDS.†
(Court of Civil Appeals of Texas. April 10, 1909. On Rehearing, May 1, 1909.)

1. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE.

In a conductor's action against a street car company for injuries sustained by being struck by a coal car on a railroad switch near the street car track, evidence *held* to show defendant's negligence in not discovering the proximity of the railroad car to its tracks, and having it removed.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

2. NEGLIGENCE (§ 15*)—CONCURRENT NEGLIGENCE—LIABILITY.

If the concurrent negligence of different persons is the efficient cause of an injury, each of those whose negligence contributed thereto is liable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 18; Dec. Dig. § 15.*]

3. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE.

In a conductor's action against a street car company for injuries sustained by being struck by a coal car on a railroad switch near the street car track, evidence *held* to show that defendant's negligence in not discovering the proximity of the car and having it removed, concurring with the negligence of the railroad company, proximately caused plaintiff's injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

4. MASTER AND SERVANT (§ 112*)—MASTER'S DUTY—CARE REQUIRED.

It is the duty of a street car company to exercise that degree of care required by law to have its track in proper condition for use by its

TORY NEGLIGENCE—RELiance ON MASTER'S CARE.

Since street car employees may assume that the company has inspected the track to keep it in proper condition for safe use, that a conductor could have discovered the dangerous proximity of a coal car to the street car track will not prevent his recovery for injuries from coming in contact with it, unless the danger was obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 724; Dec. Dig. § 236.*]

6. MASTER AND SERVANT (§ 234*)—INJURIES—CONTRIBUTORY NEGLIGENCE—CARE REQUIRED.

A street car conductor must use that care for his safety, while engaged in his work, which a person of ordinary prudence would use under similar circumstances, and is chargeable with knowledge of those things which he could have learned by exercising such care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. § 234.*]

7. MASTER AND SERVANT (§ 281*)—INJURIES—ACTIONS—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In a conductor's action for injuries by coming in contact with a railroad car on a switch near the street car track, evidence *held* to show that plaintiff was not negligent in not discovering the dangerous proximity of the car before coming into contact with it.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 281.*]

8. MASTER AND SERVANT (§ 280*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE—ASSUMPTION OF RISK.

In a conductor's action for injuries sustained by striking a railroad car on a switch near the street car track, evidence *held* to show that plaintiff did not assume the risk of injury from the proximity of the car to the street car track.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 280.*]

9. MASTER AND SERVANT (§ 219*)—ASSUMPTION OF RISK—SERVANT'S KNOWLEDGE.

Where a street car conductor had no actual knowledge of the dangerous proximity of a railroad car which struck him as his street car passed it, he did not assume the risk of injury therefrom, unless its nearness to the track was so obvious that he could have seen it by reasonable observation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 612, 618; Dec. Dig. § 219.*]

10. MASTER AND SERVANT (§ 289*)—INJURIES—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

A street car conductor was not guilty of negligence as a matter of law by stepping down onto the running board without looking to see whether he was in danger from a railroad car standing on a switch within 12 inches of the perpendicular handles of the street car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

11. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where, in a street car conductor's action for injuries caused by the coming in contact of a coal car on a railroad switch near the street

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 26, 1909.

the knew of the location of the coal car on the switch, and that therefore it was his duty to exercise ordinary care to avoid contact with the car, and, if he did not look to see whether he was opposite it, or use any means to ascertain the danger therefrom, he was negligent, was properly refused as upon the weight of the evidence in tending to instruct that plaintiff must investigate and discover whether the car was dangerously near the street car track.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

12. MASTER AND SERVANT (§ 293*)—INJURIES — INSTRUCTIONS — MISLEADING INSTRUCTIONS.

In a street car conductor's action for injuries caused by coming into contact with a coal car on a railroad switch near the street car track, a requested instruction that there was no evidence that an agent of the street car company had notice of the location of the coal car, or had control over the placing or removal of the car, was properly refused, as tending to mislead the jury to believe that, if defendant had no actual notice of the location of the car, it would under no circumstances be liable for plaintiff's injuries.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

13. MASTER AND SERVANT (§ 125*)—INJURIES — MASTER'S KNOWLEDGE OF DANGER.

It was a street car company's duty to exercise ordinary care to discover a railroad car dangerously near its track, and remove it, and it could not escape liability for injuries to employees caused by the proximity of the car to its track on the ground that it had no actual notice thereof, and could not control the movement of the railroad car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by J. B. Edwards against the Rapid Transit Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Finley, Knight & Harris, for appellant. Mathis & Freeman and Carden, Starling & Carden, for appellee.

TALBOT, J. This is an action for damages on account of personal injuries sustained by appellee while serving the appellant in the capacity of a street car conductor. The defendant railway company answered by general and special exceptions to plaintiff's petition, a general denial, and pleas of contributory negligence and assumed risk. From a judgment in favor of the plaintiff for the sum of \$1,400 this appeal is prosecuted.

Conclusions of Fact.

Appellee had been in the employ of appellant about two months, and about 11 o'clock at night on the 20th of August, 1906, while standing on the "running board" of one of

pany, standing on a spur or side track, owned by said railway company, which was near to, and lying parallel with, appellant's street car track, and was injured. The coal car had been standing near appellant's track the entire day of August 20, 1906, and up to the time appellee was injured. There was a bulge in the coal car near its center, and, by actual measurement made the next day after the accident, by one of appellant's employees, it was discovered that at this point the coal car came within 12 inches of the handles that extend up and down on the side of the street car. At the end of the coal car the distance between that car and the street car as the latter passed was 16 inches. Prior to 6:40 o'clock p. m. on the day appellee was hurt, the car under his control had been going north in passing the coal car, and during that time the running board of his car was on the opposite side of said car from the coal car, and he was in no danger of coming in contact with the coal car. At 6:40 o'clock p. m. of that day, however, the course of his car was changed, and ran south in passing the coal car, and while so running the running board in use was on the side next to the coal car. After the car began to run south, and perhaps the first time it passed the coal car, he noticed the coal car on the spur track, but did not know how close it was to appellant's track or the street car he was operating, and could not have known of its proximity to the street car without a close examination or measurement of the distance between them. Just before appellee was injured the cord used to operate the register that records or registers the fares collected became fastened in some way, and it was necessary for appellee to step up in the car to fix it. After loosening the cord so it would operate the register, he stepped down on the running board, and started to go forward to flag the street car over a railroad crossing, and just as he did so he was struck by, or came in contact with, the coal car, and received the injuries of which he complains. Neither the coal car, nor the spur track upon which it was standing, was under the control of appellant, and there is no direct testimony that appellant had actual knowledge of the close proximity of said car to its street car track or cars as they passed it. Appellant did, however, have an inspector, whose duty it was to make trips over its line of street railway and ascertain if there were any obstructions on or too near its track, and by the exercise of ordinary care the dangerous nearness of the coal car to its track could have been discovered. The failure to use such care, and to have the

from said car.

Conclusions of Law.

The first assignment of error is that "the court erred in overruling defendant's motion to quash the jury panel for the week, drawn under the law enacted by the Thirtieth Legislature Acts 1907, p. 269, c. 139), the ground of such exception being the unconstitutionality of said law." The proposition urged is that, as the act complained of provides a special jury law and system for counties which have cities aggregating in population 20,000, as shown by the United States census of 1900, and excludes from the operation of such law for all time all other counties in the state, it is an unreasonable and arbitrary discrimination, a special, and not a general, law, and violative of the Constitution of this state. There was no error in this action of the court. In the case of *Northern Texas Traction Co. v. Danforth* (Tex. Civ. App.) 116 S. W. 147, we had occasion to pass upon this question, and there held, upon the authority of *Smith v. State*, 113 S. W. 289, decided by the Court of Criminal Appeals of this state, and in which a very able and exhaustive opinion was written upon the subject by Judge Brooks of that court, that the law assailed was not unconstitutional. This ruling seems to have been approved and sustained by our Supreme Court, for that they recently denied a writ of error in the *Danforth* Case.

It is assigned that the court erred in refusing to instruct the jury at defendant's request, to return a verdict in its favor. The contention is (1) that the uncontroverted evidence showed that defendant was not guilty of any negligence resulting in plaintiff's injury; (2) that the uncontroverted evidence showed conclusively that plaintiff was guilty of negligence which contributed to any injury he may have received; (3) that the uncontroverted evidence showed conclusively that plaintiff assumed the risk of any danger incident to the location of the coal car upon the track of the Santa Fé Railway Company. We do not think that either of these propositions can be maintained. On the contrary, we are of opinion that the evidence was amply sufficient to require the submission of each of the questions involved to the jury for their decision, and, as indicated by our conclusions of fact, warranted their findings, which are necessarily embraced in their verdict, against appellant upon each of them. The mere fact that appellant did not actually know of the close proximity of the coal car to the street railway track before the accident was not sufficient to acquit it of the charge of negli-

gents at the time of the accident, whose duty it was, among other things, to look after everything that would hinder the service of the cars; that if there was any obstruction on the tracks, to look after it and keep the cars running. Appellee testified that appellant had inspectors to look after the tracks when he was injured, to see that they were clear. C. L. McManus, freight agent for the Santa Fé Railroad at Dallas, testified that if he had had any knowledge of the fact that there was a coal car on the Santa Fé track where the accident occurred, dangerously close to appellant's railway track, he would have taken action in respect to moving that car immediately, and as a matter of precaution would have stationed a man there to flag and warn the street car people. Whether under the circumstances appellant was guilty of negligence in failing to discover the situation of the coal car, and to remove or request its removal by the Gulf, Colorado & Santa Fé Railway Company was clearly a controverted issue, and its withdrawal from the jury would have been error. Nor would the fact that appellant did not have control of the coal car or Santa Fé track necessarily relieve it of liability. As said by this court in the case of *Railway Company v. Ellen Williams*, 117 S. W. 1043, decided at a former day of this term (March 6, 1909), and unreported: "If an accident occurs from two causes, both due to negligence of different persons, but together the efficient cause, then all the persons whose acts contribute to the accident are liable for an injury resulting, and the negligence of one furnishes no excuse for the negligence of the other." Therefore, notwithstanding the Santa Fé Railway Company was guilty of negligence in placing the coal car so close to the railway track of appellant, the jury were justified in concluding that appellant failed to use ordinary care to discover and have said car removed, and that such negligence, concurring with the negligence of the Santa Fé Railway Company, proximately contributed to cause appellee's injuries.

So, too, the undisputed fact that appellee knew before the accident that the coal car was standing on the track of the Santa Fé Railway Company near appellant's railway track did not, as a matter of law, charge him with contributory negligence, or impose upon him the assumption of the risk of danger from said car. He testified, in effect, that he saw the car there that evening about 6:40 or 7 o'clock p. m., but had not noticed it that night after dark; that it was drizzling rain, most of the curtains of the car drawn down, and very dark; that while

ordinarily there would be nothing to prevent a man from seeing cars standing on the Santa Fé track, yet if the curtains of the street car were down, and it was raining, he did not think a man would discover the cars. He further stated that just before he was injured he had flagged two railroad crossings, that the cord that rings the register of fares got hung, and that, after getting up in the car and fixing it, he stepped down on the running board with a view of flagging a third crossing, and as he did so he was struck by the coal car and injured. Before this he did not know of the dangerous nearness of the coal car to the street railway track, and the evidence tends strongly to show, if not conclusively so, that he could not have known of it without a close examination for that purpose. This he was not required to do. It was the duty of appellant to exercise that degree of care required of it by law to have its railway track in proper condition for the use of appellee, and to this end it devolved upon it to make such inspections thereof as were essential to constitute such care. This duty appellee had a right to assume had been properly performed, and the fact that he might have discovered by an investigation the dangerous proximity of the coal car to the street railway track does not affect his right to recover. Of course, it was appellee's duty to use, while engaged in the performance of his duties, that care for his own safety which a person of ordinary prudence would have used under similar circumstances, and he will be charged with a knowledge of those things, and held responsible for a failure to exercise those precautions which such a person would ordinarily know and exercise, whether he negligently failed to observe and exercise them or not. Therefore, as said in *Peck v. Peck*, 90 Tex. 10, 87 S. W. 248: "It is thus that he may be charged with knowledge of a defect and danger arising from negligence of the master, not because he is under obligation to make inquiry or examination as to the master's performance of duty, but because the thing is such that with common prudence he ought to see, or know, it in doing his own work." Recognizing these principles, and putting the matter in the most favorable light for appellant warranted by the evidence, it cannot be said that contributory negligence on the part of appellee or his assumption of the risk or danger incident to the location of the coal car upon the Santa Fé track was so conclusively established as to require us to reverse the judgment of the lower court on either of those grounds.

It does not appear that appellee had actual knowledge of the dangerous proximity of the coal car to appellant's track; and, unless that fact was sufficiently obvious to charge him with knowledge of it by reasonable observation, he will not be held to have

assumed the risk of injury from it, nor is he to be held guilty of contributory negligence, as a matter of law, in stepping down upon the running board of the street car without previously, or at the same instant, looking to see whether he was in danger from the coal car. *Whipple v. New York, N. H. & H. R. Co.*, 19 R. I. 587, 35 Atl. 306, 61 Am. St. Rep. 796. In the case cited it is held that the dangerous proximity of a telegraph pole, placed near a railway track, which inclined towards it at the top, so that the space between the pole and the ladder on the side of the freight car which the plaintiff was climbing at the time injured was 15½ inches, was not an obvious defect.

Appellant requested the trial court to charge the jury as follows: "You are instructed that under the uncontroverted evidence plaintiff knew of the location of the cars of the Santa Fé Railway Company on its track, and you are therefore instructed that it was the duty of plaintiff to exercise ordinary care to avoid coming in contact or collision with such cars, and if you find and believe from the evidence that he never looked to see if he was opposite said cars, and never used any means whatever to ascertain the immediate danger of a collision with said car, then he would be guilty of contributory negligence as a matter of law, and it would be your duty to return your verdict for the defendant." The refusal of this charge is made the basis of appellant's fourth assignment of error. This charge, we think, was upon the weight of the evidence, and properly refused. There was evidence that appellee observed the coal car standing on the Santa Fé track some three or four hours before the accident resulting in his injury occurred, but it certainly did not conclusively appear that the proximity of the car, or the danger of coming in contact with it, was obvious, or that appellee must necessarily have known of such proximity and danger in the discharge of his duties. Unless it did so appear from the evidence, appellee had the right to assume, as heretofore stated, that appellant had exercised the care defined by law to furnish him a track free from obstructions, and reasonably safe for his use in the performance of the work required of him. The charge in question is so framed that, had it been given, the jury would have thereby been misled into the belief that it was appellee's duty to examine and ascertain whether or not the car was dangerously near the street railway track, and that if he failed to do so, he could not recover. Whether under all the facts and circumstances of the case the appellee failed to exercise ordinary care for his own safety was an issue of fact for the jury; and this issue by the general charge, and especially by a special instruction given at the request of appellant, was fairly submitted.

Nor did the court materially err in refusing to give appellant's special charges Nos. 7 and 8, to the effect that there was no evidence before the jury that any authorized agent of appellant had notice of the location of the coal car, or participated in placing it upon the Santa Fé track before the accident, or that it had control over the placing or removal of said car, and therefore was not charged with such control, and that the jury should not consider any claim of appellee that it had such notice. These charges were probably upon the weight of the evidence, and clearly calculated to induce the jury to believe that, if appellant had no actual notice of the placing of and location of the coal car on the Santa Fé track, under no circumstances would it be liable for the injuries sustained by appellee. Such is not the law. It was appellant's duty to exercise ordinary care to discover the exact location of said car, and such care to have it removed. Failing in this, it could not escape liability on the ground that it had no actual notice that the car was there, and no authority to control it. The evidence shows that, had appellant exercised ordinary care, it would have discovered the close proximity of the car to its track, and that upon the giving of notice of that fact to the agent of the Santa Fé Railway Company's agent at Dallas immediate steps would have been taken by him to remove the car.

We have found no error requiring a reversal of the case, and the judgment of the court below is therefore affirmed.

On Rehearing.

In this motion we are asked to make additional findings of fact, which we do as follows: In the vicinity of Moser's Foundry, by which the defendant's cars passed upon its track, there were three railway crossings in rather close proximity to each other. The car of the Santa Fé Railway Company which injured the appellee was located upon the track of that company alongside defendant's track, and between the second and third railroad tracks, and appellee was familiar with the location of all the crossings and of Moser's Foundry. Appellee knew that the coal car with which he came in contact was located between the second and third tracks and near the foundry, and at the time of the accident he knew he was between the second and third tracks, and that he was near the foundry. The distance between the second and third tracks was 100 to 150 feet. As appellee stepped down on the running board, just immediately before he was injured, he did not look to see if the car that he came in contact with was standing there. Whether he could have seen the car had he looked is not entirely free from doubt. He testified on that point as follows: "I suppose the street car had a headlight on the front of it.

These headlights throw a light on either side of the track, and down the track for some distance. I don't know as I could have seen one [car] if I had looked. I suppose I could have if I had been looking that way, and had not been attending to my duties. If I had been looking for cars, I guess I could have seen it. The lights on the car that I was running were dim at the time I got hurt." We see no reason to change our views as expressed in the original opinion. Whether the appellant was guilty of negligence which was the proximate cause of appellee's injuries, and whether appellee, under all the circumstances of the case, was guilty of contributory negligence, were issues of fact for the determination of the jury.

The motion for rehearing is overruled.

TIPTON et al. v. TIPTON.†

(Court of Civil Appeals of Texas. April 10, 1909. Rehearing Denied May 1, 1909.)

1. ADVERSE POSSESSION (§ 63*)—REPUDIATION OF TITLE OF GRANTOR.

A purchaser, taking possession of land under a contract of sale, cannot, without repudiation of the title of his grantor, hold adversely against him.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 343-346; Dec. Dig. § 63.*]

2. DEEDS (§ 56*)—DELIVERY—SUFFICIENCY.

A mother conveyed to her sons land on consideration of \$1,800, payable to her heirs at her death, and on the further oral promise to pay certain rents. A deed was signed and acknowledged, and placed in a trunk belonging to one of the sons, and the sons took possession of the land, and some of the rents were paid. Held, that there was a sufficient delivery of the deed to authorize the foreclosure of a vendor's lien to secure the payment of rent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 117; Dec. Dig. § 56.*]

3. FRAUDS, STATUTE OF (§ 50*)—CONTRACTS TO BE PERFORMED WITHIN A YEAR.

A mother conveyed to her sons by deed lands on consideration of \$1,800, payable to her heirs on her death. Orally it was agreed, as a further consideration, that they would pay a certain portion of the crops on the land as rent during her lifetime. Held, that the oral agreement, not being of necessity incapable of performance within a year, was not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 76, 77; Dec. Dig. § 50.*]

4. EVIDENCE (§ 419*)—PAROL EVIDENCE—CONSIDERATION FOR DEED.

It is permissible to show that, as an additional consideration for a deed reciting a money consideration only, grantor was to receive rents for her life.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1913; Dec. Dig. § 419.*]

5. TRIAL (§ 54*)—RECEPTION OF EVIDENCE—LIMITING EFFECT OF EVIDENCE.

A grantor sued for rents, a part of the consideration for the conveyance of the land. A witness testified that the grantor had conveyed the land to her, and she had brought suit against the defendant to recover the land, and had lost the suit, and that she thereafter reconveyed to the grantor. Held, that the testimony was ad-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court June 2, 1909.

missible only for the purpose of affecting the credibility of the witness, and not for the purpose of proving plaintiff's case, as plaintiff was not claiming the debt sued for through the witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 128; Dec. Dig. § 54.*]

6. VENDOR AND PURCHASER (§ 284*)—FORECLOSURE OF LIEN—VERDICT.

A grantor sued for rents, a portion of the consideration for the conveyance of the land to her two sons, one of whom had abandoned his interest, the other taking possession, and claiming the whole by adverse possession. The petition claimed rents for four years, at \$400 per year, on all the land. The verdict rendered was: "We, the jury, find for plaintiff \$200 for each year, 1904, 1905, 1906, 1907, to wit, \$800, and said lien is hereby foreclosed." *Held*, that the verdict could not be considered, as finding that the rent was allowed for an undivided one-half interest in the land, and not on the whole land, so as to render erroneous the foreclosure of the lien on the whole land to secure the payment of the rents.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 284.*]

Appeal from District Court, Hill County; B. Y. Cummings, Special Judge.

Action by Mrs. R. J. Tipton against Mrs. Angeline Tipton and others. From a judgment for plaintiff, defendants appeal. Affirmed.

See 105 S. W. 830.

Morrow & Smithdeal, for appellants. W. E. Spell and Vaughan & Hart, for appellee.

BOOKHOUT, J. This case was originally filed March 29, 1904, by Mrs. Rebecca J. Tipton against Mrs. Angeline Tipton, widow of E. G. Tipton, and Myra E. Tipton, Allie Tipton, and Bessie Ann Tipton, children of E. G. Tipton, to recover rents on a 115-acre tract of land. On December 5, 1907, the same plaintiff filed against the same defendants a similar suit for rent accruing subsequent to the filing of the first suit. The suits were consolidated, and as consolidated it was a cause for debt and foreclosure of vendor's lien, the amount of the debt being represented by the value of the rents for the tract of land described in plaintiff's petition, and for the years therein stated, the land having been conveyed by appellee to E. G. Tipton, deceased.

Error is assigned to the court's refusal to give appellant's special charge as follows: "If you believe from the evidence that in the year 1881 the plaintiff herein made a deed describing the land in controversy, and conveying the same by said deed to E. G. Tipton and Robert Tipton, and that, as a part of the consideration therefor, E. G. Tipton was to sign notes for a part of the purchase money, payable at the death of R. J. Tipton, and that he was to pay R. J. Tipton during her lifetime a fourth of the cotton, and a third of the grain grown on the premises, and further believe from the evidence that after said deed was made, to wit, about the year 1882, or before that time, the said Robert

Tipton abandoned said premises, and that said premises were taken possession of by E. G. Tipton, and further believe from the evidence that E. G. Tipton refused to sign the notes and repudiated the contract to sign the same, if you believe he had agreed to sign the same, and that he failed and refused to pay to R. J. Tipton a third of the grain and a fourth of the cotton, and repudiated the contract to pay the same, if he had made said contract, claiming to own the same, and that he continued in possession of said premises from the said year 1882 up to the time of his death, to wit, on the — day of —, 1902, and that during said time he used, occupied, enjoyed, and cultivated said premises, and claimed to own the same, and held the same adversely to any claim of the said R. J. Tipton, then and in that event you are instructed that said E. G. Tipton acquired a title to the said premises by virtue of the 10-year statute of limitations; and, if you so believe, you are instructed that no vendor's lien could exist in favor of the plaintiff herein." There was no error in refusing said charge. Prior to 1881 R. J. Tipton, appellee, was the owner of 115½ acres of land in John Berry survey in Hill county. Some time in the year 1881 she conveyed the same to her two sons, R. T. Tipton and E. G. Tipton, for the consideration of \$1,800, for which they were to execute their notes, payable to the respective heirs of R. J. Tipton after her death. As a further consideration, they were to pay to the grantor as rent one-third the grain, and one-fourth the cotton, raised each year upon the land during the lifetime of the grantor. No part of the cash consideration was ever paid. R. T. Tipton and E. G. Tipton took possession of the land under the terms of the agreement, and paid the rent in grain and cotton, according to contract, for several years. R. T. Tipton executed his notes as stipulated in the agreement, but E. G. Tipton failed to sign them. The deed was not to be recorded until the death of Mrs. R. J. Tipton, the grantor. At the close of the year 1883, or the first of 1884, R. T. Tipton abandoned the land, and E. G. Tipton took possession of all the land, claiming it as his own. E. G. Tipton, not having paid the consideration for the conveyance to him by R. J. Tipton of an undivided one-half interest in the land, the superior title to said one-half remained in R. J. Tipton, the grantor, and limitation did not run in his favor as against such grantor. *Istes v. Browning*, 11 Tex. 237, 60 Am. Dec. 238; *White v. Cole*, 9 Tex. Civ. App. 277, 29 S. W. 1148; *Jackson v. Palmer*, 52 Tex. 427; *Moore v. Glesecke*, 76 Tex. 543, 13 S. W. 290. A different rule might prevail had he expressly repudiated his purchase and given notice to his vendor of such repudiation, and that he would not be bound by the convey-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ance. The trial court submitted the 10-year statute of limitation as to one-half of the land, and no complaint is made to his action in so doing.

It is contended that the trial court erred in refusing appellant's requested charge reading: "If you believe from the evidence that on the — day of —, 1881, the plaintiff, Mrs. R. J. Tipton, was the owner of the tract of land in controversy, and that at or about said date she and E. G. Tipton and R. T. Tipton made a contract, the effect of which was that the plaintiff R. J. Tipton was to convey to the said E. G. Tipton and R. T. Tipton the tract of land in controversy, and that they were to pay, as consideration therefor, the sum of \$1,800 at the death of R. J. Tipton, and in addition were to pay one-third of the grain, and one-fourth of the cotton, grown on the premises during the life of R. J. Tipton, and if you further believe from the evidence that the said deed was signed and acknowledged by the said R. J. Tipton for the purpose of conveying said land to E. G. Tipton and R. T. Tipton, but further believe from the evidence that the said deed was not delivered to the said E. G. Tipton and R. T. Tipton, but that the same was retained by R. J. Tipton, and that it was her intention to retain same, and not deliver same, then and in that event you are instructed that the contract and transaction between said R. J. Tipton and her two sons, E. G. and R. T. Tipton, if you find there was such transaction, did not pass the title to said land from the said R. J. Tipton; and, if you so find, then you are instructed that, even though you may find the plaintiff herein is entitled to recover rents under other charges given you by the court, she would not be entitled to the foreclosure of any lien upon the land in question as security for the payment of said rents." The petition alleged the execution and delivery of the deed by R. J. Tipton to her two sons, E. G. and R. T. Tipton. The deed was signed and acknowledged by her. The deed was placed in E. G. Tipton's trunk. R. T. Tipton and E. G. Tipton took possession of the land and paid the rent in accordance with the terms of the contract between them for about two years, and up to the time R. T. Tipton moved off the land. The uncontroverted evidence in our opinion shows a delivery of the deed. The charge was properly refused.

These remarks apply also to the third assignment of error, and the same is overruled.

Error is assigned to the court's action in refusing appellant's special charge as follows: "You are instructed that even though you may believe from the evidence that E. G. Tipton promised and agreed, that he would pay to Mrs. R. T. [J.] Tipton one-fourth of the cotton and one-third of the grain grown on the premises in controversy during the lifetime of the said R. J. Tipton, you are nevertheless instructed that the undisputed

evidence showing said contract not to have been in writing, the same is void for the reason that the same could not be performed within one year from the date of the making of said contract." This charge was properly refused. The contract was performable upon the death of Mrs. R. J. Tipton, and this was a contingency which might have happened within one year. It is only when the contract may not be performed within a year that the statute of frauds denounces it as void. Sayles' Ann. Civ. St. 1897, art. 2543, subd. 5; *Thouvenin v. Lea*, 26 Tex. 612; *Thomas v. Hammond*, 47 Tex. 42; *Lennard v. Lumber Co.* (Tex. Civ. App.) 94 S. W. 383.

The third paragraph of the court's charge reads: "You are instructed that you must first determine from the evidence in this case whether or not, at the time of the execution of said deed, the plaintiff, Mrs. R. J. Tipton, entered into an agreement with E. G. Tipton and R. T. Tipton by which it was agreed between them that, as a part of the consideration of said land, in addition to that expressed in the deed, the said E. G. Tipton and the said R. T. Tipton should pay to the plaintiff annually as the rents on said premises one-fourth of the cotton and one-third of the grain during her life; unless you believe from the evidence that such agreement was made and entered into, then you will find for the defendants." It is contended that this is error, in that it authorized a recovery on account of an alleged verbal agreement to pay rents on the land, which, according to the pleading of the plaintiff and the evidence in the case had been conveyed to the defendants' ancestors by warranty deed, reciting a cash consideration, and reserving no rent or other right in the premises. The claim of the plaintiff is not based on a claim solely for rents, but also the additional fact that such rents, under the contract between the parties, were to be paid as a part of the consideration for the conveyance of the land, and constituted a vendor's lien on the land. The charge was correct, and in accord with the opinion on the former appeal of this case, 105 S. W. 830.

Complaint is made of the seventh paragraph of the court's charge, reading as follows: "The evidence introduced before you of the witness Mrs. Clementine McClendon, to the effect that the plaintiff, a few days after the death of the deceased, E. G. Tipton, executed a deed to her purporting to convey the land in controversy to the said Mrs. Clementine McClendon, and her testimony to the effect that she brought suit against the defendant in this case for the land in controversy, and that she lost said suit, and her further testimony that she reconveyed said land to the plaintiff, was admitted only on the issue affecting the credibility of the said Mrs. Clementine McClendon, and, on the issue showing a motive to testify as she did, and as to whether the same does affect her

credit as a witness, or does show a motive to testify, are questions altogether for your consideration, and you will not consider said testimony for any other purpose." There was no error in giving this charge. The suit by appellee was not for a recovery of the land, but for the recovery of a part of the debt, representing part of the consideration to be paid for the conveyance of the land. The deed executed by appellee to Mrs. McClendon, the suit brought by her, and the result of the suit, were not admissible to prove plaintiff's case; the appellee not claiming the debt sued for, or the lien through Mrs. McClendon. The evidence to which the charge refers could only be considered as affecting the credibility of the witness.

It is insisted in the ninth assignment of error that the court erred in foreclosing a lien on the entire tract of land described in the petition, because the same is contrary to the charge of the court and the verdict of the jury. The petition sought to recover rent for four years at the rate of \$400 per year on all the land. The verdict was as follows: "We, the jury, find for plaintiff \$200 for each year 1904, 1905, 1906, 1907, to wit: \$800.00, and said lien is hereby foreclosed." It is argued that the verdict shows that the jury found this sum for the rent of an undivided one-half of the land, and that the court erred in foreclosing the lien on the whole tract. To sustain this argument we would have to assume that the jury found that appellants acquired title to an undivided one-half of the land under the 10-year statute of limitations, and, further, that the verdict shows that they only found for plaintiff the rent for one-half the land. We cannot assume that such was their finding. The evidence as to the yearly value of the rents was controverted. There is nothing in the record to show affirmatively that the jury found for appellants an undivided one-half of the land under the 10-year statute of limitations. The verdict authorized the judgment.

Finding no reversible error in the record, the judgment is affirmed.

ST. LOUIS, S. F. & T. RY. CO. et al. v.
FENLEY.

(Court of Civil Appeals of Texas. April 22, 1909.)

1. APPEAL AND ERROR (§ 916*)—PRESUMPTION FROM TRANSCRIPT OF RECORD.

Where, on appeal in an action for breach of contract, the transcript of the testimony contains a statement that the contract was put in evidence but it is not made a part of the record, and the transcript states that the contract was correctly set forth in the pleadings, the court may assume that the contract put in evidence was correctly set forth in the petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3702; Dec. Dig. § 916.*]

2. CARRIERS (§ 228*) — CARRIAGE OF LIVE STOCK—ACTIONS AGAINST CONNECTING CARRIERS—EVIDENCE.

Evidence in an action against connecting carriers for injuries to a shipment of horses held to authorize a finding against the delivering carrier for all the damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.*]

3. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—JUDGMENT.

Where, in an action against connecting carriers for damages to a shipment of horses, the evidence was sufficient to sustain a judgment against the delivering carrier for all the damages, it cannot be heard to complain on appeal that the judgment was against it for only one-half of the damages, and the receiving carrier cannot complain of a division of the damages as the interstate commerce act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3168]), as amended in 1906 (Act June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]), makes any common carrier receiving property for transportation from a point in one state to a point in another state liable for any damage to such property caused by it or any other common carrier to which the property is delivered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4060, 4061; Dec. Dig. § 1033.*]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by J. H. Fenley against the St. Louis, San Francisco & Texas Railway Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Andrews, Ball & Streetman and H. M. Chapman, for appellants. Bryan & Spoons, for appellee.

WILLSON, C. J. Appellee shipped a lot of horses from Carthage, Mo., to Ft. Worth, a distance of about 500 miles. The horses were received by the St. Louis & San Francisco Railroad Company at Carthage, and transported over a line of road controlled by it to the point where same connected with a line of road controlled by the St. Louis, San Francisco & Texas Railway Company. The latter company then transported them on and delivered them to the consignee at Ft. Worth. While transporting the horses, the carriers so negligently delayed and handled them as to depreciate their market value in Ft. Worth in the sum of \$860. In accordance with the verdict of a jury so apportioning the damages, a judgment for one-half of the sum thereof was rendered in favor of appellee against each of the carriers. The complaint made on this appeal is that the evidence showed that a greater proportion of the damages than one-half thereof was due to the negligence of the St. Louis & San Francisco Railroad Company, but otherwise did not show how much thereof was due to its negligence and how much to the negligence of the other appellant, and therefore that the finding of the jury and judgment of the court apportioning the damages as stated was con-

trary to the evidence, in that they were against the St. Louis, San Francisco & Texas Railway Company for one-half thereof, and not supported by the evidence, in that it was not sufficient to authorize an apportionment of the damages to be made at all.

In his petition appellee alleged that the horses were delivered to appellants and to each of them at Carthage, and that they and each of them undertook and agreed to transport and deliver them to the consignee thereof at Ft. Worth. In the answer of appellants it was alleged that the contract was between appellee and the St. Louis & San Francisco Railroad Company alone. In the transcript of the testimony admitted on the trial is a statement that the contract covering the shipment of horses was put in evidence; but it is not a part of the record on this appeal. It is merely mentioned in said transcript as being "correctly set forth in the pleadings in this case." If we assume, and in the condition stated of the record we think we should assume, the fact to be that the contract put in evidence was correctly set forth in appellee's petition, it is clear that neither of the appellants has a right to complain of the apportionment made of the damages; for such a contract would authorize a judgment against each of them for the entire amount of appellee's damages. But, if such an assumption should not be indulged, we still would be of the opinion that appellants' contention should be overruled. It does not appear from the evidence that a greater proportion than one-half of the damages was due to negligence of the St. Louis & San Francisco Railroad Company. Appellants' contention that it does so appear is based on the assumption that the evidence shows that that company transported the horses much the greater portion of the distance between Carthage and Ft. Worth, and that much the greater part of the delay and rough handling resulting in the depreciation in the value of the horses at Ft. Worth occurred on its line; but, while the record may be said to show at what points between Carthage and Ft. Worth the delays and rough handling of the horses occurred, it does not show at what point between those places the initial carrier's control of the shipment ended, nor at what point the delivering carrier's control of same commenced. In the absence of such a showing, we do not think it can be said that the testimony established that a greater part of the delay and rough handling occurred while the shipment was being transported by one of the carriers than occurred while it was being transported by the other. If in determining such a question we should take notice without proof thereof of the line of railway in Texas operated by the St. Louis, San Francisco & Texas Railway Company, we hardly think we should take such notice of the distances between stations on such line of railway, or assume that that company did not control and op-

erate any part of the line of railway over which the horses were transported while beyond the limits of the state, but while on their way to it.

Nor do we think we should take notice of the line of railway controlled and operated by the other appellant in another or other states over which the horses may have been transported. In this condition of the evidence, it not appearing that by the contract covering the shipment the respective carriers were exempted from liability for damages occurring off its own line, nor that appellee or some one representing him was required to and did accompany and care for the horses, evidence that the horses were delivered to one of the carriers at Carthage in good condition, and that they were delivered at their destination by the other in a damaged condition, *prima facie* was sufficient to authorize a finding against the delivering carrier for all the damages. *G., C. and S. F. Ry. Co. v. Cushney*, 95 Tex. 812, 67 S. W. 77; *G., C. & S. F. Ry. Co. v. Edloff*, 89 Tex. 458, 34 S. W. 414, 35 S. W. 144; *T. & P. Ry. Co. v. Tom Green County Cattle Co.*, 15 Tex. Civ. App. 147, 38 S. W. 1138; 3 Hutch. Car. § 1348. In the *Edloff* Case, *supra*, the court said: "When the plaintiff showed the goods to have been in a damaged condition when tendered to him by the Gulf, Colorado & Santa Fé Railroad Company at Dallas, he made a *prima facie* case against said company for the full amount of the damage. In order to escape liability in whole or in part, it devolved upon said company to show that such damage as it disputed its liability for occurred on another line. Simply showing, as it has done in this case, that the goods were damaged to some extent, without showing how much, when delivered to it, does not defeat or in any wise meet plaintiff's *prima facie* case." As therefore the judgment in this case might have been against the St. Louis, San Francisco & Texas Railway Company for all the damages, irrespective of whether it alone or jointly with the other appellant contracted to transport the horses the entire distance from Carthage to Ft. Worth or not, it should not be heard to complain that the judgment was against it for only one-half the sum of the damages. Nor do we think the St. Louis & San Francisco Railroad Company, if it should be assumed that, by the terms of the contract, it became liable only for damages due to its negligence while handling the horses, is in a better position than the other appellant is in to complain of the judgment. The twentieth section of the Interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), as amended in 1906 (Act June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 909]) declares "that any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor

and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed." 2 Hutch. Car. p. 600. The statute quoted would have authorized a judgment against said St. Louis & San Francisco Railroad Company for all the damages found by the jury. In any view of the case, therefore, it should not any more than the other appellant be heard to complain of the judgment.

The judgment is affirmed

ST. LOUIS & S. F. RY. CO. et al. v. LANE.
(Court of Civil Appeals of Texas. April 7, 1909. Rehearing Denied May 5, 1909.)

1. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—STATEMENT—REQUISITES AND SUFFICIENCY.

An assignment of error should be followed by a proper statement of the facts necessary to enable the court to pass on the assignment, and mere references to the record do not constitute a statement required by the rules.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

2. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—EFFECT OF FAILURE TO FOLLOW BY STATEMENT OF FACTS.

Where an assignment of error is not followed by a proper statement of the facts, as required by the rules, it may be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

3. EVIDENCE (§ 323*)—HEARSAY EVIDENCE—STATE OF MARKET.

A witness was properly allowed to testify as to the state of the cattle market on certain days, and state that he gained his information from market reports.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1217; Dec. Dig. § 323.*]

4. EVIDENCE (§ 323*)—HEARSAY EVIDENCE—ACCOUNTS OF SALE OF CATTLE.

In a suit for the negligent handling of a shipment of cattle, accounts of sale handed to plaintiff by commissionmen at their destination were not hearsay, and were properly admitted in evidence to show the correct weights and prices of the cattle.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1215; Dec. Dig. § 323.*]

5. TRIAL (§ 200*)—CHARGE AS INVADING DOMAIN OF JURY.

In a suit for the negligent handling of cattle, a charge informing the jury of the care that devolved on defendant, and that if they had not exercised that care they would be guilty of negligence, did not invade the domain of the jury, but amounted merely to a definition of "negligence."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 471; Dec. Dig. § 200.*]

6. TRIAL (§ 200*)—INSTRUCTIONS—POWER OF TRIAL JUDGE.

A trial judge should not be deprived of power to apply the law to the issues of a case

and permitted only to give abstract dissertations on the law to be applied by the jury as they may see fit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 471; Dec. Dig. § 200.*]

7. JUDGMENT (§ 256*)—CONFORMITY TO VERDICT—INCLUSION OF INTEREST.

In rendering judgment for damages, it is error to include interest from the date of their infliction, when the jury do not find for such interest.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 453; Dec. Dig. § 256.*]

8. APPEAL AND ERROR (§ 1151*)—REFORMATION OF JUDGMENT—ERROR IN ALLOWING INTEREST.

Error in including interest in a judgment for damages can be remedied by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4502; Dec. Dig. § 1151.*]

Appeal from Hardeman County Court; H. W. Martin, Special Judge.

Action by W. W. Lane against the St. Louis & San Francisco Railway Company and others. From a judgment for plaintiff, defendants appeal. Reformed and affirmed.

O. H. Yoakum and Decker & Clarke, for appellants. M. M. Hankins and D. E. Magle, for appellee.

FLY, J. This is a suit for damages arising from the negligent handling of certain cattle shipped by appellee from Quanah, Tex., to St. Louis, Mo. A verdict for \$250 was rendered in favor of appellee, and from the judgment based thereon this appeal is perfected.

The first assignment of error complains of the admission in evidence of the depositions of C. A. McCormack; the grounds of objection being that the questions propounded were inserted by the notary who took the depositions, and because neither the original interrogatories nor certified copies were offered with the depositions. The assignment is not followed by a proper statement of the facts necessary in order to enable a court to pass upon the assignment. Mere references to the record do not constitute the statement required by the rules. *Haley v. Davidson*, 48 Tex. 615; *McManus v. Wallis*, 52 Tex. 534; *Canal Co. v. McFarland* (Tex. Civ. App.) 100 S. W. 435. This court is empowered under such conditions to totally disregard the assignment of error and to consider it as abandoned. *Cooper v. Hiner*, 91 Tex. 658, 45 S. W. 554. In this connection it may be stated that a perusal of the record does not sustain the claim that the interrogatories were those of the notary, and not those of the parties, and it also appears that on a former trial the depositions had been recognized as proper ones by appellants, and no motion to suppress the depositions was ever made. It was not claimed that the questions had not been correctly copied by the notary from the original ones.

cattle market on December 5, 6, and 7, 1905, which knowledge he gained from reference to the National Live Stock Reporter, which he kept in book form in his office, and the evidence was properly admitted. *Railway v. Gunter*, 89 Tex. Civ. App. 129, 86 S. W. 939; *Railway v. Startz*, 42 Tex. Civ. App. 85, 94 S. W. 212; *Railway v. Bennett* (Tex. Civ. App.) 103 S. W. 1115; *Railway v. Kar-rer* (Tex. Civ. App.) 109 S. W. 440. The statement of facts fails to sustain the state-ment of appellants that the witness con-sulted any records except the National Live Stock Reporter.

Appellee swore that he was present when his cattle were sold, and that certain ac-counts of sale which were handed him by commissionmen in St. Louis gave the cor-rect weights and prices of the cattle. The accounts of sale were not hearsay and were properly admitted in evidence. Appellee personally knew the weights and prices.

The court did not err in giving the charge complained of in the fourth assignment of error. The jury was informed of the care that devolved upon appellants in handling the cattle, and that if they had not exer-cised that care they would be guilty of neg-ligence. The domain of the jury was not invaded thereby. It amounted merely to a definition of "negligence." A similar charge was approved in the case of *Railway v. Vaughn*, 5 Tex. Civ. App. 195, 23 S. W. 745, cited by appellant. The charge did not men-tion any facts that would constitute negli-gence, but was general in its nature. It is very different from the charge condemned in *Calhoun v. Railway*, 84 Tex. 226, 19 S. W. 841.

To sustain the fifth assignment of error would deprive a trial judge of the power to apply the law to the issues of a case and permit him only to give abstract disserta-tions on the law and allow the jury to blind-ly apply such abstractions as they might see fit. The charge complained of in no manner invades the province of the jury.

The court erred in rendering judgment for interest from the date of the infliction of the damages, when the jury had not found for such interest. Interest as damages might have been allowed by the jury, under prop-er instructions by the court; but the court could not render judgment for such damages without having a basis for the same in the verdict. The interest was not a legal inci-dent of the sum found by the jury, and could not be added by the court. This is a mat-ter, however, that can be remedied by this court.

be affirmed.

FLYNN et al. v. BANK OF MINERAL WELLS.

(Court of Civil Appeals of Texas. Jan. 30, 1909. On Rehearing, March 18, 1909.)

1. CONTRACTS (§ 131*) — PUBLIC POLICY — GOVERNMENT CONTRACTS.

A contract for the services of an attorney to use his personal influence to secure a con-tract from the county for the erection of bridges is void as against public policy.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 607; Dec. Dig. § 131.*]

On Rehearing.

2. BILLS AND NOTES (§ 333*)—NOTICE TO PARTNER.

The drawer of a check notified the bank through its president to refuse payment. The check was later bought for a valuable consid-eration by a firm of which the president of the bank was one of the partners. *Held*, that the notice to the president, who had no knowledge of the purchase by the firm, was not notice to the firm.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 810; Dec. Dig. § 333.*]

3. BILLS AND NOTES (§ 370*)—CONSIDERATION —VOID CONTRACT.

That the balance due on a void contract is the consideration for a draft is no defense to its payment in the hands of innocent purchasers for a valuable consideration.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 963; Dec. Dig. § 370.*]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by the Bank of Mineral Wells against Alice Flynn and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

McCall & McCall and J. T. Daniel, for ap-pellants. A. Stevenson and Penix & Rans-pot, for appellee.

DUNKLIN, J. This is an appeal from a judgment rendered by the district court of Palo Pinto county in favor of the Bank of Mineral Wells against Alice Wohleb (née Alice Flynn) for seven hundred dollars on a check in that sum dated December 20, 1904, drawn by Alice Flynn, then widow of Wil-liam Flynn, on the Merchants' & Farmers' National Bank of Weatherford, Tex. The check was drawn in favor of W. E. New-brough, who indorsed and delivered the same to appellee January 3, 1905, for a valuable consideration paid by appellee. Newbrough was a practicing attorney at law and receiv-ed the check in part payment for services rendered by him to William Flynn in pro-curing a contract to build two bridges in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs, 1907 to date, & Reporter Indexes

Palo Pinto county, which was awarded Flynn by the commissioners' court of that county. The two bridges were constructed under and by virtue of the contract; a portion of the work being done after Flynn's death. Mrs. Flynn duly qualified as administratrix of the community estate of herself and husband, William Flynn, and the suit was against her as such and also against her in her individual capacity. Paul W. Flynn, Nellie Flynn, Fred Flynn, Van Flynn, and Enid Flynn, children of William and Alice Flynn, were also made parties defendant in the suit; but the judgment of the court was in their favor. After the institution of the suit, Alice Flynn married Henry Wohleb, and judgment was against her in the name of Alice Wohleb. In her answer to plaintiff's petition, she pleaded to the jurisdiction of the court, alleging that at the time the suit was instituted she and her codefendants were residents of Parker county, and by exception challenged the sufficiency of the petition because it failed to show that suit was instituted at the first term of court which convened after the draft was dishonored. Controverting the merits of the petition, she alleged that the draft upon which the suit was based was given by her to cover a balance which at the time it was given she supposed to be due Newbrough for services rendered William Flynn under a written contract of employment, and which contract Newbrough and his agents induced her to believe was valid and binding. She further alleged that by said contract of employment Newbrough engaged to procure votes for a bond issue to build the bridges, to bribe influential citizens to advise and favor the project, and to assist Flynn in procuring the contract for the work, and that the contract was therefore contrary to public policy and void.

Following is the written contract of employment executed by William Flynn and W. E. Newbrough and introduced in evidence by defendant Alice Wohleb: "The State of Texas, County of Palo Pinto. * * * This writing and agreement made and entered into on this the 27th day of February, 1904, by and between William Flynn and W. E. Newbrough, witnesseth: That said Flynn hereby agrees to pay said Newbrough the sum of \$750 each for each bridge across the Brazos river that may be awarded to said Flynn by the commissioners' court of Palo Pinto county during the year 1904, as compensation for his services as an attorney already performed and to be performed in assisting said Flynn in obtaining said contracts, said compensation to become due and payable as follows: \$750 of said amount upon the award of the contract or contracts and the approval of the county bonds issued to pay for said bridge or bridges and in the event of two bridges being awarded to said Flynn then the remaining \$750 to be paid to said Newbrough on the date of the accep-

tance of the first of said bridges by said court and payment therefor. Said Newbrough hereby agrees to accept said above-named compensation as therein stated and to use his best efforts by all rightful and legal means to assist said Flynn in obtaining said contracts. It is hereby agreed and understood that this agreement is made and accepted in lieu of any and all other agreements heretofore made by the parties hereto and said former agreements are to be null and void. Signed in duplicate on the day and date first above written. Wm. Flynn. W. E. Newbrough."

Mrs. Wohleb testified upon the trial, without contradiction, that, when Newbrough first presented his claim for the \$700, he explained to her "that it was for his services to Mr. Flynn in using his (Newbrough's) influence to secure from the commissioners' court of Palo Pinto county certain contracts for the erection of bridges in that county." She did not at that time give Newbrough the draft sued on, but testified that a few months later Newbrough's attorney came to collect the claim, and, relying upon his assurance of the validity of the claim, she gave him the draft in controversy, but afterwards countermanded its payment upon advice of her attorney that the claim was void.

J. L. Cunningham was introduced by defendant as a witness, and testified that he was a member of the firm of the Bank of Mineral Wells, and that Newbrough solicited him to assist Flynn in securing from the commissioners' court contracts to build the bridges, representing that Flynn had authorized him to offer Cunningham \$200 for such assistance. This witness further testified that petitions requesting the commissioners' court to submit to a vote of the county the question of building the bridges were circulated by Newbrough in different portions of the county. It was proven by uncontroverted testimony that Newbrough appeared before the commissioners' court on several occasions, assisting in estimating cost of the bridges, the resources of the county available for purposes of building the same, and later urging the acceptance of Flynn's bid for the work. It was further shown that Newbrough, as attorney for Flynn, appeared before the Attorney General in Austin, and, by argument and upon additional evidence procured by him, secured that officer's approval of the bonds issued for the building of the bridges in question. The testimony of this witness was not controverted.

The court instructed the jury peremptorily to return a verdict in favor of plaintiff against defendant Alice Wohleb for the amount of the draft, and in this we think there was error. We are of opinion that the contract above referred to is contrary to public policy and void. The case of Providence Tool Co. v. Norris (by the United States Supreme Court) 2 Wall. 45, 17 L. Ed. 868, is strongly in point. That was a suit

the United States government, and Justice Field, rendering the opinion of the court, said: "The question then is this: Can an agreement for compensation to procure a contract from the government to furnish supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction so far as the government is concerned. Such is the rule of public policy, and whatever tends to introduce any other elements into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence, as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds." See, also, *Richardson v. Scotts Bluff Co.*, 59 Neb. 400, 81 N. W. 309, 48 L. R. A. 294, 80 Am. St. Rep. 682; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Burke v. Child*, 21 Wall. 441, 22 L. Ed. 623. In the case of *Mills v. Mills*, supra, the court says: "It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results." In the case of *Burke v. Child*, supra, the following language is used in the opinion of the court: "We have said that for professional services in this connection a just compensation may be recovered; but, where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and 'they perish together.'"

Appellee contends that it was an innocent purchaser of the draft for a valuable consideration, without notice of any defense against the payment thereof. The evidence showed that the check was drawn December 20, 1904, that a short time thereafter Mrs. Wohleb notified the Merchants' & Farmers' Bank of Weatherford to refuse payment of it, that its payment was accordingly refused by that bank, and that W. H. Eddleman, president of the latter bank, and also one of the partners of appellee the Bank of Mineral Wells, was notified of Mrs. Wohleb's refusal to pay the draft, before it was acquired by appellee on January 3, 1905. We are of the opinion that notice to W. H. Eddleman was

there cited; 1 Lindley on Partnerships, bottom page 352.

The trial court should have instructed a verdict in favor of appellant Mrs. Alice Wohleb as well as in favor of the other defendants, and, as it is the duty of this court to render such judgment as should have been there rendered, the judgment of the trial court is reversed and here rendered in favor of appellants.

On Rehearing.

On original hearing we held that notice to W. H. Eddleman, one of the members of the partnership firm of the Bank of Mineral Wells, of Mrs. Alice Wohleb's countermand of the draft which was sued on, was notice to and binding upon the firm, and that the firm could not be heard on its plea of innocent purchaser of the draft, and in support of which plea evidence was introduced upon the trial.

We were constrained to reach this conclusion by reason of the general rule, announced without exception in all the decisions which we could then find, that notice to a member of a partnership firm of any fact pertaining to the business of the firm was binding upon the firm. Since rendering that opinion we are convinced that in that holding we were in error. In 30 Cyc. p. 530, after announcing the general rule above stated, the following language is used: "If the notice relates to an individual transaction of the notified partner, or to one outside the scope of the firm business, it ought not to be imputed to his copartners." In the case of *Baldwin v. Leonard* (by the Supreme Court of Vermont) 39 Vt. 260, 98 Am. Dec. 324, one Leonard was sued for the price of goods purchased from the firm. His defense was that he purchased same as agent of another, and should not be held liable personally therefor. The proof showed that the member of the firm who made the sale knew nothing of the agency of Leonard, although another member of the firm, who took no part in the sale and did not know of it until after its consummation, had been told previously by Leonard that he expected to call at some future time and purchase the goods, and that the same would be purchased by him as agent for another. The court held that this knowledge of the latter member of the firm was not binding upon the firm, and that Leonard was liable personally for the value of the goods purchased by him. In *Bienenstock v. Ammidown*, 155 N. Y. 47, 49 N. E. 321, it is said: "The rule of law which attaches a responsibility to the status of a partnership relation for the acts of a copartner, within the scope of business transactions, is founded upon a just view of the requirements of public commercial interests.

To extend its operation to the extent of imputing the notice or knowledge of a copartner acquired in transactions outside of the partnership business, and which were had for his individual benefit, to the other, would be to convert the rule into an instrumentality of injustice." We think the quotation last made applies with force to the case at bar. As found in our original opinion, the check which was purchased by appellee was drawn by Mrs. Wohleb on a bank in Weatherford, and the latter bank, through Eddleman as its president, was notified by the drawer to refuse payment. In this manner Eddleman received notice of the dishonor of the draft, but he had no notice that it would be sold to the Mineral Wells Bank, and the managers of the latter bank had no notice that Eddleman had been informed of the dishonor of the draft. We therefore believe that this transaction should constitute an exception to the general rule originally announced, and that notice to Eddleman that the draft had been countermanded was not notice to appellee.

We still adhere to our former ruling that the contract between Newbrough with Flynn was contrary to public policy and void, but the fact that a balance supposed to be due on that contract was the consideration for the draft sued on would be no defense to its payment in the hands of an innocent purchaser for a valuable consideration, without notice that the draft was founded upon an illegal consideration. *Campbell v. Jones*, 2 Tex. Civ. App. 265, 21 S. W. 723.

Appellee's motion for rehearing is therefore granted, and the cause remanded for another trial.

DALLAS CONSOL. ELECTRIC ST. RY. CO. v. CHAMBERS.

(Court of Civil Appeals of Texas. April 17, 1909. Rehearing Denied May 8, 1909.)

1. JURY (§ 58*)—DRAWING PANEL—VALIDITY OF ACT.

Acts 30th Leg. 1907, p. 269, c. 139, relating to the selection of a jury in counties with cities having a certain population, is constitutional.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 58.*]

2. NEGLIGENCE (§ 136*)—QUESTION OF LAW OR FACT.

Where there is a failure to perform a duty prescribed by statute, or when the facts are undisputed and such that only one conclusion can be drawn from them, then the question is one of law, and it is not error to so instruct the jury; but where the act done or omitted is not prescribed by statute, or the facts not conclusive, then it is for the jury to say whether it is negligence or not.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

3. STREET RAILROADS (§ 117*)—NEGLIGENCE—QUESTION FOR JURY.

Where under an ordinance it is the duty of a street railway company to keep a vigilant

watch and to stop the car as soon as possible upon the appearance of danger, an instruction that it was the duty of the motorman to have such control of his car as would enable him to so stop the car was erroneous, as it was a question for the jury to determine whether he had such control, and, if not, whether such failure was negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 253; Dec. Dig. § 117.*]

4. STREET RAILROADS (§ 117*)—NEGLIGENCE—STOPPING CAR—QUESTION FOR JURY.

Where a city ordinance requires signal lights for cars after sunset, but does not prescribe the power or strength thereof as to the distance the light shall be thrown, it is error to instruct that the motorman should not have been running his car at a greater rate of speed than would have enabled him to have stopped the car within the distance covered by the light thrown by his own headlight, as this was a question for the jury to decide.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

5. STREET RAILROADS (§ 81*)—OPERATION—CARE REQUIRED.

Under an ordinance requiring vigilant care of a motorman to prevent accident, it is error to charge that the law requires of the motorman such watchful care as will prevent accidents or injuries to persons who, without negligence on their part, may not be able to get out of the way of the passing car, as the company is not an insurer against accidents.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172, 174; Dec. Dig. § 81.*]

6. TRIAL (§ 228*)—INSTRUCTIONS—ABBREVIATIONS.

The use of the abbreviation "etc." in a charge on damages is not to be commended, as the court should specify what things he means, and not leave it to the jury to speculate as to other things he has reference to.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 228.*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by R. L. Chambers against the Dallas Consolidated Electric Street Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. H. Walne and Finley, Knight & Harris, for appellant. H. P. Lawther and Chas. M. Ming, for appellee.

RAINEY, C. J. This is a suit to recover damages for personal injuries, instituted by appellee against the appellant. The petition alleged, in substance, that appellee was riding across the street at the intersection of Live Oak and Hawkins streets, when a car operated by appellant along Live Oak street was negligently caused to collide with him, which resulted in his being injured. Appellant answered by general denial and contributory negligence. A trial resulted in a verdict and judgment for appellee.

The first assignment of error complains of the court for not quashing the jury panel, the contention being that the law enacted by the Thirtieth Legislature (Acts 1907, p. 269, c. 139), under which the jury were

drawn, is unconstitutional. In the case of *Traction Co. v. Danforth* (Tex. Civ. App.) 116 S. W. 147, we passed upon this precise question, and there held the said act of the Legislature was not unconstitutional, and a writ of error was refused by the Supreme Court; therefore said assignment is not well taken.

Complaint is made of the following paragraph of the court's charge: "You are instructed that while a street railroad company has the right to run its cars on a public street, yet the public have also the right to travel thereon, and at street crossings the rights of both to cross are equal, and that the duty is imposed upon both to exercise such care and precaution to avoid accidents as a reasonable prudence would suggest. The degree of care required by the law of a street railroad company is proportioned to the danger attendant upon its operation at the time and place in question, and increases with the increase of the danger, and in the case of a motorman upon an electric car traversing the streets of a city the law requires such watchful care as will prevent accidents or injuries to persons who, without negligence on their part may not be able to get out of the way of the passing car. In this case it was the duty of the motorman to keep a vigilant watch for all vehicles and persons, either on the track or moving towards it, and upon the first appearance of danger to stop the car in the shortest time and space possible, and to have such control over the speed of his car as would enable him to so stop said car. It was the motorman's duty to give warning of the approach of the car to Hawkins street by ringing the gong on the car. It was the duty of the defendant company to have said car provided with a signal light of sufficient power to give timely notice of the car's approach to Hawkins street, and the motorman should not have been running his car at a greater rate of speed than would have enabled him to have stopped said car within the distance covered by the light thrown forward by his own headlight. The failure on the part of the defendant company or its motorman to perform any or all of the duties above named, if you find from the evidence that there was such failure, was negligence, as said term is used in this charge with reference to the defendant street car company."

Where a duty is prescribed by statute, and there is a failure to perform such duty, or "where the facts are undisputed and such that only one conclusion can be drawn from them, then the question is one of law," and it is not error for the court to so instruct the jury; but where the act done or omitted is not prescribed by statute or the facts not "conclusive," then it is for the jury to say whether it is negligence or not. *Railway Co. v. Murphy*, 46 Tex. 357, 26 Am. Rep. 272; *Railway Co. v. Hill*, 71 Tex. 451, 9 S. W. 351.

The charge violates the principles announced in some particulars. After instructing the jury as to the duty prescribed by the city ordinance to keep a vigilant watch and to stop the car as soon as possible upon the appearance of danger, it adds, "and to have such control over the speed of his car as would enable him to so stop said car." This last sentence is not contained in the ordinance. It might be argued that the car could not be stopped as soon as possible unless he had control of the speed of his car, but it was a question for the jury to determine whether or not he had such control, and, if not, whether such failure was negligence.

The charge further instructs the jury that "it was the duty of the defendant company to have said car provided with a signal light of sufficient power to give timely notice of the car's approach to Hawkins street, and the motorman should not have been running his car at a greater rate of speed than would have enabled him to have stopped said car within the distance covered by the light thrown forward by his own headlight." The city ordinance requires a signal light for cars after sunset, but it does not prescribe the power or strength thereof as to the distance the light shall be thrown. Nor does it prescribe within what distance the car must be stopped. It was therefore a question for the jury to determine whether or not it was negligence in the motorman, if the car was not stopped in the given distance.

The charge told the jury that the law requires of the motorman such watchful care as will prevent accidents or injuries to persons who, without negligence on their part, may not be able to get out of the way of the passing car. This charge makes the street car company insurers against accident. The ordinance requires vigilant care of motormen to prevent accident, but not such care as will absolutely prevent it. This is a greater burden placed on the company than the law imposes. The care imposed by law is ordinary care; that is, such care as persons of ordinary prudence would use under similar circumstances. "Ordinary care will require the exercise of a very great degree of vigilance under some circumstances, and the amount of vigilance and caution to be used will vary according to the situation of the parties and the surrounding circumstances. But the standard by which the acts are to be judged does not change; it remains the same." For a full discussion of this principle, see *Railway Co. v. Smith*, 87 Tex. 348, 28 S. W. 520. In said paragraph all the acts therein specified are denominated negligence by the court. In so far as the acts therein named were not made negligence by the statute or ordinance, the charge was erroneous, and as to these it should have been left to the jury.

The court charged the jury, if they found for plaintiff, to assess damages for "loss of time, any sum of money paid out or debts incurred by him for the services of physicians, for medicine, etc." The use of the abbreviation "etc." in a charge is not to be commended. Doubt often arises by its use to determine what other things it includes. The court should specify what things he means, and not leave the jury to speculate as to the other things he has reference to.

For the errors in the charge pointed out, the judgment is reversed and cause remanded.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. A. A. JACKSON & CO.

(Court of Civil Appeals of Texas. April 24, 1909.)

1. CARRIERS (§ 169*)—CONNECTING CARRIERS—WHO ARE.

A railway company engaged in shifting cars delivered to it by a carrier to the house tracks of consignees is not a connecting carrier, but is the agent of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 734; Dec. Dig. § 169.*]

2. CARRIERS (§ 110*)—CARRIAGE OF PERISHABLE FRUIT—CARE REQUIRED.

A carrier receiving for transportation a refrigerator car loaded at New York in March with perishable fruit destined for Texas must use ordinary care to protect the fruit by keeping the car ventilated and properly iced, though the bill of lading showing that the car is loaded with perishable fruit is silent on the subjects of ventilation and icing, and though it is customary among shippers of fruit from New York to Texas, during the seasons when the weather is so warm that it becomes necessary to ice the cars before shipping the same, to cause instructions to be placed in the bill of lading in reference to icing.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 508; Dec. Dig. § 110.*]

3. CARRIERS (§ 134*)—CARRIAGE OF FRUIT—INJURIES—EVIDENCE.

Where, in an action against a carrier for damages to perishable fruit during transportation, the evidence showed that the fruit when shipped was in good condition, and was properly packed in a refrigerator car, and that the only reason for its failure to reach the point of destination in sound condition was the failure of the carrier to keep the car ventilated and iced, the evidence showed the negligence of the carrier and not the character of the fruit.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 134.*]

4. CARRIERS (§ 185*)—CARRIAGE OF FRUIT—LIABILITY OF TERMINAL CARRIER—PRESUMPTIONS.

In the absence of any evidence on the subject, the presumption is that damages to freight during transportation resulted from the negligence of the last connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 835; Dec. Dig. § 185.*]

Appeal from Dallas County Court; W. M. Holland, Judge.

Action by A. A. Jackson & Co. against the St. Louis Southwestern Railway Com-

pany of Texas and others. From a judgment for plaintiff, defendant St. Louis Southwestern Railway Company of Texas appeals. Affirmed.

Crane, Gilbert & Crane, for appellant. Lenke & Henry, for appellee.

BOOKHOUT, J. This is a suit filed by appellee in the county court of Dallas county against the Texas & Pacific Railway Company, the St. Louis Southwestern Railway Company, and appellant, the St. Louis Southwestern Railway Company of Texas for damages. The substantial allegations in appellee's petition are as follows: On March 5, 1904, the firm of Austin & Dye, of Medina, N. Y., shipped to appellee at Dallas, Tex., 174 barrels of apples in car ARL No. 8,549, which car was a refrigerator car properly equipped for the preservation of the apples contained in said shipment. That said car of apples was transported by the defendant St. Louis Southwestern Railway Company from Memphis, Tenn., to Texarkana, Tex., and there delivered to its codefendant, St. Louis Southwestern Railway Company of Texas, the appellant herein, which transported same to Dallas, Tex., at which last-named point it delivered said car to its codefendant, the Texas & Pacific Railway Company, who delivered said car to appellee at Dallas, Tex., on March 17, 1904. That said apples were in sound condition when delivered to the railway company at Medina, N. Y., but that when delivered to appellee at Dallas, Tex., a large amount of same were rotten and of no value whatever. That the rotten condition of said apples and the damage thus caused to same was due to the negligence of said defendants in failing and refusing to ice said car while in their possession, when the temperature of the atmosphere was high, and in failing and refusing to properly adjust the ventilators; that said car was fully equipped with ventilators and with ice bunkers designed to hold ice for the proper preservation of perishable goods contained therein. That by reason of said negligence the interior of said car became heated on the southern part of its journey, and that by reason of said ventilators being closed said apples received no fresh air and were caused to be heated and spoiled. Appellee claims damages in the sum of \$282.52. The appellant, St. Louis Southwestern Railway Company of Texas, answered by general demurrer, general denial, and specially answered that this suit grew out of a shipment of a car load of apples from Medina, N. Y., to Dallas, Tex., and was an interstate shipment. That it originated at Medina on March 5, 1904, under a through bill of lading issued by the New York Central & Hudson River Railroad from Medina, N. Y., to Dallas, Tex., pursuant to directions of appellee. That among other things, said bill

car load of apples, and was transported in the same car in which they were loaded at Medina, N. Y., to Dallas, its destination. That while in appellant's custody said car of apples was handled with care and dispatched with promptness and expedition. That same was delivered to appellee after 8 o'clock p. m. on March 16, 1904, at Texarkana, Tex., and was forwarded from that station to its destination, Dallas, Tex., at 1 o'clock a. m., March 17, 1904, and that it arrived at Dallas at 7:40 p. m. on March 17, 1904, and was promptly delivered to appellee in like condition as when it was received by appellant. That plaintiff was both the consignor and the consignee in this shipment, but that he gave no directions for icing the car, either at the point of origin or while in transit, nor did he give directions, as it was his duty to have done; concerning the opening of the ventilators in said car, if he had wanted any such course pursued by any carrier having the custody of such shipment. Appellant further averred that, if the carriers handling said shipment between the point of origin and destination were to have iced or re-iced said car in transit, it was the duty of appellee, and the custom of the business of shippers of apples or other perishable fruits, to have noted on the way-bill accompanying such shipment his directions for icing and re-icing of said car in transit, of all of which plaintiff was advised at the time of making this shipment, and he could and would have refused to pay the charges for the icing or re-icing of said car if it had been done without his direction as aforesaid. That there was no request to ice or re-ice said car, and no notice of appellee's desire that it should be done, if he did so desire it done, on the waybill or bill of lading under which this appellant received and transported said car. When said cause was called for trial, appellee dismissed as to the Texas & Pacific Railway Company and the St. Louis Southwestern Railway Company. A trial was had before the court without a jury, and resulted in a judgment against appellant in favor of appellee in the sum of \$202.50, with interest from the 19th day of March, 1903, at the rate of 6 per cent. Appellant perfected an appeal to this court.

The first assignment complains that the court erred in rendering judgment against it. The contention is made that the evidence conclusively showed that this car of apples was delivered by appellant to the Texas & Pacific Railway Company at 7:15 a. m., and that the said Texas & Pacific Railway Company delivered same to appellee at 4 p. m. on the same day, and nowhere did appellee overcome the legal presumption that the

appellee at Dallas, Tex. The appellant transported said car from Texarkana to Dallas, and delivered said car to the terminal railway company at Dallas, which terminal railway company, in turn, delivered to the Texas & Pacific Railway Company to be shifted by the last railway company to the house track of the appellee on the line of the Texas & Pacific Railway Company. The Texas & Pacific Railway Company in placing the car upon the unloading track was not a connecting carrier within the meaning of the statute, but acted as the agent of the appellant. *Railway Co. v. Young* (Tex. Civ. App.) 107 S. W. 127; *T. & P. Ry. Co. v. Scoggins*, 40 Tex. Civ. App. 526, 90 S. W. 521.

Again, it is contended that the evidence conclusively shows that the damage to said apples was directly and proximately due to the failure of appellee and its agents to give directions to the carriers handling the shipment to re-ice the same in transit, and to open the ventilators, and the court should have rendered judgment in favor of appellant. The shipment was made on March 5, 1904, from Medina, N. Y., to Dallas, Tex. It was made in a refrigerator car which did not contain any ice. At the time it was cold at Medina, the temperature being 10 degrees above zero. Appellee's agents superintending the shipment did not give any instructions in reference to icing the car, and none were contained in the freight bill. The failure to open the ventilators of the car and to ice the car after the climate became too warm to safely transport them was the cause of the damage to the apples. The question arises, is it the duty of a carrier transporting perishable shipments to use reasonable diligence to protect said shipments from changes in the weather, provided the shipper has exercised the precaution to use a car by which the carrier would be enabled to regulate the temperature of the car, notwithstanding the shipper has failed to give the carrier instructions regarding same? In discussing this question, Mr. Hutchinson, in his third edition on *Carriers*, § 646, uses the following language: "In short, the conclusion to be drawn from all the cases upon this subject is that, whenever the situation or condition of the goods, from accident or from any cause, becomes such as to require especial care or attention, the carrier must put himself in the place of their owner, and do for them all that might reasonably be expected of a prudent and careful person, and, if necessary, it would be his duty to incur any expense in their preservation which their value would justify and which their condition might make necessary. His contract and his obligation is not only to carry the

goods, but to carry them safely; and when they become exposed to the danger of deterioration or destruction from their own inherent infirmity, or from any cause for which the carrier is not accountable, the law makes it his duty to employ at least a reasonable degree of skill and diligence to preserve them, and, if he fail to do so, it will be accounted negligence, and he will be liable for the loss, though the actual proximate cause of it may be one for which, but for his negligence, he would be in no wise responsible."

The case of *Beard v. Illinois Central R. R.*, 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381, was a shipment of butter delivered at West Union, Iowa, to a carrier to be shipped to New Orleans, La. No directions were given to the carrier by the shipper as to icing or re-icing the car for the protection of the butter. It was in a damaged condition when delivered to the consignee at New Orleans. In discussing the liability of the carrier under such circumstances, that court used language as follows: "We will proceed to inquire as to the duty of defendant upon receiving the butter in a car from the Cairo Short Line for transportation to New Orleans, without directions or instructions as to the character of the car in which it should be carried. A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. He must guard the goods from destruction or injury by the elements; from the effects of delays; indeed, from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated. Unknown causes, or those which are inherent in the nature of goods, and cannot be, in the exercise of diligence, averted, will not render the carrier liable. The nature of the goods must be considered in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine, and heat, and must have cars fitted for their safe transportation. Live animals must have food and water, when the distance of transportation demands it. Fruit, and some other perishable articles, must be carried with expedition and protection from frost. So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight bills, or other papers accompanying the shipment. In the case before us the marks on the package and the waybill disclosed that the subject of the shipment was butter. The employes of defendant were endowed with intelligence which taught them that the season was sum-

mer, when warm weather prevailed; that butter in common cars would be greatly injured by the ordinary heat of the climate; and that the butter, as it approached its destination, would be subject, by reason of the change of latitude, to greatly increased heat from the weather. All these things are familiarly known to all men. Surely, the law will presume that defendant's employes had full knowledge thereof. The law required the defendant, having received the perishable cargo involved in this suit, to exercise the care and diligence necessary to protect it, and, if improved cars for the transportation of articles of commerce liable to injury from heat were in use, it was defendant's duty to use such cars in carrying the butter."

The learned judge delivering the opinion cites many cases supporting the principles therein announced. We are impressed with the reasoning in that case, and are of the opinion that it is applicable to the facts of this case. It is true that it was the custom among shippers of fruit from New York to Texas, during the seasons when the weather is so warm that it becomes necessary to ice the cars before shipping the same, to cause instructions to be placed in the bill of lading in reference to icing the car. But it is not the custom to place instructions in the bill of lading where the car is not iced before starting on its journey. The car in which the apples were shipped was not iced when it started on its journey, and the weather at Medina was cold, the temperature being 10 degrees above zero. The billing by the railroad put the agents of the carrier upon notice that the car was loaded with perishable property, and it was the duty of the carrier to use ordinary care to protect it from injury. There was evidence that when the car reached Texarkana, at which point appellant received it, its employe having charge of the car knew that the car was a ventilated car, but he made no inspection of the same to see whether it needed ventilation, or to see whether or not the goods were hot or whether the car needed icing, although it is admitted that facilities for icing the car existed at the time at Texarkana. The maximum temperature on the day the car passed through Texarkana was 75 degrees.

It is also contended that the damage to the apples was not due to negligence of appellant in handling same, but the loss, if any, was from decay, due to the inherent character of the apples, the said fruit being what is commonly known as "cold storage apples," which the evidence showed spoil rapidly. The evidence shows that the apples when shipped were in good condition and were properly packed, and the only reason for their failure to reach Dallas in sound condition was the failure of the carrier to keep the car ventilated and properly iced.

It is contended that the evidence showed conclusively that no part of the damage oc-

sumption is that the damage resulted from its negligence.

The judgment is affirmed.

WEBB v. J. L. WIGINTON & CO.

(Court of Civil Appeals of Texas. April 24, 1909.)

1. SEQUESTRATION (§ 21*)—WRONGFULLY SUING OUT WRIT—EXEMPLARY DAMAGES.

To entitle a party to exemplary damages for the wrongful suing out of a writ of sequestration, both malice and want of probable cause must exist.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. § 53; Dec. Dig. § 21.*]

2. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In a suit for possession of rented property, wherein defendants reconvened for maliciously and wrongfully suing out sequestration, the court charged that, in order to find that the writ was sued out maliciously, the evidence need not show that the plaintiff had actual enmity towards defendants, but that if he had rented the property for a term, and, knowing that he had rented it for a term, he sued out the writ, it would be malice. *Held*, that such charge was on the weight of evidence, in that it told the jury that certain facts would constitute malice, while malice was not alone sufficient to award exemplary damages in the absence of the want of probable cause, which was a question for the jury under the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-466; Dec. Dig. § 194.*]

3. SEQUESTRATION (§ 21*) — ACTION FOR WRONGFULLY SUING OUT — MISLEADING CHARGE.

The charge was misleading, in that the jury had the right to conclude the existence of malice alone was sufficient to authorize a recovery for exemplary damages.

[Ed. Note.—For other cases, see Sequestration, Dec. Dig. § 21.*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by J. C. Webb against J. L. Wiginton & Co. From a judgment for defendants, plaintiff appeals. Affirmed on condition that defendants remit a part of the damages recovered on a plea in reconvention.

Collins & Cummings, for appellant. Morrow & Smithdeal, for appellees.

RAINEY, C. J. Appellant brought this suit on September 18, 1907, against the appellees to recover the possession of a store building which it was claimed had been rented to appellees, who held possession thereof, they claiming their lease had not expired, though in fact it had expired September 1, 1907. A sequestration was sued out by appellant on the ground, in effect, that he feared they would make use of their possession of said premises to convert the fruits and reve-

the malicious and wrongful suing out of the sequestration. A trial resulted in a verdict and judgment for both actual and exemplary damages, from which this appeal is taken.

We will only discuss one of the assignments of error, as that one only presents error, which is as follows: "The court erred in giving special charge No. 1, requested by the defendant, which is as follows: 'In order to find that the writ of sequestration was sued out maliciously, it is not required that the evidence should show that the plaintiff had actual enmity towards the defendants; but if the plaintiff had rented the property to the defendants for a term and not by the month, and knowing that he had rented it for a term, sued out the writ of sequestration, the same would be malicious.'"

To entitle the awarding of exemplary damages for the wrongful suing out of a writ of sequestration, both malice and the want of probable cause must exist. *Culbertson v. Cabeen*, 29 Tex. 247; *Lynch v. Burns* (Tex. Civ. App.) 79 S. W. 1084. In the case of *Culbertson v. Cabeen*, supra, where the question of malice and probable cause are discussed, the court says: "'In a legal sense,' says Mr. Greenleaf, in his work on Evidence, vol. 2, § 453, 'any unlawful act done willfully and purposely to the injury of another is, as against that person, malicious.' It need not imply malignity, nor even corruption, in the appropriate sense of these terms. Any improper motive constitutes malice in the sense it is here used. *Drake, Attachment*, § 733. The question of malice is for the jury, to be determined from the facts and circumstances proved. And so the question of probable cause, though a mixed question of law and fact, may ordinarily and properly be submitted to the jury, and the existence of probable cause may be implied by the jury from such facts and circumstances as lead to the inference that the party was actuated by an honest and reasonable conviction of the justice of his suit, or, with reference to this case, of the existence of the facts on which he based his application for the attachment. But in order to have this effect, it should appear that such facts and circumstances, or so much of them as was sufficient to induce the belief, were communicated or known to the party before he commenced his proceedings."

The special charge requested and given, under the circumstances, was upon the weight of the evidence; that is, it tells the jury that certain facts would constitute malice, but malice alone is not sufficient upon which to award exemplary damages in the absence of the want of probable cause. It takes both elements to warrant the finding of exemplary

damages. Whether or not the want of probable cause existed under all of the facts and circumstances in evidence, should have been submitted to the jury for their determination. The court's main charge told the jury if the writ was sued out willfully and maliciously to find exemplary damages against plaintiff. Nothing was said therein about the want of probable cause as an element necessary for such finding. The special charge was misleading, in that they had the right to conclude the existence of malice alone was sufficient to authorize a recovery for exemplary damages. This charge was error, and will cause a reversal, unless the amount of the judgment for exemplary damages, \$215, is remitted in 15 days, in which case it will be affirmed; and it is so ordered.

GARBER v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.

(Court of Civil Appeals of Texas. April 17, 1909.)

1. RAILROADS (§ 317*)—CROSSING ACCIDENTS—RATE OF SPEED—ORDINANCES.

A railroad company is liable for injuries at a crossing caused by running its trains through the town at a speed greater than six miles an hour in violation of an ordinance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1009; Dec. Dig. § 317.*]

2. RAILROADS (§ 318*)—CROSSING ACCIDENTS—VIOLATION OF ORDINANCE—RINGING BELL.

A railroad company is liable for injuries at a crossing caused by its violation of an ordinance requiring the engine bell to be rung continuously within the corporate limits.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1002; Dec. Dig. § 318.*]

3. RAILROADS (§ 305*)—CROSSING ACCIDENTS—BLOWING WHISTLE—FRIGHTENING TEAM.

A railroad company is liable for injuries at a crossing caused by negligently blowing the whistle, thereby frightening plaintiff's mules and overturning his wagon.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 969; Dec. Dig. § 305.*]

4. RAILROADS (§ 345*)—FRIGHTENING ANIMALS—ISSUES AND PROOF.

Where plaintiff alleged negligence on the part of defendant railroad company in running its train over a crossing at a speed greater than six miles an hour, in failing to keep the bell ringing continuously within the corporate limits, in violation of ordinances, and in negligently blowing the whistle so as to frighten plaintiff's mules, he was entitled to recover on proof of negligence in either respect.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1114; Dec. Dig. § 345.*]

5. RAILROADS (§ 345*)—CROSSING ACCIDENTS—ISSUES.

In an action for injuries caused by plaintiff's mules being frightened at a crossing and turning over his wagon, allegations as to the presence of a house near the crossing, which shut off the view, raised no issue of negligence, except as its presence made it more necessary, for the protection of travelers, to keep within

the speed limit and continuously ringing the bell, as required by ordinance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1118; Dec. Dig. § 345.*]

6. RAILROADS (§ 344*)—CROSSING ACCIDENTS—PLEADING—VIOLATION OF STATUTES.

Allegations, in an action for injuries at a crossing, that defendant's trainmen failed to blow the whistle on approaching the crossing, as required by ordinance, did not allege the violation of the statutory duty to sound a whistle 80 rods from the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1111; Dec. Dig. § 344.*]

7. RAILROADS (§ 351*)—CROSSING ACCIDENTS—INSTRUCTIONS.

In an action for injuries at a street crossing claimed to have been caused by frightening plaintiff's mules by a sudden blast of the whistle, while the train was running without continuously ringing the bell, as required by ordinance, and in excess of the limit of speed fixed by ordinance, it was error to instruct that plaintiff could not recover if the failure to ring the bell and the excessive speed did not cause the accident, since the violation of the ordinance in those respects might have contributed to the injury by increasing the danger from the sudden blasts of the whistle.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1199; Dec. Dig. § 351.*]

8. RAILROADS (§ 351*)—CROSSING ACCIDENTS—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where, in an action for injuries at a street crossing claimed to have been caused by running the train in excess of six miles an hour in violation of an ordinance, evidence was admitted that the ordinance was not enforced, and the customary rate of speed was greater than six miles an hour, an instruction that plaintiff could not recover unless the "excessive" speed was the cause of the accident was calculated to mislead the jury to believe that plaintiff could not recover if the speed of the train did not exceed the usual speed, though it was greater than six miles an hour.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1199; Dec. Dig. § 351.*]

9. RAILROADS (§ 317*)—CROSSING ACCIDENTS—ACTIONS—DEFENSES.

That a speed ordinance was customarily violated, and the train operatives were not prosecuted therefor, was not a defense to an action for injuries at a crossing caused by running the train in violation of the ordinance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1010; Dec. Dig. § 317.*]

10. RAILROADS (§ 347*)—CROSSING ACCIDENTS—ADMISSIBILITY OF EVIDENCE.

In an action for injuries at a crossing claimed to have been caused by the violation of an ordinance limiting the speed of trains to six miles an hour, testimony that the city had never prosecuted violations of the ordinance was irrelevant and harmful, as tending to lead the jury to believe that the nonobservance of the ordinance was not negligence if violations thereof had never been prosecuted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1133; Dec. Dig. § 347.*]

11. RAILROADS (§ 347*)—CROSSING ACCIDENTS—ADMISSIBILITY OF EVIDENCE.

In an action for injuries at a crossing claimed to have been caused by exceeding the speed limit and failing to ring the bell, in violation of ordinances, and by negligently blowing the whistle at the crossing, thus frightening plaintiff's mules, testimony by one who was at a distance from the place of the accident

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

— INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

In an action for injuries at a crossing caused by plaintiff's mules being frightened by a sudden blast of an engine, where the evidence showed that the train was running in excess of the speed permitted by ordinance, and that plaintiff looked and listened, but did not know of the train's approach until a moment before his team became frightened, when the train was within 20 feet of the crossing and the mules were within 15 feet of the track, a charge that if plaintiff knew he was approaching the crossing, and that a train might pass at any time, and permitted the wagon to be driven up to the track without protest, when one of ordinary prudence would have protested or gotten out of the wagon, he could not recover, was inapplicable under the evidence, and prejudicial.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1204, 1208; Dec. Dig. § 351.*]

13. RAILROADS (§ 327*)—CROSSING ACCIDENTS — CARE REQUIRED BY TRAVELER.

A traveler has an equal right with a railroad company to use a street crossing, and he is not required to stop his team or get off the wagon unless he knows that a train is approaching.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1050; Dec. Dig. § 327.*]

14. RAILROADS (§ 309*)—CROSSING ACCIDENTS — CARE REQUIRED BY COMPANY.

A railroad is only required to use ordinary care to prevent crossing accidents.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 981; Dec. Dig. § 309.*]

15. RAILROADS (§ 351*)—CROSSING ACCIDENTS — INSTRUCTIONS — MISLEADING INSTRUCTIONS.

In an action for injuries at a railroad crossing claimed to have been caused by running the train in excess of the prescribed speed limit and failing to continuously ring the bell, as required by ordinance, a charge that it was the company's duty to use ordinary care to avoid accidents at a railroad crossing was in conflict with another charge that the company was negligent if it violated the ordinance, and was misleading.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1201½, 1202; Dec. Dig. § 351.*]

Rainey, C. J., dissenting in part.

Appeal from District Court, Hunt County; T. D. Montrose, Judge.

Action by J. B. Garber against the St. Louis Southwestern Railway Company of Texas. From a judgment for defendant; plaintiff appeals. Reversed and remanded.

B. Q. Evans, for appellant. E. B. Perkins and Templeton, Crosby & Dinsmore, for appellee.

TALBOT, J. This is the second time this case has been before us. See 108 S. W. 742. It is a suit instituted by the appellant against the appellee to recover damages on account of alleged personal injuries charged to have been sustained by the appellant through the negligence of appellee's servants in the oper-

two spans of mules, a train of defendant passed the crossing and the mules became frightened at the train, overturned the wagon, and injured him. The specific grounds of negligence alleged, as we understand the petition, are: (1) That the train was, in violation of a valid ordinance of the city of Greenville, being run at a greater rate of speed than six miles per hour; (2) that the train was being operated in violation of a city ordinance of said city requiring the bell of a moving engine, while in the corporate limits of the city, to be kept continuously ringing; (3) the negligently giving of a quick and sudden blast of the whistle on the engine when within about 40 feet of the street crossing (the mules of plaintiff then being within 15 or 20 feet of the crossing), thereby frightening the mules and causing them to overturn the wagon. The defendant, railway company, answered by general denial and plea of contributory negligence. The judgment from which the former appeal was prosecuted was in favor of the plaintiff, but the last trial resulted in a judgment for the defendant, and the plaintiff has appealed.

The first assignment of error complains that the trial court committed affirmative error in failing to submit separately and as distinct grounds of recovery the several negligent acts alleged. We think this assignment is well taken. An inspection of the court's charge discloses that only the two first-mentioned grounds of negligence charged in plaintiff's petition were submitted for the consideration of the jury, and those two conjunctively. The charge should, in our opinion, have been so framed as to authorize a recovery, if the jury believed from the evidence that the defendant was guilty of negligence in either of the respects alleged, and such negligence was the proximate cause of the plaintiff's injuries. The allegations of the petition charging defendant with negligence in running the train in question at a greater rate of speed than six miles an hour, and in failing to keep the bell on the engine continuously ringing, in violation of the city ordinance, and in giving a quick and sudden blast of the whistle when so near the crossing and plaintiff's mules, show independent causes of action, the establishment of either of which would entitle plaintiff to a verdict, if he was otherwise entitled to recover. We do not think it conclusively appears, as contended by appellee, that the sounding of the whistle near the crossing was proper, or that it was not the cause of the alleged accident. We do think, however, that the allegation of the petition relating to the presence of the house near the street and railroad track,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of speed prescribed by the ordinance, and to give notice of the approach of trains by ringing the bell, as is also prescribed by the ordinance. We are further of the opinion that the allegations of the petition were not sufficient to charge the defendant with a violation of the statutory duty to sound the whistle 80 rods from the street crossing. The allegation is "that, at the time they approached the crossing, they were not ringing the bell and had failed to blow the whistle or to give any other notice of their approach to said crossing *as required by said ordinance.*" (Italics ours.) The language, "as required by said ordinance," clearly limits the charge contained in the sentence of failure to ring the bell or blow the whistle, to that required by the ordinance, and does not charge a violation of our statute on the subject.

Appellant's third and fourth assignments complain, respectively, of the giving of the following special charges requested by the defendant:

"(1) Even if you should believe from the evidence that the bell of the engine was not being rung as it approached the crossing where the alleged accident occurred, you would not be authorized to find for the plaintiff on that ground unless you further believe from the evidence that the failure to ring the bell was the cause of the alleged accident.

"(2) Even if you should find from the evidence that at the time of the accident the train was running at a rate of speed greater than six miles per hour, you would not be authorized in finding for the plaintiff on that ground, unless you further believe from the evidence that the excessive speed of the train was the cause of the alleged accident."

We are inclined to think these charges should not have been given. In the case of *St. Louis Southwestern Ry. Co. v. Garber*, 111 S. W. 227, which is a companion case to the case at bar, we held, upon testimony practically the same as that disclosed by the record in this case, that there was no error in refusing charges identical with those under consideration. We said in that case that: "The evident object of requiring the bell of an engine to be rung while the engine is in motion in the corporate limits of a city is to give notice to those who may be approaching a street crossing of the approaching of trains, that they may avoid the probable danger of placing themselves too near such trains, and that the failure on the part of the railway company in this instance to ring the bell, in compliance with the ordinance of the city of Greenville, may be said to have been a concurring cause proximately contributing to the accident in question. That, with reference to the running the train in the corporate limits of the city at a greater rate of speed

thereby induced to give the sudden blast of the whistle, as described by the witness, and appellee's team took fright at such blast of the whistle and overturned the wagon, such excessive rate of speed may also be said to have been a concurring cause proximately contributing to the accident. That the charges under consideration ignored this phase of the case and were therefore inapplicable." For the same reasons we think the charges ought not to have been given in the present case. It is true that in the case cited we further predicated our ruling upon the ground that the court's main charge in that case covered the issues sought to be submitted by the special charges; but we are of the opinion that the reasons given in the above quotation are sufficient to justify our conclusions in the matter.

We are further of the opinion, however, that the second of said special charges, in view of the testimony relating to the usual rate of speed made by trains in approaching and passing over the street crossing, was calculated, by the use of the word "excessive" to characterize the speed at which the train must have been running in order to justify a finding favorable to the plaintiff on the issue of propelling the train at a greater rate of speed than 6 miles per hour, to mislead the jury. There was evidence offered by appellee, and admitted by the court, tending to show that the speed ordinance had not been enforced by the city authorities, and that the train, which is claimed to have frightened appellant's team, was running at the usual rate of speed, which was from 8 to 12 miles per hour. The use of the word "excessive" in this charge, when the charge is interpreted in the light of the testimony referred to, was calculated, we think, as argued by appellant's counsel, to induce the jury to believe that, although they should find that the train, in this instance, was running at a greater speed than 6 miles per hour, yet if it did not exceed the usual speed of 8, 10, or 12 miles per hour, they could not find for plaintiff on that issue. The violation of the speed ordinance could not be justified on the ground that it was customary for trains to exceed the rate of speed allowed by said ordinance, and that the operatives had not been prosecuted therefor. Of course, in the absence of testimony tending to show violations of such an ordinance and acquiescence therein on the part of the city, the term "excessive speed" would naturally be construed to have reference to and mean any speed in excess of that prescribed by the ordinance.

Appellant's eighth assignment of error complains of the court's action in permitting

limits of the city at a greater rate of speed than six miles per hour. We think this assignment is well taken. The testimony was irrelevant and harmful. Its effect was to lead the jury to believe that, if the city had not prosecuted train operatives for a violation of its speed ordinance, the nonobservance of said ordinance did not constitute negligence. As above stated, appellee could not excuse its failure to observe the ordinance on the ground that its agents had not been prosecuted for its violation. So, too, the testimony of the witness Fayette Norman, to the effect that if he was down somewhere about Stonewall street crossing of the appellee and the Missouri, Kansas & Texas Railroad, and heard a whistle blow up in the neighborhood of the Mineola overhead bridge, and situated where he could not see the engine or train that sounded the whistle, he could not tell what road the engine or train was on, is immaterial; but as the failure to blow the whistle at the distance from the crossing prescribed by our statute was not alleged as a ground of recovery, and therefore not an issue in the case, the error in admitting this testimony is probably of no serious consequence.

Complaint is made of the following special charge given at the request of the appellee, namely: "If you believe from the evidence that, as the wagon plaintiff was riding on approached the crossing where the alleged accident occurred, plaintiff knew he was approaching such crossing, and that a train might be expected to pass the crossing about that time, and that, with such knowledge, he permitted the wagon to be driven up to the crossing without protest on his part, and that he could have prevented the wagon from being so driven up to the crossing, or have gotten off of the wagon in time to avoid being injured, and, if you further believe that a person of ordinary prudence situated as plaintiff was, under the circumstances surrounding him, would have protested against the wagon being driven up to the crossing, or would have gotten off of the wagon, and if you further believe that the plaintiff's failure to protest against the wagon being driven up to the crossing, or his failure to get off the wagon, caused or contributed to cause the accident of which he complains, then you should find for the defendant." We are of the opinion the evidence did not call for the giving of this instruction, and that it was prejudicial. Whether or not the bell on the engine was being rung, or any other signal given to warn persons traveling along the street and intending to pass over the crossing of the approach of the train, was a controverted issue; but it

approach and presence near the crossing until a moment before the mules became frightened and overturned the wagon. It appears that there was a house located on the west side of the street and north of the railroad track, and that it stood about 20 feet from the street and about 30 feet from the railroad track. Appellant testified that as he approached the crossing he looked and listened for "any trains that might be coming," that there was an opening between the house next to the railroad and the city barn north of the house through which a person could see to the west, that when he passed this opening he looked through this opening and did not see any train, and that he did not know what time trains passed there. He further testified: That the first thing he knew of the train it was right at the east end of the house, and about 20 feet west of the crossing, and at that time he, on the wagon, was in front of the house going south; the lead or front mules being within about 15 feet of the railroad track. That about the first thing he heard was a little short whistle, and the train dashed right out from behind the house, frightened the mules, and they jumped forward, turned right fast around, and turned the wagon over. The charge complained of does not make the duty therein imposed upon appellant, in the exercise of ordinary care, to protest against the wagon being driven up to the crossing, or to get off the wagon, to avoid injury from the train, depend upon knowledge on his part of the approach of the train and probable danger of getting too near the railroad track, nor upon the exercise of ordinary care to discover the approach of the train, but solely upon his knowledge that he was approaching the crossing, and that a train might be expected to pass the crossing at any time. We do not think the failure of appellant to do the things mentioned or enumerated in the charge can, under the evidence, be accounted negligence on his part. His right to use the crossing was equal to appellee's right to use it, and, in the exercise of ordinary care to protect himself from injury from its passing train, he would not be required to stop his wagon and team or to get off the wagon, in the absence of knowledge on his part of the approach of the train or negligence in failing to discover its approach.

Nor do we think the special charge requested by appellee, and the giving of which is made the basis of appellant's twelfth assignment of error, that "it is as much the duty of one driving on a public street to use ordinary care to avoid accidents at railroad crossings as it is the duty of train

the case, except that phase of it presented by the allegations that, when the engine reached a point about 40 or 60 feet west of the street crossing, the engineer negligently gave a quick and sudden blast of the whistle, which frightened appellant's mules and caused them to overturn the wagon. It is not questioned that the general rule is that train operatives, like travelers on the highway, are required to use only ordinary care to prevent accidents at public crossings; but in the case at bar two grounds of negligence alleged, and upon which appellant sought to recover, are, as has been seen, that the train was being run, in violation of ordinances of the city of Greenville, at a greater rate of speed than six miles per hour and without ringing the bell on the engine. Now, as we understand the law, the duty of train operatives to observe the ordinances of a city, like their duty to comply with the requirements of a statute, is absolute, and the failure to do so is negligence per se. This rule is recognized in the learned trial judge's general charge, but the special charge in question instructed the jury, in effect, that it was the duty of appellee's servants, in operating the train alleged to have frightened appellant's mules, to exercise ordinary care only to prevent injury to him. As applied to the causes of action alleged for a failure to comply with the city ordinances, the special charge was doubtless in conflict with the general charge upon the same subject and calculated to mislead the jury. Therefore it should not have been given.

Mr. RAINEY, Chief Justice, does not concur in this last conclusion, but is of opinion that the special charge is applicable, whether the ground of negligence be a violation of an ordinance of the city or arises otherwise. He does, however, agree to a reversal of the judgment upon the other grounds stated in this opinion.

Assignments of error not discussed disclose no reversible error.

For the reasons indicated, the judgment of the court below is reversed, and the cause remanded.

SOUTHWORTH v. PECOS & N. T. RY. CO.†
(Court of Civil Appeals of Texas. April 8, 1909. Rehearing Denied May 6, 1909.)

1. CARRIERS (§ 321*)—CARRIAGE OF PASSENGERS—INJURY TO ALIGHTING PASSENGER—ACTIONS—INSTRUCTIONS.

In an action against a carrier for injuries to plaintiff's wife while alighting, the court charged defining "ordinary care," and stated

under the circumstance "and deemed highest degree of care" as that care which a person possessed of the highest degree of care and prudence engaged in the same employment would have exercised under the same circumstances, and charged the jury to find for plaintiff on the issue of negligence in causing the train to jerk, if, after the train had come to a standstill, it was caused to suddenly move with a jerk, stating that it was negligence in defendant to cause it to so move, but to find for defendant unless they believed that the jerking and moving, if there was such, was negligence as the term was defined in the charge. *Held*, that the charge was not misleading as giving the jury to understand that the only duty defendant owed the passenger was to exercise such care for her safety as a person of ordinary prudence would have exercised under the circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1326-1337; Dec. Dig. § 321.*]

2. CARRIERS (§ 347*)—CARRIAGE OF PASSENGERS—NEGLIGENCE—STANDING ON CAR PLATFORM.

It is not negligence as matter of law for a railway passenger to stand on the platform or steps of a car while it is approaching a station.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1376-1378; Dec. Dig. § 347.*]

3. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action against a carrier for injuries to an alighting passenger, where there was no evidence or claim that defendant did not exercise proper care in stopping the train at the station, error in a charge that if the injured person left her seat and stood upon the platform before the train was stopped and fell as a result of the sudden stopping of the train, plaintiff could not recover, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

4. TRIAL (§ 232*)—INSTRUCTIONS—FORM OF VERDICT.

A charge that, if the jury should find for the plaintiff, the form of their verdict should be, "We, the jury, find for plaintiff," and, if they should not find for plaintiff, then their verdict should be "We, the jury, find for the defendant," was not objectionable as misleading them to believe that they were not free, if they disagreed, to report the fact to the court and to refuse to find for either party.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 232.*]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Personal injury action by H. A. Southworth against the Pecos & Northern Texas Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The suit was by appellant for damages for personal injuries to his wife, alleged to have been suffered by her as the result of appellee's negligence in failing to have some one to assist her as a passenger in alighting from one of its trains, and in causing the train, while she was attempting to alight therefrom, after it had stopped at the station, to suddenly move and jerk, throwing her from

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court June 2, 1909.

the steps of the car against the same and to the ground. The appeal is from a judgment in appellee's favor, in accordance with the verdict of a jury.

Appellant's wife was a passenger on one of appellee's trains when it reached Amarillo from Texico. With her was her son, seven years of age, and her daughter, nine years of age. Mrs. Southworth testified: That, after the train had reached the station at Amarillo and stopped, she and her children attempted to alight from same; that appellee had no one at the steps to assist them to alight; and that, as she followed her children down the steps of the car, carrying in her hands a grip weighing 40 or 50 pounds, the car suddenly was jerked or moved, causing her to become overbalanced and to fall from the steps, whereby she was injured. The daughter testified: That she and her mother and brother were standing on the platform of the car as the train approached the station; that when the train "came to a full stop" the witness and her brother alighted therefrom; and that "the train jerked while her (my) mother was going down the steps." McDonald, a witness for appellant, testified that Mrs. Southworth was on the first step below the floor of the train, and that she fell as the train stopped. Mrs. McGillvray, Miss McGillvray, and Mrs. Wynn, also passengers on the train, and witnesses for appellant, each testified that she alighted from the train at Amarillo immediately after it stopped at the station, and did not notice that the train moved after it stopped there, and thought it stood perfectly still. The testimony of Bryant and Monfort, witnesses for appellee, also was to the effect that the train was standing still when appellant's wife fell from the steps or platform of the car. The witness Monfort, who was the conductor in charge of the train, further testified that when Mrs. Southworth fell he was going towards the steps of the car to assist passengers in getting off the same, and in another instant would have reached the steps, "in ample time," he added, "to assist people in getting off who had not left their seats before the train came to a stop."

L. C. Barrett and J. M. Jones, for appellant. Madden & Truelove, for appellee.

WILLSON, C. J. (after stating the facts as above). Appellant's contention that the court submitted, as an issue in the case to be determined by the jury, a question as to whether Mrs. Southworth was a passenger on the train or not, in face of uncontradicted and conclusive evidence that she was such a passenger, is not supported by the record. On the contrary, the court in his charge assumed that she was a passenger on the train.

The court in his charge defined "ordinary care," and, after telling the jury that a failure to exercise ordinary care "is negligence in the sense that the term 'negligence' is used in this charge," further instructed them

that "negligence, as applied to the acts or omissions, if any, of defendant, its servants and agents, in connection with the accident in question, is the doing of that which a person possessed of the highest degree of care and prudence would not do, or the failure to do that which such person would not omit to do under the circumstances; and by the term 'highest degree of care' is meant that degree of care which a person possessed of the highest degree of care and prudence engaged in the same kind of employment would have exercised under the same circumstances." Proceeding in his charge to submit to the jury an issue as to whether appellee had been guilty of negligence in causing the train to suddenly move or jerk after it had been brought to a standstill, the court, after cautioning the jury to "bear in mind the foregoing definitions," etc., on other conditions specified, instructed them to find for appellant, if they believed the train "was caused to suddenly move with a jerk," and that it "was negligence in defendant, or its servants," in causing it to so move; but, on the other hand, to find for appellee on this issue, unless they believed that the jerking and moving of the train, if it was jerked and moved, "was negligence as that term is defined in this charge." Appellant urges that appellee owed to his wife as a passenger on its train the care which a very prudent and cautious person would have exercised under the circumstances, and that the instruction was misleading, in that the jury might have understood, from the language just quoted from the charge, that the duty appellee owed to his wife was only to exercise such care for her safety as a person of ordinary prudence would have exercised under the circumstances. Assuming that the jury was composed of men of ordinary intelligence, we think it should be said that they could not have been misled by the inexact way in which the instruction was worded in the particular complained of. They had been specifically told by the court that the word "negligence," when referred to in the charge as a test by which to determine the character of an act or omission on the part of appellee in connection with the accident, meant a failure to use the care which a "person possessed of the highest degree of care and prudence engaged in the same kind of employment would have exercised under the same circumstances." The sufficiency of the definitions given by the court is not questioned by any of the assignments of error.

In the seventh paragraph of the court's charge, the jury were instructed to find for appellee if they believed Mrs. Southworth left her seat in the car and went to the platform thereof before the train had stopped at the station, and, because she was on the platform or the steps thereof, fell as a result of the sudden stopping of the train, and not as a result of a sudden jerking thereof after it had stopped. If the evidence had made

cannot be said as a matter of law that it is negligence for a passenger to stand on the platform or steps of a car while it is approaching a station. *Railway Co. v. Johnson* (Tex. Civ. App.) 103 S. W. 241; *Choate v. Railway Co.*, 90 Tex. 82, 86 S. W. 247, 87 S. W. 319. But there is no evidence in the record tending to show that appellee did not exercise proper care in stopping the train. No witness testified that it was "suddenly" stopped, nor to any fact or circumstance indicating that it was not stopped in the ordinary and proper way. As, therefore, a recovery could not have been had by appellant for negligence by appellee predicated upon its manner of stopping the train, the error in the instruction on that phase of the case should be treated as harmless.

With reference to the form of their verdict, the court instructed the jury: "If you find for the plaintiff, the form of your verdict will be as follows: 'We, the jury, find for plaintiff.' * * * If you do not find for the plaintiff, then your verdict should be: 'We, the jury, find for the defendant.'" The effect of the instruction, it is contended, was to tell the jury to find for appellee if they could not agree on a verdict. The instruction was improperly framed, and perhaps was susceptible of the construction claimed for it; but, again assuming the members of the jury to have been men of ordinary intelligence, we do not think they thereby could have been misled to believe they were not free, if they disagreed, to report the fact to the court and to refuse to return a verdict in favor of either of the parties.

When considered with reference to the record, we think the assignments of error presented in the brief and not already disposed of do not point out an error which should operate to reverse the judgment of the court below.

Therefore said judgment is affirmed.

MENCZER v. POAGE et ux.

(Court of Civil Appeals of Texas. April 24, 1909.)

1. FRAUDS, STATUTE OF (§ 60*)—REAL PROPERTY—EASEMENT.

Under Rev. St. 1895, art. 624, providing that no freehold, etc., in lands shall be conveyed except by writing, a permanent right to use another's lands for a particular purpose can only be conveyed by writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 94; Dec. Dig. § 60.*]

2. FRAUDS, STATUTE OF (§ 100*)—SUFFICIENCY OF INSTRUMENT—EASEMENT.

In order to pass a permanent right to use another's lands for a particular purpose, the

3. DEDICATION (§ 43*)—ADMISSIBILITY OF EVIDENCE.

In an action to enjoin defendant from fencing a strip which plaintiff claimed had been dedicated by defendant's grantor as a public alley, an instrument signed by the latter, acknowledging receipt from plaintiff of a sum of money for five feet for an alley between certain streets, as well as parol testimony to locate and identify the strip, was admissible to show an intention to dedicate the strip as a public alley.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 84; Dec. Dig. § 43.*]

4. DEDICATION (§ 16*)—REQUISITES—INTENTION.

The assent and intent of the owner to appropriate land to a public use is sufficient to constitute a dedication; no writing being necessary.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 12; Dec. Dig. § 16.*]

Error from District Court, Dallas County; T. F. Nash, Judge.

Action by R. W. Poage and wife against Regina Menczer. Judgment for plaintiffs, and defendant brings error. Affirmed.

Wendell Spence, for plaintiff in error. F. D. Cosby, for defendants in error.

TALBOT, J. Defendants in error, R. W. and S. E. Poage, husband and wife, instituted this suit against the plaintiff in error, Mrs. Regina Menczer, to enjoin her from fencing or otherwise obstructing a strip of land 5 feet wide by 50 feet in length, across the northwest end of lot No. 7, in block 551 east of Thomas' addition to the city of Dallas. The petition alleged: That in August of 1901, one James McNab was the owner of said lot 7, block 551 east; that he, on that date, for a valuable consideration paid by plaintiff, "granted a strip of land 5 feet wide by 50 feet long across the northwest end of said lot 7, block 551 east for the purpose of an alley; that thereafter McNab inclosed lot 7 with a fence, leaving out for the use of plaintiff and the public generally the said strip of land 5x50 feet across the northwest end of said lot; that thereafter McNab sold the tract of land to one Wimmer, and in the deed expressly recognized said strip 5x50 feet off the northwest end of said lot 7 as an alley, and excepting same from his warranty; that thereafter Wimmer conveyed the property to Mrs. Menczer; that she is about to inclose the said strip 5x50 feet, and thereby inclose part of said alley and destroy the same for the purpose of an alley and exclude plaintiffs and the public from the use thereof for the purpose for which the same had been dedicated and used; that defendant had obstructed and inclosed a part of said alley excluding plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ant to remove the obstruction placed by her in said alley. By trial amendment the plaintiffs amplified the allegation of their original pleading and alleged: That the alley or strip of land 5x50 feet off the northwest end of lot No. 7, block 551 east, mentioned in their original petition, had been dedicated to the use of plaintiffs and the public since August 30, 1901, by an instrument in writing executed by McNab for the sum of \$10, \$2.50 of which was then paid, and \$7.50 thereafter; that after the granting of said strip of land by the former owner, McNab, to plaintiffs, the adjoining lot owners on either side left out and open for said alley the balance of the lands needed to make the alley 10 feet wide up to and across plaintiffs' lot; that such alley has from then until now been used by plaintiffs and adjoining lot owners for alley purposes, and has been open as an alley for the general public; that the dedication and granting for alley purposes has been accepted by the city of Dallas "by said city having grading work done in said alley." A preliminary mandatory injunction against defendant was issued, as prayed for by plaintiffs.

The defendant below (now plaintiff in error) answered plaintiffs' pleading and, after general and special demurrers and general denial, filed special answer, as follows: That she is the owner of lot 7, block 551 east of the Thomas addition, which is a lot of land fronting 50 feet on Colby street and extending thence northwest a depth of 150 feet by actual survey. That said lot by these dimensions was conveyed by Miss Mary T. Thomas, one of the heirs of the Thomas estate, to James A. McNab, by deed dated June 4, 1901, and duly recorded. That thereafter McNab conveyed the lot of land by the same description, and calling for the same dimensions, to J. E. Wimmer. That by said deed of conveyance the entire lot 7, block 551 east, being a lot 50x150 feet, in size, was conveyed to said Wimmer, but that the deed contains this recital: "It is understood, however, that the title to the strip of land 5x50 feet off the west or northwest end of said lot is not covered by the warranty of this deed, said strip being now used as an alley, and same is only quitclaimed to said Wimmer." That thereafter in May, 1906, Wimmer and wife conveyed the same lot 7 by the same dimensions of 50x150 feet to this defendant. That defendant paid for said property in cash and took title to same and every part thereof, and thus became the owner of and entitled to said lot of land of size 50 feet front on Colby street by 150 feet in depth. Defendant specially

on information and belief that when McNab owned lot 7 in block 551 east that he, at the solicitation of the plaintiff, R. W. Poage, granted to him a license to use a strip of land off the northwest end of said lot 7, 5 feet wide by 50 feet long, as a passage way from Routh street to the plaintiffs' lot. She denied that the license so granted to Poage was binding upon her as a subsequent purchaser and owner of lot 7, block 551 east. She averred that according to the map of Thomas' addition to Dallas, Tex., duly recorded in Deed Records of Dallas county, and as the lots and blocks were actually laid off upon the ground, no passageway whatever was left by those who laid out the addition, between defendant's lot and the lot immediately adjoining her lot on the northwest. She averred that she purchased all of lot 7 of block 551 east in good faith for a valuable consideration, and without any notice whatever that McNab had made any grant to plaintiffs of any part of said lot such as was binding on subsequent purchasers of said lot 7. A jury trial on June 13, 1907, resulted in a verdict, instructed by the court, as follows: "We, the jury, find for the plaintiffs, and that the injunction heretofore issued be perpetuated." Judgment was entered in accordance with the verdict, and defendant brings the case to this court by writ of error.

The material facts are as follows: Block 551 east of the Thomas addition, in which the properties of the plaintiffs and the defendant are located, is bounded by Colby street, Routh street, Thomas avenue, and Peak avenue, now Fairmount avenue. James McNab was the owner of lot 7 in said block in August, 1901. On that day he executed the following written instrument, in words and figures as follows: "Dallas, Texas, August 30, 1901. Received of R. W. Poage \$2.50 part payment for 5 feet for alley between Colby street and Thomas avenue. Amount still due \$7.50. [Signed] Jas. A. McNab." The balance of the purchase money was thereafter paid by Poage to McNab. When McNab improved lot No. 7, above mentioned, he left for the alley 5 feet by 50 feet off the northwest end of the same. He owned the property about two years after he improved it, and the alley was left open all during that time. He conveyed the said lot No. 7 to J. E. Wimmer on July 23, 1904, with this recitation in his deed: "It is understood, however, that the title to the strip of land 5 feet by 50 feet off the west or northwest end of said lot is not covered by the warranty of this deed, the said strip being now used as an alley, and the same

is only quitclaimed to said Wimmer." The strip of land 5 feet by 50 feet across the west or northwest end of said lot 7 has been used as an alley since 1901 and is still used as such alley. The alley has not been opened up through the entire block, but, together with the strip in controversy and dedications made by adjoining property owners, on either side for said alley, extend a distance of 120 feet from Routh street and is 10 feet wide. Plaintiff in error, Mrs. Regina Menczer, bought said lot 7 in block 551 east from J. E. Wimmer about the 28th day of May, 1906. The passageway or alley was open when she bought, and has been, since its dedication to the public in 1901, a way of ingress and egress to and from the rear of the houses of property owners adjacent thereto, and used for those purposes and conveniences to which an alley is usually and commonly devoted in a city. The alley was graded by the city authorities at McNab's request when he owned the lot. J. E. Wimmer and wife deeded lot No. 7 in block 551 east of the Thomas addition to the plaintiff in error, Mrs. Menczer, on May 28, 1906, and she paid therefor the sum of \$1,900 cash. When she bought the lot she did not know that McNab had executed and delivered to Poage the written instrument dated August 30, 1901, acknowledging the receipt of \$2.50 from Poage in part payment of five feet for alley between Colby street and Thomas avenue, and stating therein a balance due therefor of \$7.50. This instrument was not placed of record, and the deed from Wimmer and wife to Mrs. Menczer describes the lot conveyed to her as "lot No. 7 in block 551 east of Thomas addition to the city of Dallas, said lot fronting 50 feet on the northwest line of Colby street and extending back between parallel lines 150 feet more or less."

We shall not quote and discuss in detail the several assignments of error. The principal propositions contended for by the plaintiff in error are, in effect: (1) That the trial court erred in admitting in evidence the written instrument executed and delivered by James A. McNab to R. W. Poage, dated August 30, 1901, acknowledging the receipt by McNab of \$2.50 from Poage in part payment for five feet for an alley between Colby street and Thomas avenue, and reciting a balance due therefor of \$7.50, because said instrument does not describe any particular tract or parcel of land and is insufficient in and of itself to convey any right, title, or interest to the plaintiffs or either of them in respect to the strip of land in controversy, or to affect in any way the title to said land; that it requires words of grant to create an easement or permanent interest in realty; that said instrument is wholly insufficient to satisfy the requirement of the statute of this state, which declares that no

estate of inheritance or freehold in lands shall be conveyed unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same; that under the statute of frauds the memorandum of the sale of land must be so reasonably definite and certain within itself or by other writing referred to that the contract can be made out as to the parties, consideration, and subject-matter without resort to parol evidence. (2) That the trial court erred in permitting the witnesses Poage and McNab to testify that said written instrument or memorandum was intended to designate the strip of land five feet wide off of the northwest end of lot No. 7, in block 551 east of Thomas' addition to the city of Dallas, and that the amounts of money specified in said instrument had been paid, because the failure to describe the land in said contract or memorandum of sale so that it can be identified cannot be cured by parol evidence showing what land was in contemplation of the parties in making the contract. (3) That there is no evidence that the strip of land in question was ever dedicated to the public as a passageway.

Article 624, Rev. St. 1895, provides that: "No estate of inheritance or freehold, or for a term of more than one year in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same," etc. Under this statute it is held by our Supreme Court that a permanent right to hold another's land for a particular purpose is an important interest, and that, whether such right be denominated an easement or a license, if it be equivalent to an estate in the land, it cannot be conveyed except by writing. *Parsons v. Hunt*, 98 Tex. 420, 84 S. W. 644. It is also true that, in order to satisfy the statute of frauds, the memorandum of an agreement for the sale of land must "be so reasonably definite and certain within itself or by other writing referred to that the contract can be made out, as to parties, consideration, and subject-matter, without resort to parol evidence." *Johnson v. Granger*, 51 Tex. 42. But we do not regard these as the governing principles in the case at bar. We are of the opinion that the question involved is one of dedication vel non, and that the evidence objected to was clearly admissible. In the early case of *Oswald v. Grenet*, 22 Tex. 94, it is said: "Respecting what will amount to or may be received as evidence of a dedication, the law is too well settled to admit of controversy. A setting apart, or dedication to a public use, to be effectual, need not be by deed; nor need it be evidenced by the use of it having been continued for any particular

said that "a dedication has been defined to be the act of devoting or giving property for some proper object, and in such manner as to conclude the owner." In *Wolf v. Brass*, 72 Tex. 133, 12 S. W. 159, the same doctrine is announced in the following language: "To constitute a dedication so as to estop the proprietor and his privies, there need not be a formal grant by deed; nor is it necessary that use by the public should be continued for so long a time as to raise the presumption of a grant. It is sufficient if there has been some act or declaration upon the part of the owner of the fee indicating unequivocally his purpose to dedicate, and the public has used the property for the purpose to which the act or declaration of the proprietor indicates it was his intention to dedicate it."

The written instrument, to the introduction of which the defendant objected, in this case was admissible as tending to show that the intention of James A. McNab, who was then the owner of the strip of land in controversy, was to appropriate said strip of land to the use of the public as an alley. The fact that McNab received a consideration from Poage for so appropriating said land does not destroy or seriously impair the force of said instrument as evidence of a dedication of it to the use of the public. It is clear from the evidence as a whole that it was neither the purpose of McNab to convey the strip of land to Poage for his private and individual uses, nor of Poage to acquire it for such purposes. On the contrary, we think it was shown beyond controversy that it was the intention of both that said land should be set apart as an alley for public use. This being true, no writing whatever was necessary to accomplish the object in view, as the statute of frauds has no application to the doctrine of dedication. All that is necessary to the validity of a dedication is the assent and intent of the owner of the land to appropriate it to public use, and any act or acts clearly manifesting an intent to dedicate is sufficient. There was therefore no error in admitting the said written instrument in evidence, nor in allowing parol testimony to locate said strip of land and identify it as that referred to in said instrument. If correct in the foregoing views, the fact of dedication was conclusively established by the evidence, and the court correctly instructed a verdict for the plaintiffs.

The judgment of the court below is affirmed.

PLAINTIFF'S ATTORNEY'S FEES.

Plaintiff is entitled to an allowance of the attorney's fee provided in a note for the purchase price of land where he employed an attorney agreeing to pay him the amount so provided, though he did not agree as to the amount until after the institution of the action.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

2. BILLS AND NOTES (§ 534*) — ATTORNEY'S FEES.

The mere clerical error of omitting the pronoun "I" in the blank space in a printed note providing for an attorney's fee is immaterial in an action on the note.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1946-1947; Dec. Dig. § 534.*]

3. PAYMENT (§ 59*)—PLEADING PAYMENT—NECESSITY.

Payment cannot be shown in defense of an action unless pleaded by defendant.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 143½; Dec. Dig. § 59.*]

Error from District Court, Comanche County; N. R. Lindsay, Judge.

Action by M. S. Gaines against L. S. Rutherford and others. Plaintiff had judgment, and defendant Rutherford brings error. Affirmed.

Kearby & Kearby, for plaintiff in error.
J. M. Reiger, for defendants in error.

SPEER, J. Defendant in error, M. S. Gaines, filed this suit in the district court of Comanche county against defendants in error F. M. Bagley, E. E. Anthony, J. M. Easeley, S. F. Brown, and plaintiff in error, L. S. Rutherford, to recover on four certain promissory notes executed by F. M. Bagley, each for the sum of \$395, providing for interest and attorney's fees, and to foreclose a vendor's lien on 118¾ acres of the Adam Shipley survey in said county. There was a trial before the court resulting in a judgment in favor of the plaintiff against Bagley for the amount of the note, interest, and attorney's fee, together with a foreclosure as against all the parties to the suit. The defendant Rutherford alone prosecutes this writ of error.

Defendant in error asks us to dismiss the writ of error because of an agreement had between defendant in error and plaintiff in error, Rutherford, subsequent to the rendition of the judgment in the district court, whereby plaintiff in error agreed, in consideration of defendant in error's not taking out an order of sale until November 1st thereafter, not to prosecute an appeal or writ of error proceedings from such judgment. A written agreement of date February 25, 1909, showing what the terms of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

first agreement, which was oral, were, has been filed with the motion, and we might, under the authority of *Johnson v. Halley*, 8 Tex. Civ. App. 137, 27 S. W. 750, be authorized to dismiss the appeal; but we find it unnecessary to decide this question, since practically the same results are reached in the disposition we make of the appeal.

Plaintiff in error's first complaint is that the court erred in rendering judgment for attorney's fees because defendant in error did not contract with or become liable to her attorney for the payment of such fees. The evidence submitted by plaintiff in error shows, however, that defendant in error employed J. M. Reiger, Esq., to institute this suit, and, while she did not at the time agree with him upon the amount of the fees to be paid, she nevertheless did after the suit was filed agree to pay him the 10 per cent. provided for in the notes sued on, if he could collect the same "out of the land."

Again, we think the mere clerical error of omitting the personal pronoun "I" in the blank space of the printed form providing for attorney's fees is worthy of no consideration, since the meaning of the undertaking is otherwise perfectly clear.

The remaining assignments, to the effect that the judgment was erroneous to the extent of \$40 which had been paid on the notes, are overruled because plaintiff in error had not pleaded payment, and, in the absence of such a plea, he was not entitled to a finding on that issue. *Sayles' Ann. Civ. St.* 1897, art. 1268.

We find no error in the judgment, and it is affirmed.

BOND et al. v. INTERNATIONAL & G. N. R. CO.†

(Court of Civil Appeals of Texas. April 7, 1900.
Rehearing Denied May 12, 1900.)

1. EVIDENCE (§ 473*)—OPINION EVIDENCE—NONEXPERT—SUBJECT-MATTER OF TESTIMONY.

A nonexpert witness should state the facts and leave all conclusions or inferences to the jury, where the jury are as capable of forming a conclusion as the witness.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2220-2233; Dec. Dig. § 473.*]

2. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CONCLUSIONS OF WITNESS.

In an action for the death of a person killed while walking on defendant's track, a witness testified that he saw deceased walking beside the track, and that he walked there until defendant's train was close to him, when he stepped upon the track; that as soon as the train stopped witness went back to where deceased was lying, and that he saw tracks made by decedent where he made a step or two to the end of a tie, and then across the rail towards the center of the track, where he was struck. It was shown that there was a variety of tracks in the pathway, and there was no showing as to any distinction between tracks made by deceased and

the tracks of other people. *Held*, that the admission of the evidence as to the tracks of deceased was harmless error, for the facts upon which the opinion was formed were given, and the jury could not have been misled if the facts testified to did not justify such an opinion; and it was also rendered harmless by the reception of similar evidence, unobjected to, from other witnesses.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

3. NEW TRIAL (§ 151*)—GROUNDS—SUFFICIENCY—NEWLY DISCOVERED EVIDENCE.

It is not error to refuse a new trial for newly discovered evidence, where the motion is based on the affidavit of a person who gives a counter affidavit which so qualifies the original affidavit as to leave it of no probable importance, and the excuse for not having discovered the evidence sooner was incredible and negated by other testimony.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 311; Dec. Dig. § 151.*]

4. NEW TRIAL (§ 150*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

After judgment for defendant in an action for causing the death of plaintiffs' decedent while he was walking on defendant's track, a motion for new trial was based on newly discovered evidence of a witness, who was defendant's foreman at a station near the place of the accident. The motion stated that the witness "is not now in the employ of defendant, and that plaintiffs did not locate his present whereabouts, until the day before the trial, and as soon as he was located plaintiffs used every means in their power to secure his attendance as a witness, but failed." The affidavit of the proposed witness was introduced, showing that the witness had seen footprints at the side of defendant's track, and that he also saw the print of a foot on the end of a tie, and that he took out his knife and cut the size and shape of the shoe in the tie; and the motion stated that since securing this affidavit plaintiffs have caused shoes to be fitted to said impression, and that it did not correspond with the shoe worn by decedent. *Held*, that it was not error to refuse a new trial, as the motion did not state that plaintiffs did not know of the testimony which this witness would give or how long the witness remained in defendant's employ, neither did it show what diligence was used to ascertain who made the cut in the tie.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 310; Dec. Dig. § 150.*]

5. NEW TRIAL (§ 108*)—GROUNDS—NEWLY DISCOVERED TESTIMONY.

It is not error to refuse a motion for a new trial on the ground of newly discovered evidence, where the evidence of the witness is not as to a matter within his exclusive knowledge, but is related to facts which numerous persons familiar with the conditions that existed at the time and place could have testified to.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 108.*]

6. NEW TRIAL (§ 102*)—NEWLY DISCOVERED EVIDENCE—EXCUSE FOR NOT DISCOVERING WITNESS.

A motion for a new trial on the ground of newly discovered evidence is properly overruled, where no excuse for not knowing of the witness sooner is shown.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 214; Dec. Dig. § 102.*]

7. NEW TRIAL (§ 97*)—GROUNDS—SURPRISE—EVIDENCE OF OPPOSITE PARTY.

It is not a ground for a new trial of an action for causing the death of plaintiffs' decedent

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 26, 1900.

between the rails when the train was so close to him that it was impossible to stop it, as it was apparent from the issue that defendant would seek to show by the absence of footprints between the tracks that decedent had not walked along the track as plaintiffs alleged, and plaintiffs did not ask to withdraw their announcement of ready for trial and ask for a continuance in order to enable them to overcome the surprise.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 198; Dec. Dig. § 97.*]

Appeal from District Court, Houston County; Ben H. Gardner, Judge.

Action by Mrs. Lucy Bond and others against the International & Great Northern Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Hayne Nelms and Nunn & Nunn, for appellants. King & Morris, for appellee.

JAMES, C. J. Appellants were the widow and children of E. B. Bond, and sued for damages resulting from the striking and killing of Mr. Bond by one of defendant's engines, while he was walking (as the petition alleges) on the track between the rails going from the town of Lovelady to a saw-mill where he was employed. If necessary, in the course of this opinion, we shall state more of the petition. Besides a general denial, defendant alleged that the accident was caused by the negligence of deceased in stepping upon the track in front of the moving train, and so close thereto that it was impossible to escape striking him. This seems to be a sufficient statement from the answer. There was a verdict for the defendant.

The first assignment is that the great preponderance of the evidence showed that Bond was walking in the middle of the track for a long distance in plain and open view of the engineer and other operatives on the train; that the stock or danger alarm was sounded two or three hundred yards before he was struck; that the engineer admits that he saw him at a distance of some 250 yards (though he said he was not on the track); that there was no sign or indication on his part that he heard the signals and would leave the track; and that those on the train had the means at hand and could have slowed down and avoided the injury without endangering the train. That there was testimony which would have supported the above is not disputed, but we cannot agree with appellants that the evidence did not properly admit of the jury finding the contrary, and finding that deceased was at no time inside the track, but was walking in a path which ran along the west side of the track, and out of

enberg. This witness testified that he noticed a man (who proved to be Bond) walking on the left side of the track, in a path, about 250 yards ahead of him; that if he had continued walking where he was he would have been in no danger; that the engine was running 15 or 18 miles an hour, and came right close to him before he stepped upon the track; that witness did not know he was going to step on the track until he did so. The witness proceeded: "As soon as the train stopped I left the engine in charge of the fireman, and went back to where the man was lying. He lived only a few minutes. I saw his tracks where he made a step or two to the end of the tie, and then across the rail towards the center of the track, where he was struck." Counsel saved a bill of exceptions to the last statement, because "It is the opinion of the witness about a matter of which he has not shown that he has any knowledge. He does not show that he knew the footprints of Mr. Bond. A further objection is that it is not in response to the interrogatory, is irrelevant and incompetent."

The third assignment complains of like testimony of the head brakeman, Furguson, who was in the engine cab. This witness testified substantially as did the engineer, and the portion of his evidence assigned as error, and for the same reasons, is the following: "The engine slowed on down, and when it got slow enough I jumped off the engine on the left-hand side and ran back to where the man was lying. He did not live but a few moments after I got to him. I saw the footprints he made along the side of the track, and then one or two on the ends of the ties, and a step or two inside of the rail just before he was hit by the engine." The brief does not appear to deal with the objection that the above testimony was not responsive to the interrogatory. And it does not appear that any such objection, which was to depositions, was made at the proper time. These witnesses say they saw Bond walking in this pathway, and saw him step from it upon the track just before he was struck. They saw tracks in the pathway (which all the evidence shows were the tracks of one person), and saw that they led up to the track as far as the point where he was struck. The objection is that they referred to these tracks as being Bond's.

We recognize that a nonexpert witness ought to state facts, and leave all conclusions or inferences to the jury, where the jury are as capable of forming a conclusion as the witness. But where a conclusion is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

far in this direction. *Ry. v. Warner*, 42 Tex. Civ. App. 286, 93 S. W. 489, and cases there cited. There was no question as to there being a variety of tracks in the pathway, and the testimony of these witnesses cannot be said to involve a question of distinction between Bond's tracks and the tracks of others. It must have been plain to the jury that their reference to this line of tracks as Bond's was based upon facts testified to by them, viz., that they saw him in the act of walking along there, saw him step up, and the tracks, where they went and where they terminated, corresponded with what had seen, and not upon any knowledge of his footprints. Their conclusion was not any stronger than the facts they testified to, and depended upon the existence of the facts. It is inconceivable, under these circumstances, that the jury would have adopted the conclusion, unless they found as true the facts testified to by these witnesses. The main issue was whether Bond was walking in the path between the rails, or in the path alongside the track. If the jury believed the testimony which went to show that he was walking inside the rails, the conclusion in question would necessarily have had no effect. If they did not find this, and found that he was walking in the pathway, then the verdict was necessarily right. More especially do we think the testimony ought not to cause a reversal of the judgment, when other witnesses no better qualified to speak of the tracks as those of Bond were allowed, without objection, to refer to them as his. *San Antonio v. Potter*, 31 Tex. Civ. App. 263, 71 S. W. 765; *Ry. v. Baumgarten*, 31 Tex. Civ. App. 253, 72 S. W. 78.

The sixth and subsequent assignments complain of the refusal to grant a new trial for newly discovered evidence. To the motion an affidavit of Ellis was attached, whose testimony was claimed to be newly discovered. He, however, gave appellee a counter affidavit which so qualified the first as to leave it of no probable importance on another trial, when taken with the fact that practically all the witnesses on the trial testified that the accident happened soon after a rain. The court had the right to conclude that the testimony of the proposed new witness would not have affected the result. Furthermore, the excuse given for not sooner having discovered the fact that Ellis was at the place immediately after the accident occurred, and what his testimony would consist of and its importance to the issue, was incredible, and also was negatively by certain testimony that appears in the statement of facts.

Another newly discovered witness was J.

the Lovelady station when this accident occurred. It does not state that plaintiffs did not know of his testimony. What it states is that Norton "is not now in the employ of defendant, and that plaintiffs did not locate his present whereabouts until the day before the trial, and as soon as he was located plaintiffs used every means within their power to secure his attendance as a witness, but failed." The motion fails to show how long Norton remained at Lovelady in defendant's employ, and fails to show that plaintiffs did not know of his testimony all along. His deposition might have been secured. In addition to this, they admitted they knew of his importance as a witness some time before the trial, and located him the day before the trial, and yet were content to go to trial without any further effort, by postponement, to secure his testimony.

There is another effort in the motion to obtain a new trial for the testimony of Mr. Norton, and this is the subject of the ninth assignment. It was set forth by the affidavit of Norton that he had seen the foot tracks on the west side of the tracks where some one had been walking; the tracks were made on the sand, which was slightly damp on top from a slight shower, and at each step the sand was picked up; that he saw the print of a foot on the end of a tie, leaving fresh sand around the shoe, and that he took out his knife and cut the size and shape of the shoe in the tie. The motion states that since securing this affidavit plaintiffs have caused shoes to be fitted to said impression, and that it does not correspond with such a shoe as Bond wore. A sufficient reason for overruling this ground of the motion is the fact that it does not show what diligence was used to ascertain who made the cut in the tie. The motion states "that up to the time of securing the affidavit of J. W. Norton the plaintiffs could not find out or discover who made or cut the track in the tie, though they exercised diligence to do so." What was done in the exercise of diligence to find it out was not stated, in order that the court might consider whether or not it was sufficient. We need not mention in this connection a counter affidavit which went to show that Norton did not make the cut in the tie until after the footprint had been obliterated. As has been stated, Norton was the section foreman at Lovelady, and it is hardly credible that any real and sustained search for the person who had cut the impression would have been conducted without inquiry of the foreman, who was Norton himself.

The eighth assignment deals with newly discovered testimony of J. M. May. If the motion shows any diligence in this matter,

or any excuse for not sooner discovering this witness and his testimony, we fail to find it. In view of the probability that if any examination into the case was made in the neighborhood as appears was made by plaintiffs at or about the time any reasonably careful investigation would have revealed this witness and his testimony, appellants, perhaps, did not undertake to state the diligence and what it consisted of. Besides, the subject-matter of the proposed testimony of May was something not within his exclusive knowledge, but consisted of facts, which, if true, anybody familiar with conditions that existed at the time and place—and such persons appeared to be numerous—could have testified to.

The tenth assignment, which relates to Ed. Halsell, another newly discovered witness, is overruled, as the motion fails to show excuse for not knowing of the witness sooner. The same is true of the witnesses Cochrane and Turner, mentioned in the eleventh.

The twelfth is also overruled. It was set up in the motion for new trial, as one of the grounds, that plaintiffs had no notice that defendant would attempt to prove that there were no footprints on the pathway between the rails until testimony was adduced upon the trial; on the contrary, defendant's testimony by depositions was silent about the central pathway, and only referred to footprints on the west side of the track, and, from the fact that hundreds of pedestrians daily walked up and down said central pathway, plaintiffs were led to believe that no attempt would be made to prove that there were no tracks there; that after discovering the trend of such testimony plaintiffs questioned witnesses present, and made very reasonable and diligent attempt to find witnesses who knew about the hard track pavement inside the rails, and that on that account a pedestrian would not make a track there. The petition alleged that deceased was, and had been for a long distance, walking on the path inside the rails. Defendant denied this, and alleged that he stepped upon the track before the engine. This formed the issue. In the preparation of plaintiffs' case for trial it seems to us that any one would realize the importance of thoroughly investigating the matter of footprints. Plaintiffs admit that they knew defendant would seek to show tracks in the sidepath. It should naturally have occurred to plaintiffs the importance of showing his footprints, or the absence thereof, along the center of the track, and if none could have been made there by him, on account of the nature of the ground, to show such fact. We cannot understand how plaintiffs could reasonably have been led by defendant to rest assured that defendant would go no

further with its proof than to show foot-steps outside of the track, and to consider the question of tracks inside the rails as unimportant.

The true nature of this ground for a new trial is surprise. If we should call the introduction of testimony pertinent to the issue a proper subject of surprise to plaintiffs, then, before plaintiffs would be allowed a new trial upon that ground, it was necessary that they should have asked to be allowed to withdraw their announcement of ready to continue, or postpone the trial in order to enable them to properly overcome the surprise. Instead of pursuing this course, they were satisfied with what they had conveniently at hand to go on with the trial and take their chances on a favorable verdict, notwithstanding the ground did not entitle them to a new trial. *De Hoyos v. Ry. Co.* (Tex. Civ. App.) 115 S. W. 75.

Judgment affirmed.

COLVILLE et al. v. COLVILLE et al.

(Court of Civil Appeals of Texas. April 24, 1909.)

1. ACKNOWLEDGMENT (§ 6*) — DEFECTIVELY ACKNOWLEDGED INSTRUMENT—ADMISSIBILITY IN EVIDENCE.

A deed by husband and wife, sufficiently acknowledged as to the husband, but defectively acknowledged as to the wife, is admissible in the absence of any issue that the land was the separate property of the wife or the homestead.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 51, 53; Dec. Dig. § 6.*]

2. ESTOPPEL (§ 29*)—BY RECITALS IN DEED—PERSONS ESTOPPED.

Where both parties claimed land through a third person, the deed to the third person was a muniment of title under which both parties claimed, and the recitals in the deed were binding on both parties.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 69, 74; Dec. Dig. § 29.*]

3. TRIAL (§ 203*) — SUBMISSION OF ISSUES — SUFFICIENCY.

Where the court submitted all of the issues which related to the disputed questions of fact, and which were necessary to the determination of the case, it was not error to refuse to submit issues requested by the parties.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 478; Dec. Dig. § 203.*]

4. HUSBAND AND WIFE (§ 274*)—COMMUNITY PROPERTY.

A purchaser of 150 acres agreed that his married son should have 58½ acres thereof if he paid a specified part of the price. The son took possession in 1876, and made improvements. His wife died in 1879, after he had paid all but a small balance of the price. Thereafter the father and his wife, in consideration of the agreement with the son and the payment of the balance of the price, conveyed the 58½ acres to the son; the acknowledgment of the deed, while sufficient as to the father, being defective as to the wife. Thereafter the father procured a deed to the entire tract from his grantor and subsequently executed a deed of 58½ acres to his son, to correct the defects in the former deed. *Held*, that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a child of the deceased wife of the son inherited an undivided half of the 58½ acres.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1026; Dec. Dig. § 274.*]

5. APPEAL AND ERROR (§ 547*)—NECESSITY OF BILL OF EXCEPTIONS OR STATEMENT—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A party moving for new trial on the ground of newly discovered evidence as shown by affidavits must show by bill of exceptions or statement of facts that the affidavits were brought to the attention of the court, or the ruling on the motion is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2427; Dec. Dig. § 547.*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by O. A. Colville and others against J. W. Colville and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Vaughan & Hart and J. B. Guinn, for appellants. Morrow & Smithdeal, for appellees.

BOOKHOUT, J. Appellants, as plaintiffs below, brought suit against appellees to recover \$1,901.25, being one-half of the net proceeds arising from the sale of 58½ acres of land out of the Leon county school land in Hill county, Tex.; the petition alleging, in part, the following: "That heretofore, to wit, on the 14th day of September, 1907, J. A. Colville and wife, Nettie Colville, O. A. Colville and wife, Pearl Colville, J. W. Colville and wife, Leta Colville, Mrs. Donie Jobe and husband, W. B. Jobe, made, executed, and delivered their certain warranty deed conveying to one D. C. Hammer a tract of land containing 58½ acres out of the Leon county school land in Hill county, Tex. That said D. C. Hammer, in consideration for the conveyance to him of said 58½ acres of land, paid the sum of \$3,875.62½. That out of said sum \$73.12½ was paid to real estate agents, Turk & Smoot, as their commission for making the sale of said lands, leaving \$3,802.50, of which sum the said J. A. Colville was entitled to and did receive one-half thereof, viz., \$1,901.25; the remainder, to wit, \$1,901.25, being by agreement between plaintiffs and defendant J. W. Colville left on deposit with the Citizens' National Bank of Hillsboro, Tex., to be held by said bank until plaintiffs and said defendant, J. W. Colville, should determine their respective rights and interests in and to said sum of money, or until their rights should be determined by proceedings instituted for that purpose in a court of competent jurisdiction." J. W. Colville and the bank answered by general exception, general denial, and special plea, claiming: That said tract of land was acquired by J. A. Colville and M. D. Colville through deed executed by G. S. Dickerson to M. D. Colville, conveying 150 acres of land out of the Leon county school land; the said J. A. Col-

ville, by agreement, to have one-third thereof. That said land was so acquired during the lifetime of ——— Colville, the wife of J. A. Colville, who was the mother of appellee, J. W. Colville, and that he was the only child surviving the said ——— Colville, and as such inherited an undivided one-half of said property, and was therefore entitled to said sum of money, to wit, \$1,901.25, herein sued for by appellants. In other words, the appellants sought to recover against appellees the sum of \$1,901.25, one-half the proceeds of the sale of a tract of 58½ acres of land. A half interest in the tract of land was owned by J. A. Colville, and the appellants and the appellees are the children of the said J. A. Colville by different wives; the controversy arising over the contention of appellants that the 58½-acre tract of land was the community property of their mother and J. A. Colville, and the appellee J. W. Colville contending that the tract of land was the community property of J. A. Colville and the mother of appellee. The case was submitted to the jury on special issues, upon which the court rendered a judgment in favor of the appellee, from which the appellants appeal.

We find the facts as follows: J. A. Colville was first married in 1874. During that marriage one child was born, namely, the appellee J. W. Colville. The first wife died in the latter part of the year 1879. J. A. Colville married again in the spring of 1881. The appellants were the children of the second wife. The second wife died in 1886 or 1887. The tract of land in controversy was patented to Leon county in 1859. The 58½-acre tract of land was a part of a 150-acre tract of land, and the last-named land was conveyed to M. D. Colville on the 7th day of October, 1876, by G. S. Dickerson. The consideration for the deed from Dickerson to M. D. Colville is stated to be \$150 cash, and the assumption of 10 notes, given by Dickerson to Leon county, dated the 24th day of November, 1874; 9 of the notes being for \$63.60 and one for \$31.80. Dickerson had received a deed from Leon county, which was lost. At the time the land was conveyed by Dickerson to M. D. Colville, there were some little improvements on a part of the land. J. A. Colville was the son of M. D. Colville. After M. D. Colville had agreed to buy the 150-acre tract of land from Dickerson, he (M. D. Colville) and J. A. Colville made an agreement by which J. A. Colville was to have a third of the land and pay a third of the purchase money. After this agreement was made, M. D. Colville got the deed from Dickerson to the 150-acre tract and paid the \$150 cash consideration. He (M. D. Colville) and J. A. Colville immediately took possession of separate portions of the land; M. D. Colville taking the improved

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and continued in possession of it up to shortly before the time the suit was filed. After the land was divided between them, and after the land was deeded by G. S. Dickerson to M. D. Colville, and while J. A. Colville was in possession of the 58½-acre tract, J. A. Colville paid his pro rata part of the purchase money due to Leon county, and had completed the payment of it, except the sum of \$70, at the time of the death of his first wife. In 1880 M. D. Colville and M. C. Colville, his wife, made a deed to J. A. Colville conveying the 58½-acre tract of land in controversy. The acknowledgment to this deed is statutory so far as M. D. Colville is concerned, but defective as to his wife. It was never recorded, but its execution proved. The consideration for the deed of December, 1880, was to carry out the agreement which M. D. Colville had made with J. A. Colville with reference to the 58½-acre tract of land which J. A. Colville had taken possession of at the time of the purchase from Dickerson, and upon which he had made the improvements and payments hereinabove stated; J. A. Colville having at that time, which was before his second marriage, fully paid for the 58½-acre tract of land. In 1889 M. D. Colville, having no deed from Leon county, the deed to Dickerson being lost, procured a deed to the 150-acre tract of land and readjusted the unpaid payments. In 1885 M. D. Colville made a deed to the 58½-acre tract of land to J. A. Colville. The purpose and consideration for the deed of 1885 was to correct the defects in the deed previously made in 1880.

Error is assigned to the court's action in admitting in evidence, over appellants' exceptions, the deed from M. D. Colville and M. C. Colville, his wife, to J. A. Colville, dated December 27, 1880, conveying 58½ acres of land. The exceptions related to the acknowledgments of the grantors to the deed. The certificate of acknowledgment as to the wife was defective. The acknowledgment of M. D. Colville was sufficient. There being no issue that the property was the separate property of M. C. Colville, the wife, or that the same was their homestead, it was not error to admit it in evidence. J. A. Colville took possession of the 58½ acres under a claim of right in 1876, made valuable improvements thereon, and paid the entire purchase money prior to his marriage with the mother of appellants.

Again, it is contended, in the second assignment of error, that the court erred in overruling plaintiffs' objection to the following portion of the deed of date October 7, 1876, executed by G. S. Dickerson to M. D. Colville, conveying by field notes 150 acres

made by W. D. Wood, Com. of Leon county, to me, dated 24th day of November, 1875, which deed is here delivered and made a part hereof." It is insisted that these recitals are not binding on parties who do not claim under the deed. There was no error in permitting these recitals to be read in evidence. It appeared that both the appellants and appellee claimed title through M. D. Colville, and that M. D. Colville claimed title through G. S. Dickerson, and that the deed from G. S. Dickerson to M. D. Colville was a muniment of title under which both parties claimed. Hence the recitals therein were binding alike upon the appellants and the appellee.

Error is assigned to the court's failure to submit to the jury certain special issues, requested by plaintiffs, as follows: In making contract with G. S. Dickerson for the 150 acres of land, did M. D. Colville act for himself, or did he act for himself and son, Joseph A. Colville, under a prior agreement made with said Joseph A. Colville? If, in answer to the preceding special issue, the jury should find that M. D. Colville in making trade with G. S. Dickerson for the 150 acres of land he acted for himself, thereafter did the said M. D. Colville and Joseph A. Colville make and enter into an agreement concerning said 150 acres of land, whereby said Joseph A. Colville was to accept any portion thereof? If so, when and where was such agreement made, and what were the terms thereof, as to how much J. A. Colville was to pay for the land he was to receive, and how and when he was to pay same? The court having submitted all of the issues which related to disputed questions of fact, and which were necessary to the determination of the case, there was no error in refusing to submit the issues requested by appellants. It was undisputed that J. A. Colville took possession of the 58½-acre tract of land during the several years before the death of his first wife, and that he had possession of it under a contract with his father, M. D. Colville, and that he made improvements on it during the lifetime of his first wife, and paid substantially all the purchase money during her lifetime. The court submitted to the jury the questions as to when the agreement was made, and they found in answer to the third question that it was made before Dickerson deeded the land to M. D. Colville. There was a conflict in the evidence as to when the payments made by J. A. Colville were made. That question was submitted to the jury in the fourth question, and they found that the payments for the land were all made before December 27, 1880. The court in the fifth question submitted to the jury

the question as to how much J. A. Colville paid to M. D. Colville on account of the land prior to the death of his first wife, and this they answered in the fifth answer, and the sixth answer was to the same effect.

Again, it is insisted that the court erred in refusing to submit special issues 4 and 5, requested by plaintiffs as follows: What amount of money, if any, did the said Joseph A. Colville pay to the said M. D. Colville on that portion of the 150-acre tract of land east of the ravine, during the life of J. A. Colville's first wife? What amount, if any, did he pay during the period of time from the date of his first wife's death to his second marriage, and what amount did he pay after his second marriage up to the date of the death of his second wife? What amount, if any, did he pay after the death of his second wife? Was there a definite agreement as to when M. D. Colville should deed said land to J. A. Colville? If so, when was said deed to be made? It is contended that these issues were not embraced in the issues submitted by the court. The special issues requested, with reference to whether there was a definite time when M. D. Colville should deed the land to J. A. Colville, was immaterial. It was shown by the undisputed evidence that M. D. Colville did deed the land to J. A. Colville before the marriage of J. A. Colville with the mother of appellants.

The jury rendered their verdict on special issues, and thereafter the plaintiffs moved that judgment be entered in their favor on their findings taken in connection with the issues as agreed upon by counsel for plaintiffs and defendants. The court overruled the motion, and his action in this respect is assigned as error. The proposition presented is that M. D. Colville having entered into an agreement to purchase the 150 acres of land from G. S. Dickerson, acting for himself, and not for himself and his son Joseph A. Colville, the said M. D. Colville being a married man, and not owning any other property, the tract of land purchased by him became his homestead, and the deed executed by M. D. Colville and M. C. Colville to J. A. Colville of date December 27, 1880, not being sufficient to convey title on account of the defective acknowledgment of M. C. Colville, the deed executed by M. D. Colville and wife to J. A. Colville of date November 10, 1885, for the first time vested title in J. A. Colville to the tract of land involved in this suit, and the mother of appellants then being his wife, the property became community property, and on the death of appellants' mother, the second wife of said J. A. Colville, they acquired by inheritance an undivided one-half interest in said land, and under the above facts and findings of the jury the court should have

granted appellants' motion to render judgment on the findings of the jury in favor of appellants. There was no issue of homestead made by the pleading. Again, the 150-acre tract of land never became the homestead of M. D. Colville. The undisputed evidence shows: That, before he got a deed to it, he made an agreement with J. A. Colville, whereby he was to own the 58½ acres of land in controversy; that said J. A. Colville at once took possession of the same and made valuable improvements thereon.

Appellants assign error to the court's action in overruling their motion for new trial based on newly discovered evidence. The contention is that, where it is shown that due diligence has been made to discover material testimony before trial of a case, and that such testimony could not sooner have been discovered through the use of a higher degree of care and diligence than that used, and that after the trial said testimony had first been brought to the knowledge of witnesses, a new trial based on such newly discovered evidence should be granted, to the end that the conclusion reached may be had on all the proof. Appellants' motion for a new trial has attached to it the affidavit of A. R. Smoot and J. A. Colville, purporting to relate to newly discovered evidence; but no bill of exception was reserved showing that said evidence was heard or considered by the court. This court has held that, unless the record shows that the affidavits relied on as showing the newly discovered evidence were called to the court's attention, the assignment will not be considered. There is no bill of exception in the record, nor is it shown by a statement of facts that these affidavits were called to the attention of the trial court. They cannot be considered. *Ayres v. Railroad* (Tex. Civ. App.) 116 S. W. 612; *Frizzell v. Johnson*, 30 Tex. 36.

Finding no reversible error in the record, the judgment is affirmed.

TEXAS & P. RY. CO. v. GRAFFEO et al.†

(Court of Civil Appeals of Texas. Feb. 6, 1900.
Rehearing Denied March 13, 1900.)

1. DAMAGES (§ 208*) — INJURY BY FIRES — QUESTIONS FOR JURY.

In an action for injuries to an asparagus bed by a fire set by a locomotive, evidence that the bed was about 150 feet by 400 feet, that it was all burned off, that the heat killed the roots, and that it would cost about \$300 or \$400 to repair, was sufficient to authorize the question of damages to be submitted to the jury.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 208.*]

2. DAMAGES (§ 210*)—AMOUNT RECOVERABLE UNDER PLEADING.

In an action for injuries to an asparagus bed by fire set by a locomotive, it was error to instruct that the jury could allow the reason-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court April 21, 1900.

3. APPEAL AND ERROR (§ 1140*)—DISPOSITION OF CAUSE—REMISSION OF EXCESS OF RECOVERY.

Where, in an action for damages, the court fails to limit the amount of the recovery to the amount claimed, and the jury award a larger sum, the cause will not be reversed where plaintiff offers to remit the excess.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.*]

4. DAMAGES (§ 208*)—INJURIES BY FIRE—QUESTIONS FOR JURY.

In an action for injuries to peach trees by fire set by a locomotive, evidence that 26 bearing peach trees were destroyed, that a reasonable yield for a peach tree was from three to five bushels, worth from 75 cents to \$1.50 a bushel, is sufficient to authorize the submission of the issue of the depreciation in the land by reason of destruction of the trees.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 208.*]

5. DAMAGES (§ 112*)—FIRES—MEASURE OF DAMAGES.

Where peach trees and grapevines are entirely destroyed by fire set by a locomotive, the measure of damages is the difference in value of the land just before and after the burning.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by George Graffeo and others against the Texas & Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Spoons, Thompson & Barwise, for appellant. Capps, Cantey, Hanger & Short and Theodore Mack, for appellees.

CONNER, C. J. This is an appeal from a judgment in favor of appellees for the sum of \$1,500 as damages caused by fire, which burned appellees' garden and vineyard, and which was negligently permitted to escape from one of the appellant's engines.

Objection is made to the court's charge on the measure of damages with reference to the asparagus bed that was burned. It is first insisted that there was "no evidence" as to the reasonable value of the asparagus bed, and that the issue hence should not have been submitted to the jury. The same contention is made in different forms under the third and fourth assignments of error. One of the witnesses, George Lunetta, testified, among other things, that the asparagus bed was about 150 feet by about 400 feet, that it was all burned off, that asparagus is a vegetable for table use and sold upon the market in bunches, that the heat went through and killed the roots, and that it would cost "about \$300 or \$400 to go there and repair that asparagus bed." This, with other evidence,

ever, seems to be well taken. The instruction was that, if the jury found for the plaintiff, they would allow the reasonable value of the asparagus bed destroyed at the time of its destruction without limiting the recovery in this respect to the amount claimed therefor in the petition, to wit, \$200. This should have been done when, as here, the evidence of its value would have authorized a recovery for "\$300 or \$400." See *City of Dallas v. Jones*, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377. We will not reverse the judgment, however, because of this error, inasmuch as appellee in answer to the objection has offered to remit the sum of \$200, which will be entered.

It is further insisted under the second and fifth assignments of error that there was no evidence as to the value of the peach trees growing upon the burned ground, and that therefore the court should not have submitted any depreciation in the value of the land which may have been caused by reason of the destruction of the trees. We find no merit in this contention. There was proof to the effect that 26 bearing peach trees were destroyed, that a reasonable yield for a peach tree was from three to five bushels, worth from 75 cents to \$1.50 per bushel. Besides, the true measure of the damage for the destruction of the growing trees and grapevines entirely destroyed was, as submitted by the court, the difference in the value of the land just before and after the burning, as to which there was ample evidence.

The evidence sustains the material allegations of appellees' petition, and, finding no error other than that pointed out, it is ordered that the judgment below be reformed and affirmed in the sum of \$1,300, with interest as specified in the judgment, and inasmuch as the error requiring the remittitur was not called to the attention of the court below in appellant's motion for new trial, or otherwise, the costs of the appeal will be taxed against appellant.

SOUTHERN KANSAS RY. CO. OF TEXAS
v. McSWAIN.

(Court of Civil Appeals of Texas. March 13, 1909. On Rehearing, April 17, 1909.)

1. DAMAGES (§ 53*)—PERSONAL INJURIES—MENTAL ANGUISH AS ELEMENT OF RECOVERY.

In an action for personal injuries, it was not error to permit plaintiff to testify that he suffered mental anguish by fear that blood poisoning might set in and prove fatal.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 100; Dec. Dig. § 53.*]

ferred in evidence, in an action by a railroad employé for personal injuries, evidence held to present a question for the jury whether the application under which he was working was to another company than defendant, and whether there was any material difference between the duties of an engine wiper, the position for which he applied, and that of an engine watcher, the duties of which he was performing when injured.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 284.*]

3. MASTER AND SERVANT (§ 264*)—PERSONAL INJURIES—ENGINE WATCHER—ADMISSIBILITY OF EVIDENCE.

In an action by an engine watcher who was injured in a collision between a box car and an engine, which he was cleaning when a car was run against it, plaintiff pleaded inexperience, negligence of defendant for the collision, and in failing to provide rules for his protection. Defendant answered, denying negligence, and pleading contributory negligence, and furthermore introduced in evidence rules for his protection. There was evidence that, without displaying the lights required by the rules, plaintiff went under an engine while another train was switching, and the operator of the train moved the engine without knowing plaintiff was under it but without sending a man for a personal examination. Held that rules of defendant, included in the plaintiff's application for employment as an engine wiper, requiring him to have a copy of the rules at hand, and to be conversant therewith, and to do all in his power to carry them out, and which were in the nature of a declaration that he understood the hazards and dangers of the business, and that the application should apply to any position to which he might thereafter be assigned, were relevant, and should have been admitted.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.*]

4. TRIAL (§ 85*)—OFFER OF EVIDENCE—ADMISSIBILITY IN PART—OBJECTION THERE TO AS A WHOLE.

An objection, urged as a whole to evidence admissible in part, is properly overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

5. EVIDENCE (§ 472*)—OPINION EVIDENCE—MATTERS DIRECTLY IN ISSUE.

In an action by an engine watcher for personal injuries, testimony of a witness that it was plaintiff's duty, before going under the engine, at the time of his injury, to warn the train crew of the fact, or to have put out lights to indicate he was under it, was objectionable, on the ground that it was a conclusion for the jury's determination, and not that of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

On Rehearing.

6. MASTER AND SERVANT (§ 264*)—ACTION FOR INJURIES—PLEADING AND PROOF AS TO NEGLIGENCE.

It is one thing to fail to adopt reasonable rules to protect employes as was alleged in a petition, in an action by an employé for injuries, and another to be negligent in their enforcement, or in failing to furnish signals required thereby, according to his testimony.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.*]

peals. Reversed.

Hoover & Taylor, for appellant. Cooper & Stanford, for appellee.

CONNER, C. J. Appellee recovered a judgment for \$6,000 for personal injuries received by him while engaged as one of appellant's employes, in the regular discharge of his duties as engine watcher at Pampa, in Gray county. Appellee alleged, and there was evidence tending to show, that on the 19th day of July, 1907, at about 2:30 o'clock a. m., one of appellant's engines at Pampa was by its operative run into the Pampa yards, and placed upon what is designated in the evidence as the "passing track," in close proximity to one or more box cars, and was turned over to appellee to be cared for and attended to; that in the regular discharge of his duties appellee took charge of said engine, and began cleaning the same; that in order to clean out the ash pan he went underneath the engine, and just as he was ready to begin taking the ashes out of the pan, the crew in charge of another engine ran a box car, with great force and violence, against the engine under which appellee was working, in consequence of which his right foot was mangled, and amputation thereafter necessitated. Appellee, among other grounds of negligence not necessary to here notice, alleged that the defendant had failed to adopt proper rules and regulations for the protection of employes working as engine watchers, which fact was the proximate cause of his injuries. The defendant answered by demurrers, the general denial, and special pleas of assumed risk and contributory negligence.

We find no error in the court's action in overruling appellant's motion to quash the citation, nor in permitting plaintiff to testify that he suffered mental anguish by reason, among other things, of "the fear that blood poison might set up and prove fatal." See *M., K. & T. Ry. Co. of Tex. v. Miller*, 25 Tex. Civ. App. 460, 61 S. W. 978.

The third assignment of error, however, we think must be sustained. In this assignment complaint is made of the court's action in refusing to permit appellant to introduce in evidence the following paragraphs of the plaintiff's application for employment, dated on the 16th day of May, 1906, as follows:

"33. Do you understand that every employé of this company whose duties are in any way prescribed by the rules must always have a copy of the rules at hand when on duty and must be conversant with every rule, and that you must render all the assistance in your power in carrying them out, and immediate-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shall be a part of your contract of employment? Yes."

"37. Do you understand that all employes are expected to protect themselves from personal injury by avoiding risks, and that those who may receive injuries on account of taking risks will have no claim upon the company? Yes."

"41. Do you understand that no officer or employe of this company is authorized to request or require you to use defective tracks, cars, machinery or appliances of any kind, except at your own risk of injury therefrom? Yes."

"42. Do you understand that this company desires to employ only experienced men in its service, and does not undertake to educate inexperienced men; and do you state that you are aware of the hazards and dangers of the business, and agree to rely upon your co-employes, and not upon the company, for information as to any or all things, including the character of any kind of machinery and appliances which would render your work dangerous or subject you to injury, or which may be necessary to the proper performance of your duty; and do you waive any responsibility whatsoever on the part of the company, or its officers, touching the matters herein referred to, and that this shall apply to any position to which you may now or hereafter be assigned? Yes."

To the introduction of these rules appellee objected, first, on the ground substantially that the application was for a different position, that of an engine wiper at Amarillo, from that involved, an engine watcher at Pampa, and that hence the testimony was immaterial and irrelevant; second, that it was an attempt on the part of the railroad company to avoid their own negligent act in making the applicant assume a risk that the law does not put upon him; and, third, that the application is made to the Pecos Valley & Northern Texas Railway Company, whereas at the time of the injury the plaintiff was in the service of appellant. Nothing in the facts shows that the application would not apply in favor of appellant, as well as the Pecos Valley & Northern Texas Railway Company, save possibly that the heading of the application shows the name "Santa Fé," and in the body in one place appears the name "Pecos Valley & Northern Texas Railway Company." Appellant insists that we are required to take judicial notice of the fact that all of the railway companies named are parts of a single system, but, whether so or not, the evidence plainly indicates that the application under consideration was the one under which appellee was working at the time he was injured. He did not in his testimony undertake to testify otherwise. On the contrary, he testified: "On or about the

shops at Amarillo. He then gives the name of the person by whom he was employed, and testified that the successor in position of the person so named later directed him to go to Pampa for the employment he was engaged in at the time of the inquiry complained of. He says: "I worked for the railroad at Amarillo, I think it was a month and four days—a month and three and a half or four days—something like that. Then I came to Pampa, Tex., then Mr. Cramer sent me to Pampa. He is the roundhouse foreman at Amarillo. While I worked at Amarillo, I worked under, all but the first few days, the man that I made out my application with, John Sartori—he was foreman at first. I understand that he was in Mr. Cramer's place; I don't know that. After I worked there about a month and four days, I was transferred to Pampa. I worked as engine watchman at Pampa. Mr. Cramer sent me to Pampa to work.

* * * My duties were to watch engines at night. Mr. Cramer directed me to watch engines there at Pampa at night. Mr. Cramer didn't give me any instructions, only just told me to go down and watch engines." Another witness, J. B. Browning, among other things, in testifying about the book of rules he was identifying, said that: "The outside says that is a Santa Fé book. I suppose that includes all the branches—the Atchison, Topeka & Santa Fé, the Gulf, Colorado & Santa Fé, Pecos Valley, and Southern Kansas. I suppose it includes the whole system." So that, if the question of whether the application had been made for employment under the Pecos Valley & Northern Texas or the appellant was material, the issue under the evidence should at least have been submitted to the jury. This last observation would seem also to apply to the question of whether or not there was any material difference in the duties of an "engine wiper" and an "engine watcher." In reading the evidence, which for the sake of brevity we will not set out, it would seem that the duties in many respects are very similar. At all events, appellee testified that, while at Amarillo for some three weeks, he "was working at and around engines," and that "during those three weeks I learned enough to go off and undertake to be an engine wiper. I learned enough in that time so that I thought I could take the job of engine wiper and perform the duties of that job. I learned what an engine wiper had to do around there in the roundhouse."

Was, then, the rejected testimony immaterial? We think not. Appellee had pleaded inexperience, negligence on appellant's part in making the collision, and in a failure to provide rules for his protection. Defendant had answered by denying the negligence charged, and pleading the contributory neg-

ligence of appellee. Furthermore, appellant introduced, among others, the following rules in use on its system: Rule No. 26 that: "A blue flag by day and a blue light by night displayed at one end or both ends of an engine, car or train, indicates that workmen are under or about it; when thus protected it must not be coupled to or moved. Workmen will display the blue signals, and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track, so as to intercept the view of the blue signals; without first notifying the workmen." Rule No. 317 that: "All car inspectors, conductors, brakemen or other employes, who are working under or about any car or train in yards upon switch or main track, or at any other place, must, for their own protection, place thereon a blue flag by day and a blue light by night as a warning to advise other employes that work is being done upon said car or train." There is evidence tending to show that appellee went under the engine that injured him while the other train was switching in the yards, without displaying the lights required by the rules quoted, and that the operative of the train which moved the engine under which appellee was working did so without knowledge of his presence under the engine, but without having sent a man for personal examination. In the light of all this testimony it seems to us that the rejected rules were relevant to the issue of appellant's negligence in backing into the engine under which appellee was working, and upon the issue of appellee's contributory negligence in going thereunder at the time he did, and under the circumstances that he did. The rejected rules required the employe to have a copy of the rules at hand, and required him to be conversant with every rule, and to do all in his power to carry them out. They were in the nature of a declaration on appellee's part that he understood the hazards and dangers of the business, and that the application should apply to any position to which he might thereafter be assigned. We know of no reason why an employe may not lawfully so declare and so agree. It may be that one or more of the rules offered is subject, as appellee insists, to the objection that it is in the nature of a contract to relieve appellant of the risks arising from its own negligence. But clearly all are not so, and the objections were urged to the rules as a whole. In such case, the practice is to overrule the objection. See *Jamison v. Dooley*, 98 Tex. 206, 82 S. W. 780.

Numerous other assignments of error are presented, but we find nothing requiring extended discussion. The testimony of the witness Browning to the effect that it was the duty of the plaintiff, before going under the engine, at the time of his injury, to warn the train crew of the fact, or to have put out lights to indicate that he was under the

engine, was subject to the objection urged that it was a conclusion for the jury's determination, and not that of the witness. See *Lispcomb v. H. & T. C. Ry. Co.*, 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804; *Grand Rapids & I. R. Co. v. Ellison*, 117 Ind. 234, 20 N. E. 135; *Allen v. Burlington, Cedar Rapids & Northern Ry. Co.*, 57 Iowa, 623, 11 N. W. 614.

In the charges given, and in the action of the court in refusing special instructions, we find no reversible error, but for the error of the court complained of in the third assignment, and above discussed, the judgment must be reversed, and the cause remanded.

On Rehearing.

It is urged that the evidence excluded by the court, and because of which the judgment was reversed, is immaterial, among other things not noticed in our original conclusions, in that it is undisputed in the evidence that "appellant had no rules or regulations in its yards at Pampa for the protection of engine watchers." It seems to be conceded, in the motion for rehearing, that the appellant railway company is one of the branches of the Santa Fe System, and the testimony of the witness Browning, part of which we quoted in our original opinion, at least tends to show that the book of rules identified by him, from which also we quoted, applies to Pampa, as well as to other stations of the system. In speaking of the rules he testified, in addition to what we before quoted: "This rule that I have referred to, the using of blue flags in the daytime and a blue light at night to protect a train under which an employe may be at work, is in force at Amarillo on the rip track; that is, where car men are working. This rule applies all along the line. All car inspectors, conductors, brakemen, or other employes who are working under or about any car or train in yards, upon switch or main track, or at any other place, must, for their own protection, place thereon a blue flag by day and a blue light by night as a warning to advise other employes that work is being done upon said car or train." It is true that this witness further testified that "I never saw any blue lights at Pampa," and that appellee testified, without contradiction, that "Nothing was done by Mr. Cramer, or the operator, or the station agent, or any one else, with reference to furnishing me flags, signals, lanterns, or anything else. They did not furnish me any signals such as flags, lanterns, or any other means of protecting the engine under which I was employed to work. The company did not, through any of its agents, give me any information whatever with reference to any rules by which I should do my work, or by which I should protect myself against being run into by any other engine or cars." But the failure to furnish appellee with flags,

lanterns, or other signals with which to protect himself, or to enforce rules requiring the use of such signals, was not made by appellee a ground of negligence in his petition. The ground of negligence in this respect appellee saw proper to allege was that appellant had failed to "adopt rules and regulations to prevent engines under which, or upon which, employes were engaged in work from being run into by other engines and cars," etc., without restriction as to station. We think it apparent that it is one thing to fail to "adopt" reasonable rules for the protection of employes, and quite another to be negligent in their nonenforcement, or in failing to furnish the signals required by the rules. We, therefore, adhere to the conclusion that the rejected evidence was relevant to issues as made by both pleading and testimony, and that the court should have admitted such rejected testimony.

The motion for rehearing is accordingly overruled.

PATCHING et al. v. HUTCHISON et al.
(Court of Civil Appeals of Texas. March 20, 1909. Rehearing Denied May 1, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 101*)—TAXATION—CONSTITUTIONAL LIMITATION.

Sp. Act March 5, 1907 (Sp. Laws, p. 176, c. 18), creating the Tullia independent school district is void because in conflict with Const. art. 7, § 8, in attempting to authorize the board of trustees to levy a tax for school purposes in excess of the rate of 20 cents on the \$100 valuation of property; and, the grant of power of taxation not being separable, the entire tax levied under it is void, and not merely the excess of the constitutional limitation.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 236; Dec. Dig. § 101.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—VALIDITY OF BONDS.

Where the act authorizing a school tax is void for failure to limit the amount of tax as required by the Constitution, valid bonds cannot be issued in anticipation of a levy of taxes under the act.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 225; Dec. Dig. § 97.*]

Appeal from District Court, Swisher County; L. S. Kinder, Judge.

Action by F. G. Patching and others against W. B. Hutchison and others. From a judgment for defendants, plaintiffs appeal. Reversed and rendered.

Reeder, Graham & Williams, for appellants. Turner & Boyce, A. B. Martin, and W. F. Hendrix, for appellees.

WILLIAMS, Sp. C. J. There is no dispute as to the material facts in this case. The record shows that the Tullia independent school district was created by special act of the Thirtieth Legislature approved March 5,

1907 (Sp. Laws 1907, p. 176, c. 18). The district thus created was 9 miles square, and embraced within its boundaries a territory of 81 square miles, containing 51,840 acres of land. There was included within this territory the town of Tullia, having a population of 1,200, living on $2\frac{1}{4}$ sections, or 1,440 acres of land. This town had never been incorporated for municipal purposes, either as a town or as a village, under any of the provisions of the Constitution or of the statutes of Texas. The act of the Legislature constituting the Tullia independent school district created the same for school purposes only, and, having first made provision for an election to determine whether the citizens residing within the district would incorporate under the act in question, and having also provided for the election of a board of trustees, proceeded to vest in the district itself, and in its school board, all the powers, rights, and duties of independent school districts formed by towns and villages incorporating for school purposes only under (1) chapter 45, p. 45, of the General Laws of the state of Texas for the year 1897, and under (2) chapter 15, tit. 86, Rev. Civ. St. 1895, and (3) under an act of the Twenty-Seventh Legislature approved April 18, 1901 (Laws 1901, p. 273, c. 111), amending an act approved February 21, 1900 (Gen. Laws 1900, p. 18, c. 7), entitled "An act to provide a uniform method of selecting school trustees in independent school districts," etc. The citizens of the district voted to incorporate, and afterward elected the required number of school trustees. On May 1, 1907, this board of trustees ordered an election to be held June 1, 1907, to determine if the bonds of the district to the amount of \$15,000 should be issued, and if there should be levied and collected an annual "tax sufficient to pay the current interest on said bonds and to provide a sinking fund sufficient to pay the principal at maturity." The election was held, and, having resulted in favor of the issuance of the bonds of the levy of the tax, the vote was canvassed, and the result was so declared. June 3, 1907, the board of trustees ordered the issuance of the bonds for the full amount of \$15,000, and, at the same time levied a tax of 25 cents on each \$100 of taxable property within the district to pay the interest and to provide a sinking fund on the issue. Afterward another election was ordered to determine if the board of trustees should have the power annually to assess, levy, and collect a tax for the support and maintenance of the public free schools of the district "at the rate of not exceeding one-half of one per cent. ad valorem." At this election, this additional tax was voted, and, afterward, on the 16th day of September, 1907, the board of trustees ordered and levied an additional ad valorem tax of 50 cents on each \$100, for the support

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and maintenance of the public free schools of the district. Eight thousand dollars in par value out of the authorized bond issue of \$15,000 was sold before the filing of this suit, and before and at the time suit was brought, the officers of the said district were proceeding to sell the remainder of said bonds, and to collect a tax of 75 cents in the aggregate on each \$100 valuation, pursuant to the elections and orders already mentioned. Suit was instituted January 15, 1908, by F. C. Patching and others, appellants in this court, tax-paying citizens of the Tulla independent school district, against W. B. Hutchison and others as trustees and officers of the same. By their first amended original petition, filed February 14, 1908, appellants, who were plaintiffs in the trial court, having alleged the act of the Legislature, and the orders, elections, and other proceedings already set out, and having further alleged that the appellees, who were defendants below, were carrying out, and intended to, and if not restrained would, carry out the orders for the issuance and sale of the said bonds, and for the assessment, levy, and collection of school district taxes aggregating 75 cents on each \$100 valuation, attacked the said act of the Legislature constituting said independent school district as unconstitutional, and the proceedings had thereunder as illegal, unauthorized, and void, complaining especially that the rate of taxation attempted to be authorized was in excess of the rate permitted by the Constitution, and praying that the said act of the Legislature and all orders, elections, and other proceedings had under the same be adjudged to be unconstitutional and void, and that the orders levying the taxes, and directing the issuance and sale of the bonds be canceled and annulled, and that the Tulla independent school district, and its board of trustees, be enjoined from making further tax levies under said act, and from selling the bonds not already disposed of, and from collecting, or attempting to collect, the taxes, or any part of the taxes, already levied. The cause was tried February 14, 1908, and judgment was rendered for the appellees, defendants in the lower court. An appeal was prosecuted from this judgment, and the cause is now presented to this court.

The pleadings and the evidence bring this case within the rule laid down by the Supreme Court in *Snyder v. Baird* (Tex.) 111 S. W. 723. Following the opinion in the case cited, we hold that the act of the Legislature here in question is unconstitutional in so far as it attempts to authorize the Tulla independent school district and its board of trustees to levy a tax for public free school purposes in excess of the rate of 20 cents on the \$100 valuation, and that the tax levies complained of are excessive under the Constitution, and are therefore illegal and void. The grant attempted to be made to the school district, and to its board of trustees, of the power to levy

and collect an annual ad valorem tax in excess of 20 cents is not capable of separation into two grants of power, the one within, and the other in excess of, the limit fixed by the Constitution. There is but a single grant, and that is of the entire power attempted to be conferred, and this is void, not merely as to the excess, but as to the entire grant. To hold otherwise would be, as it seems to us, nothing short of judicial legislation. The Legislature did not authorize a tax of 20 cents, and for the court to do so would be for it to substitute for the provision made by the Legislature another and different provision framed by three judges, having no constitutional authority to enact laws. There being no valid authority to levy and collect any district school tax whatever, it follows that, under the mandate of the Constitution requiring an antecedent provision for a tax levy sufficient to cover the interest and sinking fund, there could be no valid issue of bonds.

It is accordingly ordered that the judgment of the trial court denying the injunction prayed for by the appellants be reversed, and that judgment be now and here rendered perpetually enjoining the appellees from the collection of the taxes complained of, and from making future levies of taxes under said act of the Legislature, and from selling the unsold bonds of the said school district.

DALLAS CONSOL. ELECTRIC ST. RY. CO. v. STATE et al.

(Court of Civil Appeals of Texas. April 24, 1909. Rehearing Denied May 8, 1909.)

1. STATUTES (§ 161*)—STREET RAILROADS (§ 69*)—OCCUPATION TAX—REPEAL OF STATUTE.

Sayles' Ann. Civ. St. 1897, art. 5049, subd. 54, provides for the levy of an annual occupation tax on street railway companies on a track mileage basis. Acts 30th Leg. (Gen. Laws 1907, c. 18) pp. 479-489, levies an annual occupation tax upon street car companies in cities over 10,000 population, on a basis of gross receipts, and provides that, except as herein stated, all taxes levied by this act shall be in addition to all other taxes now levied by law. The Thirtieth Legislature voted down an amendment to this act, expressly repealing article 5049, subd. 54. *Held*, that the latter act did not repeal the former.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 16, 17; Dec. Dig. § 161; * Street Railroads, Dec. Dig. § 69.*]

2. LICENSES (§ 7*)—OCCUPATION TAX—STREET RAILROADS—DOUBLE TAXATION.

Held, also, that the exaction of both taxes was not double taxation, since it was the intention to equalize the burden of taxation, on the theory that the franchises of companies in populous cities were more valuable than in smaller ones.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-19; Dec. Dig. § 7.*]

Appeal from Dallas County Court; W. M. Holland, Judge.

Suit by the State of Texas and Dallas

Baker, Bott, Parker & Garwood and Finley, Knight & Harris, for appellant. R. V. Davidson, Atty. Gen., W. E. Hawkins, Asst. Atty. Gen., Dwight L. Tewelling, Co. Atty., and James T. Goggans, for the State.

RAINEY, C. J. The statement of the case is taken from the brief of appellant, and is as follows: "The suit was instituted on September 25, 1908, by the state of Texas and Dallas county, through the county attorney of Dallas county. The suit is to recover, by the state and county, of said street railway company occupation taxes for two years, one beginning September, 1907, and the other September, 1908; it being alleged that said occupation taxes, under the law, are due and payable in advance. Appellant, during the period for which the occupation tax is sought to be recovered, owned and operated, in its corporate capacity as a street railway company, 38.93 miles of track in the city and county of Dallas. It is claimed that under the laws of this state said company was liable to the state for an annual occupation tax amounting to the sum of \$2 per mile for each and every mile of track owned by said defendant in said county and state, which tax aggregates the sum of \$77.86 per annum, or a total of \$155.72 for the two years; that for the same period of time the appellant was liable, under the laws of this state, to Dallas county, as an annual occupation tax, for the sum of \$1 per mile for each and every mile of track owned by it in the county of Dallas, aggregating \$38.93 per annum, or a total of \$77.86 for the two years; that said sum became due and owing annually in advance prior to the 20th day of September of each year. It was also alleged that said tax has been properly levied by the commissioners' court of Dallas county. It was further alleged that said tax had not been paid for the period mentioned, and that appellant had pursued the occupation of a street car company during said period, and is still pursuing such occupation, and is subject to the alleged occupation tax. Appellant answered by general denial, and specially pleaded that it was not liable for the taxes sought to be recovered, for that it was liable for, and had paid to the state of Texas, an occupation tax covering the same period of time under the occupation tax law passed by the Thirtieth Legislature, levying an occupation tax on the basis of gross receipts, which act was approved by the Governor on May 16, 1907, and is found on pages 479-489, Acts 30th Leg. (Gen. Laws 1907, c. 18), that to hold it liable for the occupation tax sued for and claimed under the old law, Act 1897, Sayles' Ann. Civ. St. 1897, art. 5049, subd. 54, for the same

no longer in force as to appellant; that there is no law in force, and has not been during the period for which plaintiffs sue, for occupation taxes, authorizing and empowering the County of Dallas to levy and collect any occupation tax whatever on this appellant. The case was tried upon an agreed statement of facts, and resulted in a judgment in favor of the state and county against appellant, on November 20, 1908, for the amount of taxes claimed. From the judgment rendered the street railway company has perfected its appeal. The sole question involved is whether article 5049, subd. 54, Acts 1897, Sayles' Ann. Civ. St., which levies an annual occupation tax by street railway companies in this state of \$2 per mile on each and every mile of track owned by such company or corporation, has been superseded and repealed by implication by the occupation tax law enacted by the Thirtieth Legislature, hereinbefore referred to, which levies an annual occupation tax upon street car companies upon the basis of gross receipts, or is still in force notwithstanding the passage of said occupation tax law by the Thirtieth Legislature. In other words, whether appellant, street railway company, is legally required to pay occupation tax under the old law (Sayles' Ann. Civ. St. 1897, art. 5049, subd. 54), and also under the gross receipts occupation tax law of 1907."

The agreed facts are:

"(1) The Dallas Consolidated Electric Street Railway Company is a corporation created by and under the laws of the state of Texas, owning and operating a line, or lines, of street railway in the city and county of Dallas, amounting in the aggregate to 38.93 miles of street railway track, and so owned and operated said street railway in said city and county prior to the 20th day of September, A. D. 1907, and continuously since said date. That the city of Dallas has a population of more than 20,000, as shown by the last United States census.

"(2) That said Dallas Consolidated Electric Street Railway Company has not paid occupation tax to the state of Texas and Dallas county during said period mentioned in the preceding paragraph hereof, under subdivision 54, art. 5049, Sayles' Ann. Civ. St. 1897, which imposes an occupation tax of \$2 per mile on each and every mile of track owned by street railway companies, and article 5060, which authorized counties to levy and collect one-half of the amount levied by the state as occupation tax.

"(3) That heretofore, prior to September 20, 1907, and annually thereafter, the commissioners' court of Dallas county, Tex., sea-

tion tax, payable annually in advance, amounting to one-half of the amount levied as an occupation tax on such occupations for the state of Texas, making the amount so levied by Dallas county, upon and against the defendant herein, provided it had any authority to levy such tax against said defendant, as an annual occupation tax payable annually in advance, the sum of \$1 per mile for each and every mile of track owned by it in Dallas county. The amount of tax which would be due the county, if any, under said old law, aggregating \$77.86 for two years, and double that amount, viz., \$155.72, would be due the state for occupation tax, if anything under the said old law. The intent and purpose of this paragraph is to agree that the county of Dallas has regularly levied an occupation tax against the defendant for the time hereinbefore shown under the occupation tax law (articles 5049 and 5050), and particularly subsection 54 of said article 5049, and plaintiffs have demanded, and are attempting to collect, the state and county taxes under said occupation tax law.

"(4) It is further agreed that the defendant has paid to the state of Texas an occupation tax based upon gross receipts for the period hereinabove set forth, under chapter 18, General Laws of the State of Texas, Acts of the Thirtieth Legislature approved May 18, 1907, found in Sess. Acts, pp. 479-489, inclusive."

The contention of appellant is that "the act of 1897 and that of 1907 here in question are eo nomine occupation tax laws, and both levy an occupation tax upon street car companies. While the two laws levy the tax upon a different basis—one upon mileage of track, and the other upon gross receipts—they are essentially and confessedly the same character of tax, viz., occupation tax; and, in the absence of express provision to the contrary, the latter act must be construed as intended to supersede and take the place of the older act, if not in toto, at least to the extent that the two acts cover the same subjects of taxation." Mr. Sutherland on Statutory Construction (2d Ed.) p. 465, says: "Repeals by implication are not favored. This means that it is the duty of the court to so construe the acts, if possible, that both shall be operative." On page 467 the same author says: "Considerations of convenience, justice, and reasonableness, when they can be invoked against the implication of repeal, are always very patent. There must be such a manifest and total repugnance that the two enactments cannot stand. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to, each other, or unless in the later

as a repeal of the former by implication." The statute of 1897 and that of 1907 are not so clearly inconsistent with, and repugnant to, each other as that both cannot stand, and there is nothing in the act of 1907 that indicates to our minds that the Legislature intended to repeal the act of 1897. On the other hand, in section 22 of the act of 1907 (Gen. Laws, p. 487) this language is used: "Except as herein stated all taxes levied by this act shall be in addition to all other taxes now levied by law"—which indicates that said act was not intended to relieve against any tax that had theretofore been imposed. The term "all other taxes" includes occupation tax, as well as all other kinds designated by the laws of the state. The state having levied theretofore an occupation tax by the act of 1897, said tax was not excluded by the said act of 1907. This view we think is strengthened by reference to House Journals of Thirtieth Legislature, where it will be seen the House voted down a proposed amendment repealing the act of 1897, from which it would seem, had the House not intended to make this an additional tax, a different action would have been taken on said repealing clause.

It is argued that to hold the two acts as in force as to appellant would be to levy a double or duplicate occupation tax on street car companies in cities containing a population of 10,000 or over, which is contrary to the principles governing the laws of taxation. We do not think this construction should be applied to the law under discussion. We think the better construction is that the Legislature intended the two acts to be construed together, considering that the operation of a street railway in a larger and more populous city was more valuable than in a smaller one, and the levying of a tax on the gross receipts would be nearer just and equitable, and come nearer equalizing the burdens of taxation. This is a reasonable view of the matter, we think, and therefore conclude that the act of 1907 levying an occupation tax is but an additional tax to the one levied by the said act of 1897, and the last-named act is not repealed by the act of 1907.

The judgment is affirmed.

FRANCIS v. HOLMES.

(Court of Civil Appeals of Texas. March 27, 1909.)

1. VENDOR AND PURCHASER (§ 298*)—REMEDIES OF VENDOR—RECOVERY OF LAND—"FORCIBLE DETAINER"—"LET."

Sayles' Ann. Civ. St. 1897, art. 2519, makes it forcible detainer to willfully hold over with-

as the term "let" contemplates the existence of the relation of landlord and tenant, it being defined as "to give leave to; to permit; to grant the use of realty for a compensation correlative to hire; to lease or hire out for compensation."

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 834; Dec. Dig. § 298.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2872, 2873; vol. 5, pp. 4094, 4095.]

2. VENDOR AND PURCHASER (§ 298*)—REMEDIES OF VENDOR—RECOVERY OF PREMISES—FORCIBLE DETAINER.

A person who entered into possession of land under a contract to purchase was not a tenant at will or at sufferance of the vendor, so as to authorize the vendor to maintain forcible detainer against him under Sayles' Ann. Civ. St. 1897, art. 2519, providing that, where such a tenant refuses to give up possession after the termination of the landlord's will and after demand in writing, he shall be guilty of forcible detainer.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 834; Dec. Dig. § 298.*]

3. LANDLORD AND TENANT (§ 1*)—WHO ARE "TENANTS."

A "tenant" is one who occupies the lands or premises of another in subordination to the other's title and with his assent, express or implied; but, in order to create the relation, the two elements must coöcur.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6904, 6905.]

4. FORCIBLE ENTRY AND DETAINER (§ 32*)—QUESTIONS DETERMINABLE—TITLE.

Under the express provisions of Sayles' Ann. Civ. St. 1897, art. 2529, the question of title cannot be adjudicated in an action of forcible detainer.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Dec. Dig. § 32.*]

Appeal from District Court, Wheeler County; H. G. Hendricks, Judge.

Action of forcible detainer by A. N. Holmes against B. L. Francis. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

Lackey & Cocke, for appellant. J. B. Reynolds, for appellee.

DUNKLIN, J. On September 9, 1907, A. N. Holmes entered into a parol agreement with B. L. Francis to sell to him the north-west quarter of section 42 in block 17, Houston & Great Northern Railroad Company survey in Wheeler county for the sum of \$3,450, payable as follows: \$200 cash; \$1,800 on November 9, 1907; \$600 November 1, 1908; \$600 November 1, 1909; and \$250 November 1, 1910. On the same date Holmes executed a deed to the land in favor of Francis, expressing the foregoing consideration, and Francis executed promissory notes in favor of Holmes for all the deferred payments except the \$1,800 payment, all of which papers, together

\$1,800 on November 9, 1907, then the \$200 deposited with the papers should be forfeited to Holmes and the contract of purchase terminated. Francis was then placed in possession of the land under and by virtue of the foregoing agreements and has held same ever since. At the time he took possession, there were matured crops on the land grown by Holmes, and these crops were embraced in the contract of sale as a part of the realty. On October 28, 1907, Holmes, at the request of Francis, agreed to extend time of payment of the \$1,800 installment, and Francis agreed to pay interest thereon; but the period of extension and the rate of interest were not agreed on. December 15, 1907, there was a definite agreement of extension of time for payment of the \$1,800 to January 1, 1908. During the month of December Francis paid to Holmes \$350, which was accepted by the latter as a part payment of the \$1,800 before mentioned. This money was realized by Francis from the sale of cotton gathered by him from the land and grown by Holmes. On January 1, 1908, Francis, being unable to pay the balance of the \$1,800, asked for further extension of time, and Holmes agreed to give him an answer on the morning of the following day. On the evening of January 2d Francis offered to give a check on a bank for this balance, but Holmes refused to accept it and declared the contract of purchase terminated. On February 6, 1908, Holmes instituted a suit in the justice court for forcible detainer against Francis to recover possession of the land, alleging in his complaint that possession of the property had been given to Francis under a contract by which defendant had the option to purchase it on or by January 1, 1908, and that he had failed to exercise the option according to its terms, and thereby defendant's right to purchase was forfeited and lost, and his right to possession terminated. Plaintiff recovered in the justice court, and from the judgment there rendered Francis appealed to the district court, where he was again cast in the suit, and now appeals from the judgment last rendered to this court.

Upon the trial in the district court Francis tendered to Holmes in open court \$1,475 as the balance due of the \$1,800 payment, with interest thereon from January 2, 1908, also the notes previously executed by him, and in his pleadings claimed title to the land. Sayles' Ann. Civ. St. 1897, art. 2519, reads as follows: "If any person (1) shall make an entry into any lands, tenements or other real property, except in cases where entry is given by law, or (2) shall make any

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such entry by force, or (3) if any person shall willfully and without force hold over any lands, tenements or other real property after the termination of the time for which such lands, tenements or other real property were let to him, or to the person under whom he claims, after demand made in writing for the possession thereof by the person or persons entitled to such possession, such person shall be adjudged guilty of forcible entry and detainer, or of forcible detainer, as the case may be." Article 2521: "A person shall be adjudged guilty of forcible detainer also in the following cases: (1) Where a tenant at will or by sufferance refuses, after demand made in writing as aforesaid, to give possession to the landlord after the determination of his will. (2) Where the tenant of a person who has made a forcible entry refuses to give possession, after demand as aforesaid, to the person upon whose possession the forcible entry was made. (3) Where a person who has made a forcible entry upon the possession of one who acquired it by forcible entry refuses to give possession on demand, as aforesaid, to him upon whose possession the first forcible entry was made. (4) Where a person who has made a forcible entry upon the possession of a tenant for a term, refuses to deliver possession to the landlord, upon demand as aforesaid, after the term expires; and if the term expire whilst a writ of forcible entry sued out by the tenant is pending, the landlord may, at his own cost and for his own benefit, prosecute it in the name of the tenant. It is not material whether the tenant shall have received possession from his landlord or have become his tenant after obtaining possession."

If the facts proven and above noted make this a case of forcible detainer, under the statutes it must be by virtue of subdivision 3 of article 2519, or by virtue of some provision of article 2521, above quoted. All those provisions contemplate the existence of the relation of landlord and tenant as a basis for the action of forcible detainer. The facts above noted plainly show that Holmes gave to Francis possession of the land under and by virtue of the contract of the latter to purchase it, and we think the land was never let to Francis within the meaning of the term "let," as used in subdivision 3 of article 2519, and that he was never a tenant by will or sufferance within the meaning of article 2521. The term "let" is thus defined in Anderson's Law Dictionary: "To give leave to; to permit. To grant the use of realty for a compensation; correlative to hire." And thus in Rapalje's Law Dictionary: "Hindrance, obstruction. To lease, or hire out a thing for a compensation." The following from 1 Wood's Landlord & Tenant, 1, seems in accord with the

weight of the authorities: "A tenant is one who occupies the lands or premises of another, in subordination to that other's title, and with his assent, express or implied. But, in order to create the relations, the two elements must concur. The fact that one is in the possession of the lands of another does not of itself establish a tenancy, because, if he is in possession under a claim of title in himself, or under the title of another, or even in recognition of the owner's title, but without his assent, he is a mere trespasser, and cannot be compelled to yield rent for his occupancy, nor is he estopped from attacking the owner's title. In such a case, all the elements requisite to create the relation of landlord on the one hand, or of tenant on the other, are lacking, to wit, assent upon the one hand, and subordination to title upon the other. If the owner gives his assent to the occupancy of one who has entered upon his lands adversely, a tenancy is not thereby created. In order to have that effect, the person in possession must accept such permission, and consent to hold under him, and in subordination to his title." See, also, *Cunningham v. Ammerman*, 3 Wilson, Civ. Cas. Ct. App. § 352; *Brown v. Randolph*, 26 Tex. Civ. App. 66, 62 S. W. 981; 24 Cyc. 884-887; 1 *Taylor's Landlord & Tenant*, §§ 23, 25.

The issue made both by the pleadings of the parties and by the evidence, being necessarily one of title, could not be determined in the action for forcible detainer. *Sayles' Ann. Civ. St. 1897*, art. 2529; 19 Cyc. 1124-1127.

The judgment of the trial court is therefore reversed, and the cause dismissed.

GABBART v. JOHNSON.

(Court of Civil Appeals of Texas. April 10, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 37*)—CHANGE OF BOUNDARIES—CONSTRUCTION OF STATUTE.

Rev. St. 1895, art. 3938, as amended by Act June 8, 1899 (Gen. Laws 1899, p. 321, c. 183), provides that the county commissioners' courts of organized counties which are not subdivided shall subdivide their counties into convenient school districts, except counties under the community system, but that, when districts are once established, they shall not be changed, except upon petition of patrons desiring to be transferred from one district to another, when a change may be made as requested, upon a certain showing. The act also empowers the commissioners' court to correct errors in district lines, and complete them when defective. *Held*, that the act applies to a district as formed after the addition of territory under the statute, and hence, after such a change of boundaries, the county commissioners' court had no power to revoke its former order making the change, without observing the prescribed procedure, in the absence of any error or defect in the lines as formerly fixed.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 37.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 37.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 24*)—PROCEEDINGS TO CHANGE BOUNDARIES—IRREGULARITIES.

Where the county commissioners' court acquired and exercised jurisdiction of proceedings to change the boundaries of a school district under the act, the fact that one person living without the district, who did not petition for a change, was transferred to the district could not be availed of to invalidate the proceedings, in a collateral proceeding to contest the election of a trustee for the district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 48; Dec. Dig. § 24.*]

Appeal from District Court, Comanche County; L. S. Kinder, Judge.

Action between Charley Gabbart and J. J. Johnson. From the judgment Gabbart appeals. Affirmed.

McMillan & Reid, for appellant. Calloway & Calloway, for appellee.

CONNER, C. J. This is a contest over the office of trustee for Union Grove school district No. 63 of Comanche county. From the facts found by the trial court it appears that Comanche county was regularly subdivided into school districts, in accordance with section 40, Gen. Laws 1893, p. 194, c. 122 (Rev. St. 1895, art. 3938), after which, on, to wit, November 18, 1904, the commissioners' court, as authorized by Acts 1899, p. 321, c. 183 (article 3938, Sayles' Ann. Civ. St. Supp. 1904), upon the petition of W. S. Stephens and seven others, who lived in adjoining districts, changed the line of district No. 63 so as to include the petitioners therein. At the February term, 1905, the commissioners' court, acting upon its own motion, passed an order rescinding the former order of November 18, 1904, restoring the lines of district No. 63 to its original boundaries. During the years 1906 and 1907 the order of the February term, 1905, seems not to have been resisted; all persons living within the territory added to district No. 63 by the order of November 18, 1904, taking no part in the affairs of district No. 63, but voted, etc., within the districts of which they originally constituted a part. At the regular trustee election for school district No. 63 in April, 1908, however, the voters residing in the added territory came into district No. 63 and voted at said election. At this election appellee received a majority of all the votes cast, but appellant received the majority of the votes cast by persons living within the original boundaries of district No. 63. The vital question presented to us for determination, therefore, is whether the

Rev. St. 1895, art. 3938, as amended by act approved June 6, 1899 (Gen. Laws 1899, p. 321, c. 183), provides, so far as necessary to here set out, that: "It shall be the duty of the county commissioners' court of all organized counties, not already subdivided, to subdivide their respective counties into convenient school districts by the first day of June, 1899, or as soon thereafter as practicable, and counties hereafter organized shall be subdivided before the beginning of the next ensuing school year (provided, that nothing in this article shall be construed to affect counties that have been placed under the community system). Said courts shall designate said school districts by numbers: Provided, that when districts are once established they shall not be changed except upon the following conditions, to wit: When any patron or patrons of any school district desire to be transferred to any adjoining district they shall make application to the commissioners' court of their county for a change in the district line, and if it shall appear to the said court upon full and complete evidence that the desired change in the district line will divide the distance more equally between the two schools affected by the change, and that the patrons so petitioning live nearer by the most practical road to the school to which they desire to be attached than to the one from which they seek to be released; or if it shall appear to the said court that there is an uncontrollable and dangerous obstacle between the houses of said petitioning patrons and the school to which they have heretofore been attached, and that the school to which they desire to be attached is more accessible than the former, the said commissioners' court may change the district line as requested, but said change shall be by unanimous consent of all the commissioners elected. The commissioners' court shall also have power to correct all errors in school district lines and to complete said lines when they are defective." The evident purpose of the Legislature was to prevent disturbance of existing conditions when once lawfully brought about, and in this respect it seems difficult to differentiate between a district as originally formed and as formed after the addition of territory under the statute. The policy of nondisturbance—of preserving and maintaining the statu quo—would seem to apply as well to the district after it has been lawfully enlarged as before. If this be true, we think we must approve the trial court's conclusion that the order of the commissioners' court at its February term, 1905, was void because in direct

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Unless there were some error or defect in the lines of the enlarged district, the commissioners' court was forbidden to change the lines, save upon "petition" as provided in the act. The purpose of conferring the power to change the original lines was evidently to enable the commissioners' court to so adjust the lines as to subserve the interest and convenience of those situated on or near the lines of the original districts, and when, upon petition of persons to be affected, the commissioners' court so adjust the lines, we think the district is to be thereafter considered as if thus originally established. These conclusions lead to an affirmation of the judgment, inasmuch as we think the acquiescence on the part of the people in the added territory in the order of February, 1905, for the years 1906 and 1907 cannot have the effect to validate an order otherwise void. Nor do we regard as of any consequence appellant's contention that in the added territory there lived one person who did not join in the petition to be added to district No. 63, particularly in view of the nature of this proceeding. The power of the commissioners' court to pass the order of November 18, 1904, was certainly invoked by the petition filed in that court. Jurisdiction having been thus invoked and exercised, the irregularity, if it be an irregularity, of including a person not petitioning therefor is not available in a collateral proceeding, as this must be held to be. We conclude that the judgment must be affirmed upon the trial court's conclusions of fact and of law, which we adopt.

J. J. B. McCULLAR LUMBER CO. v. HIGGINBOTHAM BROS. & CO.

(Court of Civil Appeals of Texas. March 27, 1909. Rehearing Denied April 24, 1909.)

1. VENUE (§ 7*)—SALES—BREACH OF CONTRACT.

A confirmation of an order for the sale of shingles recited the order, which, after being dated at Ft. Worth, Tex., followed with the words, "Ship to Comanche, Tex.," certain described shingles. Held, that such order and confirmation were insufficient to prove a contract in writing for the delivery of the shingles to the purchaser in Comanche county so as to entitle the purchaser to sue for the breach in such county.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 7.*]

2. VENUE (§ 21*)—PLEA OF PRIVILEGE.

Where the evidence showed that defendant's residence was in a county other than that in which he was sued, and the evidence was insufficient to prove a case of fraud by the de-

was committed, defendant's plea of privilege against suit in such county should be sustained. [Ed. Note.—For other cases, see Venue, Dec. Dig. § 21.*]

Appeal from Comanche County Court; Edwin Dabney, Judge.

Action by Higginbotham Bros. & Co. against the J. J. B. McCullar Lumber Company to recover loss of profits on two cars of shingles alleged to have been sold by defendant to plaintiff. From a judgment for plaintiff. defendant appeals. Reversed and remanded.

J. M. Reiger and Smith & Latimore, for appellant. Goodson & Goodson, for appellee.

DUNKLIN, J. Higginbotham Bros. & Co. recovered a judgment in the county court of Comanche county for \$125 against J. J. B. McCullar, doing business in the trading name of J. J. B. McCullar Lumber Company, from which judgment the defendant has appealed.

The suit was to recover loss of profits on two cars of shingles which plaintiff alleged defendant had contracted in writing to sell and deliver to plaintiff in Comanche, Comanche county. Plaintiff further alleged that defendant executed the contract with the fraudulent purpose not to comply with the same if the market value of the shingles should advance in price before time of delivery thereof should arrive, and that the negotiations between plaintiff and defendant resulting in the order for the shingles were had in Comanche county. By plea in abatement defendant alleged: That he was an inhabitant of Texas, and when the suit was instituted had his domicile in Denton county, but had his business headquarters in Ft. Worth, Tarrant county; that he never contracted in writing to deliver the shingles in Comanche county; and that in agreeing to sell the shingles to plaintiff he acted in good faith. The evidence showed that defendant's agent went to plaintiff's office in Comanche and proposed to sell the shingles in controversy for \$3.75 per 1,000, which proposition was accepted by plaintiff's agent. Defendant's agent then mailed to defendant in Ft. Worth an order to ship the shingles to plaintiff at Comanche. The defendant then wrote plaintiff confirming the order, as follows:

"Notice. The copy of this order is inclosed for comparison. If not correct in every particular notify immediately. We guaranty grades to be up to the standard of the Yellow Pine Manufacturers' Association, and this order is taken to be shipped subject to their grades and classifications. Our terms are 60 days, or 2 per cent. discount after deducting freight, if paid within 10 days from date of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

invoice, and this order is accepted on these terms:

Order No. 248.			
Ft. Worth, Tex., March 16, 1907.			
Ship to Higginbotham Bros. & Co.			
Comanche, Texas.			
Rate	Prices f. o. b.		
Via			
Feet.	Pieces.	Description.	Price.
One Car No. 1 Clear Redwood Shingles \$3.75			
J. L. McC's No. 258.			

"We have entered your order as above. If you have any further communication in regard to same, kindly address us direct, referring to our order No. ———.

"Yours truly,

"J. J. B. McCullar Lumber Co."

A duplicate of the above confirmation was also mailed for the other car of shingles ordered. The foregoing order and confirmation thereof was the only evidence offered to prove a contract in writing on the part of defendant to deliver the shingles to plaintiff in Comanche county, and we think it fails to prove such a contract. *Orthwein's Sons v. W. M. & E. Co.*, 32 Tex. Civ. App. 600, 75 S. W. 364; *Russell v. Heitman* (Tex. Civ. App.) 86 S. W. 75. The undisputed evidence also showed defendant's residence in Denton county, as alleged in his plea of privilege, and the facts proven did not constitute a case of fraud committed in Comanche county such as would give the county court of that county jurisdiction over the defendant under *Sayles' Ann. Civ. St. 1897*, art. 1194, subd. 7. We are therefore of opinion that defendant's plea of privilege should have been sustained, and the failure of the trial court to so hold was error which will require a reversal of the judgment.

Other questions presented in appellant's brief will not likely arise on another trial, and a discussion of them is unnecessary.

For the reasons above noted, the judgment is reversed, and the cause remanded, with instructions to the trial court to enter an order changing the venue of the case to the county court of Denton county, and to make all other orders necessary to effectuate such change of venue, as prescribed by *Acts 30th Leg. c. 133 (Gen. Laws 1907, p. 248)*.

Reversed and remanded.

WALL et ux. v. LUBBOCK et al.†
(Court of Civil Appeals of Texas. Nov. 25, 1908. On Rehearing, April 14, 1909.)

1. EVIDENCE (§ 285*)—HEARSAY—PEDIGREE.

Matters of pedigree such as family history may be proved by hearsay testimony, and other facts, not entirely matters of pedigree, may be so intimately connected with pedigree as to permit their proof by the same character of testimony.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1143; Dec. Dig. § 285.*]

2. EVIDENCE (§ 288*)—HEARSAY—PEDIGREE.

Where a witness was the husband of the granddaughter of a person, he was a member of the family and could testify as to the family history, including the death and time of death of that person, though he did not state that he obtained his information from deceased members of the family.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 288.*]

3. EVIDENCE (§ 288*)—HEARSAY—REPUTATION AS TO PERSONS.

Where a witness testified that he first became acquainted with the family of S. about 60 years ago, and that the family consisted of Mrs. S., son, and daughter, he could testify that it was generally understood at the time in that community that S. was dead and that Mrs. S. was recognized as a widow.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 288.*]

4. PRINCIPAL AND AGENT (§ 43*)—REVOCATION OF AGENCY—DEATH OF PRINCIPAL.

Death of the principal revokes the agent's authority, and his subsequent deed is void, and conveys no title.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 67-71; Dec. Dig. § 43.*]

5. TRIAL (§ 199*)—PROVINCE OF JURY—INSTRUCTIONS—DETERMINATION OF QUESTIONS OF LAW.

In trespass to try title, where defendants claimed through a deed from an agent of the person who was the common source of title, and the question in dispute was whether the agent's principal had died prior to the execution of the deed, thus revoking his agency, a request to submit to the jury the question whether the agent had authority to convey the land when he executed the deed was properly refused, since it would have submitted a question of law as well as fact.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 199.*]

6. VENDOR AND PURCHASER (§ 239*)—INNOCENT PURCHASER—HOLDING UNDER VOID TITLE.

Where a link in the title of purchasers of land was a deed from an agent which was void because of the prior revocation of his authority by his principal's death, the purchaser could not claim protection as an innocent purchaser, since he was holding under a void title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 239.*]

7. PRINCIPAL AND AGENT (§ 119*)—HOLDER UNDER VOID DEED—PRESUMPTION OF AGENT'S POWER FROM LAPSE OF TIME.

Where a deed in chain of title to land was void because the authority of the agent of the owner, who executed it had been revoked by the owner's death, the agent's authority to convey could not be presumed from mere lapse of time.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 119.*]

8. ADVERSE POSSESSION (§ 71*)—COLOR OF TITLE.

Where one link in the chain of title of persons claiming land is void, they have no such color of title as would bar an action against them under the three-year statute of limitations.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 415-429; Dec. Dig. § 71.*]

9. ADVERSE POSSESSION (§ 100*)—SUFFICIENCY OF POSSESSION.

Rev. St. 1895, art. 3344, provides that when peaceable and adverse possession of land is taken under a written memorandum of title

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 19, 1909.

ten instruments. Held, that where one of the muniments of title under which persons claimed land was a will, the registration of which had been destroyed, and no steps to restore the record as allowed by statute had been taken, and the persons actually occupied for over 10 years only a part of the land which was separated from another part by an intervening tract which had been sold off, their possession did not constitute possession of the detached part which would bar an action for recovery thereof by 10-year limitation.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.*]

On Motion for Rehearing.

10. TRIAL (§ 261*)—REFUSAL OF REQUESTS—REQUEST EMBRACING SEVERAL PROPOSITIONS.

Where defendant's request to submit 17 different special issues embraced a single instrument with one caption signed at one place at the end by attorneys, so that the court could not detach a single paragraph, and, in view of the court's charge, it would not have been proper to charge the entire request, defendant could not complain of the court's refusal to charge the single paragraph.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 660; Dec. Dig. § 261.*]

11. PRINCIPAL AND AGENT (§ 195*)—ACTION—SPECIAL VERDICT—RIGHT TO JUDGMENT.

Where parties claimed land under a deed of an agent, who they contended had an interest in the land, so that his authority to convey was not revoked by the principal's death, and the existence of that interest, which was a question of fact, was not found by the jury, they were not entitled as matter of law to a judgment upon the facts found by the jury that the deed was executed by the agent after the death of the principal.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 195.*]

Appeal from District Court, Sabine County; James I. Perkins, Judge.

Trespass to try title by F. R. Lubbock and others against W. A. Wall and wife. Judgment for plaintiffs and defendants appeal. Affirmed.

Hamilton & Minton, John B. Warren, and John Hamman, for appellants. Goodrich & Synnott, for appellees.

KEY, J. This is an action of trespass to try title; F. R. Lubbock and others being plaintiffs and W. A. Wall and his wife being defendants in the court below. The land involved is a part of the John S. Chivaler headright survey of 1,280 acres, located in Sabine county. The answer filed by the defendants embraced a general denial and plea of not guilty, and limitation of three, five, and ten years. The land was patented to John S. Chivaler in 1845, and the plaintiffs proved the death of John S. Chivaler and that they were his heirs. The defendants claimed the land under a chain of title al-

ferred to was not produced, but evidence was submitted tending to prove its existence, loss, and contents, and the jury, in responding to special issues submitted to them, found that such deed was executed. The plaintiffs introduced testimony tending to show the death of John S. Chivaler prior to the execution of the deed referred to by W. B. Frazier as agent of Chivaler, and the jury found as a fact that John S. Chivaler was dead at the time Frazier executed that deed. The jury also found that the defendants, or those under whom they held, had peaceable and adverse possession of a portion of the John S. Chivaler survey lying south of the Houston Bayou in Sabine county, cultivating, using, or enjoying the same for ten consecutive years after the 30th day of March, 1870, and prior to the 24th day of May, 1882. They also found that in 1875 the deed records of Sabine county, including the records of the deeds and will under which the defendants claim, were destroyed by fire, and that said deeds and will were not again recorded in that county. Upon these findings of the jury the trial court rendered judgment for the plaintiffs for the land in controversy, and the defendants have appealed.

The first assignment of error challenges the correctness of the trial court's ruling in permitting the plaintiff F. R. Lubbock to testify concerning the death and the time thereof of J. S. Chivaler and the relationship of the plaintiffs to him; the contention being that the testimony referred to was hearsay, and not admissible. The witness testified that his wife was a daughter of G. H. Chivaler, and that G. H. Chivaler was the son of John S. Chivaler. He also testified that John S. Chivaler died in 1836, leaving two surviving children, only one of whom is now alive. On cross-examination the witness stated that at the time of testifying he was 56 years old, and that he did not know John S. Chivaler. Being asked how he knew that G. H. Chivaler was related to John S. Chivaler, he answered: "I know that John S. Chivaler was the father of G. H. Chivaler from family history." In response to another cross-interrogatory, he said: "When I answered direct interrogatory No. 10 by saying that Jane and G. H. Chivaler were the only heirs of John S. Chivaler, I spoke from what I had been told by the family. I was told by the family that they were the children of John S. Chivaler of Sabine county, Tex." It was also shown that the witness first formed the acquaintance of G. H. Chivaler in 1864 or 1865, and afterwards married his daughter Elizabeth, who is one of the plaintiffs in this suit. It is well settled that matters of pedi-

same character of testimony. *Byers v. Wallace*, 87 Tex. 511, 28 S. W. 1056, and 29 S. W. 760. The witness was a member of the Chival family, and we think it was competent for him to give testimony as to the family history, including the death and time of death of John S. Chival, although he did not state that he obtained his information from members of the family now deceased. *Elliott on Ev.* §§ 360, 366, 367, 371, 378; *Wharton on Ev.* § 201; *Jewell v. Jewell*, 1 How. 219, 11 L. Ed. 108; *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. Ed. 915.

John A. Morris, a witness for the plaintiffs, testified that he first became acquainted with the family of John S. Chival about 1842 or 1843; that the family consisted of Mrs. Chival and a son and daughter; that it was generally understood at that time in that community that John S. Chival was dead; and that Mrs. Chival was recognized as a widow. This testimony was objected to as hearsay, and the objection overruled. While the testimony complained of was hearsay, it seems to come within one of the exceptions to the rule which excludes hearsay testimony, and we therefore overrule the second assignment, which complains of the ruling admitting that testimony. 1 *Whar. Ev.* § 223; *Lessee of Scott v. Ratliffe*, 5 Pet. 81, 8 L. Ed. 56; *Primm v. Stewart*, 7 Tex. 182.

The third assignment complains because the court refused to give an instruction requested by the defendants in effect directing a verdict for them. That assignment is overruled, because, if John S. Chival died before Frazier executed the deed under which the defendants hold, his death revoked all of Frazier's authority as agent, and the deed from Frazier was void, and did not convey any title.

Under the fourth assignment of error, it is contended that the court should have submitted to the jury an instruction allowing them to determine whether or not Frazier had the power to convey the land at the time he executed the deed. That instruction was properly refused, because, if given, it would have required the jury to determine a question of law as well as fact. There being no proof that Frazier's authority as agent was coupled with an interest held by him in the land, if John S. Chival was dead when Frazier executed the deed, the law declares that his power and authority as agent had ceased, and that the deed executed by him was void and of no effect, and it was not the province of the jury to determine Frazier's power to convey the land. It was their province to determine the facts, and the

found that John S. Chival was dead when Frazier, purporting to act as his agent, attempted to convey the land, that conveyance was void; and, such being its character, and it being a link in the defendant's chain of title, the question of innocent purchaser is not in the case. One holding under a void title cannot claim protection as an innocent purchaser. *Daniel v. Mason*, 90 Tex. 240, 38 S. W. 161, 59 Am. St. Rep. 815; *Terry v. Cutler*, 14 Tex. Civ. App. 520, 39 S. W. 152.

Under the ninth assignment, it is contended that the court should have rendered judgment for the defendants, notwithstanding the finding of the jury that John S. Chival was dead when the deed purporting to convey the land from him was executed; the contention being that, after the lapse of so long a time, Frazier's power to execute the deed should be presumed. We cannot sanction that contention. The death of Chival *ipso facto* and absolutely revoked Frazier's power to sell the land, and such revocation cannot be affected by the lapse of time.

Under the eleventh and last assignment it is contended that the court should have rendered judgment for the defendants upon the finding of the jury as to adverse possession; the contention being that such finding, in connection with their chain of title, established the defendants' pleas of three and ten years' limitation. One link in the defendants' chain of title being void, they had no such color of title as would support the three-year statute of limitation. *Cox v. Bray*, 28 Tex. 263. In the case cited, it was held that a deed by an agent after the death of the principal is void, and not such color of title as will support the defense of limitation under the three-year statute. The proof also fails to meet the requirements of the ten-year statute. While it was shown that the defendants and those under whom they claim had for many years been in actual possession of a portion of the Chival headright, the portion so occupied was disconnected from the land in controversy by an intervening tract, which had been sold off, and one of the monuments of title relied on by the defendants was a will, the registration of which was destroyed by fire in 1875, and the steps authorized by statute had not been taken to restore that record. Not having shown actual possession of the land in controversy, and holding under a muniment of title other than a deed, which was not kept of record as required by statute, the possession relied on did not include the land in controversy. *Rev. St. arts.* 3344, 4597, 4600, 4352; *Craig v. Cartwright*, 65 Tex. 413; *O'Neal v. Pettus*, 79 Tex. 254, 14 S. W. 1065; *Salmon v. Huff*, 80 Tex. 133, 15 S. W. 257.

verted testimony that they were the heirs of John S. Chivaler, to whom the land was granted by the state, and having shown that John S. Chivaler was dead at the time Frazier attempted to convey the land as his agent, and defendants having failed to establish any of their defenses, the trial court properly rendered judgment for the plaintiffs; and, no error having been pointed out, that judgment is affirmed.

Affirmed.

On Rehearing.

This motion and the accompanying argument in behalf of the motion have received careful consideration, and we are still of the opinion that the case was correctly disposed of by this court.

As to the fourth assignment of error, complaining of the trial court's refusal to give a requested instruction set out in the assignment, in addition to what was said on our original opinion, we call attention to the fact that the instruction referred to was requested in such manner as to justify its refusal under the rules of practice announced in Burnham-Hanna-Munger Co. v. Logan, 88 Tex. 1, 29 S. W. 1067. The record shows that appellant presented to the court a written request to submit to the jury 17 special issues. The document is only one instrument, embracing 17 different paragraphs, has but one caption, is signed at but one place by attorneys, which is at the end of it, and following the names of the attorneys is the judge's indorsement refusing the entire instrument. In view of the charge given by the court, it would not have been proper to have given the entire charge requested, and no complaint is urged as to the refusal of any portion of it, except the sixteenth paragraph, and the instrument was not so framed as that the court could detach that paragraph and submit it to the jury. Such being the condition of the record, the case comes within the rule announced in the case cited, and appellants are not in condition to complain of the refusal to give the sixteenth paragraph of the requested instruction.

It may be true, as urged on behalf of appellants, that Frazier not only had a power of attorney from Chivaler, but that when he conveyed the land to Smith, acting as agent for Chivaler, he had an interest in the land, which fact, if true, would take the case out of the general rule that the death of a principal revokes the power of an agent to act for such principal. That, however, was a question of fact, and not a question of law, and the jury not having found the existence of such fact, appellants are not in a

If appellants, in a charge properly framed, had requested the court to submit that issue to the jury, and such request had been refused, a different question would be presented. But such charge was not requested, and in one which appellants contend covered this phase of the case was so framed and connected with others, as above stated, as that refusal does not disclose reversible error.

With these observations, the motion for rehearing is overruled.

GREENVILLE WATER CO. v. BECKHAM (Court of Civil Appeals of Texas. April 8, 1907 Rehearing Denied May 1, 1909.)

1. MUNICIPAL CORPORATIONS (§ 739*)—MAINTENANCE OF WATERWORKS—FAILURE TO FURNISH WATER—LIABILITY.

A city owning its own waterworks is not liable for failure to furnish sufficient water supply to extinguish a fire.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1557; Dec. Dig. 739.*]

2. WATERS AND WATER COURSES (§ 206*)—WATER COMPANIES—FAILURE TO SUPPLY WATER—LIABILITY.

A contract between a city incorporated under Rev. St. 1895, art. 418, authorizing the council to provide the city with water for the extinguishment of fires and the convenience of the inhabitants, etc., and a water company which stipulates that the company shall supply water to the city and the inhabitants thereof and fixes the sum the city shall pay as rent for fire hydrants, etc., is not a contract for the benefit of the inhabitants of the city, and the company owes no duty to the inhabitants to supply water for fire protection.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 301; Dec. Dig. 206.*]

3. WATERS AND WATER COURSES (§ 206*)—WATER COMPANIES—FAILURE TO SUPPLY WATER—LIABILITY.

A water company contracting with a city to furnish water to the city and its inhabitants and to supply water to extinguish fires, etc., does not undertake a public duty, so as to be liable on that ground for the destruction of the property of an inhabitant because of the failure to furnish water to extinguish a fire.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 301; Dec. Dig. 206.*]

4. WATERS AND WATER COURSES (§ 206*)—WATER COMPANIES—FAILURE TO SUPPLY WATER—LIABILITY.

An owner's house was supplied with water from the waterworks of a company having a franchise to supply water to the city and inhabitants for his closet, kitchen, etc., and in addition he had one hydrant in the yard. He had no arrangement with the company as to its supplying him with water further than that his place was connected with the waterworks, and he paid what the company charged for water. He had a private hose that he used for sprinkling his yard and the street, but it was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court June 2, 1909.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 301; Dec. Dig. § 206.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by Sam A. Beckham against the Greenville Water Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

Looney & Clark, for appellant. B. Q. Evans, for appellee.

BOOKHOUT, J. This suit was brought by appellee to recover from appellant the value of a dwelling house and its contents which were destroyed by fire in the city of Greenville on the 18th day of August, 1907. The petition alleged that in 1888 the city of Greenville by ordinance entered into a contract with King and others and their assigns, giving them the right to construct, maintain, and operate in said city a complete system of waterworks for an adequate supply of water to said city and its inhabitants for domestic and manufacturing purposes and for the extinguishment of fires; that the said works were constructed, and that appellant as the assignee of said King and others became the owner thereof; that, in consideration of the benefits from said franchise and the hydrant rentals paid by said city, appellant undertook to supply the hydrants in said city with sufficient water pressure at all times to throw water 70 feet high; that in 1901 the said city rented from appellant until 1918 60 fire hydrants at the sum of \$40 per annum for each hydrant, to be paid out of the revenue for general purposes raised by taxation in said city, to be appropriated and set aside by said city for such purposes; that appellee is a taxpayer, and that the property destroyed was constructed by him in reliance upon the performance by appellant of its contract with the city, and that, for that reason, he did not provide other means to protect his property from fire; that on the date above named his property caught on fire; that the Greenville fire department was immediately notified and came to the scene, but that there was no pressure in the water mains and hydrants of appellant, and that, on account of the failure of appellant to comply with its contract and its negligence in failing to maintain such pressure, his property was entirely destroyed by fire. It was further alleged that appellant in consideration of its franchise, benefits, and money received by it from said city "held itself out to the public as being able, capable, and willing to fur-

that he had rented from defendant, and for which he had paid, and was then paying, monthly rentals to defendant, and in consideration for such rentals defendant had agreed and contracted to furnish him water in said hydrants with sufficient pressure that, in case of fire, he might attach his hose to said hydrant and thereby extinguish said fire; that, when the fire started, he did attach his hose to said hydrant and undertook to put out the fire, and would have done so but for the failure of the appellant to have proper water pressure in its mains. He alleged his property to be of the value of \$8,500, and prayed for judgment for that amount. Appellant answered by general demurrer, special exceptions, general denial and special answer. The case was tried before a jury on the 1st day of April, 1908, and resulted in a verdict and judgment for appellee for the sum of \$1,733. Appellant's motion for new trial being overruled, it duly excepted, gave notice of, and perfected an appeal.

Appellant assigns as error the court's action in refusing a special charge instructing a verdict for defendant.

It is contended that a property owner cannot hold a water company liable for loss of his property by fire because of its breach of its contract with the municipality to supply water for fire purposes. The contract is embraced in the terms of an ordinance passed by the city council of the city and the acceptance thereof by the beneficiaries in said ordinance. The sections of the ordinance bearing upon this discussion are 1, 2, 8, 9, 11, 18, 20, and 21, in substance providing as follows: Section 1 stipulates that the purpose of making the contract is "to supply water to the city of Greenville and the inhabitants thereof." Section 2 names the source from which the water may be procured, and the means by which the water company may store it. Sections 8 and 9 relate to extensions, and are as follows:

"Extension of pipes shall be made from time to time upon a petition of property owners who may desire to take water for domestic or manufacturing purposes, provided an income from said property owners reach the sum of four hundred (\$400.00) dollars per annum per mile, or the proportional amount for the fractional part of a mile."

"Extension of pipes shall be made whenever ordered by the city council of Greenville, provided, that the city shall order the placing of fire plugs so that said fire plugs shall in no case be more than five hundred (500) feet apart."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ning with the legal adoption and approval of this ordinance and assent thereto by the Greenville Water Company, and ending, to-wit, the 2d day of August, 1918, the sixty hydrants now located upon the mains of said water company and in use for fire protection in said city and shall pay to the water company the sum of forty (\$40) dollars per hydrant per annum, for each and every one of said hydrants, and the same price for any additional hydrants which it may hereafter order installed or placed upon the mains of the said water company up to the said 2d day of August, 1909. All hydrants shall be kept in repair and working order by the said water company. Whenever the mayor or chief of the fire department notifies the superintendent of the water company that any fire hydrant is out of repair, then said water company shall cause said fire hydrant to be repaired at once and in case of a delay of five days in making the desired repairs, then in that case the hydrant rental for said hydrant shall cease for the entire length of time the hydrant was out of repair, by reason of failure to make the necessary repairs. The amount agreed to be paid under this ordinance for the year 1901, shall be paid out of the current revenues of said city for said year; and the city council of the city of Greenville shall annually appropriate and set aside, out of the general fund, such sum as may be necessary to pay the hydrant rentals herein agreed to be paid, and the sum so set aside shall constitute, be and remain, a fund for the sole purpose of paying said hydrant rental, and shall not be appropriated to any other purpose whatever."

Section 18 provides that the city council shall locate the mains and hydrants stipulated for.

Section 20 is as follows: "The said waterworks company shall have the right to make all needful rules and regulations for the protection of said waterworks and for their operation. For the tapping of mains, proper size of service pipes, and for shutting off water for nonpayment of water rates by private consumers or for waste or for any wrongful use of water by any party."

Section 21 provides a maximum list of rates which private consumers shall pay for water they may use, and also contains the following: "No charge to be made for water for city hall, public schools, four (4) public water troughs, said troughs to be inclosed so as to prevent stock running at large from using, and citizens of the city are prohibited from using same except by permission of water company, and flushing gutters. The hydrants when erected to be used exclusively for the extinguishment of fires, necessary

a longer period of one (1) hour in the same week, notice to be given for at least five (5) hours previous to time set for such practice to the superintendent or engineer of said waterworks, for flushing of paved gutters or sewers any one of the hydrants to be used, but the use of all not to exceed forty (40) minutes each week and an extension of one minute in time for flushing to be made for each hydrant erected or extended piping. Same notice when hydrants are to be used for flushing as provided for fire companies practice. All rates shall be payable quarterly in advance, at the office of the water company. When no rate is established contract may be made with the water company. No water will be furnished by meter measurement for less than fifty (\$50) dollars per annum and the party desiring to use meter must furnish it and pay fifty (50) cents per one thousand (1,000) gallons consumed."

The franchise was originally granted T. H. King, J. H. Cook, John W. Harrison, F. B. Nichols, and Thomas Howard, their associates, successors, and assigns. The Greenville Water & Electric Light Company was organized and incorporated, and they took the franchises and contracts from the persons to whom it had been granted. The property was finally sold out by the receiver in the federal court and bought in by the present company, a corporation whose name is "The Greenville Water Company." It has the same franchise and the same property that the old company had. By the contract now in force the city is to pay \$40 per annum per hydrant for each of the water company's fire hydrants, and this is paid out of the general fund of the city. The city of Greenville had a regularly and legally organized fire department consisting of 24 officers and men, and the necessary horses, hose carts, engines, and apparatus to extinguish fires. When the company arrived at the fire, the pressure was not sufficient, and the property was entirely destroyed.

The question presented is: Can a property owner hold a water company liable for loss of his property by fire resulting from a breach of its contract with the municipality to supply water for fire purposes? It is clear that a city owning its own waterworks cannot be held liable in an action for damages for failure to furnish sufficient water supply to extinguish fire. *House v. Houston Waterworks Co.*, 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; *Butterworth v. City of Henrietta*, 25 Tex. Civ. App. 467, 61 S. W. 975; *Tainter v. City of Worcester*, 123 Mass. 811, 25 Am. Rep. 90; *Fowler v. Waterworks Co.*, 83 Ga. 222, 9 S. E. 673, 20 Am. St. Rep. 818; *Vanhorn v. City of Des Moines*, 68 Iowa, 447, 19

cover of the company for the value of certain property alleged to have been burned by reason of the negligent failure of the water company to furnish sufficient pressure, as it had contracted to do, to throw water the height specified in the contract, by reason of which negligence plaintiff's property was destroyed by fire. The contract was between the Houston Waterworks Company, a private corporation, and the city of Houston, and stipulated that the purpose and intent of the contract was "to supply the city of Houston with water to maintain the cleanliness and health of the city, for the extinguishment of fires, and for the protection of property of the inhabitants of said city." The contract also provided for the furnishing of water to private consumers at the rate therein stipulated. It was held in that case that the contract there sued on was a contract between the city of Houston and the water company, and that no part of the contract justified the conclusion that the water company assumed a duty to the citizens. It was further held that, unless the water company under the contract assumed a duty to the citizens of Houston, no right of action accrued to a citizen to maintain a suit because of a breach thereof. Appellee maintains that the purpose of the contract being "to supply water to the city of Greenville and the inhabitants thereof," it is a contract made for the benefit of a class, to wit, the inhabitants of the city, and that he belongs to the class named. This contention is fully answered adversely to appellee in the opinion in the House Case. The purpose of the contract in that case is substantially the same as that of the contract between the appellant water company and the city of Greenville, and, as previously stated, it was held that it was not a contract between the water company and the citizens of Houston, and that under its terms the company owed no duty to the citizens in the performance of its contract. But appellee argues that there is a distinction between the terms of the charter of the city of Houston, under which that city was operating at the time of the execution of that contract, and article 418 of the Revised Statutes of 1895, under which the city of Greenville is incorporated. We have examined the terms of the charter of the city of Houston at the time the contract construed in that case was executed and article 418 of the Revised Statutes of 1895, under which the city of Greenville was incorporated, and are of the opinion that there is no material difference between them in conferring upon the respective cities power to provide water for the extinguishment of fires.

Again, appellee contends that the water

on the water company's undertaking, constructed his house with reference to the location of the hydrants and mains, and failed to take any other precautions, such as taking out insurance, to protect his property, relying upon the faithful discharge of the duties of the water company. The proposition urged is that the water company, in consideration of the franchise and privileges which it enjoyed, and the benefits and emoluments and profits that it derived from the conducting of its business, undertook to serve the public by furnishing an adequate supply of water to the city of Greenville and to its inhabitants for fire protection, and that, while plaintiff did not construct his house specially with any understanding with the water company, yet he failed to carry insurance on his house, relying upon the protection that the water company had undertaken to furnish, and as a direct result of its failure to keep its mains and hydrants supplied with water, not only in accordance with its contract with the city and its inhabitants, but in accordance with its public undertaking, wherein the water company held itself out as being ready, willing, and able to furnish necessary fire protection, plaintiff suffered and sustained the injury herein complained of. This proposition is fully met and answered by the opinion of Judge Brown in the House Case. He says: "If the city of Houston had contracted with the defendant that it was to be liable to individual citizens for losses sustained by fires under such circumstances as are shown in this case, such contract would have been void, because the city had no power to make such contract. *Taylor v. Dunn*, 80 Tex. 670, 16 S. W. 732; *Becker v. Waterworks*, 79 Iowa, 422, 44 N. W. 694, 18 Am. St. Rep. 377. It being true that the city could not have made a contract with the defendant that it should be so liable, it follows that no such implied liability could arise out of the contract, for assuredly nothing could be implied which could not have been lawfully expressed in the contract." 88 Tex. 248, 31 S. W. 185 (28 L. R. A. 532). That opinion is in accord with the great weight of authority in this country. *Cleburne Water Co. v. City of Cleburne*, 13 Tex. Civ. App. 141, 35 S. W. 733; *Allen v. Shreveport Water Co.*, 113 La. 1091, 37 South. 980, 68 L. R. A. 650, 104 Am. St. Rep. 525; *Lovejoy v. Bessemer Water Co.*, 146 Ala. 374, 41 South. 76, 6 L. R. A. (N. S.) 429; *Nicherson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1; *Foster v. Lookout Water Co.*, 8 Lea (Tenn.) 42; *Davis v. Clinton Waterworks Co.*, 54 Iowa, 59, 6 N. W. 126, 37 Am. St. Rep. 185; *Fowler v. Athens Waterworks Co.*, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313;

works Co., 119 Mo. 304, 24 S. W. 184, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Fitch v. Seymour Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; *Britton v. Green Bay Water Co.*, 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856; *Beck v. Kittanning Water Co.*, 8 Sadler (Pa.) 237, 11 Atl. 300; *Wilkerson v. Light, Heat & Water Co.*, 78 Miss. 389, 28 South. 877; *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267; *Bush v. Artesian Hot & Cold Water Co.*, 4 Idaho, 618, 43 Pac. 69, 95 Am. St. Rep. 161; *Eaton v. Fairbury Waterworks Co.*, 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653, 40 Am. St. Rep. 510; *Boston Safe-Deposit Co. v. Salem Water Co. (C. C.)* 94 Fed. 238; *Metropolitan Trust Co. v. Topeka Water Co. (C. C.)* 132 Fed. 702; *Ukiah City v. Ukiah Water Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107; *Springfield v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667. We are aware of the case of *Guardian Trust Co. v. Fisher*, 200 U. S. 57, 26 Sup. Ct. 186, 50 L. Ed. 367, and of the cases of *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536, *Gorrell v. Greensboro Water Supply Co.*, 124 N. C. 828, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 548, and *Mugge v. Tampa Waterworks Co.*, 52 Fla. 371, 42 South. 81, 6 L. R. A. (N. S.) 1171, 121 Am. St. Rep. 207, and are not impressed with the reasoning in those cases. These decisions are against the great weight of the authority in this country. See note to opinion in the case of *Mugge v. Tampa Waterworks Co.*, 6 L. R. A. (N. S.) 1171. The opinion of the Supreme Court of this state in the *House Case* is exhaustive and well considered, and because we are impressed with the soundness of its reasoning, and because it is the opinion of the highest legal authority of this state, we do not hesitate to follow it.

Appellee's house was supplied with water from the waterworks for his closet, kitchen, etc., and in addition he had one hydrant in the yard. He had no particular arrangement with the company that he was to be supplied with water further than his place was connected with the water company as stated, and he paid what they charged for water. He had a private hose that he used for sprinkling his yard and the street, and for watering flowers. He testified that he could have used it for putting out fire. When the fire was discovered, part of the kitchen was on fire about 20 feet from the ground. The lawn hose had been used the evening previous for watering the lawn, and was left attached to the hydrant, and there is evidence that

had a contract with the water company for consideration of a monthly rental whereby it undertook and agreed to furnish him with sufficient water and pressure in the mains so that, by the use of a private hydrant and hose in his yard, he could protect his property from fire. We do not agree to this contention. The evidence does not show that had there been sufficient pressure the fire could have been controlled by the garden hose. Besides, it appears from the evidence that it was not contemplated that the garden hose would be used to put out fires. The chief of the fire department testified that he never used one and never saw one used for that purpose.

It appearing that appellee is not entitled to recover under the facts as alleged and proven, it follows that the trial court erred in refusing to instruct a verdict for defendant.

The judgment is reversed, and judgment is here rendered for appellant.

SAVAGE et al. v. UMPHRIES, Co. Atty.

(Court of Civil Appeals of Texas. March 31, 1909. On Rehearing, April 28, 1909.)

1. ELECTIONS (§ 1*)—ELECTIVE FRANCHISE—RIGHT TO EXERCISE—"FRANCHISE."

The exercise of the elective franchise is not a natural right, but is, as the word "franchise" implies, a right conferred by the state or body politic.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2929-2941; vol. 8, p. 7666.]

2. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—CONTESTS.

In a local option election contest, that only one of two tickets, each bearing the same number, was counted for prohibition, did not show any injury to contestants in the absence of any allegation that the other ticket was voted against prohibition.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 37.*]

3. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTIONS—CONTEST—COMPLAINT—EVIDENCE.

Acts 29th Leg. 1905, p. 535, c. 11, § 64, requires the polls in all elections to be open from 8 o'clock a. m. to 7 o'clock p. m., and provides that the election shall be held for one day only. Held that, in a local option election contest, allegations of the complaint that in a certain precinct the polls were not opened until 11 a. m. and were closed at 4 p. m., that there were polled in such precinct only 7 votes for and 3 against prohibition, though there were 20 legally qualified voters in the precinct, and that a large majority thereof would have voted against prohibition, had the polls been open, were sufficient to admit proof that contestants

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were prejudiced by the violation of the statutory provision.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 37.*]

4. ELECTIONS (§ 60*) — PAYMENT OF POLL TAX.

That Const. 1875, art. 6, § 2, as amended by Acts 1901, p. 322, providing that any voter subject to pay a poll tax must pay the same before he offers to vote at any election, further provides that the provisions of the section shall be self-enacting, does not render unconstitutional Acts 29th Leg. 1905, p. 527, c. 11, § 23, providing a method for determining how and when one offering to vote at an election shall or shall not be declared subject to a poll tax.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 60.*]

5. ELECTIONS (§ 198*)—STATUTES—CONSTRUCTION.

The general rule is that statutory provisions regulating the conduct of public elections, if not expressly made mandatory, will be construed as so far directory that the election will not be nullified by mere irregularities, not fraudulently brought about, when the irregularity was not so great as to throw a substantial doubt on the result and there was no obstacle to a free expression of the will of the electors.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 170; Dec. Dig. § 198.*]

6. ELECTIONS (§ 51*)—JUDGES—DISQUALIFICATION.

Election Law (Acts 29th Leg. 1905, p. 535, c. 11) § 60, provides that no one holding any office of profit or trust under the United States or this state, or any city of this state, except notary public, shall act as judge of any election. *Held* that, though a city alderman acted as judge, the election will not be declared void, in the absence of an allegation that he did anything to change the result, as it will be presumed that the other judge was competent to act.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 51.*]

7. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—CONTEST—ESTOPPEL.

One may contest a local option election, though he has obtained a temporary injunction restraining the publication of the result of the election; such injunction having been dissolved.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 37.*]

8. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EVIDENCE.

Where, in a local option election contest, the court found that a certain party was an illegal voter and excluded his vote, the error, if any, in excluding his testimony that he did not remember what was on the ticket he voted, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190; Dec. Dig. § 1056.*]

9. APPEAL AND ERROR (§ 1056*)—ELECTION CONTESTS—HARMLESS ERROR.

In a local option election contest, error, if any, in excluding testimony of one as to his intention to vote in the precinct where he resided, instead of in the one where he did vote, was harmless; the court having excluded his vote.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190; Dec. Dig. § 1056.*]

10. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ELECTION CONTEST—EVIDENCE.

Where, in a local option election contest, it appeared that a certain voter was qualified, regardless of the fact as to whether or not his deceased father, an alien, had ever declared his

intention to become a citizen, the admission of testimony of such voter that his father had declared his intention to become a citizen, but was killed before he could take out his naturalization papers, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

11. APPEAL AND ERROR (§ 1050*)—ELECTION CONTEST—HARMLESS ERROR—EVIDENCE.

In a local option election contest, the admission of testimony of a witness as to where he thought a certain voter considered his home, if error, was harmless; it appearing that the court, in excluding the vote of such party, was not influenced by the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

12. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—CONTESTS—RECOUNTING BALLOTS.

In the absence of a statute requiring it, the court was not bound, in a local option election contest, to have certain challenged ballots removed from the boxes, and then direct the clerk to recount the remaining ballots in each of the boxes and announce the result of the count to the court.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 37.*]

13. ELECTIONS (§ 293*) — CONTESTS — EVIDENCE.

While, in an election contest, if it be shown that ballots are not in existence, the contents may be proved by parol evidence, yet where it appears that the ballots have been tampered with, and that the identical ballots voted are not before the court, parol evidence of the contents is not admissible.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 293.*]

14. ELECTIONS (§ 293*)—CONTEST—EVIDENCE.

While a voter may not testify that he voted one way, when he admits that he cast a ballot, which has not been changed, showing that he voted another way, testimony of voters that they voted for a certain candidate or measure, and that their ballots have been changed, is admissible.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 291; Dec. Dig. § 293.*]

15. EVIDENCE (§ 434*) — PAROL EVIDENCE — FRAUD.

The rule excluding parol evidence to contradict, vary, or modify written instruments is much relaxed, when fraud is alleged.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

16. INTOXICATING LIQUORS (§ 37*) — LOCAL OPTION ELECTION—CONTESTS—EVIDENCE.

In a local option election contest, the action of the commissioners' court in counting the ballots may not be impeached by the testimony of one present at the count as to how the duty was performed by members of the court, thereby showing a different result than that officially declared.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 37.*]

17. APPEAL AND ERROR (§ 1056*)—ELECTION CONTEST—HARMLESS ERROR.

Where, in an election contest, there was no specific allegation as to certain irregularities, and the case was tried without a jury, the erroneous rejection of testimony as to such irregularities was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fore he offers to vote, is not added to by a legislative enactment requiring the payment of a city poll tax by a voter subject to its payment, since no tax can be levied by a city unless done under the laws of the state, and hence such enactment is not unconstitutional.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 60.*]

19. ELECTIONS (§ 295*)—CONTESTS—QUALIFICATIONS OF VOTERS—SUFFICIENCY OF EVIDENCE.

It was not essential, in an election contest, to prove that a voter owed a poll tax to both the state and the county, and failed to pay the same as required by law, in order to render his vote illegal; proof that he owed it to the state, and failed to pay it, sufficing.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 295.*]

20. ELECTIONS (§ 83*)—QUALIFICATIONS OF VOTERS—PAYMENT OF POLL TAX.

One owing a state and county poll tax to T. county for 1906, which he had not paid prior to February 1, 1907, was not entitled to vote at an election in P. county in December, 1907.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 83.*]

21. ELECTIONS (§ 72*) — VOTERS — "RESIDENCE."

Under Election Law (Acts 29th Leg. 1905, p. 521, c. 11) § 4, providing that the residence of a single man is where he usually sleeps at night, and that of a married man is where his wife resides, if he be not permanently separated from her, one's residence must be determined by actual facts, and where the testimony showed that a voter lived with his "family" in a certain town, and that, though he owned a ranch which he considered his home, he had not lived on it since moving to the town, his "residence" was in such town, whether his wife was living or not.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6151-6161; vol. 8, p. 7783.]

22. ELECTIONS (§ 291*)—QUALIFICATIONS OF VOTER—PAYMENT OF POLL TAX.

In an election contest, it would be presumed, in the absence of evidence to the contrary, that a voter produced the proper evidence before the judge of election that he had paid his poll tax as required by law.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286; Dec. Dig. § 291.*]

23. ELECTIONS (§ 72*) — QUALIFICATIONS OF VOTERS.

A citizen of the United States, who had actually resided in the state 12 months and in the county 6 months prior to casting his vote, was qualified, though he testified that he could not say when he decided to permanently reside in the state.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 67, 68, 70; Dec. Dig. § 72.*]

24. APPEAL AND ERROR (§ 742*)—QUESTIONS REVIEWABLE.

A proposition which cannot be deduced from an assignment of error will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 742.*]

Dec. Dig. § 190.*]

28. ELECTIONS (§ 291*)—MUTILATED BALLOTS—PRESUMPTIONS.

A mutilated ballot will be presumed to have been mutilated after it was counted by the election officers, since it must be assumed that they know and will perform their duty.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286; Dec. Dig. § 291.*]

27. ELECTIONS (§ 180*)—MUTILATED BALLOTS—CONSTRUCTION.

A mutilated ballot must be construed in the same way as any other written or printed document, and the construction must be such as to give effect to the voter's intent, if it can be ascertained from the face of the ballot.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 180.*]

28. APPEAL AND ERROR (§ 219*)—FINDINGS OF FACT—CONCLUSIVENESS.

A finding of fact of the trial court, not complained of, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315, 1322; Dec. Dig. § 219.*]

29. APPEAL AND ERROR (§ 265*)—FINDINGS—NECESSITY OF EXCEPTION.

It is not necessary to take exception to findings of law and fact, when there is a statement of facts in the record, in order to review them on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1536-1551; Dec. Dig. § 265.*]

30. ELECTIONS (§ 72*)—QUALIFICATIONS OF VOTERS.

A minor, residing for 12 months in the state with his father's consent, became a resident, and entitled to vote on attaining his majority, though the father was absent from the state part of the time.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 72.*]

31. ELECTIONS (§ 83*)—POLL TAX.

Where one paid his state poll tax within the time required by law, it was immaterial, so far as it affected his qualification as an elector in P. county, whether he paid the tax there or in another county; there being no evidence that a county poll tax was levied in such other county.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 80; Dec. Dig. § 83.*]

32. ELECTIONS (§ 74*) — QUALIFICATION OF VOTERS.

A member of the National Guards, employed in the service of the army of the United States, is not, under the state Constitution, entitled to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 71; Dec. Dig. § 74.*]

33. ELECTIONS (§ 291*)—QUALIFICATIONS OF VOTERS—BURDEN OF PROOF—"CITIZEN."

As a man is a "citizen" of the country to which his father owes allegiance, it was incumbent on the party alleging in an election contest that a certain voter was not a citizen of the United States to show that such voter's father was not a citizen thereof during his son's minority.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 291.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1164-1174; vol. 8, pp. 7602-7603.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the trial, but must remand the case to the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

85. APPEAL AND ERROR (§ 1178*)—REVIEW—REMAND.

When a judgment is reversed because exceptions have been erroneously sustained to pleadings, a judgment cannot be rendered on appeal on evidence which would have been admissible under the pleadings, if the exceptions had not been sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

86. ELECTIONS (§ 208*)—CONDUCT—TIME OF OPENING AND CLOSING POLLS.

The provision of a statute as to the time of opening and closing the polls ordinarily is so far directory that an irregularity in this respect, which does not deprive a legal voter of his vote or admit a disqualified person to vote, will not vitiate the election, though it is otherwise where the irregularity is so great as to affect the result.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 184; Dec. Dig. § 208.*]

Appeal from District Court, Potter County; H. G. Hendricks, Judge.

Action by Z. Z. Savage and others against Hugh L. Umphries, County Attorney, to contest an election. From the judgment, plaintiffs appeal. Reversed, and remanded for new trial.

Geo. G. Clough and Reeder, Graham & Williams, for appellants. Hugh L. Umphries, Madden & Truelove, and Ben H. Stone, for appellee.

NEILL, J. We take from appellants' brief the following statement of the nature and result of the suit:

"This cause is a contest of a local option election held in Potter county, Tex., on the 8d day of December, 1907, for the purpose of determining whether the sale of intoxicating liquors should be prohibited within said county. The statement of the contestants, filed within the statutory period, after due notice, alleges in substance:

"(1) That the election is void for want of constitutional authority to hold same.

"(2) Because the same was ordered on the petition of 302 persons alleged to be qualified voters, whereas but 149 of said persons were duly qualified voters when said petition was presented and the election held.

"(3) Because said order purports to and does affect taxation, and the entire board of commissioners were not present when the same was made.

"(4) That said election is void because the officers chosen to hold the same were all of one political faith, to wit, members of the

No. 5, was a school trustee in Amarillo independent school district, the same being an office of trust, as contemplated within the law, and at the same voting box R. B. Newcome acted as one of the judges of election, he being also a school trustee for the same district, and likewise disqualified under the law.

"(6) That J. D. Brady, one of the judges of election in voting box No. 3, was a school trustee for school district No. 3 of Potter county, which is an office of trust within the meaning and intent of the law.

"(7) That in voting precinct No. 3 F. M. Hill was presiding judge, and at the same time was a school trustee in school district No. 2, which is an office of trust within the meaning and intent of the law.

"(8) That J. C. McDowell was judge of election in voting precinct No. 4, and at the same time a county commissioner, which is an office of emolument and trust within the meaning and intent of the law.

"(9) That in voting precincts Nos. 1 and 5 a large number of influential citizens coerced and intimidated voters, by announcing that they would prosecute persons who should vote 'against prohibition,' and circulated a handbill to that effect; that said persons congregated at or near voting precincts Nos. 1 and 5, and if they had reason to believe that a person would vote 'against prohibition' would make remarks calculated to, and which did, deter many timid persons from so voting, which votes, had they been cast, would have reversed the result of the election; that as a part of the scheme of coercion the said persons procured the arrest of one El. C. Jeffries, charged with illegal voting, which charge was fictitious and fraudulent, and which wrongful arrest intimidated many persons who were lawfully entitled to vote from voting 'against prohibition,' which persons, had they voted, would have voted 'against prohibition,' and would have reversed the result of the election; that large crowds were permitted to congregate in and about said voting boxes, within the 100-foot limit, in open violation of law, and their presence intimidated persons, and prevented them from voting 'against prohibition,' which persons and their votes would have materially affected the result and reversed the same, had they been permitted to vote without molestation.

"(10) That in voting precinct No. 5 the poll list shows J. M. Frazier voted ticket 318; and in said box two tickets of said number were found, one of which was counted 'for prohibition.'

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"(11) That in voting precinct No. 1 one ticket was found which contained two numbers, 3 and 360, and said ticket was counted 'for prohibition,' and in said box a ticket was found with two numbers, 25 and 267, which ticket was counted 'for prohibition,' and according to the poll list C. F. Blanchard voted ticket 267, which was also counted 'for prohibition'; that in voting precinct No. 1 a ticket was found torn in two pieces, which, when placed together, was made to read 332, and which was counted 'for prohibition,' and in said voting precinct was found two tickets, each being numbered 87, one of which was counted, and that 'for prohibition,' and two tickets were found containing the number 376, one of which was counted 'for prohibition' and the other not counted, and allegation is made that the tickets which were not counted were cast 'against prohibition.'

"(12) Because in voting precinct No. 3 one ballot was found in the box which contained no number, but the same was counted 'for prohibition.'

"(13) Because in voting precinct No. 5 J. N. Browning voted ticket 127 'for prohibition,' but the county commissioners, in counting the ballots, counted said ballot as 'against prohibition,' by reason of which glaring irregularity and inaccuracy a recount of the ballots is necessary to arrive at the true result of the count.

"(14) Because in voting precinct No. 4 the polls were not opened until 11 a. m. and were closed at 4 p. m., and there were polled but 7 for and 3 against prohibition; that there were 20 legally qualified voters at said precinct and entitled to vote therein, and that a large majority thereof would have voted 'against prohibition,' had the polls been opened during the hours required by law, by reason of which a sufficient number of electors had been deprived of the privilege of voting in such number as, had they voted, would have materially changed the result of the election.

"(15) Because in voting precincts Nos. 1, 2, 3, 4, and 5 a large number of persons voted illegally for prohibition, in that they owed and had not paid a poll tax to the county of Potter for the year 1906, an itemized statement and list of which persons so illegally voting was attached as an exhibit.

"(16) Because the 9 persons named on Exhibits D and E each voted for prohibition, and their votes were so counted, and that each of said persons owed a poll tax to Potter county, Tex., for the year 1906, and had not paid same.

"(17) Because 114 persons named in Exhibit F voted for prohibition in voting precinct No. 5, a majority of which, if, indeed, not all, owed a poll tax to Potter county for the year 1906, and had not paid same.

"(18) Because the 5 persons whose names appear on Exhibit G owed a poll tax to Pot-

ter county, Tex., for the year 1906, and each voted for prohibition.

"(19) Because the 33 persons named on Exhibit H voted for prohibition, in precincts Nos. 1 and 5, and they and each of them owed a city poll tax to the city of Amarillo, lawfully levied and assessed, and did not pay the same; allegation being made that a large number of other persons also voted in said city of Amarillo in said election, and their votes were cast 'for prohibition,' who owed a city poll tax for the year 1906, but contestants were unable to give names of the voters so voting, except as named in Exhibit H.

"(20) Because the persons named in Exhibit I, 19 in number, each voted for prohibition, each arrived at the age of 21 years after January 1, 1906, and prior to election day, and that said persons failed to procure a certificate of exemption from the tax collector of Potter county, or from any other collector within the state, within the time required by law.

"(21) Because the persons whose names appear on Exhibit J each voted against prohibition, and their votes were erroneously or otherwise, counted by the commissioners' court as 'for prohibition,' each of said persons being duly qualified voters in their respective precincts.

"(22) Because the persons named on Exhibit K, 7 in number, each voted 'for prohibition,' and their votes were so counted, and none of said persons had resided in the state of Texas for 12 months next preceding the day of said election.

"(23) Because the persons named on Exhibit L, being 4 in number, each voted for prohibition, and none of said persons were entitled to vote, for the reason that they were not residents of Potter county, Tex., for 6 months next preceding the date of the election.

"(24) Because D. H. Morris and J. H. Moore, legal voters in precinct No. 1, cast their votes against prohibition, yet no votes were found in the voting box as being cast by them; that both W. W. White and J. A. Dunavan each voted against prohibition in precinct No. 5, being tickets 300 and 319, respectively, yet no ticket 300 or 319 was found in the said voting box, and said ballots were not counted against prohibition as cast.

"(25) Because W. W. Watkins, who voted ticket 377 'for prohibition' in precinct No. 5, was an alien, and not a qualified voter, and Horace Gooch, who voted 'for prohibition' in precinct No. 1, was at the time of casting his ballot a resident and voter in precinct No. 5, in Potter county."

By trial amendments to the fifth ground of contest were added the allegations therein that one Shaughnessy, who acted as the judge of the election in precinct No. 5, was at the time an alderman of the city of

ground, that two votes, each bearing the ballot box, one of which was counted for prohibition and the other not counted, contestants contending that neither should have been counted; and the 20th ground of contest was amended by alleging that at the date of holding the election the city of Amarillo was a city of 10,000 inhabitants, and was on January 1, 1906, and 1907, and by adding other disqualifications to certain of the voters named in an exhibit to their petition.

The contestee's answer contained a plea in abatement and another in estoppel, the substance of which will be stated when we come to consider the court's action upon them. It also contained general and special exceptions to various grounds of contest alleged in the contestants' petition. On the merits the contestee answered by a general denial, and pleaded specially that in voting precinct No. 1 a "large number of persons, naming them, voted against prohibition, and owed and were due a poll tax to Potter county, Tex., for the year 1906; that a large number of persons, naming them, owed and were due, and did not pay, a city poll tax for the year 1906 to the city of Amarillo, in Potter county, Tex.; that certain persons, naming them, did not reside in Potter county, Tex., for 6 months next preceding the date of the election, and that certain persons, naming them, had not resided in the state of Texas for 12 months next preceding the date of the election; that certain persons, naming them, were over the age of 60 years on January 1, 1906, and did not take out a certificate of exemption before February 1, 1907; that certain persons, naming them, became of age after January 1, 1906, and before election day, and did not take out a certificate of exemption, etc.; that Carl Zapp was an alien at the time of casting his ballot; that Cowan, Trigg, Buckingham, and Jeffries voted in precinct No. 1, while living in precinct No. 5; that J. N. Browning, W. A. Christian, J. N. Vernon, R. B. Newcome, and Clyde Cockrell each voted 'for prohibition,' but their ballots were counted as against prohibition. By trial amendment H. R. Jack was challenged on the ground that he was not a resident of Potter county for 6 months next preceding the date of election, and also that he was not a resident of precinct No. 5, though he voted therein. Chas. J. De Wolf was also challenged on the ground that he was not a resident of the state of Texas for 12 months next preceding the election, and not of Potter county for 6 months, and that he voted in precinct No. 1, though not residing therein. Youngblood, Hassler, and Casey were also challenged on the additional

1907, and became of age prior to election day, and did not procure a certificate of exemption. D. H. Greer was also challenged for the additional reason that he was not a resident of the county of Potter, state of Texas, for 12 months preceding the date of election. S. Boyer was challenged on the ground of not being a resident of the county for 6 months preceding the date of the election, and for 12 months in the state of Texas."

Contestants prayed that "the matters and things complained of be inquired into; that the ballot boxes be opened, and the lawful ballots counted, and a result thereon be declared; and that if it should appear that such irregularities existed in bringing about such election, or in the holding or conducting of the same, as to render the true result impossible to arrive at, or doubtful of ascertaining, the election be declared void and a new election ordered."

The case was tried by a special judge, the regular judge being disqualified. The exceptions of both contestants and contestee were considered, and sustained in part and overruled in part. (Those overruled and those sustained will be specifically stated when we come to consider the assignments complaining of such rulings.) The trial then proceeded on its merits before the court, without a jury, who found for the contestee on his plea in estoppel, and that the commissioners' court of Potter county had declared that local option had carried in the county by a majority of 15 votes, and concluded from the evidence as a matter of law that of the voters who voted for prohibition all were legal, except 8, whose names are given in its conclusions, and that 2 voters, whose names are stated, who voted against prohibition, were counted and estimated by the commissioners' court as being for prohibition, and that their votes should be deducted from the total vote cast for prohibition and added to the votes against prohibition; that the ballot containing no number, found in box 3, which read "for prohibition," should be deducted from the total vote cast, and that the voters who voted against prohibition all were legal, except 5, whose names were stated.

The effect, therefore, of the conclusions of the trial court was to find that the election had carried for prohibition by a majority of 7 votes. The conclusions of fact and of law, filed by the trial court, were excepted to by the contestants, and from the judgment against them they prosecute this appeal.

Fifty assignments of error are presented and insisted on by appellants in their brief, and six cross-assignments are urged by the appellee in his. Before considering any of

decide upon a just view of the true relation between the power of the suffragans and the rights of the whole people. Hence the exercise of the elective franchise is not a natural or God-given right, but is, as the word "franchise" implies, a right conferred by the state or body politic. In other words, as is said by an eminent authority on constitutional law, the questions whether one is fitted by intelligence to perform the function of an elector, or has such interests in the matters controlled through his suffrage as to check the misuse of power which self-interest prompts, or has such community of interest in the laws which are to govern the community, which should fit him for the discharge of the duties of a suffragan, must be determined by the body politic. "If he lacks intelligence, it is the greatest absurdity to give him the suffrage, and the greatest wrong to the community. If he lacks community of interest in the laws which are to govern the community, it is not only a serious danger, but a false principle, to give it to him, for thus you give power to the hand which is alien to the rights of others which it controls." Tucker on the Constitution, 89. See, also, *Solon v. State* (Tex. Cr. App.) 114 S. W. 349. Hence, article 6 of the Constitution of 1875 of this state, as amended by the people in 1901 (Acts 1901, p. 322), determines who should have the right of suffrage, and, in connection with the act of the Twenty-Ninth Legislature and the amendment thereof by the Thirtieth, prescribes how it shall be exercised.

Section 2 of the article of the Constitution referred to is as follows: "Every male person subject to none of the foregoing disqualifications, who shall have attained the age of twenty-one years and who shall be a citizen of the United States, and who shall have resided in this state one year next preceding an election and the last sixth months within the district or county in which he offers to vote, shall be deemed a qualified elector and every male person of foreign birth subject to none of the foregoing disqualifications who not less than six months before any election at which he offers to vote, shall have declared his intention to become a citizen of the United States in accordance with the federal naturalization laws, and shall have resided in this state one year next preceding such election and the last six months in the county in which he offers to vote, shall also be deemed a qualified elector; and all electors shall vote in the election precinct of their residence: Provided, that electors living in any unorganized county may vote at any election precinct in the county to which county is attached for judicial purposes; and provided further, that any voter who is sub-

such election. Or if said voter shall have lost or misplaced said tax receipt, he shall be entitled to vote upon making affidavit before any officer authorized to administer oath that such tax receipt has been lost. Such affidavit shall be made in writing and left with the judge of the election, and this provision of the Constitution shall be self-enacting without the necessity of further legislation. Such legislative enactments, prescribing the manner in which the right of suffrage given by the Constitution shall be exercised by the suffragans, as are pertinent to several assignments of error to be hereinafter considered will be stated in connection with the assignments when we come to consider them.

Section 1 of article 3397, Rev. St. 1895, as amended by Acts 30th Leg. 1907, p. 447, c. 8 is as follows: "At any time within thirty days after the result of the election has been declared, any qualified voter of the county, justice's precinct or subdivision of such county, or any town or city of such county in which such election has been held, may contest the said election in the district court of the county in which such election has been held, which shall have original and exclusive jurisdiction of all suits to contest such election, and the proceedings in such contest shall be conducted in the same manner as has been or may hereafter be prescribed, and said court shall have jurisdiction to try and determine all matters connected with said election, including the petition of such election and all proceedings and orders relating thereto, embracing final count and declaration and publication of the result putting local option into effect, and it shall have authority to determine questions relating to the legality and validity of said election, and to determine whether by the action or want of action on the part of the officers to whom was entrusted the control of such election, such a number of legal voters were denied the privilege of voting as had been allowed to vote might have materially changed the result, and if it shall appear from the evidence that such irregularities existed in bringing about said election or in holding same, as to render the true result of the election impossible to be arrived at, or very doubtful of ascertaining, the court shall adjudge such election to be void, and shall order the proper officer to order another election to be held, and shall cause a certified copy of such judgment and order of the court to be delivered to such officer upon whom is devolved by law the duty of ordering such election. It is further provided that all such cases shall have precedence in the district court and appellate courts, and that the result of such contest shall finally settle all questions relating to the validity of said

election, and it shall not be permissible to again call the legality of said election in question in any other suit or proceeding; and provided further, that if no contest of said election is filed and prosecuted in the manner and within the time provided above, it shall be conclusively presumed that said election as held and the result thereof declared, are in all respects valid and binding upon all courts; provided also that pending such contest the enforcement of local option law in such territory shall not be suspended, and that all laws and parts of laws in conflict herewith be and the same are hereby repealed." Acts 30th Leg. 1907, p. 447, c. 8.

Some of appellants' assignments present questions purely of law, and others present mixed questions of law and fact. Those of the first class will be first considered and disposed of, without regard to the order in which they are presented in the briefs; and, in considering those of the second class, our conclusions of fact pertaining to them will be stated.

Conclusions.

1. That only one of the two tickets, each bearing the number 318, found in the box of voting precinct No. 5, was counted for prohibition, as was the one voted by J. M. Frazier, does not show any injury to appellants, in the absence of an allegation that the other ticket was voted against prohibition; for, from aught that appears from the allegation in appellants' tenth ground of complaint, both tickets bearing that number may have been for prohibition, and in that event appellants would have been benefited by not counting them both. Therefore appellants' first and fifth assignments of error, which complain of the court's counting only one of the tickets, instead of both, are overruled.

2. Acts 29th Leg. 1906, p. 535, c. 11, § 64, provides that "in all elections, general, special or primary, the polls shall be open from 8 o'clock in the morning until 7 o'clock in the evening, and the election shall be held for one day only." It will be seen from our statement of the case that appellants alleged, as their fourteenth ground of contest, that in voting precinct No. 4 the polls were not opened until 11 a. m. and were closed at 4 p. m.; that there were polled in said precinct only 7 votes for and 3 against prohibition; that there were 20 legally qualified voters in said precinct and entitled to vote therein; and that a large majority thereof would have voted against prohibition, had the polls been opened during the hours required by law. The exceptions of appellee to this ground of contest are that it is too general, and fails to specify any voter or voters, who are voters in said precinct and desired to vote, failed to cast their votes by reason of said polls not being so kept open, nor does it show that such voters would have voted against prohibition. The second assignment

of error complains of the court's sustaining the exceptions.

We think that the allegations in appellants' petition were sufficient to admit proof of the fact that the statutory requirement above quoted was violated by the officers charged with the duty of opening the polls and conducting the election, and that, had there not been such a violation of duty on the part of the officers, the result of the election at that precinct might have been different. It is a matter of general knowledge that many men, entitled to vote at an election, are so occupied with their own business, or in the discharge of their duty to their employers, that the only time they can spare, without prejudice to their business or violating their duty to their employers, to cast their ballots, is early in the morning, before their work commences, or late in the afternoon, after the day's work is done. If officers charged with the duty of holding elections are allowed to arbitrarily violate a provision of the election law that may result in depriving electors of their right to vote, or in making it inconvenient for them to exercise the right, the salutary provision, intended by the Legislature to secure an open, fair, and free election, with an opportunity for every qualified voter to exercise his right to the elective franchise, will be of little avail. It may be that, had the exceptions not been sustained to this ground of the contest, the evidence would have failed to show that appellants were in the least prejudiced by the failure of the officers of the election to open and keep open the polls at such election precinct during the hours prescribed by law. This, however, was a matter of fact, and the appellants, under the allegations in their complaint, had the right to introduce evidence to show that they were prejudiced by such breach of official duty on the part of those who were conducting the election. This right was denied them by the holding of the court, which we have no doubt was erroneous.

3. The third assignment complains of the court's sustaining appellee's exception to the twentieth ground of the contest. This ground of the contest will be noticed from our statement of appellants' pleadings. The exception interposed to it is that it is an insufficient ground for contesting the election, because it is not required that voters of the class mentioned should procure their certificates of exemption from payment of the poll tax from the tax collector before the 1st day of February, 1907, the year during which the election was held. As has been seen from the constitutional provision above quoted, any voter who is subject to pay a poll tax under the laws of the state of Texas must have paid the tax before he offers to vote at any election; but under the law male persons, otherwise entitled to vote, coming of age after the 1st day of January of the year in which the election shall be held, are not subject to the payment

of poll tax for the preceding year. There must, however, be some means of ascertaining the fact of whether the person who offers to vote belongs to a class who is not subject to a payment of the poll tax, else the requirement of its payment, as a condition precedent to the exercise of the elective franchise, would doubtless, in many instances, be avoided by the assertion that the person offering to vote was not subject to the tax for the year it was required to be paid. Hence section 23 of the election law passed by the Twenty-Ninth Legislature provides that: "Every male person who will be twenty-one years old on or before the day of an election and was not subject to a poll tax preceding the election at which he desires to vote, and who by reason of minority has not theretofore been subject to a poll tax but has or will become twenty-one years old on or before the date of any election, and who possesses all the other qualifications of a voter, shall be entitled to vote at such election, if he has obtained a certificate of exemption from the county collector before the first day of February, which shall specify the day when he will be twenty-one years old, and contain all the other requisites of a certificate of exemption. Before the certificate of exemption shall issue the applicant therefor shall make written affidavit of his age to be administered and certified to by the county collector, who shall file and preserve same."

That section 2, above quoted, of article 6 of the Constitution, provided that its provisions "shall be self-enacting without any necessity of further legislation," does not, in our opinion, render the section of the election law just quoted unconstitutional; for it does not attempt to restrain the Legislature from declaring when and in what manner it shall be determined that one offering to vote at an election is not subject to the payment of a poll tax. The section of the statute declaring when and how this matter shall be determined is general and applies to all elections, whether general or special, and to every voting precinct in which it is held, whether in a city having a population of 10,000 inhabitants or one having a population less than that number. Hence we are of the opinion that the contestants had the right, under the allegations setting forth the twentieth ground of contest, to show that the persons named therein arrived at the age of 21 years after January 1, 1907, prior to the election, and had failed to procure their certificates of exemption, as is required by the law to entitle them to vote at the election in question.

4. To appellants' trial amendment of the fifth ground of contest, the purport of which is shown in our statement of the case, the appellee interposes the exceptions that it contains no allegation of fraud or wrongful acts upon the part of Shaughnessy, the judge of the election, such as in law would justify holding the election void on account of his

being at the time an alderman of the city of Amarillo, and, further, that it appears from contestants' pleadings that Shaughnessy acted as a judge in holding the election and became a de facto officer or judge thereof. These exceptions were sustained by the trial court, and such ruling is the subject of the fourth assignment of error. Section 60 of the election law of 1905 provides "that no one who holds any office of profit or trust under the United States or this state, or any city or town of this state, except notary public, * * * shall act as judge, clerk or supervisor of any election." From this it is clear that Shaughnessy, if he was, as alleged by appellants, an alderman of the city of Amarillo, and acted as a judge of the election, was prohibited from holding such office and was incompetent, by reason of the statute referred to, to perform its duties or functions. The question to be determined is whether the provision of the statute just quoted is mandatory or directory.

The general rule is that statutory provisions regulating the conducting of public elections, if not made mandatory by the express terms of the law, will be construed as so far directory that the election will not be nullified by mere irregularities, not fraudulently brought about, when the departure from the prescribed method was not so great as to throw a substantial doubt on the result, and where it is not shown that there was any obstacle to a fair and free expression of the will of the electors. Black on Interpretation of Laws, p. 353. It is said that: "There is nothing better settled than that the acts of election officers de facto, who are in under color of election or appointment, are as valid, as to third parties and the public, as those of officers de jure. The doctrine that electors may be disfranchised because one or more of the judges or inspectors of election did not possess all the qualifications required by law finds no support in the decisions of any judicial tribunal." 15 Cyc. 311. But here, if the allegations in appellants' trial amendment be true, Shaughnessy was absolutely prohibited by the statute from acting as judge of the election. This inhibition did not go to his ineligibility or disqualification, but is an absolute denial of his right to act at all as judge in the election, and, in view of the statute, he could no more have acted as an officer de facto than he could de jure, for the law absolutely prohibits him from acting at all in any capacity. But it does not follow from this that, because he, in violation of the law, acted as a judge of the election, it should be declared null and void as to that precinct. It seems to us that the question as to the validity or invalidity of the election should be determined as though he had not acted at all, in the absence of any allegation that he did anything that would tend to change the result. In this view the election in that precinct should be regarded as having been presided over by only one judge, for the county

commissioners' court was required in voting precincts, where there were less than 100 voters who had paid their poll tax and received their certificates of exemption, to appoint two reputable men, who were qualified voters, as judges of the election, and it will be presumed that it performed this duty. We are not prepared, therefore, to hold that, because one of the parties appointed as judge was prohibited by the law from acting as such, would vitiate, so as to render null, the election as to such precinct, presided over by the other judge, who, in the absence of an allegation to the contrary, must be presumed as competent to act; for to so hold would be to disfranchise all the qualified electors who voted at said precinct, without it appearing that the election was in any way affected by being presided over by one judge, instead of two as required by the statute. We therefore overrule the assignment.

5. The sixth assignment of error, which complains of the court's overruling appellants' exception to appellee's plea of estoppel, is sustained. Neither the plea, nor the evidence adduced in support of it, presents any of the elements of a judgment estoppel. We know of no principle of law or equity, nor can we conceive of any, which takes from a party the right given him by law to contest an election of this character because he has obtained a temporary injunction restraining the publication of its result, when such restraining order has been dissolved. From this it follows that these assignments (7, 14, and 15), which complain of evidence introduced by appellee to sustain such plea, should be sustained. It also follows that the findings of fact and law by the trial court, complained of in the forty-second and forty-ninth assignments, that by reason of the matters alleged in said plea the appellants were estopped from contesting the validity of the election, are erroneous.

6. As the trial court found that W. F. Janzen was an illegal voter, and excluded his vote in estimating and declaring the result of the election, it is wholly immaterial whether he voted for or against prohibition. Therefore, if it should be held that the court erred, as is complained of in the eighth assignment, in excluding his testimony, offered by appellants, to the effect that he did not remember what was on the ticket he voted, such error was harmless.

7. The admission of the testimony of Horace Gooch, who resided in one voting precinct and cast his ballot at the election in another, as to his intention to vote in the one where he resided, instead of the one where he did vote, which is complained of by the ninth assignment, though error, was harmless, because the court held that he was an illegal voter, and excluded the vote cast by him from its estimate in declaring the result of the election.

8. W. A. Watkins, who voted at the election, having not less than six months prior

thereto declared his intention to become a citizen of the United States in accordance with the federal naturalization laws, and having resided in the state one year next preceding the election and the last six months in Potter county, Tex., and having paid his poll tax as required by law, was, under the Constitution and laws of this state, a qualified voter and entitled to vote at said election, regardless of the fact as to whether or not his deceased father, who was an alien, had ever declared his intention to become a citizen of the United States. Therefore his testimony, complained of in the tenth assignment, to the effect that his deceased father had made affidavit of his intention to become a citizen of the United States, but was killed before he could take out his final naturalization papers, in no way prejudiced the appellants; the legality of W. A. Watkins' vote being the subject of inquiry. This also disposes of the sixteenth assignment of error.

9. The testimony of Ed. Kirk, as to where he thought E. C. Jeffries considered his home on the 3d of December, 1907, the admission of which is complained of by the eleventh assignment of error, was harmless, inasmuch as the court found that Jeffries' vote was illegal, because he voted out of the precinct of his residence in Potter county; it thus appearing that the trial court was not influenced, in excluding such vote, by the testimony complained of.

The twelfth assignment of error, which complains of the admission of testimony of a like character as to the residence of one De Wolf, is disposed of adversely to appellants upon the same ground.

10. The thirteenth assignment of error, which complains of the court's admitting in evidence the testimony of George Cole tending to show that he voted illegally at the election because of having failed to pay his poll tax prior to the 1st of February, 1907, for the reason that appellee's pleadings did not attack the legality of his vote upon such ground, is predicated upon an erroneous assumption of what is shown by appellee's pleadings, which assail Cole's vote upon the very ground which the assignment denies was alleged.

11. The seventeenth assignment of error complains of the court's overruling appellants' motion, made during the trial of the cause, for the court to have the district clerk remove from the ballot boxes of precincts Nos. 1, 3, and 5 certain ballots contained in said boxes, which were challenged by appellants, and then to direct the clerk to recount the remaining ballots in each of said boxes and announce to the court the result of the count. It occurs to us that this assignment regards merely a matter of procedure in the trial of the cause, and in the absence of a statute expressly requiring the court to proceed in the manner sought to be required by the motion the court could proceed in such manner as it

ity passed upon by the court, and those found to be illegal were deducted from the count in determining the number of legal votes cast. The assignment is, therefore, overruled.

12. The eighteenth assignment of error complains of the court's excluding parol evidence of certain witnesses, who were qualified voters and voted at the election, offered by appellants as tending to show that certain ballots, shown by the official records of the election to have been voted, respectively, by the several witnesses, which were counted for prohibition, should have been counted against prohibition. The rule is that the contents of ballots can best be shown by the instruments themselves, if in existence; but, if it be shown that they are not in existence, then the contents may be proved by parol evidence, the same as that of any other document that has been lost or destroyed. But where it appears that the ballots have been tampered with, and that the identical ballots voted are not before the court, it seems that parol evidence of the contents of the ballots that were voted should not be received.

A voter cannot be allowed to testify that he voted one way, when he admits that he cast a ballot, which has not since been changed, showing that he voted another way. But testimony of voters that they voted for a certain candidate or measure, and that the ballots purported to have been cast by them have been substituted for, or changed from, those actually cast, is admissible; for, where it is contended that a fraudulent substitution has been made, the elector may be asked for whom or for what measure he voted. In election contests, as in all other cases, the rule, excluding parol evidence to contradict, vary, or modify written instruments, is much relaxed when fraud is alleged. 15 Cyc. 419, 420. "Stuffing ballot boxes," or the fraudulent substitution of different votes from those actually cast at an election, can rarely, if ever, be shown by the testimony of those who perpetrated the fraud, and must, almost of necessity, be proved by circumstances, or by the parol testimony of the voters themselves as to what candidate or measure they actually cast their vote for at the election. It is true that such testimony may be false, and the temptation, for those vitally interested in the result of an election, to procure, by bribery or chicanery, perjured testimony of electors, may be great; but this goes to the probative force, rather than to the admissibility, of such testimony. If such evidence is false, it is easier to procure the evidence of the perjury than it would be to procure evidence of the fraudulent substitution of ballots for those actually voted at the election. If the testimony of men of the highest integrity of

of public policy, then the policy of the public may well be deemed as a cloak for hiding frauds perpetrated at the ballot box.

Finally, we believe the proposition: "Where it is alleged that certain persons (naming them), each voted 'against prohibition,' but that the county commissioners erroneously or otherwise counted their votes 'for prohibition,' and it was further alleged that great irregularities existed, and that other votes, naming them, were erroneously counted, and it was shown by the poll list that the person named in the pleadings cast the ballot accredited to him by number, and that the ballot boxes had at all times since the date of the election been in proper custody, and the boxes produced in court, opened, and the numbered ballots found, it was competent to present the alleged ballot, and to prove by the testimony of the voter that the ballot found in the box, and accredited to him on the poll list, was not cast by him, but that he cast another and a different ballot than that presented"—asserted by appellants under this assignment, should be sustained.

13. We believe that the testimony of the witness Graham, offered by appellants to show how the commissioners' court had counted certain ballots in reaching the conclusion announced by it as to the result of the election, the rejection of which is complained of by the nineteenth assignment of error, was properly excluded upon the ground that it is against sound public policy and contrary to the legislative intent that the action of the commissioners' court in counting the ballots should be impeached by the testimony of one who was present at the count as to how the duty was performed by the members of the court, and thereby show a different result than that officially ascertained and declared by them.

14. After the witness J. M. Russell, who was an officer of the election in precinct No. 1, had testified on direct examination as to the irregularities in the manner of holding the election, he testified, on cross-examination, "that right in front of this voting box in the hallway there was quite a number of men in it all the time; that there were booths on the opposite side of the hall; that during the time the polls were open there were other and more persons on the outside than the officers; that there were challengers on either side of the voting box, and that he made no objection to these extra persons participating in the election; and that said extra persons during the day would make objections to people voting." On objection of appellee's counsel, this testimony was excluded on the ground that there were no allegations in the pleadings in regard to chal-

of the witness given on his examination in chief, to the effect that there was no irregularity in holding the election at that precinct, was not true; but, inasmuch as there was no specific allegation as to such irregularity as the rejected testimony would tend to show, and as the case was tried without a jury, such error affords no ground for a reversal of the judgment.

15. The testimony offered by appellants for the purpose of showing that Ed Guleke, who voted at the election, and whose vote was counted for prohibition, who had not paid his city poll tax for the year 1906 prior to the 1st of February, 1907, to which he was subject, was an illegal voter, the exclusion of which is the subject of the twenty-first and twenty-third assignments of error, should have been admitted, for the statute provides that any voter who is subject to pay his poll tax under the laws of the state of Texas, or under the ordinance of any city or town in this state, before he offers to vote at the election shall have paid said tax; for we cannot believe, as appellee contends, that "the requirement that a voter be compelled to pay a city poll tax is an additional burden to that placed upon him by the Constitution, and is unconstitutional for that reason." As has been before shown, the right of suffrage is not a natural right of the citizen, but a franchise dependent upon the law, by which it must be conferred to permit its exercise. It is true that where the Constitution of a state fixes the qualifications, and determines who shall be deemed qualified voters, in direct, positive, and affirmative terms, these qualifications cannot be added to by legislative enactments, yet, as the constitutional provision in section 2, art. 6, hereinbefore quoted, required that "any voter who is subject to pay a poll tax under the laws of the state of Texas shall have paid the tax before he offers to vote at any election in this state," it cannot be said that this qualification is added to by the legislative enactment which requires the payment of a city poll tax by a voter who is subject to its payment; for such tax is required under the laws of the state of Texas, though it be a municipal tax, for no tax can be levied by a city unless it is done under the laws of the state. *McCormick v. Jester* (Tex. Civ. App.) 115 S. W. 278; *People v. Teague*, 106 N. C. 576, 11 S. E. 665. Though such testimony should have been admitted, we cannot, as is urged by appellants under the assignment, consider it as evidence, and deduct Guleke's ballot from the general result of the election as declared by the court.

16. The finding of the trial court in its tenth conclusion of fact, that A. S. Tugwell, who voted at the election, and whose vote

county, Tex., prior to February 1, 1907, for 1906, but I did not pay a city poll tax for the year 1906." The twenty-fourth assignment of error complains of this finding of the court and of its counting Tugwell's vote for prohibition. The assignment is sustained, for, according to his own testimony, his vote was illegal, and should not have been counted at all. *McCormick v. Jester*, supra.

17. The fifteenth finding of fact by the trial court is as follows: "I find that John Parr was living with his parents in Greenville, Tex., until January 1, 1906, and for several years prior to said date; that about January 1st or 2d he left Greenville for Sulphur, Okl., to work; that he don't remember the exact day he left Greenville for Oklahoma, but according to his best recollection it was January 2, 1906; that when he left for Oklahoma he didn't know just how long he would stay there; that he was looking for work; that he came to Amarillo on the 7th day of July, 1906, from Oklahoma; that he was past 21 years of age on January 1, 1906; that he did not pay any poll tax for the year 1906 to Hunt county; that said voter was a single man, and between the age of 21 and 60 years, on December 3, 1907, but is not attacked on the ground of failure to pay Hunt county his poll tax." John Parr was one of the five persons mentioned in appellants' eighteenth ground of contest as voting for prohibition, who were alleged to have owed a poll tax to the county of Potter and state of Texas for the year 1906 and failed to pay the same. It is urged by the twenty-fifth assignment of error that the finding of the court, above copied, shows that he was an illegal voter, in that he was due a poll tax to the state for the year 1906, and that he never paid the same as required by law, and that the court erred in counting his vote for prohibition. The finding, as well as the testimony, did show that he owed, and never paid, the state of Texas his poll tax for that year. We think that proof of this fact was, under the allegations in appellants' ground of contest, sufficient to show that his vote was illegal and should not have been counted; for, though the proof did not show that he owed a poll tax in the county of Potter, it did show that he owed it to the state of Texas, as alleged. It was not essential to prove that he owed a poll tax to both the state of Texas and county of Potter, and failed to pay the same, in order to render his vote illegal. The proof that he owed it to the state and had not paid it was sufficient to render his vote illegal, and it should have been rejected on that account. Therefore the assignment of error is sustained.

18. A. C. Parr is another man who voted for prohibition at the election, whose vote is charged to be illegal because he had not paid his poll tax. The finding of the court upon this issue is as follows: "I find that A. C. Parr moved to Amarillo, Potter county, Tex., on January 19, 1907, from Hunt county, Tex., where he had resided for seven years; that he had paid his poll tax to the county of Hunt for the year 1906 prior to the 1st day of February, 1907; that he concluded there was going to be no election during the year 1907, and thinking he would not need them again, destroyed his poll tax receipts about six weeks prior to the election on December 3, 1907; that he had carried these receipts in his pocket until this time; that said voter was on December 3, 1907, between the age of 21 and 60 years." Parr's testimony upon the question is as follows: "I was between the ages of 21 and 60 on January 1, 1906, when I lived in Greenville, Hunt county, Tex. I came to Potter county January 19, 1907. I had my state and county poll tax receipt for 1906 paid for, and took same out before February 1, 1907; and about six weeks before the local option election I got discouraged and did not think we would have any local option election and decided we were not going to have any, so I burned up the receipts. I voted in the local option election in Potter county, December 3, 1907. I voted in precinct No. 1." The twenty-sixth assignment of error complains that the court erred in not finding that he was an illegal voter. While we are inclined to think that Mr. Parr got discouraged and burned up his poll tax receipts too soon, yet, if he made the affidavit required by section 71 of the Acts of the Twenty-Ninth Legislature as must be presumed in the absence of anything to the contrary, we are not prepared to say that his vote was illegal and wrongfully counted.

19. The twenty-seventh assignment of error is as follows: "The trial court erred in his finding of fact No. 18, wherein he fails to find that J. M. Young was an illegal voter, for the reason that the evidence introduced on the trial showed that said voter owed a state and county poll tax to Tarrant county, Tex., for the year 1906, which he had not paid prior to February 1, 1907, and it also showed that said voter voted for prohibition in the election in controversy and that his vote was so counted, which finding was duly excepted to by appellants." We believe that the finding of fact referred to in the assignment shows, as a matter of law, that Young, if a citizen of 12 months' residence in the state of Texas when he voted at the election in question, was due a poll tax to the state of Texas and Tarrant county for the year 1906, which was never paid, and that, therefore, his vote should have been rejected by the trial court in determining the result of the election.

20. The thirtieth assignment of error com-

plaints of the court's finding that J. M. Neeley was a legal voter, and that his vote, cast for prohibition at the election, should be counted. It is undisputed that Neeley never paid a city poll tax to the city of Amarillo for the year 1906. His own testimony shows that he lived with his family in the town of Amarillo on the 1st day of January 1906; that his family has resided in that city ever since; that, though he owns a ranch which he considers his home, he had never lived on it since he first moved to Amarillo; and that he had always voted in said city. Section 4 of the election law provides that the residence of a single man is where he usually sleeps at night, and that of a married man is where his wife resides, if he be not permanently separated from her. If, therefore, it can be inferred, from his speaking of his family, that he had a wife residing with it, then his residence, under the law, was in Amarillo. If the inference cannot be drawn from his testimony that his wife was living, then he must be regarded as a single man; and, in that event, his residence was in Amarillo on the 1st of January, 1906, for the inference is clear that he usually slept there at night. So, in either event, his residence, in contemplation of our election laws, was in the city of Amarillo on January 1, 1906, for under such law one's residence must be actual, and determined by actual facts, and not by the intention of the voter. We are of the opinion, therefore, that the assignment is well taken.

21. The evidence does not show, as is contended by appellants in the thirty-first assignment of error, that J. G. Fondren, who voted at the election for prohibition, had not paid his state and county poll tax, to which he was subject, prior to the 1st of February, 1907. As to this matter there is no evidence one way or the other, and the presumption must be indulged, in the absence of anything to the contrary, that he produced the proper evidence before the judge of election that he had paid such tax in accordance with the law, or else he would not have been permitted by them to vote at such election. From the evidence it is questionable whether he owed a poll tax to the city of Amarillo for the year 1906, and, in deference to the finding of the trial judge, we conclude that he was entitled to vote at the election, and that his vote was properly counted.

22. It is insisted by the thirty-second assignment of error that the court erred in finding W. L. Barnes was a qualified voter at the election in controversy, for the reason that the evidence shows that he had not resided in the state of Texas 12 months prior to casting his vote. The evidence shows that Barnes came to Texas in April, 1906, and that he resided in Potter county from that time until the election was held.

siding in Texas. The fact that he did actually reside in the state 12 months and in Potter county 6 months prior to casting his vote, and, being a citizen of the United States and possessing the other qualifications necessary to make him an elector, he was, under the Constitution and laws of the state, entitled to vote at said election.

23. We cannot sustain appellants' thirty-third assignment of error, which complains that R. H. Stone was not entitled to vote at the election, because he had not resided in Potter county 6 months prior to casting his ballot. The evidence shows that Stone, prior to January 1, 1906, resided in Hemphill county, Tex., and that he paid his state and county poll tax for that year in said county; that he has lived in Potter county since March, 1907; and that his family moved from Canada, and arrived in Amarillo, on the 4th day of June, 1907, and resided there ever since. As the election was held on the 3d day of December, 1907, even if the time of his residence should be estimated from the date of the arrival of his family in Amarillo, this evidence shows that he had resided in said city exactly 6 months when he voted at the election, and was, therefore, a qualified voter under the Constitution and laws of this state. Black on Interpretation of Laws, p. 162.

24. It is contended by the thirty-fourth assignment of error that W. A. Watkins, who voted at the election for prohibition, was a foreigner, and had never complied with the federal naturalization laws, and that he was at an age of between 21 and 60 years on January 1, 1906, and resided in the city of Amarillo and had not paid his poll tax to the city for that year. The evidence is sufficient to warrant the finding of the trial court in regard to his having declared his intention of becoming a citizen of the United States in accordance with the federal naturalization laws and had resided in the state one year next preceding such election. There was no finding of the trial court upon the question as to whether he was due and had paid a poll tax to the city of Amarillo for the year 1906, nor is it shown by appellants' brief that the court was requested to make a specific finding on such question. Therefore the assignment is overruled.

25. The finding of the trial court that E. C. Jeffries, who voted against prohibition at the election, resided in voting precinct No. 5 of the city of Amarillo, and cast his vote in precinct No. 1 on the day of the election, is assailed by appellants' thirty-fifth assignment of error, upon the ground that the legality of his vote was not attacked on account of his voting in a precinct different

No. 5, and should have voted in said precinct No. 5," is found in appellee's reply to appellants' ground of contest. This is a complete answer to the assignment, and demonstrates that it should be overruled.

26. In its conclusions of fact the court found that H. R. Jack, who voted at the election in Amarillo for prohibition, was an illegal voter, because he failed to pay his city poll tax. This finding is objected to by the thirty-sixth assignment of error upon the ground that his vote was not challenged by the appellee for nonpayment of his poll tax. In appellee's reply to appellants' ground of contest, Jack's name appears among a number of others immediately preceding this allegation, "each and all owed and did not pay the city poll tax to the city of Amarillo, Potter county, Tex., for the year 1906." This is conclusive against the assignment.

27. Appellants' thirty-ninth assignment of error is as follows: "The trial court erred in his finding of fact No. 46, wherein he found that one ticket with the number 87 on it and one ticket with the number 376 on it were legal tickets, and should be counted, for the reason that in voting box No. 1 two tickets were found folded together, both reading for prohibition, the number 87 being on the one folded on the outside, while there were two other tickets found in the same box, both reading for prohibition, with the number 376 on the ticket folded on the outside, and the evidence shows that one each of said tickets was counted for prohibition, which finding of fact was duly excepted to by appellants." The proposition advanced under it in appellants' brief is: "Where tickets are found in the ballot box folded together, none so folded can be counted. All must be rejected." It will be perceived that no complaint is made in the assignment of the two votes bearing the numbers referred to being counted, nor is it even asserted in the assignment that they were counted. The assignment, without stating any ground, simply complains of the court's finding of fact No. 46. An examination of the statement of facts fully supports the finding of the trial court complained of by the assignment, and, as the proposition asserted cannot be deduced from the assignment of error, it will not be considered.

28. The forty-seventh finding of fact of the trial court is as follows: "I find that box No. ——— contained a ticket which was torn in three pieces, which pieces fitted together perfectly and made a complete ticket of the ordinary size, bearing upon the back thereof the number 332, and read 'for prohibition'; that said No. 332 appeared on

the poll list opposite the name of W. A. Blank." The fortieth assignment of error complains of this assignment, and asserts the proposition that a ballot mutilated or torn to pieces cannot be counted. We hold with appellee in his counter proposition, which is that, when a torn ballot can be so placed together as to show beyond doubt its number and for what it was voted, it does not lose its validity simply because it is torn, and should be counted. It does not appear from the evidence that the ballot was torn before it was counted by the election officers, and the rule seems to be that, where a ballot appears to have been mutilated, it will be presumed to have been done after it was counted by the election officers, as it must be supposed that they know, and will perform, their duty. 15 Cyc. 365. The ballot is to be construed in the same way as any other written or printed document, and the construction must be such as to give effect to the voter's intent, if it can be ascertained from the face of the ballot. No court would hold a written or printed document, torn as the ballot in question was, inexpressive of its maker's intent simply because it was found torn in such a manner after its execution and delivery; nor can we perceive why a different holding should be made in regard to the ballot in question.

29. The trial court's fourth conclusion of law, which is as follows: "Of the voters who voted 'against prohibition,' and the legality of their votes challenged by contestee, all were legal voters except the following voters, which were illegal, and their votes should be deducted from the total vote cast 'against prohibition,' to wit: W. H. Baggett, Chas. De Wolf, Geo. Cole, H. R. Jack, and E. C. Jeffries"—is assailed by the forty-third assignment of error for the reason that under the pleadings and proof introduced on the trial the voter of each of the votes named in the conclusion of law was legal, and the votes should have been counted against prohibition. This assignment, in so far as it questions the court's conclusion as to the legality of the votes of Jeffries, De Wolf, Cole, and Jack, is, in effect, disposed of by what we have said in passing upon the eleventh, twelfth, thirteenth, and thirty-sixth assignments of error, in which, as is before seen, we have held that the votes of those four were illegal and properly rejected by the trial court. There seems to have been no complaint of the trial court's finding of fact, upon which the conclusion of law is based, that Baggett's vote was illegal, and for that reason should not be counted. Therefore such finding, which is as follows: "I find that W. H. Baggett was not 60 years old until February, 1906, and that he did not pay a city poll tax, nor a state and county poll tax, for that year, but voted on an affidavit of over age; that said voter had resided in Amarillo, within the corporate limits of said city of Amarillo, for several years

prior to December 3, 1907, and find him an illegal voter for failure to pay poll tax for the year 1906"—must be regarded as conclusive of the fact stated therein. The conclusion of law of the trial court, as to the legality of his vote, logically attaches to the fact found in the conclusion stated. The assignment of error is overruled.

30. Under the forty-first, forty-fourth, and forty-eighth assignments of error is asserted this proposition: "Where it is shown that coercion, intimidation, and unlawful arrests have been made on election day in close proximity to the polls, from voting, and the result of the election was very close, and where it was further shown that gross irregularities and errors existed in the count, in the casting of ballots, in the determination of the result, and in the general conduct of the election, from all of which it would be impossible to arrive at a correct result if the election had been legally held, it is proper to set aside such election and to order a new election; and a failure to do so is error." In view of the evidence and findings of the trial court, we are not prepared to hold that this proposition is sustained in its entirety by the record, or to such an extent as would authorize this court to declare the election void. There was, however, to our minds evidence of fraud, or at least gross irregularities suffered, if not committed, by officers charged with the duty of holding the election in accordance with the law. While such evidence is not so conclusive as to authorize us to set aside the conclusions of fact found by the trial court upon the matters to which the proposition quoted relates, the record shows, at least, such irregularities as justify us in animadverting upon the manner in which it was held and conducted. In doing so, we will say that if, when blind fanaticism runs riot and greed of traffic corrodes and corrupts, the officers charged with the duty of presiding over and conducting elections fail to administer and enforce the law, it is in vain that the great statesman, whose illustrious name is given to our election laws, labored in his old age to maintain the purity of the ballot, upon which depends the perpetuation of our republican institutions. The bands of social organism will be loosened when we fail to maintain the purity and sanctity of the ballot, and anarchy, like another blind Samson, may grapple and pull down the pillars of state, and bury the best government the world ever saw beneath the ruins of the temple, which the hands of patriotism erected to perpetuate.

31. It does not appear, from the statement subjoined to the proposition under the fiftieth assignment of error, that specific findings were requested by appellants upon the matters that the assignment complains of the court's failing to find. It would seem, however, from the action of the court, complained of by the eighteenth assignment of error, hereinbefore considered and disposed of,

show the existence of the facts, which they now contend that the court should have found, was excluded upon objection of the appellee, which we held to have been erroneously sustained.

This brings us to appellee's cross-assignments of error. Appellants contend that they should not be considered, because the appellee did not except to the findings of fact and conclusions of law with reference to the votes which are claimed by the cross-assignments to have been illegal. As is said in *Hahl v. Kellogg* (Tex. Civ. App.) 94 S. W. 391: "It is settled by an unbroken line of authorities that it is not necessary to take exception to findings of law and fact, when there is a statement of facts in the record, in order to review them on appeal"—citing *Voigt v. Mackle*, 71 Tex. 78, 8 S. W. 623; *Smith v. Abadie* (Tex. Civ. App.) 67 S. W. 1077; *Brenton & McKay v. Peck* (Tex. Civ. App.) 87 S. W. 903.

1. The first of these cross-assignments complains that the court erred in not finding that D. H. Greer was an illegal voter, inasmuch as he had not been a resident of the state of Texas for one year and of the county of Potter for six months prior to December 3, 1907. The evidence shows that Greer came, with his father, to Amarillo on June 4, 1906; that he was 21 years old in October, 1907; that he remained in Amarillo, and his father returned to Tennessee; that it was the understanding, when his father left for his home in Tennessee, that D. H. Greer should remain in Amarillo; that his father returned to Amarillo in March, 1907, with his family, and resided there thereafter. As young Greer, with the consent of his father, remained in Amarillo from the date of his arrival there up to the time of the election, in our opinion, it made him a resident, in contemplation of our election law, of the state of Texas for 12 months prior to the time he voted, and that the court, therefore, properly held that he was a qualified voter.

2. The second cross-assignment complains that the court erred in failing to find Phil Denitz, who voted at the election against prohibition, an illegal voter, in that he owed and did not pay a state and county poll tax for the year 1906 prior to February 1, 1907. The evidence, to our mind, clearly shows that he was due such poll tax for the year 1906, and that he failed to pay it within the time required by law to entitle him to vote at the election. The assignment is therefore sustained.

3. The third cross-assignment complains of the court's failure to find J. C. Storm, who voted for prohibition at the election, disqualified from voting because he did not pay a

poll tax for that year. The assignment is therefore overruled.

4. The fourth of these cross-assignments complains that the court erred in failing to find that the vote of C. A. Fisk, who voted against prohibition at the election, was an illegal voter, for the reason that he owed and did not pay a state and county poll tax to the county of Grayson for the year 1906. The evidence shows that, Fisk moved, with his family, from Grayson county, Tex., to Amarillo, Potter county, Tex., on the 27th day of February, 1906, and that he paid his poll tax, state, county, and municipal, for the year 1906, in Potter county in January, 1907. He was, however, on the train going to Amarillo on the 1st day of January, 1906, and made arrangements to move to Amarillo on the 6th day of January of that year. We are not prepared to say, under these facts, that Fisk was not, under the Constitution and laws of this state, a qualified voter at the election, especially as the evidence fails to show that a county poll tax was levied (which, under the Constitution and laws, is not mandatory, but merely permissive) by the county commissioners' court of Grayson county for the year 1906. He did pay his state poll tax within the time required by law, and it would seem that it is immaterial, so far as it affects his qualification as an elector, whether he paid it in Grayson or Potter county.

5. The fifth cross-assignment complains of the court's failure to find that Sam Snyder, who voted against prohibition, was not a legal voter. The evidence shows that Snyder was born in Denton county, Tex., in November, 1884; that he resided in Amarillo, Potter county, on the 1st of January, 1906; that he did not pay a state and county poll tax for that year anywhere or at any time. He testified that he was exempt from such tax because he belonged to the National Guards, and had been a member of the troop to which Mr. Golding belonged since 1905, and is still a member of the same, and that he voted against prohibition. If, as a member of the National Guards, he was employed in the service of the army of the United States, he was not, under our Constitution, entitled to vote at all; and if he was not employed in such service, under section 2, art. 6, before quoted, of the Constitution, he could not legally vote at the election, if he had not paid at least his state poll tax within the time prescribed by law. Therefore the assignment of error is well taken.

6. The sixth, which is the last, cross-assignment of error, complains that the court erred in finding the vote of Carl Zapp, which was against prohibition, legal, and in not de-

seems from the testimony of Jos. Astrican, which is based entirely upon what he heard Zapp say, that Zapp was a German and came to the United States of America when he was 5 years old, and had resided ever since in the United States, and that he had never taken out naturalization papers. As a man is a citizen of the country to which his father owes allegiance, it was incumbent upon the appellee to show that Zapp's father was not a citizen of the United States during his son's minority. The evidence, in our opinion, is not sufficient to prove such fact. Therefore the assignment of error is overruled.

Finis. In view of the record and these conclusions, the question presents itself: What should be the disposition of the case on this appeal? The recount before the county commissioners' court of the vote cast at the election in question resulted in that court's finding that the total number of votes cast at the election was 943, 479 of which were for prohibition and 464 against prohibition, making a majority, according to the finding of that court, of 15 votes in favor of prohibition. On the contest of the election before the trial court, it was found that 8 of the votes counted by the commissioners' court for prohibition were illegal and should not be counted. This would leave a total vote of 935 cast at the election, of which 471 were for prohibition and 464 against prohibition, leaving a majority in favor of prohibition of 7 votes. In reviewing the findings and conclusions of the trial court, this court has held that 4 of the votes cast for prohibition and 2 of the votes cast against prohibition were illegal, making 6 more votes which should not have been counted, which makes a total legal vote cast and entitled to be counted at the election of 929, of which 467 were for prohibition and 462 against, leaving a majority in favor of prohibition of 5 votes.

This would require an affirmation of the judgment, were it not for the errors, indicated in this opinion, in the trial court's rulings upon appellee's exceptions to appellants' pleadings, and in sustaining objections to testimony offered by appellants upon issues involved in this contest. On account of such errors the judgment of the district court is reversed, and the cause remanded for a new trial in accordance with this opinion.

On Rehearing.

Both parties have filed motions for rehearing in this case.

The appellants in their motion insist that we failed to consider and dispose of the forty-seventh and forty-ninth assignments of error, and request us to file conclusions of law and fact as to the questions they involve. The first of these assignments was,

thought and still think that, inasmuch as the court sustained appellee's exception to that part of appellants' pleadings which challenged the legality of the votes of the parties whose names are mentioned in the assignment, there were then no pleadings in the case which authorized the trial court to pass upon the question of fact as to whether or not such parties were qualified to vote at the election; and, being of such opinion, we deemed we were without authority to pass upon a question of fact that the trial court had cut itself off from passing upon by sustaining exceptions to the only pleading which sought to bring such fact in issue. Where a judgment is reversed, the Court of Civil Appeals cannot render judgment for the other party based upon evidence not admitted on the trial, but must remand the case to the trial court. *Eldson v. Reeder* (Tex.) 105 S. W. 1113; *Brazelton v. Campbell* (Tex. Civ. App.) 108 S. W. 771. Nor, when a judgment has been reversed because an exception has been erroneously sustained to pleadings, can a judgment be rendered on appeal upon evidence which would have been admissible under the pleadings if the exceptions had not been sustained. Therefore the only consideration that could be given the forty-ninth assignment of error was involved in the disposition of the third.

But it is insisted by the appellee that we erred in sustaining appellants' third assignment of error; the insistence being that section 23 of the Terrell election law is an additional limitation to that fixed by the Constitution on the right of suffrage. The basis for this contention, as we understand it, is that inasmuch as section 2, art. 6, of the Constitution specifically enumerates the classes of persons who shall not be allowed to vote, it is beyond the legislative power to add to it any other class or classes of persons among those to whom the elective franchise is granted by the Constitution. This is undoubtedly correct; for unquestionably the Legislature could not place bald-headed, bow-legged men, or any kind of men, among the classes who are inhibited by the Constitution from voting. But it does not follow that section 23, referred to, places any one in the prohibited class. On the contrary, it clearly appears that it does not; for it recognizes their right to vote, and simply prescribes what shall be done to entitle them to exercise the right. It is no more a limitation of the right given by the Constitution to the class mentioned in the section to vote than are other sections of the act upon the right of those subject to the payment of a poll tax who shall have paid such tax before he offers to vote. Every one, under the

would logically follow that the entire election law is void.

It is further contended by appellee that we erred in sustaining appellants' second assignment of error, and in doing so are in conflict with the cases of *Oxley v. Allen* (Tex. Civ. App.) 107 S. W. 945, and *Hash v. Ely* (Tex. Civ. App.) 100 S. W. 980. In the latter case the question of the effect of a failure to comply with section 64, regarding the time of opening and closing the polls, of the Terrell election law, upon an election, does not seem to have been involved. In the first, the petition alleged that the election was illegal because the polls at one of the voting boxes were closed at 6 o'clock and not kept open for the time required by law, to wit, until 7 o'clock p. m., and thereby a large number of voters were deprived of the privilege of voting, which would have changed the result and have rendered the same doubtful. In passing upon an exception to this part of the petition the court said: "We do not think that the court erred in sustaining the exception * * * because * * * the number and names of the persons who, it is claimed, were deprived of voting at said election, were not alleged, nor was any excuse offered for failing to state them; nor is it alleged that the result would have been materially changed by the reason thereof, but only that it would have changed the result." It will be seen from our statement of the allegations of plaintiffs' petition, to which exceptions were sustained in the present case, that they are essentially different from those in that case. In this one the polls were not opened until 11 a. m., and were closed at 4 p. m. In other words, they were not opened until three hours had elapsed from the time the law prescribed they should have been, and were closed three hours before they should have been. Also the number of legally qualified voters entitled to vote in precinct 4 are stated, and it was alleged that a large majority would have voted against prohibition if the polls had been opened as required by law. It is true that the names of the voters are not stated, nor is it alleged who of those not voting would have voted against prohibition, or who of them would have voted for it.

The provisions of a statute as to the time of opening and closing the polls ordinarily are held so far directory that an irregularity in this respect, which does not deprive a legal voter of his vote or admit a disqualified person to vote, will not vitiate an election. *Patton v. Watkins*, 131 Ala. 387, 31 South. 93, 90 Am. St. Rep. 43; *People v. Prewett*, 124 Cal. 7, 56 Pac. 619; *Cleland v.*

of closing the polls was so great that it must be deemed to have affected the result, the election must be held invalid. *People v. Hill*, 125 Cal. 16, 57 Pac. 669; *Tebbe v. Smith*, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68; *Banks v. Sergeant* (Ky.) 48 S. W. 149; *State v. Drake* (Wis.) 53 N. W. 496. As is said in *Tebbe v. Smith*, supra: "The rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed. A substantial compliance with the terms of a directory provision is, after all, required. And a substantial compliance is not had by strictly following some provisions, while essentially failing to observe others. There must be a reasonable observance of all the prescribed conditions. It is the duty of the courts so far to adhere to the substantial requirements in regard to elections as to preserve them from abuses subversive of the rights of the electors; and under this view the question becomes a broader one than can be disposed of by answering that in the individual case no harm resulted. * * * In this case we are quite willing to believe that the misconduct of the officers of Lake precinct was prompted by nothing worse than ignorance and lack of appreciation of the responsibility of their positions, and we may say, further, for such is the evidence, that no harm is shown to have resulted from their conduct; but, looking to the purity of elections and integrity of the ballot box, we are constrained to hold that conduct like this [when the law required the polls to be open at sunrise and to be kept open until 5 p. m., and they were not opened until near 10 o'clock] amounts in itself to such a failure to observe the substantial requirements of the statute as must invalidate the election. And, while reluctant to so hold in this instance, we are confirmed in the opinion by consideration of the fact that any other interpretation would add grave perils to the safe conduct of our elections, which are already harassed by dangers enough." The court then holds that the votes of Lake precinct should therefore have been rejected.

It was, we apprehend, for the purpose of having the votes of voting precinct No. 4 rejected, for it was alleged that only 7 were polled there for and 3 against prohibition, that the allegations were made by plaintiffs in their petition. We have not been able to find any case where such a wide departure

the polls can be kept closed nearly half the time they are required to be kept open, and the election upheld upon the ground that the statute, being simply directory, was substantially complied with, then the officers charged with the duty of opening and keeping open the polls may ignore the law and take their own sweet wills instead as the standard of duty. If this be so, a wider door to election frauds could not be opened—a door that the Terrell election law contemplates shall never exist in the structure of the election laws in Texas. When there is such a palpable violation of the law as is presented by that part of plaintiffs' petition, to which the court sustained the exception complained of by the second assignment of error, it cannot be expected of the party complaining of it to allege more than was done by the plaintiffs in this case; for it would be practically impossible for him to ascertain who of the qualified voters of the precinct would have voted, and how they would have voted, had there not been such a wide departure from the law. These matters would necessarily be enveloped in doubt; and it might well be doubted whether the electors themselves could say with any certainty whether they would have voted and on which side of the question they would have voted. We adhere to our original opinion on this question, and do not believe it is in conflict with either of the cases cited, as claimed by appellee, nor with any decision of any of the Courts of Civil Appeals, but believe it is fully sustained by principle and the weight of authority.

We deem it unnecessary to discuss any other of the questions raised by either of these motions, believing that they were all sufficiently discussed and correctly disposed of in our original opinion.

Both motions are overruled.

LOFTON v. MILLER et al.

(Court of Civil Appeals of Texas. April 14, 1909. Rehearing Denied May 12, 1909.)

1. LIMITATION OF ACTIONS (§ 195*)—DEFENSE—BURDEN OF PROOF.

In trespass to try title, where it is uncontested that plaintiff is entitled to recover unless defeated by defendants' plea of limitation, the burden of establishing such defense is on defendants.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 713; Dec. Dig. § 195.*]

2. TAXATION (§ 411*)—LEVY AND ASSESSMENT—TAX ROLLS.

Rev. St. 1895, art. 5098, requires persons rendering a list of taxable property to swear to the same; article 5103 directs assessors to make

such lists made up from information furnished by property owners.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 677; Dec. Dig. § 411.*]

3. TAXATION (§ 529*)—PAYMENT—EVIDENCE.

Evidence in trespass to try title, in which defendants' defense was limitations, based on the payment of taxes on the land, held not to show a payment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 984; Dec. Dig. § 529.*]

Appeal from District Court, Lynn County; L. S. Kinder, Judge.

Action by J. T. Lofton against J. R. Miller and others. Judgment for defendants, and plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Wm. J. Berne, for appellant. John R. McGee and Will A. Morriss, for appellees.

NEILL, J. On November 27, 1907, J. T. Lofton sued J. R., O. L., and J. K. Miller in trespass to try title to recover the N. E. $\frac{1}{4}$ of survey No. 19, block No. 11, located by virtue of land scrip No. 636, issued to the East Line & Red River Railroad Company. The defendant answered by a plea of not guilty, and pleaded the five-year statute of limitation. The case was tried before a jury, who returned a verdict in favor of defendants on their plea of limitation; and this appeal is prosecuted from a judgment rendered in accordance with the verdict.

Under the assignments of error it is contended that the court erred in not peremptorily instructing the jury that defendants did not have title under the five-year statute of limitations, because there was no evidence that they or either of them paid taxes on the land for the year 1905, or that they paid taxes thereon for five years prior to the institution of this suit. This requires us to review the evidence upon the issue of limitation. It is uncontroverted that the plaintiff exhibited in evidence such title as entitled him to recover, unless defeated by defendants' plea of limitation. And for this reason the court instructed the jury to return a verdict for the plaintiff, unless it should find that his title was defeated by defendants' plea of limitation. The burden of establishing this defense was upon the defendants. In order to discharge this burden it was incumbent upon them to prove that they, or some of them, paid the taxes on the land for the year 1905; for the deed under which they prescribe was not executed until December 23, 1901, nor recorded until January 27, 1902, and, as stated, the suit was filed November 27, 1907. The abstract number of the survey is 218, its certificate number is 635, and its survey number

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is 19. The defendants are meant when words "Miller & Sons" are used in the statement of the evidence.

The witness J. R. Miller was asked by defendants' counsel this question: "Since you took possession of it [meaning the land in controversy], who has paid taxes on it?" which he answered as follows: "We [meaning J. K. Miller, O. L. Miller, and J. R. Miller] have paid said taxes, said taxes being for the years 1901, 1902, 1903, 1904, 1905, 1906, and 1907." On cross-examination he testified: "I did not pay in person the taxes for each of the years 1901 to 1907, inclusive. I did not in person pay the taxes on the land in controversy for the year 1905; my son paid them. All I know about them being paid for the year 1905 is what I know from my son's turning over the receipt for said taxes."

The witness here identified the receipt for the taxes of 1905, which is as follows:

No. 280.	Total value of Property assessed \$48 20
Lynn County, Texas.	Taxes.
Received of Miller & Sons the sum of Fifty-six & ⁰⁰ / ₁₀₀ Dollars, in payment of State and County Taxes for the year 1905, on personal property and the following described real estate:	State Ad Valorem \$ 9 64
	School Ad Valorem \$ 63
	State and School Poll
	Penalty
	County Ad Valorem
	em 12 05
	County Special.... 19 28
	County Poll.....
	District School.... 7 28
	Penalty

	Total Tax..... \$56 88

Lands.					Town Lots.
Abst. No.	Cert. No.	Survey No.	Original Grantee	Acres	
218	635	17	E. L. & R. R.	640	
249	636	19	Do. W. $\frac{1}{4}$	320	
327	7	407	D. & S. R.	640	(Seal of Tax Collector.)

C. H. Doak,
Tax Collector, Lynn County, Texas.
Jan. 25, 1906.

Continuing, the witness said that all he knew about said taxes having been paid for the year 1905 is that his son told him that he had paid it, and had handed him said receipt. Thereupon plaintiff asked that said testimony as to the witness' son having told him that he paid the taxes for the year 1905 be struck out, because said testimony was hearsay and secondary. The objection was sustained, and the testimony struck out.

Another of the defendants, O. L. Miller, testified that he had paid the taxes on the land in controversy for the year 1905 to the tax collector at that time.

The witness, being on cross-examination shown this paper:

Inventory of Property

Owned by Miller & Sons and rendered for Assessment of Taxes for the year 1905, by O. L. Miller to A. S. Caughran, Assessor of Lynn County, State of Texas.

Real Estate.

Abst. No.	Cert. or Scrip No.	Survey No.	Original Grantee	No. Acres Rendered	Total Value
218	635	17	E. L. & R. R.	640	640
249	636	19	Do. W. $\frac{1}{4}$	320	320
327	7	407	D. & S. E. R.	640	640

Total Value of Lands.....1600

(We omit the parts of the paper, which follow under the heads of "City or Town Real Estate" and "List of Personal Property," until the affidavit thereon is reached, which is:)

"The State of Texas, County of Lynn.

"I, O. L. Miller, do solemnly swear (or affirm) that the above inventory rendered by me contains a full, true and complete list of all taxable property owned or held by me in my own name for Miller & Sons in this county, subject to taxation in this county, and personal property not in this county subject to taxation in this county by the laws of this state, on the first day of January, A. D. 1905, and that I have true answers made to all questions propounded to me touching the same, so help me God.

"O. L. Miller.

"Subscribed and sworn to before me, this the 19th day of April 1905.

"A. S. Caughran,

"Tax Assessor Lynn County, Texas."

—testified that he signed it, and that it was inventory of the property of Miller & Sons for the year 1905, and that it was his rendition of the property of Miller & Sons for that year; that part of the inventory had been sworn to by him—that part pertaining to the cattle rendered for taxes. On being shown the affidavit attached to the inventory, he admitted that it contained nothing as to his swearing to only a part of it.

Continuing, he testified that the way he came to render the property was that the assessor came to him, and that he made the rendition for the year 1905, and that it was for him, his father and brother; that, when he listed a part of the property for the year 1905 and signed the affidavit attached to the rendition, he was at home, and that when he signed the list or inventory the land now listed on it was not then listed thereon; that the reason it was not was because he thought the assessor could get the descrip-

Sons; that he did not tell him to put in the "W. half" on this survey; that the "W. half" of survey 19, block 11, in Lynn county, is neither owned nor claimed by J. R. Miller & Sons; that when he came to pay his taxes he found the tax rolls made out. On being handed the receipt above copied, he testified that it was the receipt for the 1905 taxes for Miller & Sons; that the receipt contained, among other items, the following: "Abstract 249, Cert. 636, Survey 19 E. L. R. R. Co., W. $\frac{1}{2}$, acres 320;" that said receipt was the only one for the taxes of Miller & Sons for the year 1905, and that when he went to pay the taxes he called for the amount that was due, paid said amount, and got the receipt for it; that at the time he took the receipt he made no examination of it; that some time afterwards, probably 12 months, he found out about this "W. half" being on the receipt; that he discovered the error about the time this controversy with Lofton arose; that his father took the tax receipt and discovered the error, and, the collector's attention being called to it, he, the collector, suggested its being changed, and did change it, and afterwards the collector changed it back so as to make it read as it did originally.

Caughran, the tax assessor, having identified the rendition sheet hereinbefore copied, testified that the description, "Abstract 249, certificate 636, survey 19, E. L. R. R. Company, original grantee, W. one-half, acres 320," was in his handwriting, and that it was written before the instrument was signed.

The county clerk of Lynn county, having produced and identified the delinquent report of the tax collector made for the year 1905, and approved by the commissioners' court, was asked to examine it and see if abstract 249, certificate 636, was mentioned in the report, and, after making the examination, answered that it was not.

We have thus recited practically all the testimony upon the question as to whether the defendants paid the taxes on the land in controversy for the year 1905.

In the case of *Sharpe v. Kellogg* (Tex. Civ. App.) 118 S. W. 401, in which substantially the same question was presented, it is said: "While payment of taxes is an act in pais, which may be proved not only by the record, but by the original receipt, or by any other evidence which satisfies the jury of the fact (*Deen v. Wills*, 21 Tex. 642; *Watson v. Hopkins*, 27 Tex. 642; *Ochoa v. Miller*, 59 Tex. 460; *Allen v. Woodson*, 60 Tex. 652; *Cooley on Taxation* [3d Ed.] 807), yet the question here is, Did the evidence introduced by plaintiff tend to show that Lowenstein paid the

entry, and must depend upon the records in the assessor's office, and not on parol testimony or the private duplicates of the assessor. * * * The result of the whole is that, where the assessment wholly fails to lead to 'the identification, so that neither the owner nor the officer can tell that his land is taxed, the duty of the payment cannot be performed, and the assessment is void.' If this be so, then a fortiori it must be held that payment of taxes could not be made by the owner under an assessment shown by the records of the assessor's office, by the description in the tax rolls, to have been made upon entirely different tracts of land from those claimed by him, which is the case presented here. See, also, *Wigmore on Evidence*, § 1640. * * * Suppose the land in controversy had been sold for taxes under that assessment, would any one think for an instant that the sale vested a shadow of title in the purchaser at such sale? Again, suppose that the defendants, or those under whom they claim, who were the real owners of the land in controversy at the time, had seen on the records in the assessor's office the description of the lands as it appeared on the rolls, and had learned that the taxes had been paid for the year 1891 in accordance with such assessment, would any one contend that this gave them notice that their land had been assessed and the taxes paid upon it for that year by Lowenstein? No; on the contrary, it would inform them that the assessment and payment of the taxes were upon entirely different tracts of land—that described in the rendition, and on tax rolls. The best that can be made out of the evidence, in plaintiff's favor, is that his vendor who was in possession, intending to render the lots for taxes for the year 1891, through carelessness, rendered different tracts, and, intending to pay the taxes for that year on the land in controversy, paid the taxes on the land that was assessed in accordance with his rendition. He cannot in this manner, under the five-year statute of limitation, deprive the defendants of their property, for such deprivation would be without due process of law."

That case is hardly distinguished from the one in hand. True it is, that in this case the tax roll was not introduced in evidence, but the rendition sheet was, from which the law contemplates the tax roll shall be made. *Articles 5098, 5103, 5126, 5127, Rev. St. 1895; Dutton v. Thompson*, 85 Tex. 118, 19 S. W. 1026.

In the case just cited it is said by Chief Justice Stayton: "The purpose of these laws

is manifest, and ought a person who has made a rendition of his property, presumably under oath, to be heard to say that he paid taxes on property in a given year, and then claimed it under a deed duly recorded, when his rendition shows that for taxpaying purposes he made no such claim? Ought it not rather be held that he paid taxes on what he listed, though it may have been his intention to pay taxes on some other land? If he had offered his tax receipts, they evidently would have shown that he paid taxes only on the land he rendered for taxation; for the tax roll, which is but a transcript of renditions, is the officer's warrant to collect taxes, and his receipt must, and will if it be true, describe the property on which taxes are paid as the same is described in the tax roll. Rev. St. arts. 4737-4741. If, under the renditions made by appellee, the collector of taxes had seized and sold any property of his to enforce the payment of taxes on the land in controversy, the sale would have been void, because the officer would have been without authority, on rendition of property as a part of section 180, to sell the property of appellee to satisfy

taxes due on a part of section 182. Mere intention to pay taxes on the land in controversy cannot make that such a payment which was not so in fact, when tested by his rendition made by appellee."

Then, after citing a number of cases in its support, the opinion continues as follows: "Appellee's statement, that he paid the taxes on the land for the years enumerated, in view of his rendition, amounts to no more than an expression of an intention to pay on the land, and this cannot override the conceded fact that his rendition did not cover the land in controversy, and the further fact that the tax roll was the collector's warrant for demanding and receiving taxes. That paid must be held to have been paid under the assessment, in the absence of evidence other than such as appears in the record."

When the evidence in this case is viewed in the light of the opinions from which we have quoted, it appears as a matter of law that the defendants never paid taxes on the land in controversy for the year 1905. Therefore the judgment of the district court is reversed, and judgment is here rendered for appellant.

ous killing of another with malice aforethought, not in the necessary or apparently necessary self-defense of the slayer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 12; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, vol. 5, pp. 4632-4637; vol. 8, pp. 7726-7727.]

2. HOMICIDE (§ 139*)—INDICTMENT—SUFFICIENCY—"VOLUNTARY MANSLAUGHTER."

Under Cr. Code Prac. § 122, subsec. 2, providing that an indictment shall contain a statement of the acts constituting the offense in ordinary and concise language, etc., and section 124, providing that the indictment must be direct and certain as regards the party and the offense charged, etc., an indictment alleging that accused committed manslaughter by unlawfully, willfully, and feloniously killing another by shooting, from which shooting the latter died, does not charge the common-law crime of voluntary manslaughter punished as provided by Ky. St. § 1150 (Russell's St. § 3628), and defined as the unlawful, willful, and felonious killing without previous malice, in a sudden affray or in sudden heat of passion, not in the necessary or apparently necessary self-defense of the slayer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 232-235; Dec. Dig. § 139.*

For other definitions, see Words and Phrases, vol. 8, pp. 7350-7351.]

3. HOMICIDE (§ 139*)—"INVOLUNTARY MANSLAUGHTER"—INDICTMENT—SUFFICIENCY.

The indictment does not charge involuntary manslaughter defined as the unintentional killing of another in the performance by the slayer of an unlawful act or by the doing of a lawful act in an unlawful manner.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 232-235; Dec. Dig. § 139.*

For other definitions, see Words and Phrases, vol. 4, pp. 3762-3763; vol. 8, p. 7692.]

4. HOMICIDE (§ 127*)—MANSLAUGHTER—INDICTMENT—SUFFICIENCY.

The form of indictment for manslaughter prepared by the Code commissioners does not conform to Cr. Code Prac. §§ 122-124, defining the requisites of an indictment.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 127.*]

Appeal from Circuit Court, Trimble County.
"To be officially reported."

Harry Mosser was indicted for manslaughter, and, from a judgment sustaining a demurrer to the indictment and dismissing it, the Commonwealth appeals. Affirmed.

Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and Chas. H. Sanford, for the Commonwealth. D. H. Peak, Eugene Mosley, and Edwards, Ogden & Peak, for appellee.

SETTLE, C. J. The following indictment was found and returned against the appellee by the grand jury of Trimble county: "The grand jurors of the county of Trimble, in the name and by the authority of the commonwealth of Kentucky, accuse Harry Mosser of the crime of manslaughter, com-

moniously kill Mattie Hensley by shooting the said Mattie Hensley with a gun and pistol, a deadly weapon, from which shooting and wounding the said Mattie Hensley died within a year and a day, against the peace and dignity of the commonwealth of Kentucky." Appellee interposed a demurrer to the indictment, which the court sustained, and dismissed the indictment. The commonwealth excepted to this ruling, and from the judgment resulting therefrom prosecutes this appeal.

The Criminal Code of Practice (section 122, subsec. 2) requires that an indictment shall contain "a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment, on conviction according to the right of the case." Section 124 provides that the indictment must be direct and certain as regards "(1) the party charged; (2) the offense charged; (3) the county in which the offense was committed; (4) the particular circumstances of the offense charged, if they be necessary to constitute a complete offense." We do not think the indictment in question conforms to either of the foregoing sections. If the word "murder" had been substituted for the word "manslaughter" wherever the latter occurs in the indictment, and the words "with malice aforethought" had been added immediately following the word "feloniously" appearing therein, it would have been good as an indictment for murder, and under it the appellee might have been convicted of voluntary or involuntary manslaughter, if proof of the facts of the homicide had warranted the jury in finding him guilty of either instead of murder. But the acts charged in the indictment are not sufficient to make it good as to any of these offenses. Murder is the unlawful, willful, and felonious killing of another with malice aforethought, not in the necessary or apparently necessary self-defense of the slayer. Voluntary manslaughter is the unlawful, willful, and felonious killing, without previous malice, of another, in a sudden affray or in sudden heat and passion, not in the necessary or apparently necessary self-defense of the slayer. Wharton (10th Ed.) § 303; Mitchell v. Commonwealth, 88 Ky. 351, 11 S. W. 209; Roberson's Criminal Law, § 189. Involuntary manslaughter is the unintentional killing of another in the performance by the slayer of an unlawful act, or by the doing of a lawful act in an unlawful manner. The omission from the indictment of the word "voluntary"

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

malice." In other words, as the indictment fails to charge that the homicide was committed by appellee in a "sudden affray or in sudden heat and passion," it fails to set forth the particular facts or circumstances that would make the homicide voluntary manslaughter.

Section 1150, Ky. St. (Russell's St. § 3628), declares what punishment shall be inflicted for voluntary manslaughter, but does not define the crime. It is not therefore a statutory, but a common-law crime, and in determining whether the indictment is sufficient we must apply the common-law rules in effect adopted by the Criminal Code of Practice, which requires, as in subsection 2 of section 122, that the indictment shall contain "a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended," and, as in section 124, by stating "the particular circumstances of the offense charged"; such circumstances being necessary to show a complete offense, it being apparent from the indictment itself that the grand jury were attempting to indict appellee for voluntary manslaughter.

The indictment is also far short of being a good indictment for involuntary manslaughter, as it fails to allege any facts from which it can be inferred the appellee was engaged in an unlawful act from which the homicide unintentionally resulted, or that it resulted from an improper or unlawful performance by appellee of a lawful act. It is true the indictment follows the form prepared by the Code commissioners, but, as the form does not conform to the provisions of the Criminal Code of Practice contained in sections 122 and 124, it, too, must be declared insufficient. Obviously, the indictment is not good as an indictment for murder, voluntary manslaughter, or involuntary manslaughter. It follows, therefore, that the demurrer was properly sustained.

Wherefore the judgment is affirmed.

TRUMBO et al. v. PERSONS et al.

(Court of Appeals of Kentucky. April 30, 1909.)

MINES AND MINERALS (§ 66*)—LEASES—FORFEITURE—RECOVERY OF POSSESSION.

Where plaintiffs leased the mineral rights in certain land to defendants, on condition that, if the property was idle for 30 successive days, the contract should be void, plaintiffs, on breach of such stipulation, were not limited to an action of forcible detainer, or a bill in equity to cancel the lease for forfeiture, but could sue for possession.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 66.*]

against the persons and was sustained for defendants, and plaintiffs appeal. Reversed and remanded.

Edward F. W. Kaiser and J. W. Blue, for appellants. Moore & Moore, for appellees.

BARKER, J. The appellants (plaintiffs below), being the owners in fee of a tract of land in Crittenden county, Ky., which is described in the petition by metes and bounds, on the 21st day of February, 1907, leased the mineral rights therein to the appellees for a period of three years, and placed the lessees in possession. It is not deemed necessary to state all of the stipulations and conditions of the lease, except to say that among others it contained the following provision: "If the property lays idle for thirty successive days, this contract becomes null and void." Evidently deeming that the contract had become void by reason of a breach of the foregoing stipulation, the appellants instituted an ordinary action in the Crittenden circuit court for the recovery of the possession of the land, alleging themselves to be the owners and entitled to the possession thereof. The appellees (defendants below) filed an answer, admitting the ownership in appellants of the property, but denying the right of the latter to the possession, and setting up and relying upon the lease before mentioned in bar of appellant's right to recover possession. The appellants then by reply alleged the condition in the lease before set forth, and that the lessees had wrongfully permitted the property to lie idle for more than 30 successive days, and claimed that thereby the lessors became entitled to recover possession of the property. A general demurrer was filed to this reply, and sustained by the court, whereupon, the appellants declining to plead further, their action was dismissed.

There is nothing in the record to show the grounds for sustaining the demurrer to the reply; but it is said in the briefs that the court thought that the plaintiffs' remedy was by an action of forcible detainer, or by bill in equity to cancel the lease for forfeiture. We cannot agree to the soundness of either position. The lessees' right to hold the property was under the lease, and they could not rightfully retain possession of the property after wrongfully forfeiting the lease by breaking the stipulation for the continuous operation of the mine. The lessors had a right to treat the lease as null and void after condition broken, and sue for possession. When the lessees pleaded the lease, it was a sufficient reply that the condition upon which the lease was to remain valid had been broken.

We are of opinion that the court erred in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(Court of Appeals of Kentucky. April 28, 1909.)

1. HOMICIDE (§ 252*)—MURDER—EVIDENCE.

Evidence held to sustain a conviction of willful murder.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 252.*]

2. HOMICIDE (§ 14*)—"AFORETHOUGHT."

"Aforethought," as used to define murder, means a predetermination to kill, however recently formed in the mind before the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 19, 20; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 1, p. 252.]

3. CRIMINAL LAW (§ 603*)—CONTINUANCE—GROUNDS—APPLICATION.

Where a prosecution for homicide had been twice continued while accused was being defended by attorneys appointed by the court when he employed counsel, and the attorneys appointed were permitted to withdraw, an affidavit by the counsel employed for a third continuance because he had not had time to become sufficiently acquainted with the case to undertake the defense, but failing to disclose how long he had been in charge thereof before it was finally called for trial, was insufficient.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 603.*]

4. CRIMINAL LAW (§ 600*)—CONTINUANCE—ABSENCE OF WITNESSES.

Where the attorney for the commonwealth permitted accused to read his affidavit for a continuance as the deposition of two absent witnesses, subject only to exceptions for competency and relevancy, the denial of the application was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1342-1347; Dec. Dig. § 600.*]

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

George Freeman was convicted of murder, and he appeals. Affirmed.

F. E. Graves and T. N. Hazelp, for appellant. James Breathitt, Atty. Gen., and Tom M. McGregor, Asst. Atty. Gen., for the Commonwealth.

BARKER, J. The appellant, George Freeman, was indicted by the grand jury of McCracken county charged with the willful murder of Essie Cobb. To this indictment he pleaded not guilty, but a trial by a petit jury resulted in his being found guilty as charged, and his punishment fixed at death. To review the judgment based upon this verdict he is in this court on appeal.

Briefly, the facts are as follows: George Freeman and Essie Cobb, both of color, were living in a state of concubinage in the city of Paducah. Freeman had a wife living in Metropolis, Ill. On the day of the tragedy Essie Cobb went into a restaurant and called for oysters, and was seated at a table

ing Freeman fled, but, his flight having been observed by two policemen, they without knowing what he had done pursued and captured him. His defense, when placed upon trial, was that he was forced to kill his mistress in order to protect his own life.

The witnesses for the commonwealth who saw the tragedy all state positively that the shooting was done without cause or provocation; that the woman was not armed with a knife or any other weapon; that she was seated at the table when defendant came into the restaurant, and, as said before, the shooting was wanton and without provocation so far as appeared at that time. Both of the policemen state that, when they captured him and it was ascertained that he had shot his mistress, he gave as a reason for killing her that "she had too many men," and that he intended to "kill the whole bunch." Without going into the evidence in detail, it may be stated that the commonwealth's witnesses, if they were to be believed, established a most wanton and cruel murder without any extenuating facts or circumstances. In his own behalf the defendant stated that his mistress was jealous of his wife, and had said to him that she would kill him if he ever spoke to his wife; that he had awakened from sleep in the night, and found her standing over him with a drawn knife in her hand; that, when she observed that he was awake, she laughed, and he went back to sleep; that at the time he went into the restaurant and found her seated at the table as soon as she saw him she threw her hand into her bosom as if to draw a knife; that he knew she carried a knife, and, believing his life was in danger at her hands, he fired the fatal shots. He was also permitted to read his own affidavit as to what two absent witnesses would say if present. This evidence tends to corroborate his own. The jury believed the witnesses for the commonwealth, and disbelieved the testimony adduced in behalf of the defendant, as they had a right to do; and it is not for us to disturb their verdict in so far as it is based upon the testimony.

The appellant insists that the definition of the word "aforethought," as given in instruction No. 3, is erroneous. The definition is as follows: "The word 'aforethought,' as used in said instruction, means a predetermination to kill, however recently formed in the mind before the killing. This definition has been approved so often that we need not stop to cite the cases." The main contention of the appellant for reversal, however, is based upon the fact that the court refused to grant him a continuance when the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ance of the case for further preparation on the part of the defendant. When next called on the docket, the case was continued upon the motion of the commonwealth. When called for the third time for trial, it appears that the defendant had employed counsel, and the appointed counsel were permitted to withdraw from the case. The employed counsel, T. N. Hazellip, filed his own affidavit that the defendant was not ready for trial, owing to the fact that he had not had time to become sufficiently acquainted with defendant's case to undertake his defense. Without citing the allegations of the affidavit, we deem it sufficient to say that the affidavit nowhere discloses how long he had been in charge of the case before it was finally called for trial, and his affidavit was wholly insufficient to authorize the court to continue the case for the third time. The defendant filed his own affidavit for a continuance based upon the absence of Albert Bozzer and G. W. Davis, but the commonwealth's attorney permitted the affidavit to be read as a deposition, subject to exceptions for competency and relevancy. Upon the trial the court permitted all the affidavit that was material or competent to be read as a deposition, and the defendant has nothing to complain of on this score.

Surveying the whole case, we think, without doubt, that the defendant had a fair and impartial trial, that no errors of law were committed to his prejudice, and that the jury were fully warranted by the testimony in reaching the verdict of guilty.

Judgment affirmed.

WRIGHT v. BAYLESS et al.

(Court of Appeals of Kentucky. May 6, 1909.)

1. BILLS AND NOTES (§ 520*)—VALIDITY—DURESS—EVIDENCE.

Evidence held sufficient to support a finding that a note secured by mortgage given to induce defendants to withdraw a contest filed against the will of the father of the parties had not been obtained by duress.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 520.*]

2. BILLS AND NOTES (§ 92*)—CONSIDERATION—CONTEST OF WILL—WITHDRAWAL.

Where defendants had sufficient ground to contest a will, so that it could not be said that the contest was not filed in good faith, a note executed by one of the beneficiaries to one of the contestants in consideration of her withdrawing the contest which she did was based on a sufficient consideration.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 92.*]

Appeal from Circuit Court, Bourbon County.

"Not to be officially reported."

appellant, Russen Mann and Denis Dandou, for appellees.

LASSING, J. James W. Wright, Sr., died testate, resident of Bourbon county, Ky., on the 20th day of February, 1898. His will was duly admitted to probate. He had been twice married, and left surviving him his second wife and three children by her, and three children by the first marriage. By his will he gave to his children by his first wife nothing, but recited therein that he had given to these children their full share or portion of his estate. Mrs. Laura W. Bayless, a daughter by the first marriage, had for many years prior to her father's death been on such unfriendly terms with his second wife and two of her children that she did not visit at her father's home. She was very much dissatisfied with the will, in that it made no provision for her, and she and her husband took an appeal from the order of the county court probating her father's will, and proceeded to contest same. Summons was issued upon the appeal, and served upon James W. Wright, a son by the last marriage, and Isaac Wright, a son by the first marriage. Shortly after process had been served upon him, and upon the same day, James W. Wright met Mrs. Bayless, his half-sister, and a proposition was made and accepted whereby he obligated himself to give to his sister his note for \$2,000, due and payable upon the death or termination of the widowhood of his mother, and secured by mortgage lien upon certain real estate, in consideration of which she ordered the suit contesting the validity of the will discontinued. This was on the 12th day of March, 1898. Thus matters stood until the 1st day of June, 1904, when James W. Wright instituted a suit in the Bourbon circuit court against his half-sister, Mrs. Laura W. Bayless, and her husband, in which he sought to have set aside and canceled the said note and mortgage for \$2,000 executed by him to her on the ground that they were procured through the fraud and undue influence of his half-sister and her husband over him, and were without any consideration to support them. To this petition the defendants filed an answer in three paragraphs, the first of which is a traverse; the second, a plea of the statute of limitations; and the third a plea of estoppel. A demurrer to the second paragraph of the answer was overruled, and a reply was filed, in which the plaintiff stated that the fraud which had been perpetrated upon him was not discovered by him until within less than five years before the date of the institution of this suit. Upon the issues thus formed a mass of tes-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It appears from the testimony of appellant that he had a high regard for the business capacity of his brother-in-law, and was fond of his sister, the appellee, and that he visited her perhaps as many as eight or ten times during the course of a year. Considering that they lived in the same neighborhood, and were near of kin, this degree of friendship cannot be regarded as evidencing that appellee or her husband had or exercised a controlling, unusual, or undue influence over appellant. The record shows that Issac Wright, his half-brother, lived with his sister, the appellee, and it is urged that these visits on the part of the appellant to his sister's home were for the purpose of seeing and being with his half-brother as well as for the purpose of seeing his sister; but, be that as it may, it is certainly no evidence of undue influence on the part of his sister that she should have her brother visit her as often as the record shows appellant did, and, in fact, it would not have excited suspicion had his visits been much more frequent than they were. He is shown to be a man of average intelligence, fair education, and as much business experience as one of his years would be expected to possess. Further than his own testimony, the record fails to show that any influence, undue or otherwise, was exerted over him by either his sister, the appellee, or her husband. It is shown, however, by the testimony of appellant himself, that upon the occasion of almost every visit to her home she would discuss with him the relations which existed between herself and her father and his family, and would frequently state that her father had not done for her what she expected him to do, and that, if he did not make proper provision for her in his will, she would contest same. When she learned, after the death of her father, that no provision had been made for her in the will, and upon the very day it was first read to the family, she testifies that she again told appellant that she intended to contest it, and that appellant thereupon said to her if she would not do so he would give her \$2,000; that, relying upon said promise, she permitted the will to be probated without objection; that thereafter, as her brother did not comply with his promise to her, she instituted a suit contesting the will by taking an appeal from the order of the county court probating same. Appellant denies that he made to his sister any proposition to pay her \$2,000 if she would not resist the probate of the will, but he does admit that upon the very day that the appeal was taken he met his sister on the street near the post office in Paris, and told her that, if she would dismiss her appeal, he would execute a note for \$2,000, and secure it by a mortgage, and immediate-

missed in accordance with the agreement which she had upon that day made with her brother. At the time the agreement was reached and the mortgage executed, summons had been served upon but two of the defendants to the litigation, and the sheriff was directed by appellee Mrs. Bayless not to serve the summons upon the other defendants named therein. This fact is commented on at length by appellant's counsel, but the explanation which is offered concerning this conduct on her part is entirely reasonable and altogether natural; for, having adjusted the matter, it would have been a useless expense to have permitted the sheriff to go ahead and serve the remainder of the summonses. Thus matters stood for more than six years, during which time appellant made no complaint to his sister or anyone else, so far as the record discloses, which would indicate that he was dissatisfied with the settlement and adjustment which he had made with his sister; nor did he claim to them or to any one that he had been overreached, defrauded, or deceived by his sister or her husband. The execution of the note and mortgage was the free voluntary act of appellant, and the evidence utterly fails to support his claim to the contrary.

This brings us to the consideration of the further question as to whether or not there was a consideration for its execution. Much stress is laid by counsel for appellant upon the fact that the proof taken in this case failed to establish any evidence of lack of capacity on the part of the testator to make a will. This is true, but appellee was not limited in prosecuting her contest to the question of capacity alone, but it would have been her right to show that, although her father had sufficient capacity to make a will, yet he himself was overreached and unduly influenced by his wife or other members of his family or the conduct of his daughter or other cause to make the will in the way and manner in which he did; and the fact that appellee when called upon to testify in this case, after a lapse of nearly seven years, was unable to present a state of facts which would warrant an intelligent jury in overthrowing the will, cannot be seriously taken as evidence tending to show that the contest of her father's will was not instituted in good faith. Nor can the further fact that others of her brothers and sisters did not join with her in the proposed contest be accepted as militating against her honesty of purpose in instituting same. They may all have been satisfied with the provision which their father made for them. They may have felt that, although the division was not equal, still, it being their father's will, they would accept it without complaint. Unfortunately

sons than he had with his daughters. He had given to his sons their property in fee, or at least a goodly portion thereof, while he had given to his daughters only a life estate. Appellee was very much dissatisfied with what her father had done for her; and this feeling was, no doubt, intensified and aggravated by the fact that she was not on friendly terms with her stepmother and other members of her father's household. It is but natural that she would attribute her father's treatment of her and his scant provision made for her as she regarded it to the exercise of some influence in his home which was operating to her detriment. That the contest over his will was not trumped up for the purpose of extorting money from her half-brother, he in his own testimony furnishes the most conclusive evidence, for he makes it plain that some time before her father's death she notified appellant that she had not received a fair portion of his estate, and that, if in his will she was not properly provided for, she would contest it.

The inequality of division furnished to her, if not a meritorious, certainly a sufficient ground to warrant the institution of the contest. As soon as he learned that the contest had been instituted, and, in fact, as soon as it was talked about, appellant busied himself to prevent it, and, whether he proposed to his sister to pay her the \$2,000 as she says he did before it was instituted, he certainly took the initiative to have the suit dismissed at his earliest opportunity after it was commenced. He no doubt recognized the fact that his sister had not been fairly treated by their father in the division of his estate. She was a woman past middle life, and had no children; and, while her brothers could use the property received from their father as they saw fit, and make such disposition thereof as they desired, yet she, under the terms of the deed which he made to her, was limited merely to the use of her property, and was denied the right to make disposition thereof either by will or deed. He knew of the estrangement which had existed between her and other members of his father's family for many years, and whether he was actuated in making this settlement by a fear that the will might not be upheld, or by a desire to avoid having the breach in the friendship of the family circle widened, or for the purpose of avoiding and saving the expense which such a litigation must necessarily bring upon the estate, and particularly to him, it is immaterial. Any one of these grounds would have furnished a good and sufficient consideration for the contract which he made and entered into with his sister. She had a

for a promise if there is any benefit to the promisor, or any loss or detriment to the promisee. It is not necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction, and, in the matter of a benefit, a mere expectation or hope or a contingent benefit is sufficient, as, for example, the expectation of advantage or profit from the thing promised. Indeed, there is a consideration if the promisee in return for the promise does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not." In *Pugh v. Barton*, 7 Ky. Law Rep. 822, it was held that the dismissal of an action to recover land was a sufficient consideration for the execution of a note. And in *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 310, it was held that an agreement to settle and arrange matters to prevent a suit from being brought against a promisor was a sufficient consideration to uphold a contract. Instances of cases of this character might be cited almost without number, where the promise to do or forbearance from doing a given act which is not in itself illegal, or unauthorized in law, has been held to be a sufficient consideration to support a contract.

Being of opinion that the evidence in the case fails to support appellant's contention that the note and mortgage were procured through fraud or undue influence, and the dismissal of the appeal from the order of the county court probating the will being a good and sufficient consideration for the execution of the note and mortgage, it is unnecessary to consider the other questions raised upon this appeal.

The judgment is affirmed.

FORD LUMBER & MFG. CO. v. GRIGGS.

(Court of Appeals of Kentucky. May 5, 1909.)

1. LOGS AND LOGGING (§ 35*)—UNAUTHORIZED CUTTING OF TIMBER.

Where a third person bought a certain number of trees of plaintiff and sold them to defendant, who hired the third person and others to cut the trees, and they cut in addition other trees belonging to plaintiff, defendant was liable to plaintiff for the other trees so cut, though plaintiff did not own the land upon which some of them stood.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 35.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

about \$2.50, a verdict for \$725 was not excessive in view of the fact that the jurors lived in the vicinity, and probably knew the value of timber, as well as either witness.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 35.*]

Appeal from Circuit Court, Perry County.
"Not to be officially reported."

Action by L. E. Griggs against the Ford Lumber & Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

T. E. Moore, Jr., and Miller & Ward, for appellant. F. J. Eversole and P. T. Wheeler, for appellee.

NUNN, J. This action was instituted by appellee to recover \$725, the alleged value of 145 poplar trees which he averred appellant and A. B. Asher had cut and hauled from two surveys of land, and which timber trees belonged to him. Upon the conclusion of the testimony appellee dismissed his petition as to Asher, and the jury, after being properly instructed, returned a verdict in favor of appellee for the sum claimed. Appellant claims that it is not responsible in this action, for the reason that A. B. Asher and his hands cut and hauled away the timber, and that it did not trespass upon appellee's land.

The testimony shows that Asher bought a certain number of trees from appellee and sold them to appellant, and that it employed Asher and a lot of hands to cut the trees; that they not only cut the trees which Asher purchased from appellee, but in addition cut the 145. Appellant does not deny having received these trees, and that it has not paid either Asher or appellee therefor, but makes the contention that appellee did not own the land from which 88 of the trees were cut. It is true that he did not own this land, but the testimony shows that he owned the trees. This was proved by appellee as well as by the owner of the land.

Appellant also contends that the verdict is excessive. It was shown by the testimony that a large number of the trees were 6½ feet in circumference at the stump, and would make 2 logs, each 14 feet in length. Appellant stated that the trees were worth \$5 apiece. Asher stated that their value was about \$2.50. We do not feel authorized to disturb the verdict of the jury on this question. The jury had a right to believe either witness on this question, and, in addition, the members thereof lived in that vicinity and probably knew the value of timber as well as either witness.

For these reasons, the judgment of the lower court is affirmed.

CITY BONDS—OBLIGATION OF CONTRACT.

A city may tax its bonds in the hands of another; there being no express or implied provisions to the contrary, and hence no impairment of the obligation of contract of sale.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 354; Dec. Dig. § 137.*]

Appeal from Circuit Court, Logan County.
"To be officially reported."

Action between the Bank of Russellville and the City of Russellville. From an adverse judgment, said bank appeals. Affirmed.

S. R. Crewdson, for appellant. S. J. Browning, for appellee.

CLAY, C. Appellant, Bank of Russellville, is the owner and holder of \$24,000 worth of bonds issued by the city of Russellville. The sole question involved on this appeal is whether or not said bonds should be taken into consideration in determining the value of appellant's capital stock for the purpose of taxation. The case arises on an agreed statement of facts. The court below gave judgment in favor of appellee, city of Russellville. From that judgment the Bank of Russellville prosecutes this appeal.

It is the contention of appellant: That appellee is without power to tax its own indebtedness; that, if this could be done, it would impair the obligation of its contract to pay the debt and interest contracted to be paid. This is not a case where the ordinance providing for the bond issue specially exempts the bonds from municipal taxation. It will not be necessary therefore to discuss that question. The bonds in this case have no such provision. They are simply obligations on the part of the city to pay certain sums, with certain interest, within a specified period.

An interesting case upon this subject is that of *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760. In that case the plaintiff was a resident of Bonn, Germany, and was the owner of \$35,262.35 of stock issued by the city of Charleston. This stock was equivalent to municipal bonds. One-third of the interest due the plaintiff on the 1st days of April, July, and October, 1870, and January and July, 1871, having been retained by the city, he brought an action to recover the sums retained. The city sought to justify the retention of the interest by virtue of certain ordinances which it had enacted. By these ordinances the city appraiser was directed to assess a tax of two cents upon the dollar of the value of all real and personal property in the city of Charleston, for the purpose of meeting the expenses of the

city government. It was further provided that the taxes assessed on city stock should be retained by the city treasurer out of the interest thereon when the same became due and payable. The court held that the levy and collection of the tax in the manner provided by the ordinances of the city of Charleston impaired the obligation of its contract, and gave judgment in favor of plaintiff. In discussing the question involved, the court uses the following language: "Is, then, property, which consists in the promise of a state, or of a municipality of a state, beyond the reach of taxation? We do not affirm that it is. A state may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched; but, until payment of the debt or interest has been made, as stipulated, we think no act of state sovereignty can work an exoneration from what has been promised to the creditor, namely, payment to him, without a violation of the Constitution. 'The true rule of every case of property founded on contract with the government is this: It must first be reduced into possession, and then it will become subject, in common with other similar property, to the right of the government to raise contributions upon it. It may be said that the government may fulfill this principle by paying the interest with one hand, and taking back the amount of the tax with the other; but to this the answer is that, to comply truly with the rule, the tax must be upon all the money of the community, not upon the particular portion of it which is paid to the public creditors, and it ought besides to be so regulated as not to include a lien of the tax upon the fund. The creditor should be no otherwise acted upon than as every other possessor of money, and, consequently, the money he receives from the public can then only be a fit subject of taxation when it is entirely separated [from the contract] and thrown undistinguished into the common mass.' 3 Hamilton, Works, 514 et seq."

It will be observed that the facts of the above case differ from those of the case at bar. There the owner of the bonds was a nonresident, and the ordinance provided that the tax should be deducted from the interest to be paid by the city of Charleston, and that the owner should receive merely the balance. Here the bonds are owned by a resident of the city of Russellville, and have an actual situs in that city. They are not sought to be taxed by any arrangement by which the amount of the tax is deducted from the interest agreed to be paid. The bonds are sought to be taxed like any other property.

In the case of *People v. Home Insurance*

Co., 29 Cal. 533, the power of a state to tax its own bonds was sustained. The bonds, issued by the state and owned by a foreign insurance company doing business in that state, and deposited with a banker, were held to be property within the meaning of the revenue act. The court, in passing upon the question, said that the state had the power to tax its own bonds equally with other property, and that the exercise of such a power involved no violation of the contract.

In the case of *Champaign County Bank v. William Smith*, 7 Ohio St. 42, it was held that stocks or bonds of the state of Ohio, which were not expressly exempted from taxation either by their own terms or by the provisions of the laws under which they were issued, were subject to taxation by the Legislature. In discussing the question the Supreme Court of that state said: "One man invests capital in state stocks, as a source of income and profit to himself. From the same motives of interest, other capital is invested in the bonds of a private corporation, or the notes of individuals. These investments are equally taxed, as property, as sources of profit and income. The consequence is that the profit is diminished in both cases. This is an effect, but not the object of the law imposing the taxation. It contemplates no such purpose. As between the parties, the contract is left in full force; but the property invested, or acquired by the contract, is taxed, not by way of interference with the rights of the parties, as borrower and lender, but for the support of government, and the consequent protection and welfare of the whole community. No one doubts the power of the state to tax land within its territorial limits, whether held by direct grant from the state, or by title from a different quarter; and if the taxation of capital invested in state bonds impairs the obligation of a contract which contains no stipulation for exemption, upon what principle shall the taxation of bank bills, or corporation bonds, or the notes of individuals, be justified? The principle that, in the absence of any stipulation to the contrary, a sovereign state possesses the power of taxing all property held under it, and within its jurisdiction, is fundamental and essential to the very being of government. Property can only be acquired and held subject to this condition, and this infirmity of tenure furnishes the only adequate means for its protection."

And in the case of *Phil. & Wil. R. R. Co. v. Maryland*, 10 How. 393, 13 L. Ed. 461, Chief Justice Taney uses the following language: "This court on several occasions has held that the taxing power of a state is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms."

There can be no doubt that the power of

were property, and it held and owned by it were, under the charter of the city of Russellville and of the statutes of the state of Kentucky, subject to taxation. There is neither an express nor an implied contract on the part of the city of Russellville to surrender its power of taxation. The contract of purchase of the bonds was made subject to the taxing power. The imposition and collection of a tax upon the bonds cannot therefore impair the obligation of the contract, which was certainly made subject to the right of the city of Russellville to exercise the power of taxation.

For the reasons given the judgment is affirmed.

BOWLING v. BOWLING et al.

(Court of Appeals of Kentucky. April 30, 1909.)

EXECUTION (§ 256*)—SALE—RIGHTS OF PURCHASER—QUIETING TITLE.

In a proceeding between a landowner and the purchaser at execution sale, considering the value of the land and the amount of the judgment to be satisfied, with the facts that the judgment was one which the purchaser should himself have paid, and that he was attempting to defraud the landowner, who was his aunt, held, that the title to the land should be quieted in the landowner.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 256.*]

Appeal from Circuit Court, Clay County.

"Not to be officially reported."

Action by Alabama Bowling against Nancy J. Bowling, wherein M. F. Bowling intervened. From a judgment for plaintiff, intervenor appeals. Affirmed.

D. K. Rawlings, for appellant. Greene, Van Winkle & Schoolfield and J. W. Wright, for appellees.

LASSING, J. In October, 1897, J. S. Bowling and his wife conveyed to their daughter, Alabama Bowling, two small tracts of land. She was placed in possession following the execution of the deed and held the land until in March, 1903, when she sold same to Nancy J. Bowling. A part of the consideration was paid in cash, and purchase-money notes were executed for the remainder. No deed was executed at the time, but a bond for a deed was given instead; the deed to be executed upon the payment of the remainder of the purchase money. The notes matured, and, being unpaid, suit was instituted to enforce their collection and sell the land or a sufficiency thereof to satisfy the debt.

Defendant Nancy J. Bowling answered, admitting the purchase and sale, the execution of the notes sued on, and the delivery of possession of the land to her. She pleaded fur-

vendor, Alabama Bowling, could not make her a good and sufficient title to the land, that the land which had been sold to her by Alabama Bowling had, together with other lands, been sold by the master commissioner of the Clay circuit court under an order of said court to one M. F. Bowling, and that a deed had been executed to him for his said purchase. She asked that said M. F. Bowling be made a party to the suit and required to assert any claim that he might have against said land, or renounce his right to do so. Upon being brought before the court, M. F. Bowling answered and made his answer a counterclaim. In this he alleged: That in March, 1897, J. S. Bowling, his grandfather, who, at that time, owned the land in question, together with other lands, conveyed these lands to himself and his brothers and sisters in consideration of love and affection; the said M. F. Bowling and those to whom the land was conveyed being the children of John E. Bowling, a son of J. S. Bowling. That, after the execution of this deed, the First National Bank of Pineville brought suit in the Clay circuit court against J. S. Bowling and the grantees in the aforesaid deed, in which it sought to have the same set aside as fraudulent, and the land therein described subjected to the payment of a judgment debt which it had procured against J. S. Bowling, etc., upon which there had been an execution issued and returned no property found. All of the defendants were duly summoned, but made no answer, and in March, 1898, judgment was rendered adjudging the deed fraudulent, and same was canceled. The land was adjudged to be in lien to the bank for the payment of this judgment debt, and a sufficient amount thereof was ordered sold to satisfy same. That, after the rendition of the judgment directing the land to be sold, he (M. F. Bowling) had paid various sums on said judgment, amounting in the aggregate to about \$175; the last of said payments being in July, 1900. That by making these payments a stay or postponement of the sale had been procured. That the bank took no steps to enforce a sale of the land until in March, 1902, at which time the court ordered its commissioner to sell said lands, and in June following a sale was made, whereupon he (M. F. Bowling) became the purchaser of all the lands described in the deed of March, 1897, for the balance of the money due said bank, to wit, \$180, interest, and some costs. The sale was in due time reported and confirmed, and in June, 1903, a deed was ordered and made to him. That he had been in the possession of all of said lands except the two small tracts described in the plead-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

J. S. Bowling, had conveyed to his aunt, Alabama Bowling, the said two tracts of land set out in her petition. He stated that there was no consideration for said conveyance, and that same was made for the purpose of defeating the bank in the collection of its debt, and that in this way and manner the said Alabama Bowling became possessed of the land described in her pleading. He prayed for a writ of possession, and a decree adjudging him to be the owner of the lands described in the petition, under his commissioner's deed.

To this answer and counterclaim the plaintiff filed a reply, in which she admitted the execution of the deed by her father in March, 1897, but denied that it was made for the object and purpose of defeating the bank, denied that the defendant M. F. Bowling was entitled to said land or the possession thereof, and alleged: That the order of sale entered at the March term, 1902, of the Clay circuit court was procured by M. F. Bowling through fraud upon the rights of herself and his brothers and sisters; that the debt for which the judgment was rendered in March, 1898, was the debt of John E. Bowling, the father of said M. F. Bowling; that said J. S. Bowling was in fact merely the surety for him; that these facts were well known to M. F. Bowling, and after the judgment had been rendered he and his father undertook to satisfy same, and did, from time to time, pay the sums of money set up by said defendant in his answer and counterclaim; that M. F. Bowling pretended to pay said money in his own name, but that in fact his father furnished the money, and had the payments made in the name of his son for the purpose of covering up his property, defrauding others of his creditors; that the defendant M. F. Bowling was at that time and still is an unmarried man and lived with his father; that in March, 1902, in order to perpetrate a fraud upon her, the said M. F. Bowling procured and induced the bank to take the supplemental judgment and have the lands sold in satisfaction thereof in order that he might purchase same. She further pleaded: That in March, 1897, her father, who owned some 1,200 or 1,500 acres of land, undertook to make a partial allotment and division of same among his children, and that, his son John E. Bowling being heavily in debt, her father conveyed the portion to which the said John E. Bowling would be entitled to his children. That thereafter, and without any purpose to defeat the bank in the collection of its debt, which only amounted to \$224, he and his children became dissatisfied with the division he had made, and he selected two housekeepers and

lands, and in this said division they set apart to the children of John E. Bowling, one of whom was the defendant M. F. Bowling, all of the land which her father had described in the deed of March, 1897, except the two small tracts which were set apart to this plaintiff, Alabama Bowling, and which are the subject-matter of this litigation. That in this division the defendant M. F. Bowling and his father not only acquiesced, but actively assisted. They knew that J. S. Bowling and his wife conveyed these two tracts of land to Alabama Bowling in October, 1897, and some time during the spring following a deed was made to defendant M. F. Bowling and his brothers and sisters conveying to them the lands which the said commissioners had found to be their equitable share. That the said M. F. Bowling never made any claim whatever to the lands described in the petition, or asserted any right thereto until after he was made a party to this litigation, but had, all the time, recognized the same as the property of his aunt, the plaintiff, and during a part of the time both he and his father had rented a portion of the land and paid rent to plaintiff. That neither plaintiff nor her father paid any attention to the bank suit for the reason that they each regarded it as a debt which was properly chargeable to the interest in the estate of their father, which the children of John E. Bowling received from their grandfather. That the land which was sold in satisfaction of the \$180 bank debt was in fact worth more than \$1,500. And that the defendant M. F. Bowling, with full knowledge of plaintiff's title and possession, and his acquiescence in the transactions under which she became possessed thereof, had procured the sale of the lands in the way and manner in which he did, for the fraudulent purpose of procuring her land. She asked that his claim to so much thereof as was covered by the deed from her father to her be rejected.

The affirmative matter in this reply was traversed in a rejoinder. On the issues thus made proof was taken, and on final submission the chancellor found in favor of the plaintiff, Alabama Bowling, and dismissed the counterclaim of the defendant M. F. Bowling, from which ruling and judgment he prosecutes this appeal.

It is admitted that all of the land referred to in this litigation belonged, in March, 1897, to J. S. Bowling, that there was no consideration save love and affection for any of the conveyances which he made to his children and grandchildren, that he desired to divide his land among his children and grandchildren during his lifetime, and that such division should be equal. One of his sons, John

As evidenced by the pleadings, the first division was made in March, 1897. At that time the deed which was made to M. F. Bowling and his brothers and sisters contained two tracts of land, and included within which were the parcels in controversy in this litigation. In October following, for some reason not altogether clear, the land was divided again, and this time, before the deeds of conveyance were made, J. S. Bowling caused his lands to be surveyed and divided by commissioners especially selected and sworn for that purpose. Each of his children accepted the portions allotted to them, and were placed in possession thereof, and likewise the children of John E. Bowling were placed in possession of the portion set apart to them. In this allotment they were given the fee, while their father, John E. Bowling, was given a life estate; the deed to them being executed and delivered in April, 1898, after the judgment setting aside the deed of March, 1897, had been entered, and in this deed of April, 1898, the two small parcels involved in this litigation, and which had been included in the deed of March, 1897, were excluded. Appellant and his father were fully advised concerning this partition and allotment, and knew that appellee Alabama Bowling had been placed in possession of the two small tracts so allotted to her. They recognized her ownership and possession thereof from the date of the conveyance in the fall of 1897, until after the institution of this suit in January, 1905.

After the default judgment had been taken by the bank in this suit, in which it sought to set aside the deed executed in March, 1897, no further steps were taken by the bank to enforce this judgment until in 1902, during which time the debt had been reduced until there remained unpaid on same \$180. These payments had all been made by M. F. Bowling, with the exception of one, which was made by John E. Bowling, in his name, but John E. Bowling had been quite active during this time in securing a stay of proceedings on the part of the bank. He and his son M. F. Bowling were living together, and at one time they had procured the assistance of J. S. Bowling in getting further time from the bank, even going so far as to induce him to pledge to the bank a collateral note for the purpose of securing said debt, and preventing a sale of the land in satisfaction of the judgment, and it is evident, from the conduct of John E. Bowling, and M. F. Bowling as well, that it was understood and agreed, at the time the deed from J. S. Bowling to the children of John E. Bowling was delivered and accepted in the spring of 1898, that this balance of the bank debt

was to be paid, and this testimony on his part nowhere denied.

In 1902 appellant, M. F. Bowling, for the alleged purpose of securing himself in the money which he had theretofore paid on the debt, induced the bank to have its judgment executed, and the land which had been sold in lien to it to satisfy this judgment. This the bank proceeded to do. The land was appraised at \$400. The proof shows that it was worth anywhere from \$1,500 to \$2,000. The plaintiff was not a party to the suit, either as originally brought or before the supplemental judgment was entered. Neither she nor her father paid any attention to the proceeding of the bank, for they each understood that was an obligation which was the duty and right of appellant and his brothers and sisters to satisfy; and this is especially true of plaintiff, Alabama Bowling, for the reason that she knew that her nephew, M. F. Bowling, had all along recognized her claim and right to the tract of land on which she was in possession, and it never occurred to her that the appellant was attempting to disturb her title or possession. With plaintiff and her father lulled into quiet inaction, he proceeded to have the decree of court enforced, and the land sold. He became the purchaser thereof for a mere pittance without advising either his grandfather or his aunt, the plaintiff, that he was desiring or attempting to disturb her possession, and, in fact, the whole proceeding was carried along on his part under the guise of securing him in the moneys which he had theretofore paid. He was not acting in good faith in thus attempting to purchase his aunt's property, as is further evidenced by the fact that, after having made his said purchase, he possessed himself of all the lands covered thereby save and except the two tracts which had been conveyed to her by her father. Now, had he been acting in good faith, when the deed was made to him by the commissioner, he would have taken his writ of possession and attempted to enforce his right; but, on the contrary, he takes his deed, but makes no effort whatever to secure possession of this property until after the lapse of two years, and he is brought into court and called upon to show cause why his claim thereto should not be rejected.

The rule that a purchaser at a judicial sale, when the sale has been confirmed and the deed made, takes by virtue of his purchase all the rights of the parties to the land conveyed to him, has no application to a case like that under consideration, for, while it is true that appellee acquired title to the property from her father, who was a party to the bank suit under which the land in question was sold, it is also true that appellant

before and after the order of sale was entered, and before and after he became the purchaser at the commissioner's sale, and he knew that his aunt, the plaintiff, was not a party to that litigation, and he therefore is in no position to claim that the decree and deed conveyed to him the property of plaintiff, and that her claim and title thereto was void. If appellant had been attempting to perpetrate no fraud upon his aunt, the plaintiff, after he purchased the same, and with a knowledge that she was in possession of same, and claiming it under a deed, he would have filed exceptions to the report of sale after he became the purchaser, and had the question of her right and title decided by the court; but, as he failed to do so, he is not now in a position to complain because he was not put in possession of her land. He was not misled by the plaintiff or any one else at the time he bought it at the commissioner's sale. No fraud was perpetrated upon him, but, on the contrary, he, himself, was attempting to perpetrate a fraud upon his aunt, the plaintiff, in procuring the sale in the way and manner in which he did, and later, in receiving from the commissioner a deed for plaintiff's land, and then concealing from her the fact that he had done so until compelled, under process of court, to disclose the fact.

The chancellor, in adjudging that appellant had no right or claim to the two tracts of land described in the petition, reached a just, equitable, and proper conclusion, and the judgment is therefore affirmed.

LOUISVILLE & N. R. CO. v. SUMMERS. (Court of Appeals of Kentucky. May 5, 1909.)

1. CARRIERS (§ 276*)—CARRIAGE OF PASSENGERS—DIRECTION OF PASSENGER TO WRONG TRAIN—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action by a passenger for damages from being directed to a train which did not stop at her destination, instead of the proper one, which followed a few minutes later, testimony that her son had been directed to meet her on arrival of the train which did not stop, and that he did so, and, not finding her, returned home so that she was compelled to walk, was improperly admitted on the question of damages, since, if she had been directed to the proper train, her son would still not have met her.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 276.*]

2. CARRIERS (§ 382*)—CARRIAGE OF PASSENGERS—EJECTION OF PASSENGER—ACTION FOR DAMAGES—PUNITIVE DAMAGES.

Punitive damages were not recoverable where the ejected passenger, after stating that the agent was insulting, testified only that he

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1489; Dec. Dig. § 382.*]

Appeal from Circuit Court, Bullitt County. "To be officially reported."

Action by Susan Summers against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Charles Carroll and Benjamin D. Warfield, for appellant. Nat. W. Halstead and Ben. Chapeze, for appellee.

CLAY, C. Appellee, Susan Summers, a lady 65 years of age, on Sunday, April 28, 1907, purchased of appellant's ticket agent at Union Station in Louisville, Ky., a ticket over its line of railroad to Gap-in-Knob, a station on appellant's railroad in Bullitt county, Ky., about 17 miles from Louisville. After purchasing the ticket she went in company with her brother to the gate through which passengers go in leaving the station to board trains. She presented her ticket to the gatekeeper, and claims that he told her to take the Bardstown & Springfield Accommodation train, which was known as train No. 91. In obedience to the direction of the gatekeeper, she, in company with her brother, approached train No. 91 for the purpose of boarding it, and the brakeman stationed at the door of the car looked at her ticket and directed her to take that train. From this time on the evidence is conflicting.

According to appellee, the conductor in charge of the train, shortly after it left Union Station, came to her, and she presented her ticket. He took it, looked at it, and said, "Gap-in-Knob." He then punched the ticket and went on collecting fares or tickets from other passengers. Some time before reaching the station on appellant's line known as "South Louisville," which is distant about three miles from Union Station, the conductor returned and told appellee that she would have to take her ticket back, that he would not stop at Gap-in-Knob, and that she would have to get off at South Louisville. She refused to accept the ticket, and he then told her she would have to get off the train. As the train approached South Louisville, he picked up her suit case and said: "Come on. You have got to get off." As she got off, the conductor directed the agent to take charge of her and flag some train and instruct the conductor thereof to put her off at Gap-in-Knob. The depot was locked or fastened, and she was compelled to remain standing on the platform about an hour until the arrival of the train upon

from which she was ejected. He was there to meet her, but, finding that she was not on the train, returned home. When appellee reached Gap-in-Knob, she was compelled to walk over rough and muddy roads and to carry a suit case weighing from 40 to 50 pounds to her home, a distance of about a half mile. Owing to her excitement and mortification in being ejected from the train and being compelled to remain at South Louisville, and having to walk a distance of a half mile in the dark and carry a heavy valise, she was made sick and suffered a great deal for two or three weeks thereafter.

The testimony for appellant was to the effect that train No. 91, a Bardstown & Springfield train, and the one which appellee boarded, left for Bardstown at 6 p. m. Train No. 95 left for Bowling Green at 6:10 p. m., and train No. 93 left for Greensburg at 6:30 p. m. All of these trains ran over appellant's main stem from Louisville to points beyond Gap-in-Knob. Train No. 91 left the main line for the Bardstown & Springfield branch at Bardstown Junction. Train No. 93 left the main line at Lebanon Junction for Greensburg via Lebanon. Train No. 95, which ran to Bowling Green, ran the entire distance on the main line. These trains were all in the train shed at Union Station, Louisville, loading passengers at the time appellee passed through the gate and boarded Springfield train No. 91. On Sundays the Springfield train No. 91 did not stop at any point between Louisville and Bardstown Junction to let off passengers, and train No. 95, the Bowling Green train, did not stop at any point between Louisville and Lebanon Junction to let off passengers. Train No. 93, the Greensburg train, made all of the stops that were required to be made between Louisville and Lebanon Junction. Instead of taking train No. 91, appellee should have taken train No. 93. Appellant's conductor testified: That, as he was walking through the train on leaving Union Station, he found appellee about the middle of the ladies' car sitting on the west side of the coach. She presented a ticket for Gap-in-Knob. He told her: That they did not stop at Gap-in-Knob on that run; that it was a bad place to stop, a bad place to flag from; that if anything happened they couldn't get around that curve; that No. 93 made all the stops and followed No. 91 out of Louisville in 30 minutes; that she would have to get off in South Louisville and catch No. 93 out. He then passed on through the car, took up the rest of the tickets, then came back to where Mrs. Summers was, and explained to her the reason that they

running into them from the rear. He further testified: That he was not rude or insulting or bolsterous in any way towards Mrs. Summers; that he knew her and all of her family.

Upon the conclusion of the evidence the case was submitted to the jury, which returned a verdict in appellee's favor for \$1,000. From the judgment based thereon, the Louisville & Nashville Railroad Company prosecutes this appeal.

It is first insisted: That the court erred in permitting appellee and her son to testify to the fact that he had been directed to meet appellee on the arrival of the Bardstown & Springfield train, and to the further fact that appellee's son, after he had gone to that train and found she was not a passenger thereon, left the station, and upon her arrival she was compelled to walk to her home and carry a valise; that the court also erred in instructing the jury to consider these facts in determining the amount of damages to be awarded. Our conclusion is that appellant's contention is correct in both respects. The Bardstown & Springfield branch train did not stop at Gap-in-Knob on Sundays. If appellee and her son supposed it did, it was their mistake. The fact that her son failed to meet her, and she was therefore compelled to carry her valise to her home, was not due to any negligence on the part of appellant's servants in directing her to take the Bardstown & Springfield branch train, or in ejecting her from the train. If she had been directed to take the proper train, No. 93, he still would not have met her. Under the circumstances, then, it was error to admit such evidence and to predicate any right of recovery thereon.

It is next insisted that the court erred in permitting appellee to testify that the conductor, in a rough, rude, and insulting manner, told her to get off. The argument is made that such testimony is only an expression of opinion on the part of the witness; whereas, she should have simply testified to the facts and let the jury conclude therefrom whether or not the conductor's manner was rough, rude, or insulting. In the same connection it is contended that the facts of the case did not justify an instruction authorizing punitive damages. For the purpose of determining these questions, we give below the exact language of the witness: "Q. After the train had pulled out, shortly thereafter, while you were in Louisville, did the conductor, Ike Wright, come around? A. He came around as usual to collect the tickets. Q. Now, then, what occurred first between you and the conductor?

car. Q. Now, after that, did he come back to you before you reached South Louisville? A. Yes, sir; he came to me and says; 'Here take your ticket, I will not stop and put you off at Gap-in-Knob.' I said: 'What are you going to do with me?' He says: 'I will put you off at South Louisville.' I says: 'I won't take the ticket back. You've punched the ticket, and I bought it for Gap-in-Knob, and I won't take it back.' Then he, in a rough, rude, insulting manner, told me, said, 'You get off of here.' Q. Then what occurred there? A. We came nearer and nearer the depot. He picked up my baggage, and he says: 'Come on. You've got to get off.' He was mad. I didn't take the ticket back, I think, was the reason."

While we think it was proper to permit the witness to testify that the conductor's manner was rude or insulting, yet we are also of the opinion that, where the facts to which the witness testifies do not show that he was insulting in words, manner, or tone, a punitive damage instruction should not be given. We have carefully examined a number of cases wherein this court approved of a punitive damage instruction, and in every one of them facts were testified to showing that the railroad company's agents were rude or insulting. Thus in the case of Louisville & Nashville R. R. Co. v. Ballard, 88 Ky. 159, 10 S. W. 429, 2 L. R. A. 694, the conductor told the plaintiff, who was a woman, that, if she would not go on, she would have to get off the train and walk back. He waived his hand towards the door, and she went carrying a bundle and valise. He followed her to the door and stood on the platform without offering to assist her. The brakeman, who was on hand, offered her no assistance, but seemed to enjoy the situation. As she stepped on the ground from the coach, the brakeman grinned at her with a broad grin. Both he and the conductor seemed to enjoy her discomfiture. Other facts were testified to showing the conductor's tone of voice and manner towards her were insulting. In the case of Memphis & Cincinnati Packet Co. v. Nagel, 97 Ky. 8, 29 S. W. 743, the plaintiff, accompanied by another young lady, took passage for New Albany, Ind., on defendant's steamboat. When the boat approached New Albany, the porter came to her and asked her for her check, and told her to get her trunk ready to get off. She got ready, and on coming out of her stateroom found that the boat was opposite the New Albany landing and was making no effort to land there. She went to the front of the boat and told the captain that she wanted to land at New Albany. His answer was, "I thought you

is." The plaintiff then said to the clerk, "You know I wanted to get off at New Albany," and he replied, "I never dispute a lady's word." There were other facts showing that the captain spoke roughly to her. The language of the clerk was an intimation that the plaintiff was not telling the truth, although, as a matter of fact, she was. In the case of Illinois Central R. R. Co. v. Winslow, 119 Ky. 877, 84 S. W. 1175, the facts testified to showed that the brakeman abused the plaintiff, who was a passenger in a caboose attached to a freight train, and threatened to "knock a lung out of him." In the case of Louisville & Nashville R. R. Co. v. Fowler, 123 Ky. 450, 96 S. W. 568, and 107 S. W. 703, there was testimony that the conductor's tone of voice was harsh and his manner abrupt, and that he took hold of plaintiff's arm, roughly pulled her from her seat, and ejected her from the train, because she did not produce her ticket or tender her fare. Others present, however, did volunteer to pay her fare. On the other hand, this court, in the case of Southern Railway in Kentucky v. Hawkins, 121 Ky. 415, 89 S. W. 258, held that a punitive damage instruction should not have been given. In that case the party who was ejected from the train and brought the action testified as follows: "The conductor looked at it [the ticket] and said it was no good, that I could not ride on that. I asked him why, and he said the ticket wasn't any good. I told him that I got it the evening before and paid full fare for it. He still said it was no account, and I would have to pay my fare or get off. I told him that I couldn't pay my fare, that I didn't have any money. He said there wasn't any use in talking about it, and he pulled the bell cord and stopped the train. He walked in front of me, and when we got to the step he took me by the arm until I got down the steps. He did not get off the train. He helped me down to the bottom step, it seemed to me in a pretty rough way. He held me tolerably tight, but did not hurt me." In discussing the question this court said: "It will be observed that the conductor was neither offensive nor insulting to appellee. He applied to him neither force nor threats and did not even place his hand upon him except to assist him down the car steps. It is true the witness thought he helped him down the steps in a pretty rough way, yet when he describes his manner and explains what he did it is apparent that he was neither rough nor unkind. It is patent therefore that the conduct of the conductor was not such as to manifest a wanton or reckless disregard of appellee's rights or a disposi-

tion to oppress or humiliate him. What he said or did gave no cause for the infliction of punitive damages upon his employer. Therefore the instruction as to punitive damages should not have been given."

From a careful reading of these and other cases, we conclude that the following is the correct rule: Where the facts testified to, in and of themselves, show that the agent ejecting the passengers was insulting in words, manner, or tone, an instruction authorizing punitive damages should be given. Where the witness, however, merely expresses an opinion that the conductor or other agent was insulting, and then proceeds to testify to facts which, in and of themselves, do not show that the employee's conduct was insulting in words, manner, or tone, a cause for punitive damages is not made out. Applying this rule to the facts of this case, it is manifest that appellee was not entitled to recover punitive damages. The words which she says the conductor used were not insulting. She testifies to no fact showing that his manner was offensive or insulting. As far as the record discloses, she did not attempt to describe the tone of his voice or to imitate it, so that the jury could determine whether or not his tone was insulting. From her own testimony it appears that the conductor was simply positive or emphatic in his manner and in the use of the language which he employed. This gave no cause for the infliction of punitive damages upon his employer.

Upon the return of the case, if the evidence be the same, the court will instruct the jury, substantially, as follows:

"(1) If you believe from the evidence that plaintiff, on the occasion in question, purchased a ticket from defendant's agent in Louisville, Ky., for Gap-in-Knob, and at and by the direction of defendant's agent or agents took passage upon defendant's Bardstown & Springfield branch passenger train, and that defendant's conductor thereafter ejected plaintiff from said train upon its arrival at South Louisville, you will find for the plaintiff.

"(2) Unless you believe from the evidence that plaintiff, on the occasion in question, purchased a ticket from defendant's agent in Louisville, Ky., for Gap-in-Knob, and at and by the direction of defendant's agent or agents took passage upon defendant's Bardstown & Springfield branch passenger train, and that defendant's conductor thereafter ejected plaintiff from said train upon its arrival at South Louisville, you will find for the defendant.

"(3) In case you find for plaintiff, you will award her such sum in damages as you may believe from the evidence will fairly compensate her for any mortification or humiliation, for any inconvenience or dis-

comfort, and for any sickness which you may believe from the evidence she suffered as the direct or proximate cause of being ejected from said train."

Judgment reversed, and cause remanded for proceedings consistent with this opinion

DIXON v. CHAPPELL.

(Court of Appeals of Kentucky. May 4, 1909.)

LIBEL AND SLANDER (§ 7*)—LIBELOUS PUBLICATION—“GRAFT.”

A newspaper article, charging that justice has been outdone, that it is a matter of self-exposure, self-ignorance, bad recollection, no bookkeeping, or downright graft on the part of the county officials, that, when things go wrong, the county judge has a very bad memory, and his graft continues to extract money from the taxpayers' pockets, touches the county judge in his office, and charges him with graft, and is libelous per se; the word "graft" meaning the fraudulent obtaining of public money unlawfully by the corruption of public officers.

[Ed. Note.—For other cases see Libel and Slander, Dec. Dig. § 7.*]

Appeal from Circuit Court, Leslie County.
"To be officially reported."

Action by William Dixon against H. C. Chappell. From a judgment of dismissal rendered on sustaining a general demurrer to the petition, plaintiff appeals. Reversed.

Cleon K. Calvert and J. G. Begley, for appellant. J. M. Bicknell, Jas. H. Jeffries, and T. G. Lewis, for appellee.

HOBSON, J. William Dixon is the county judge of Leslie county. H. C. Chappell is the publisher of a newspaper at Hyden, Ky., called "Thousandsticks," which circulates in the county. In that paper on October 22, 1908, Chappell printed the following article: "Right is Our Motto. There has been quite an inquiry by the taxpayers of Leslie county to the editor of Thousandsticks as to whether he had abandoned his fight for good government on the part of our county officials. We can say that we have not and never will. Defeat does not spell anything to us, when justice has been outdone, overruled by the sleight of hand. It is a matter of self-exposure and self-ignorance, bad recollection, no bookkeeping, or it is downright graft on the part of our county officers. There is no better way of doing anything than a plain show down, which has been evaded by the fiscal court. When things go wrong the county judge has a very bad recollection, and his graft continues to extract the money from the taxpayers' pockets. In Harlan county the taxpayer is assessed only 25 cents on the \$100.00 for his county levy. That 25 cents on the \$100.00 pays the officers' salaries, paupers and other county claims and still has enough left to lay up a road and bridge fund, and out of that fund they have

Evidently some one has been getting fat jobs. Now, we are going to push this fight for a better condition of our financial affairs and demand of our public officials to show their record so the taxpayers may know where their money has gone. If any taxpayer thinks he is an interested party, we would be glad to hear from him." Dixon thereupon brought this suit against Chap-pell, charging that he had made the publica-tion with express malice, and to his damage in the sum of \$5,000. The circuit court sus-tained a general demurrer to the petition on the ground that the article is not libelous per se, and that no special damage was al-leged. His petition having been dismissed, the plaintiff appeals.

The only question arising on the appeal is whether the article is libelous per se. In Newell on Libel and Slander the rule is thus stated: "Defamatory words falsely spoken of a person, which impute to the party un-fitness to perform the duties of an office, or employment of profit, or the want of in-tegrity in the discharge of the duties of such an office or employment, are actionable in themselves without proof of special dam-ages." The same principle is thus stated in Townsend on Slander and Libel, § 196: "As regards language concerning one in an office, the same general principles apply as to lan-guage concerning one in trade. Language concerning one in office, which imputes to him a want of integrity or misfeasance in his office, or a want of capacity generally to fulfill the duties of his office, or which is cal-culated to diminish public confidence in him, or charges him with a breach of some public trust, is actionable. But as in the case of one in trade, the language, to be actionable, must touch him in his office." To same ef-fect, see 18 Am. & Eng. Encyc. of Law, 954; 25 Cyc. 346. In Robbins v. Treadway, 25 Ky. 540, 19 Am. Dec. 152, the charge was that the judge lacked capacity as a judge, and that he had abandoned the common principles of truth. Holding this actionable, the court said: "Anything which assails the integrity or capacity of a judge is action-able." In Commonwealth v. Duncan (Ky.) 104 S. W. 997, which was a prosecution for libeling L. E. Pierce, the clerk of the quar-terly court of Fayette county, the article charged that the county had been plundered by the county officials, and, after referring to the county judge, used this language in re-gard to the quarterly court clerk: "Did he promise that his 'Fidus Achates'—that ubiq-uitous county official who is sometimes 'County Auditor,' sometimes 'County Bookkeeper,' sometimes 'Clerk of the Quarterly Court' and

been industriously at work for four years bringing order out of chaos, correcting unsat-isfactory entries and making new ones, sup-plying missing vouchers and putting every-thing in 'apple pie' order for investigation?" Holding this libelous, the court said: "The article speaks of the plunderers of the county. It speaks of Pierce as the holder of many of-fices, who has been industriously at work for four years correcting unsatisfactory en-tries and making new ones, supplying miss-ing vouchers, and putting everything in ap-ple pie order for investigation. It charges that he will elucidate, explain, modify, or magnify the numerous entries and vouchers which are to be submitted. If such charges are not calculated to bring an official into contempt, it is hard to understand what would." See, also, Penn Iron Works v. Henry Voght Machine Company (Ky.) 96 S. W. 551, 8 L. R. A. (N. S.) 1023.

In the article before us it is charged: That justice has been outdone, overruled by sleight of hand; that it is a matter of self-exposure, self-ignorance, bad recollection, no bookkeeping, or downright graft on the part of the county officials; that when things go wrong the county judge has a very bad mem-ory, and his graft continues to extract mon-ey from the taxpayers' pockets. The natural meaning of this is that the misuse of the county money is due to ignorance, bad recollection, no bookkeeping, or downright graft on the part of the county officials, and that the county judge has both a bad recollection and by graft continues to extract money from the taxpayers' pockets. The word "graft" has a well-defined popular meaning at this time. It means the fraudulent obtain-ing of public money unlawfully by the cor-ruption of public officers. It is constantly so used in the daily press, and is thus defined in Clarkson's American Dictionary: "The act of any one, especially an official or pub-lic employé, by which he procures money surreptitiously by virtue of his office or posi-tion." "Grafter" is thus defined: "A dis-honest official." The charge touches the county judge in his office. To charge an of-ficial with graft is to charge him with want of integrity. The article in question, if true, would necessarily destroy the respect of the people of Leslie county for the county judge. Its necessary tendency was to degrade him in public estimation, for no one could regard him as a capable and upright official who believed the statements of this article to be true. The publication was therefore action-able per se, and the circuit court erred in sustaining the demurrer to the petition. Judgment reversed.

PADUCAH COOPERAGE CO. v. HAZEL HEADING CO.

(Court of Appeals of Kentucky. May 4, 1909.)

1. SALES (§ 364*)—ACTION FOR PRICE—INSTRUCTIONS—PRESENTATION OF ISSUES.

Plaintiff's petition alleged that it sold a certain number of whisky heads to defendant at 10 cents each, a certain number of oil heads at 6 cents, amounting in all to \$1,079.20, and that defendant had agreed to pay that amount for the heads. Defendant's answer alleged that it did not take the heads at the price named, but under an agreement to pay therefor the reasonable market value, which was \$676, which amount it had paid. *Held*, that instructions that if the heads were sold at the price charged, and the quantity sued for was delivered, the jury should find for plaintiff \$1,079.20, less a credit for the amount defendant had paid, but, if the heads were received under an agreement that defendant should pay plaintiff the reasonable market value of them, then it was responsible only for such market value, properly presented the issues made by the pleadings.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 364.*]

2. SALES (§ 359*)—ACTION FOR PRICE—EVIDENCE.

In an action for the balance of the price of headings, evidence *held* to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 359.*]

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by Hazel Heading Company against Paducah Cooperaage Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wheeler, Hughes & Berry, for appellant. Miller & Miller, for appellee.

HOBSON, J. The Hazel Heading Company brought this suit against the Paducah Cooperaage Company alleging in its petition: That at the special instance and request of the defendant it had furnished and delivered to it lumber for making barrel heads of the value of \$1,079.20, for which the defendant agreed to pay it that sum. That the material was sold as follows:

June 1, 1906.	3,132 whisky heads at 10 ct..	\$ 313 20
June 14, "	4,080 " " " "	408 00
June 16, "	2,350 " " " "	235 00
June 16, "	2,050 oil heads " 6 ct..	123 00

Making a total of..... \$1079 20

It was alleged that the material was reasonably worth \$1,079.20 at the regular market price therefor at the time, that the defendant promised to pay that sum in a reasonable time, but had only paid \$676, leaving a balance due of \$403.20, for which judgment was prayed. By the first paragraph of its answer the defendant traversed the allegations of the petition. By the second paragraph it pleaded: That the plaintiff shipped the heading to it voluntarily and without solicitation, plaintiff advising it to go ahead and work the heading up, and give the plaintiff what there was in it; that it accepted the heading on this understanding; that there were

only 2,486 sets of whisky heading worth at the market price 20 cents each, making \$497.20, and 1,490 sets of oil heading worth at the market price 12 cents each, making \$120.80, or in all \$676, and this amount it had paid the plaintiff. A reply was filed denying the allegations of the answer. A trial was had resulting in a verdict and judgment for the plaintiff. The defendant appeals.

It is insisted that the instructions of the court did not submit to the jury properly the issue in the case. The instructions are as follows:

"(1) Gentlemen of the jury: It is undisputed evidence that defendant has paid plaintiff \$676 on the heading sued for in this action, and if you shall believe from the evidence in this case that the plaintiff, at the instance and request of the defendant, sold and delivered to defendant on June 1, 1906, 3,132 whisky heads at 10 cents per head, amounting to \$313.20, June 14, 1906, 4,080 whisky heads at 10 cents each, amounting to \$408, June 16, 1906, 2,350 whisky heads at 10 cents per head, amounting to \$235, June 16, 1906, 2,050 oil heads at 6 cents per head, amounting to \$123, and in all \$1,079.20, then the law is for the plaintiff, and you will find for them \$403.20, the balance claimed by plaintiff, and the amount sued for in this action, with interest thereon from the 16th day of August, 1906.

"(2) If, however, you shall believe from the evidence in this case that the heading mentioned and described to you in instruction No. 1 herein was shipped by plaintiff to defendant, and that the same was used and worked up by defendant, under an agreement that it would pay plaintiff the reasonable market value therefor, and that the reasonable market value was only and not more than \$676, then the law is for the defendant, and you will so find. But if you shall believe from the evidence that the reasonable market value of said heading so shipped by plaintiff to defendant was more than \$676, then you will find for the plaintiff whatever sum you may believe from the evidence said heading was reasonably worth, in excess of said sum of \$676, if anything."

The sum of the plaintiff's petition is that it sold a certain number of whisky heads to defendant at 10 cents each, and a certain number of oil headings at 6 cents each, amounting in all to \$1,079.20, and that the defendant had agreed to pay it this amount for the heads. The sum of the defendant's answer is that it did not take the heads at the price named in the petition, but took them under an agreement to pay therefor the reasonable market value, and that the reasonable market value was \$676, the amount which it had paid. In instructing the jury the court should present the issues made in the pleadings. This the court did, by the instructions given. He told the jury, in sub-

received under an agreement that the defendant would pay the plaintiff the reasonable market value of them, then it was responsible only for such market value.

The defendant also insists that the verdict is palpably against the evidence. The plaintiff introduced on the trial R. W. Christman, who was its manager, and proved by him that he made a contract verbally with Paul Dysart, who was the manager of the defendant, by which he sold him the heads at 10 cents each for the whisky heads and 6 cents each for the oil heads, and that he shipped the quantity of heads stated in the petition and delivered them to the defendant. On cross-examination he stated: That under the trade Dysart was to send an inspector to Hazel to inspect the heads before they were shipped, and they were to be received at this price on board the cars at Hazel; that Dysart did not send a man to inspect the heads at Hazel, and when he saw him again he and Dysart agreed that the heads should be shipped and inspected when they reached the defendant; that Dysart proposed that he should take circle count; that he said he knew nothing about circle count. Dysart replied: "If you will go back home, and measure every car as you have been doing and take circle count, I will guarantee that it will hold out, and if there is any gain you shall have the benefit of it." Christman said that with this guarantee he went home, measured the stuff as he had been doing, and shipped it to defendant, and that the quantity was as sued for. He also said that there was no one present when he made the contract with Dysart. The defendant did not introduce Dysart as a witness. It introduced Blain Kilgore, who said he made the contract with Christman in connection with Dysart, and that the contract was substantially as stated in the answer; Christman agreeing to take circle measure. He also stated that he did not measure the stuff, that it was measured by H. Petter, and, being asked where H. Petter was, said that he was in the courtroom. Neither Dysart nor Petter were introduced as witnesses. Christman, being introduced in rebuttal, testified that he did not make a contract with Kilgore, and that Kilgore was not present when he made the contract with Dysart.

Under this evidence it is manifest that the real issue between the witnesses is: How much of the stuff there was. There was no dispute as to the price. One witness stated that the plaintiff agreed to take circle measure, and the other witness stated that he agreed to take circle measure with the guarantee that it would not be less than his meas-

It is true the defendant introduced on the trial a number of letters from Christman, and from it to him, which go far to sustain its contention as to the contract; but these letters are not conclusive, and, after all, the real question in the case is: How much heading there was. On this question the jury had before them the testimony of Christman as to his measurements by square measure, and there was no evidence for the defendant as to what it was by circle measure, as Kilgore had not measured it, and no witnesses who had personal knowledge of the facts were introduced by it.

Judgment affirmed.

CALDWELL et al. v. WILLIAMS et al.
(Court of Appeals of Kentucky. May 5, 1909.)

1. MARRIAGE (§ 48*)—EXISTENCE OF RELATION—PROOF.

Marriage may be proved by reputation, as well as by record, or by the testimony of those who saw the rites performed.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 76; Dec. Dig. § 48.*]

2. MARRIAGE (§ 50*)—EXISTENCE OF RELATION—PROOF.

Reputation of a marriage, coupled with a man holding himself out as the husband and father of the family, is sufficient.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-89; Dec. Dig. § 50.*]

Appeal from Circuit Court, Lincoln County.

"Not to be officially reported."

Action between S. B. Caldwell, Jr., and others, and Sarah J. Williams and others. From a judgment for the latter, the former appeal. Affirmed.

P. M. McRoberts and Hendrick, Miller & Marble, for appellants. P. H. Taylor, for appellees.

O'REAR, J. James R. Napier was a bachelor, who died intestate. This suit involves the relationship of the appellees, who claim to be heirs at law of the decedent. Appellees claim, and the circuit court found, that the father of James R. Napier had been married three times, and had children born to him as the result of each marriage. The issue of the first marriage was, besides James R. Napier, a son and a daughter. The son died intestate and unmarried during the war with Mexico. The daughter married Dr. S. B. Caldwell of Paducah. Upon the death of the first wife, the three children, who were small, were given into the custody of their maternal aunts and separated. Mrs. Caldwell was taken to Boyle county, where she lived until her marriage. James R. Napier removed to Lincoln county and settled

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

near Houstonville, where he lived till his death recently. Their father's name was John Napier, and he lived in Casey county. Appellees claim that, after the death of his first wife, John Napier married again, and by that wife had born three children. After the death of his second wife he again married, and it is claimed by appellees had eight children as the result of this union. All the children of John Napier were dead when this suit was prepared for trial, except appellee Sarah J. Williams. She testified: That she was the youngest child of John Napier by his last wife; that he died in 1854 when she was five years old; that his name was John Fox Napier; that he had lived in Casey county, Ky., but was moving in 1854 to Missouri, stopping at Hawesville, in Hancock county, on the way; that he was taken sick and died there; that James R. Napier was her brother of the half-blood; and that Mrs. Caldwell was her sister of the half-blood. She testified to the relationship of the other appellees. Two other witnesses, each uninterested, who lived at Hawesville, but who had lived in Casey county, testified: That they knew John Fox Napier when he lived in Casey county; that he had married three times, or at least more than once, and had children by each marriage; that they saw him when he came to Hawesville in 1854; that appellee Mrs. Williams is his daughter. Two witnesses, old people residing at Liberty in Casey county, testified that they knew John Fox Napier, who was married three times (one says two times), and who moved to Missouri before the War and died in Hancock county on the way; that he had a number of children, one named James, who subsequently moved to Houstonville in Lincoln county, where he owned a farm, and lived there till he died. Two witnesses testified: That they were near neighbors and intimate friends of James R. Napier in Lincoln county; that each heard him say that his father had married again, and that as a result he had a number of half-brothers and half-sisters (one testified he said 11); that he was talking of making his will so that his full sister Mrs. Caldwell would get all the property. So it is established that John Fox Napier of Casey county was the father of James R. Napier, was the one who moved to Missouri in 1854 and died on the route in Hancock county, and was the father of Mrs. Williams and the ancestor of the other appellees. It is true that Dr. Caldwell testified he had never heard his wife speak of having any brother or sisters of the half-blood, and had never heard that his father-in-law's middle name was Fox, or that he had a middle name; nor did he ever hear his brother-in-law James R. Napier mention having had brothers or sisters of the half-blood. He testified that his father-in-law's name was John Napier, and he had lived in

Casey county, but he had never known him. The records of Casey county do not show that John Napier or John Fox Napier was married in that county. In a number of minor details there are some contradictions and improbabilities in the evidence; but not more than might be expected after the lapse of so many years, when the memories of different witnesses are called upon to detail occurrences more than half a century past.

It is insisted that there was not evidence that John Fox Napier was married to the mother of Mrs. Williams. There is not record evidence of the fact, nor the testimony of the eyewitnesses; but marriage is a fact that may be proved by reputation, as well as by a record, or by the testimony of those who saw the rites performed. On that score the reputation of the marriage, coupled with John Napier's holding himself out as the husband and father of that family, establishes the relationship.

We perceive no reason for disturbing the judgment of the chancellor.

Consequently, the judgment will be affirmed.

ILLINOIS CENT. R. CO. v. SMITH.

(Court of Appeals of Kentucky. May 11, 1909.)

1. WITNESSES (§ 383*)—CONTRADICTION—COLLATERAL MATTER.

Where, in an action for injuries to plaintiff by his mule becoming frightened at a railroad pumping engine in a highway, defendant's employé in charge of the engine testified that he did not remember having stated that he would sue the company if he was in plaintiff's place, and that he would not have been in plaintiff's place for the railroad company, but that it was true, was a collateral matter and hence evidence that he made such statement was inadmissible to contradict him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.*]

2. APPEAL AND ERROR (§ 1053*)—REVIEW—HARMLESS ERROR.

The court having charged that testimony offered to show that a witness had made certain immaterial statements could be considered only to contradict him, and not as substantive testimony in the cause, the erroneous admission thereof was trivial, and not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4182; Dec. Dig. § 1053.*]

3. HIGHWAYS (§ 184*)—USE—ACTION FOR INJURIES—VARIANCE—"PUBLIC HIGHWAY."

Civ. Code Prac. § 129, provides that no variance is material which does not mislead a party to his prejudice, and that a party claiming to be so misled must show such fact, when the court may order the pleading amended, and section 130 declares that, if such variance be not material, the court may direct the fact to be found according to the evidence and order an immediate amendment. *Held* that, where plaintiff alleged the maintenance of a nuisance by defendant in a highway of G. county, evidence that the place was a public street in a village, in the absence of a claim of surprise, did not constitute a material variance, a public

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. HIGHWAYS (§ 184*)—OBSTRUCTION—FRIGHTENING ANIMALS—ISSUES.

Where, in an action for injuries to plaintiff by his mule becoming frightened by a railroad pumping engine alleged to have been maintained in a highway, defendant's answer put in issue the fact that the engine and coal therefor were within the highway, but did not deny the legality of the establishment of the highway, the court was not required to submit the circumstances under which the highway was created.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 184.*]

5. HIGHWAYS (§ 68*)—EXTENT—EVIDENCE.

Where the existence of a highway is admitted, its width could be shown by the record, if one existed, otherwise by the testimony of witnesses who knew it, or by evidence of the extent of travel between its lateral edges.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 227-223; Dec. Dig. § 68.*]

6. TRIAL (§ 191*)—INSTRUCTIONS—DAMAGES—ASSUMED FACTS.

In an action for personal injuries, an instruction that the jury could award such sum as would reasonably compensate plaintiff for any mental and physical pain and suffering caused by the injury, not exceeding \$2,000, was not objectionable as assuming that plaintiff had endured mental and physical suffering.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 431; Dec. Dig. § 191.*]

7. TRIAL (§ 256*)—INSTRUCTIONS—CURING ERROR—OMISSION OF REQUESTS.

Defendant's failure to offer correct instructions, while ineffective to cure error in those given, is persuasive that the instructions given were not regarded as prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

8. DAMAGES (§ 131*)—PERSONAL INJURIES—EXCESSIVENESS.

Plaintiff was bruised in an accident, made sore, and continued to be disabled for some months, so that he could not do his customary work and suffered considerable pain when he did work. Held, that a verdict for \$700 was not so excessive as to indicate passion or prejudice.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367; Dec. Dig. § 131.*]

Appeal from Circuit Court, Grayson County.

"To be officially reported."

Action by Warren Smith against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. A. Faurest, J. M. Dickinson, Marion A. Arnold, and Trabue, Doolan & Cox, for appellant. H. L. James, for appellee.

O'REAR, J. This is the second appeal of this case. The opinion delivered upon the first appeal states the cause of action. Smith v. I. C. R. R. Co., 105 S. W. 98. Upon the new trial there was a verdict for \$700 for appellee. The grounds relied upon by appellant for a reversal are: (1) Admission of irrele-

highway was the alleged cause of appellee's injury. Campbell testified for appellant. An issue in the case was whether the pumping engine was located in the highway. Campbell testified that the space between the engine and the fence on the opposite side of the road was about 16 feet. He did not know the limits of the road, and was not present when the engine was put there. He also testified that coal dumped near the engine for its use was piled by the side of the engine, and that some of it extended out into the wagonway; but he did not regard it as material. He was asked on cross-examination whether he did not say, on the day of the injury to appellee, in the presence of Cal. Stone, that "he (meaning Campbell) would sue the railroad company" (if he were Smith), and that "he wouldn't have been in Mr. Smith's place for the Illinois Central Railroad Company." He answered that he did not remember having made the statement, but that it was true. He would not have been in Smith's place for the Illinois Central Railroad. Stone and Smith were introduced in rebuttal for appellee and testified that Campbell made the statement alleged. The court thus admonished the jury: "The testimony of Mr. Smith and Mr. Stone can only be considered by you for the purpose of contradicting the witness Campbell, and not as substantive testimony in the case." Campbell's statement to Smith and Stone seems to us to have been immaterial and irrelevant. He may have meant by it that he regarded the railroad company as liable for the injury whether the pumping engine was on the highway or not, and upon that supposed liability he would have sued the company on account of the injury. It was only his opinion as to the company's liability in the premises, based upon what is not disclosed. The fact that he would not have been in the predicament that Smith was in when his mule threw him and fell on him, with a runaway team dragging them, for the consideration of a railroad, was even less relevant to any issue being tried by the jury. The matter was collateral. If he had testified to any fact showing that the company was not liable, or indicated his belief that it was not liable, when his belief was admissible in evidence, it would have been competent to impeach him by evidence that he had made a different statement about the matter. Civ. Code Prac. § 597. The contradiction of this witness on the matter to which this testimony was directed served to cancel that statement, as it were. The court's admonition retrieved the testimony objected to from being substantive evidence for any purpose, and limited it to "contradicting"

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Campbell. If the court had said that it was to be considered as impeaching evidence, the question would look more serious. On the whole, the matter seems trivial. The witness Campbell's evidence was not controlling, and was not as to matter that was particularly material. We cannot think the evidence complained of was prejudicial.

The petition alleged that the obstruction was upon a public highway of Grayson county. The evidence was that it was within an incorporated village, Spring Lick. Therefore the highway, if a public way at all, was a street of that village. It is contended by appellant that this constituted a variance between the pleading and the proof. If it be admitted that there was a variance, still appellant is not in a position to claim a reversal on that score. Section 129, Civ. Code Prac., provides that: "No variance between pleadings and proof is material which does not mislead a party to his prejudice in maintaining his action or defense upon the merits. A party who claims to have been so misled must show that fact to the satisfaction of the court; and, thereupon the court may order the pleading to be amended upon such terms as may be just." By section 130, Id., it is provided: "If such variance be not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment." There was not a claim of surprise in the trial court. If there had been, then the court could have ordered an amendment of the petition to show that the highway was a village public street, and, as it was not a material variance, the trial would have proceeded, for a public street is a public highway of the county in a broad sense. The plaintiff had the same right to travel the street as if it were a county road. The defendant was equally liable for so obstructing either as to endanger the public travel upon it.

The third complaint on this appeal is that the trial court erred in not laying down to the jury some rule by which they could determine the extent of the highway in question. The instruction was: "If the defendant erected, in the public highway leading from Spring Lick to Caneyville, a stationary engine which was calculated to scare horses of ordinary gentleness by reason thereof," etc. The answer did not put in issue the existence of that highway as a public highway, but it controverted the allegation of the petition that the defendant placed the named obstructions in it. It denied that it "fostered or maintained a common nuisance in Grayson county by obstructing one of the highways of said county. It denies that it placed upon said public highway a steam engine, which it used for pumping water to one of its water tanks upon its line of railroad. * * * It denies that it erected or placed or maintained or operated said engine on said highway, and it denies that it placed large quantities of coal or any coal near to

said public highway in such a manner as to obstruct the travel thereon, or render it unsafe for persons to travel along said public highway in vehicles or on horseback." Construed liberally, this pleading does not put in issue the existence of the public highway or the legality or sufficiency of its establishment. It did put in issue, if anything, the fact that the engine and coal were within that highway. It was not therefore necessary for the trial court to have submitted to the jury under what circumstances a public highway is created, whether by dedication or acceptance, or long use from which such dedication and acceptance are presumed. The existence of the public highway being admitted, its width was then the point in question. It could be shown either by the record, if there was one, or by other competent evidence showing the fact. The public records of Grayson county had been destroyed by fire. The width of that road was then to be proved by the testimony of witnesses who knew it, and by the evidence shown upon the ground as to the extent of the travel upon it between its lateral edges. Evidence was introduced upon those points, and the instruction left it to the jury to say whether the engine, boiler, and coal were in the public highway.

In instructing the jury as to the measure of damages, the court said: "If the jury find for the plaintiff, they will award him such sum as will fairly and reasonably compensate him for any mental and physical pain and suffering caused by said injury, not exceeding in all \$2,000, the amount claimed in the petition." It is contended: That this instruction assumed that the plaintiff had endured mental and physical suffering; that the court should have said "such mental and physical suffering, if any," etc. The preceding instruction had directed the jury before they could find for the plaintiff, they must find not only that the highway was obstructed as charged, but that by reason thereof plaintiff's team became frightened and ran away, thereby causing injury to him. When the jury found all those elements, as they had to do before applying the measure of damages, it follows that they must have found that plaintiff was injured in his person, and, if so, that he had suffered from it mental and physical pain, so that nothing was assumed. Nor did the defendant complain of the form of these instructions in the court below, by offering any other covering those points. While the fact that defendant did not itself offer instructions correct in form would not cure error in those given by the court, it is persuasive argument that the form was not then regarded as prejudicial. Nor was it. Appellee was thrown under his mule, which fell upon him, and he was dragged for some distance by the runaway team. He says he was bruised and made sore, and continued to be disabled for some months, so that he could not do his customary work, and suffered considerable pain when he did work.

it is, we ought not to, and will not, disturb it. Judgment affirmed.

FELTNER et al. v. HUFF et al.

(Court of Appeals of Kentucky. May 11, 1909.)

1. INFANTS (§ 89*)—PROCESS—SERVICE.

A return of service on certain infants, showing that the process was executed by delivering a copy to H. for each of the infants named, they being under 14 years of age, and having no legal guardian, and their father having died, dated January 17, 1889, showed proper service under the Code of Practice as it then existed.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 255-272; Dec. Dig. § 89.*]

2. JUDGMENT (§ 470*)—COLLATERAL ATTACK.

Where the court had jurisdiction of the parties and subject-matter, its judgment will be presumed valid on collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.*]

3. JUDICIAL SALES (§ 61*)—DEED—NECESSITY—CONFIRMATION.

Confirmation of a judicial sale of real estate and payment of the purchase money confers title on the purchaser; the execution of a conveyance being only necessary for the purposes of record as evidence of title.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 119; Dec. Dig. § 61.*]

Appeal from Circuit Court, Leslie County.

"Not to be officially reported."

Action by Charlotte Feltner and others against John C. Huff and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Cleon K. Calvert, for appellants. J. M. Bicknell, for appellees.

NUNN, J. This action was instituted by appellants to recover of appellees a tract of land, and their petition was dismissed. It appears that prior to the year 1888 one John Huff, Sr., sold the land to one Henry C. Patton and executed to him a title bond therefor. Some time after that Patton sold it to one William Huff. Patton, having never received a conveyance of the legal title, caused John Huff, Sr., to execute a bond for title to William Huff. William Huff executed to Patton his note for the balance of the purchase price, \$100, and reserved a lien upon the land for its payment. Huff paid Patton several dollars on this note. Huff died prior to 1889, and in the year 1888 or 1889 Patton instituted an action to enforce his lien against the land for the balance of the purchase price. He made the widow and all of the children of William Huff parties defendants to the action. The children, at the time, were all under 14 years of age. John Huff, Sr., was also made a party, as he held the legal title to the land. The return on the summons issued

delivering a copy to Charlotte Huff for each of them, they being under fourteen years of age, having no legal guardian, and their father having died January 17, 1889. B. T. Fields, S. P. C. Granville Burton, D. C." Thereafter the guardian ad litem filed an answer for the infants, and a judgment was rendered enforcing Patton's lien and the land ordered sold. At the sale one John C. Huff, a brother of John Huff, Sr., purchased the land, and the sale was confirmed, and he afterwards conveyed it to appellee, Jasper N. Huff, who has been in possession of it for many years.

Appellants claim that the proceedings had in the case of Patton against Huff, under which John Huff claims title by purchase at the commissioner's sale, were void, and therefore John Huff obtained no title or interest in the land. They present several alleged reasons why the proceedings in that case were void: First, there was no affidavit or demand of claim as required by Gen. St. c. 39, art. 2, §§ 35-37. Second, there was no affidavit filed authorizing the court to appoint a guardian ad litem for the infants or any order of the court showing that it did appoint a guardian ad litem for them. Third, because the decrees and orders of the court confirming the sale and directing the deed to be made to appellee John Huff were made and entered by a special judge who was of counsel for the plaintiff Patton. It will be observed from the return, entered on the summons above copied, that the infants were properly before the court under the provisions of the Code of Practice as it then existed. Therefore it appears that the court in that action had jurisdiction of the parties and the subject-matter.

In *Derr v. Wilson*, 84 Ky. 17, the court said: "Where the court has no jurisdiction of the subject-matter or of the parties, the judgment would be void; but where the court has jurisdiction, and the defendant appears or is warned according to law, the judgment is not void, although it may be erroneous in all its parts; nor can an erroneous judgment be assailed collaterally." In the case of *Northington v. Reed* (Ky.) 75 S. W. 206, no summons appeared to have been served upon the infants, and this court in considering that question said: "It is unnecessary for us to determine whether the judgment in contest could be held valid in a direct proceeding to set it aside, instituted in proper time by some person entitled to maintain it. It is attacked here collaterally. It was rendered in a court of general jurisdiction, and when a judgment of a court of general jurisdiction is attacked collaterally every presumption is made in favor of its integrity. If no sum-

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Nothing shall be intended to be out of the jurisdiction of a superior court but that which expressly appears to be so. Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, has acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appears.' Jones v. Edwards, 78 Ky. 6; Newcomb's Ex'rs v. Newcomb, 13 Bush, 554, 26 Am. Rep. 222." See, also, the cases of Myers v. Pedigo (Ky.) 72 S. W. 734, and Sorrell v. Samuels (Ky.) 49 S. W. 762, which affirm the doctrine as to collateral attacks upon judgments of a court of general jurisdiction, and further decided that the only way to correct such errors is by appeal, and infants are given 12 months after obtaining the age of 21 to show cause against the judgment.

In this case, however, it is shown by the uncontradicted evidence that the courthouse in Hazard, where the action of Patton against Huff was pending, was destroyed by fire after the sale of the land, and the book containing the orders of the court for the years 1888 and 1889 was destroyed as well as many papers in the office, and the presumption is that the action of the court in that proceeding was regular; that every legal step necessary to make the proceeding valid was had. It appears from the record that the last order made in the case of Patton against Huff, which distributed the purchase money received from John C. Huff and approved the deed made by the commissioner to him, was indorsed by L. H. N. Salyer and D. K. Rawlings. It is proved that at that term of the court, September, 1890, Salyer was elected by the bar as special judge for that term, and it also appears that he was one of the attorneys for the plaintiff, Patton. It is unnecessary for us to determine the effect, if any, it had upon the validity of the deed made by the commissioner to John C. Huff, as it is shown by the record that he was the purchaser at the sale which was confirmed, the presumption is, by a regular judge, and the purchase money paid. This made him the owner of the land. The only necessity for the conveyance was that it might be recorded in the county court clerk's office as evidence of his title. We will say, however, that in our opinion the deed conveying the land to John C. Huff was valid for the reason that the proof shows without contradiction that, in every case where Salyer signed his name as judge, there also appeared, when Salyer was counsel for either of the parties, the name D. K. Rawlings, a member of that bar, as judge,

that an attorney could act as judge by agreement of parties or their counsel. For these reasons the judgment of the lower court is affirmed.

RATHFON v. GAINES et al.

(Court of Appeals of Kentucky. May 6, 1909.)

1. SALES (§ 52*)—ACTION FOR RESCISSION—MISREPRESENTATIONS—EVIDENCE.

Evidence held to sustain a finding that there were no misrepresentations by the seller's agent as to the value of the physical property of a printing plant sold or as to its gross and net earnings.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 140; Dec. Dig. § 52.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDING OF CHANCELLOR.

Where, on appeal, the mind upon consideration of the whole case is left in doubt, the finding and judgment of the chancellor exercises a controlling influence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Warren County.
"Not to be officially reported."

Consolidated actions by Renson Rathfon against John B. Gaines and another and by Mrs. John B. Gaines against Renson Rathfon. There was a judgment dismissing Rathfon's petition, and judgment rendered against him in the other action, and he appeals from both judgments. Affirmed.

Sims, Du Bose & Rodes, for appellant.
Wright & McElroy, C. U. McElroy, and Thomas W. Thomas, for appellees.

LASSING, J. Prior to April, 1906, Mrs. John B. Gaines was the owner of a newspaper and printing outfit at Bowling Green, Ky., known as the "News Publishing Company." Her husband, John B. Gaines, was the manager of said plant for her. Desiring to dispose of said plant, she caused it to be advertised, and a notice of the advertisement fell into the hands of Renson Rathfon. He was a printer and had saved up some \$3,000 or \$4,000, and, as he wanted to purchase a newspaper plant, he answered this advertisement, and the correspondence relative thereto resulted in his meeting John B. Gaines in Louisville, where the proposition to purchase at least an interest in the plant was discussed. The representations made to him by Gaines at this time were such as to induce him to go to Bowling Green and inspect the plant with a view of purchasing, if upon inspection it measured up to his expectations. After inspecting the physical properties of the plant, and conferring with John B. Gaines relative to the nature, character, and extent of the business done by said company

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chased a one-third interest in the company upon the same terms. This purchase carried with it, not only the physical property, but also the good will, subscription list, and such evidences of indebtedness in the way of accounts, etc., as were held by the company. It was agreed that the company should thenceforth be operated by Gaines, representing his wife, Andrews, and Rathfon; that each was to receive \$25 per week out of the gross earnings of the company, and each assumed to pay the one-third part of a debt of \$1,550 which the company owed for a linotype machine. Under this agreement the said parties took charge of the company and operated it for some time, when Rathfon became dissatisfied, and instituted a suit wherein he sought to rescind the contract and compel Mrs. Gaines to repay to him the \$3,166.66 which he had paid to her, and to cancel the note for \$1,000 which he had executed to her for the purchase price of his interest in the plant, on the ground that her husband and agent, John B. Gaines, had falsely and fraudulently represented to him that said plant and property was worth at least \$12,500, and that the earning capacity thereof was at least \$12,000 per year in gross, and that the net earnings were at least \$5,000 per year; that the earnings of the plant for the year 1905 were about \$12,000, while the gross expense for the year was about \$6,000; that the net earnings for the year 1905 amounted to at least \$5,000, and that it had run as high as \$5,000 per year for some years prior to 1905. He alleged that each of these statements so made to him by Gaines was false, and known by him to be false at the time they were made, and were made for the purpose of deceiving him, and that they did deceive him, to his prejudice and injury. He pleaded further that the plant was not worth to exceed \$6,500, and that its total earnings did not exceed \$6,000 per year, and that all of this sum was required to operate said plant, and get out the daily and weekly paper which it edited. To this petition an answer was filed, traversing all of the allegations of fraud and misrepresentation, and pleading affirmatively that Rathfon was a practical printer of long experience, and that before purchasing the property he had examined it fully, and investigated its earning capacity, especially as to the year 1905, which was taken as a basis, and had satisfied himself that the gross and net earnings of said plant for that year were as represented. Andrews was made a party defendant to the suit, and filed his separate answer, in which he sided with his codefendant Gaines. Thereafter the note which Rathfon had ex-

to rescind the contract. Proof was taken and the cases were submitted and heard together. The chancellor found against the claim and contention of plaintiff Rathfon as to the allegations of fraud and misrepresentation, and dismissed his petition, and rendered judgment against Rathfon for the \$1,000 note, with interest, in favor of Mrs. Gaines, and directed that his interest in the plant be sold in satisfaction thereof. From both of said judgments Rathfon appeals.

The correctness of the judgment for the \$1,000 in favor of Mrs. Gaines depends upon the disposition that is made of the suit for rescission. If the finding and judgment of the chancellor upon the questions raised in that suit is correct, then, of course, the judgment directing a sale of Rathfon's interest in the plant to satisfy his \$1,000 debt must stand, for his only defense thereto is that he was deceived and overreached in the purchase by John B. Gaines, her agent. Quite an effort is made in the record to show that the defendant Andrews never, in fact, paid his part of the purchase price, and that he was acting in collusion with Mrs. Gaines in perpetrating a fraud upon Rathfon by inducing him to purchase an interest in the plant; but, after a careful inspection of the record, we are satisfied that plaintiff failed in this particular, for the evidence fairly establishes the claim of Andrews that he paid his part of the purchase price, as stipulated in the contract, and was not guilty of any reprehensible conduct in bringing about the negotiations which resulted in the sale of the interest in the plant to appellant. Hence the sole question open for determination is whether or not John B. Gaines, as the agent of his wife, falsely and fraudulently represented to appellant a state of facts relative to the company's business, which he knew to be untrue, for the purpose of making the sale.

The fraudulent representations relied upon by appellant to support his contention are the statements which he alleges John B. Gaines made to him relative to the value of the physical property of the plant and its business. First, as to the physical property, he alleges that it was represented to him as being worth \$12,500, when as a matter of fact it was not worth to exceed \$6,500. Upon this point the weight of the evidence is against his contention. Two witnesses are introduced by appellant, who fixed the value of the physical property at about \$6,500, whereas the witnesses introduced by defendants place the value of the physical property at from \$8,750 to \$10,000, and the average value, as fixed by the witnesses for the defendant, some four or five in number, ex-

ceeds \$9,000. However, as appellant is shown to be a practical printer, and familiar with printing presses and other machinery, contrivances, and apparatus in general use about a printing establishment, his claim that he was deceived as to the value of this property cannot be seriously taken, since the property was exhibited to him in full, and he was given every opportunity to examine same and satisfy himself as to its value. The testimony of the witnesses for appellee as to the value of the physical property of the plant is much more satisfactory, and is clearer than that of the appellant, and, considering all of the testimony upon this point, we are of the opinion that the physical property of the plant was at the time of which the witnesses spoke worth not less than \$9,000, and \$10,000 could not be said to be an exorbitant valuation thereon. Appellant himself, while fixing the valuation upon this property at a much lower figure, states, that, if the earning capacity of the plant was \$5,000 net per annum, the plant would be easily worth \$12,000.

It is shown that the accounts held by the plant on April 2, 1906, the date of the purchase, amounted to about \$1,700. To this must be added the value of the good will of the company, its subscription list, etc., which the testimony shows under normal conditions is worth 50 per cent. of the value of the physical property, which would make the total value of plant at that time, in round numbers, about \$16,000. Of course, if this was its value, then appellant did not pay more for the one-third interest therein, which he bought, than it was reasonably worth. But it is argued that the statement of John B. Gaines, the manager, as to the gross and net earnings of the company for the year 1905, was false and fraudulent, and that, even though it be conceded that appellant is not in a position to complain as to representations made to him concerning the value of the physical property, still as to these latter statements he had no means of informing himself, and had relied wholly upon the word and representations of the manager, John B. Gaines, and in this way the deceit was practiced and fraud perpetrated. Appellant called to his aid an accountant, and had him investigate and report on the business done by the company for the year 1905. The receipts for that year were kept in a book called a "Cash Book." This book showed the various sums collected during the year, the date upon which each was paid, and by whom. According to this book there was received from January 1, 1905, to January 1, 1906, a total of \$10,587.07. Of these collections a part were for work that had been done in 1904, and it is argued in favor of appellant that for these collections a deduction should be made, and that, while the books show receipts for the year 1905 amounting to more

than \$10,500, as a matter of fact the receipts for this period were much less than this sum. On the other hand, appellee urges that, while it is true that a portion of the receipts taken in during the year 1905 were for business done during the year 1904, there was likewise a large part of the collections which should have been made during the latter part of the year 1905 for business done in that year that were not made, but were carried over into the year 1906, and were or should have been collected during that year, and that, as a matter of fact, the cash book does not show all of the business done by the company during the year 1905, for the reason that the accounts or claims for business done in 1905, which were uncollected, exceed the amount of claims for business done in 1904 which were collected and reported in 1905.

As the business was owned solely by Mrs. Gaines during the year 1905, no itemized account of the expenses for that year was kept, and this item is estimated by Gaines, and reported on in a very unsatisfactory way by the accountant representing appellant. John B. Gaines says that the expenses for that year amounted to \$5,506.75, and that this was arrived at by taking into account all of the various items of expense per week which he had during that year. If we accept the statement as shown by the cash book as correct, the receipts exceeded the expenditures for that year by something in excess of \$5,000. According to the calculation of the accountant, the cash from business in 1905 amounted to \$7,596.55, and the profits for the same time amounted to \$2,589.80, and he reports "accounts uncollected" which went over into the succeeding year amounting to \$3,360.48. Now, then, what proportion of these accounts were old claims which had been brought over into 1905 from 1904 is not clear, nor is this method of determining the amount of business each year as satisfactory as that suggested by the manager, Gaines, for the reason that, where accounts are carried over from one year into the next year's business, it would be difficult in keeping the books of the company to determine with nicety the amount of business transacted in any one year, but, where the business for the year is taken to be the amount of money actually collected on new business and old accounts during a given year, a very simple method, and one easily understood, is presented, and, if from these gross receipts of the year there is deducted the actual expenses, we have then what would be generally understood to be the net income from the business during that year. As this was the method which was employed by Mr. Gaines in keeping the book accounts of the company, it is but natural that in making his report of the business for the year 1905 he should have been governed by these figures. If he was, and the cash book represents the real amount collect-

However, we apprehend that it, at the time appellant was investigating the financial condition of the company and looking into the nature and extent of the business, he had been told that the company had done a given amount of business during the year, and that it had received in cash the amounts which his accountant showed it had received, \$7,598.55, and had realized a cash profit of \$2,589.90, and had uncollected accounts amounting to \$3,360.48, claims for work done, the report would have been as satisfactory and acceptable to him as it was in the form in which it was made. While certain statements are shown to have been made by Mr. Gaines, the manager, relative to the circulation of a periodical in which he was interested for the purpose of securing advertisements, which, we confess, are somewhat confusing, if not misleading, still no such statements were made to appellant upon this account which induced him to enter into the trade, and therefore they have little or no bearing upon the question at issue. Nor is much light thrown upon the question as to the extent of the business done by the company in 1905 by showing that it did a much less business in 1906, nor by showing that another newspaper plant conducted in the same town did as good, if not better, business in 1906 than it did in 1905. The success of a newspaper plant, like that of any other enterprise, depends upon its management. Under one management it may thrive and flourish, while under a different management it may be a complete failure. Certain it is that when managed by John B. Gaines, as agent for his wife alone, the cash receipts were much larger than they were during a similar period when the business was conducted under the new arrangement. The record shows conclusively that the business done in 1906 was much less than that proven to have been done in 1905, and no satisfactory explanation is given for all of this decrease. There are likewise sharp conflicts in the testimony which we cannot reconcile or harmonize; still the weight of the evidence is in favor of the contention of appellee, and, while the conclusion we have reached is not altogether satisfactory, it is in accord with the judgment of the chancellor, who was on the ground, and, no doubt, more or less familiar with the surroundings, the litigants, and their witnesses. His opinion is entitled to some weight, and, as has often been held, where the mind, upon consideration of the whole case, is left in doubt, the finding and judgment of the chancellor should and does exercise a controlling influence.

The judgment is therefore affirmed.

Under Civ. Code Prac. § 80, denning a general demurrer as an objection to a pleading because it does not state a cause of action, and providing that a failure to make such objection is not a waiver thereof, a defendant answering to the merits without first having his general demurrer to the petition disposed of does not waive the defects in the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1366; Dec. Dig. § 408.*]

2. EVIDENCE (§ 82*)—PRESUMPTIONS—DISCHARGE OF OFFICIAL DUTY.

In the absence of a showing to the contrary, the presumption is that a warrant issued by the judge of the county court was regular, and that the judge discharged his duty with reference thereto.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. § 82.*]

3. PLEADING (§ 8*)—SUFFICIENCY—CONCLUSIONS.

A petition in an action for false imprisonment, which shows that plaintiff was arrested under a warrant issued by the judge of the county court, but which fails to allege that the judge issued the warrant without information on oath or without affidavit filed showing the nature of the offense, or that the judge did not have personal knowledge of the commission of the offense charged, but which merely avers that the judge, "without probable cause or any cause," issued the warrant, etc., does not allege that the warrant was illegally issued; the quoted averment being a mere conclusion of the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

4. PLEADING (§ 8*)—CONCLUSIONS.

A petition in an action for false imprisonment, which shows that plaintiff was arrested on a warrant issued by defendant as judge of the county court, and which avers, with reference to an examining trial, that there was no testimony heard by the judge tending to show that any act was done or omitted by plaintiff since the law alleged to have been violated by him went into effect, and that, though not proven guilty, defendant as judge had required of plaintiff excessive bail, etc., states only a conclusion of the pleader, and does not allege any wrongful conduct of defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

5. FALSE IMPRISONMENT (§ 20*)—PETITION—SUFFICIENCY.

A petition in an action for false imprisonment which alleges that defendant as judge of the county court required excessive bail of plaintiff, and refused to permit third persons to sign to a bond, and that plaintiff was committed to jail, but which fails to allege that the third persons authorized any one in writing to sign their names to the bond as required by Ky. St. § 482 (Russell's St. § 1799), is insufficient for failing to allege that the third persons executed a power of attorney authorizing some one to sign their names to the bond and to file the power.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 86-88; Dec. Dig. § 20.*]

Appeal from Circuit Court, Owen County.
"To be officially reported."

Action by Jones Schooler against W. P. Yancey and another. From a judgment of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dismissal rendered on sustaining a general demurrer to the petition, plaintiff appeals. **Affirmed.**

J. H. Settle, for appellant. J. L. W. Slaughter, John W. Douglas, and J. G. Val-landingham, for appellees.

NUNN, J. This action was instituted by appellant against W. P. Yancey and the United States Fidelity & Guaranty Company, his surety, for false imprisonment. The court sustained a demurrer to appellant's petition and dismissed his action; he failing and refusing to plead further. Omitting that part of the petition setting up the election and qualification of appellee Yancey as county court judge, the execution of bond as such, and other formal parts, it is as follows: "The plaintiff further states that on the 23d day of July, 1908, the defendant W. P. Yancey, as judge aforesaid, without probable cause, or any cause, issued a warrant of arrest against this plaintiff, and caused plaintiff to be arrested thereunder, and that on the 3d day of August, 1908, still acting as judge aforesaid, proceeded to hold an examining court to ascertain if this plaintiff had violated the law as charged in said warrant of arrest, and at said 'trial' announced that he (the judge) 'wanted the law read to the crowd,' which was done, and plaintiff says that there was no testimony whatever heard by said defendant judge tending to show that any act was done or omitted to be done by this plaintiff in Owen county or in the state of Kentucky since the said law said to have been violated by plaintiff, and known as the 'Crecelius Act,' went into effect. But plaintiff says that, although not proven guilty, the defendant Yancey, as judge aforesaid, and legally empowered to preside, hear, and determine questions of both law and fact, in violation of the Constitution, required of plaintiff 'excessive bail,' and all without testimony to support his judgment, and thereupon the plaintiff offered to execute bond as demanded by said judge, with M. H. Stonestreet and June W. Gayle, personally known to said judge to be solvent and amply sufficient, as sureties thereon, the said judge announcing publicly that either of said sureties alone is 'good,' but then and there unlawfully and over plaintiff's protest refused to permit the said Stonestreet or Gayle either of them to have their names signed as sureties to said bond, which they were willing to do and offered to do as by law required, and that said defendant Yancey, as judge aforesaid, then and there did willfully and unlawfully cause the body of this plaintiff to be committed to the jail of Owen county where he was incarcerated for hours against plaintiff's will, and without semblance of legal justification for his said act. The plaintiff says that by reason of the cruel, inhuman, and unlawful act of said judge in committing plaintiff to prison that the plaintiff has been humiliated and sub-

jected to taunts and jeers of his fellow men, and caused to suffer indescribable mental anguish, and to expend \$50 attorney fee for services in securing plaintiff's release, and that he has been damaged," etc.

At the first term of the court after the filing of the petition, appellee Yancey filed a general demurrer thereto. The court took time to consider the demurrer, and pending this motion Yancey filed his answer. At a subsequent term, by permission of the court, Yancey withdrew his answer and filed another. At the same term of the court the United States Fidelity & Guaranty Company filed its separate answer, and the court disposed of the general demurrer by the following order, to wit: "The general demurrer heretofore entered to plaintiff's petition herein having been considered by the court and the court sufficiently advised, said demurrer is sustained and leave given plaintiff to amend, to which plaintiff excepts, and plaintiff, declining to amend, it is ordered that the petition be, and the same is now dismissed, and it is adjudged that the defendants recover of the plaintiff the cost here expended, may have execution, to all of which plaintiff excepts." Appellant contends that the court erred in sustaining this demurrer for two reasons: First, that appellees had waived the defects, if any there were, in the petition by filing their answers to the merits without first having the demurrer disposed of; second, that the petition stated a good cause of action. Section 93, Civ. Code Prac., is in part as follows:

"(1) A general demurrer is an objection to a pleading because it does not state facts sufficient to constitute a cause of action or a defense, or because it does not state facts sufficient to support a cause of action or a defense.

"(2) Failure so to make such objection is not a waiver thereof," etc.

This section is conclusive of the first question raised by appellant.

The lower court did not err in sustaining the demurrer to the petition. It will be observed that the action was instituted against appellee Yancey as county judge of the Owen county court to hold him liable for damages which appellant claims to have sustained by reason of the judge's decision against him on an examining trial, and for refusing to allow certain persons to have their names signed to his bail bond. It appears from the petition that appellant was arrested under a warrant which was issued by appellee as judge of the Owen county court. While it is not stated in the petition the substance of the warrant under which he was arrested, nor is there a copy of it filed with the petition, it is intimated that the warrant was issued against appellant for a violation of the Crecelius act. Other than this, he gave the court no statement of the nature of the offense or crime with which he was charged. Without this, the presump-

arrest for appellant and caused him to be arrested, and that he, acting as judge aforesaid, proceeded to hold an examining trial to ascertain whether or not appellant had violated the law as charged in the warrant. The phrase "without probable cause or any cause," without showing any reason for such statement, is a conclusion of the pleader, and for that reason is bad. He did not allege that the judge issued the warrant without information given him on oath, or without affidavit filed in his office showing the nature of the offense for which the warrant issued, or that the judge did not have personal knowledge of the commission of the offense charged in the warrant. Therefore no fact was alleged in the petition from which the court could have been authorized to conclude that the warrant was illegally issued. The petition is equally defective with reference to the alleged examining trial. It was alleged in the petition that "there was no testimony whatever heard by said defendant judge tending to show that any act was done or omitted to be done by this plaintiff in Owen county or in the state of Kentucky since the said law said to have been violated by plaintiff, and known as the 'Crecellus Act,' went into effect. But plaintiff says that, although not proven guilty, the defendant Yancey, as judge aforesaid, and legally empowered to preside, hear, and determine questions of both law and fact, in violation of the Constitution, required of plaintiff 'excessive bail.'" This amounts only to a conclusion of the pleader. The amount of the bail required is not alleged. There is an admission in the pleading that evidence was introduced on the examining trial; but appellant was of the opinion that it did not tend to show that he was guilty of any offense, but it appears that the court differed from him on that point. There was no positive fact alleged which indicated that the lower court erred in that matter, even if the court could have been made liable for an error in its opinion, which it is not necessary to determine or discuss, as the petition is so defective that it fails to present that question for determination.

It is also alleged in the petition, in substance, that the court required excessive bail of appellant; that he could have avoided going to prison, however, but for the fact appellee Yancey refused to permit one Stonestreet or Gayle, or both of them, to have their names signed as surety to said bond, which they were willing and offered to do as by law required. It was also alleged that Yancey said at the time that either of the gentlemen would have made the bond

"No person shall be bound as the surety for another by the act of an agent, unless the authority of the agent is in writing, signed by the principal," etc. It is not alleged in the petition that Stonestreet or Gayle in this manner authorized any person to sign their names to the bail bond. It is alleged that they offered to do this as required by law. This, however, is merely a conclusion of the pleader. It should have been alleged that they executed a power of attorney under section 482, Ky. St., authorizing some one to sign their names to the bond, and the power of attorney should have been filed, or the substance of it copied into the pleading, so that the court might have determined whether or not it conformed to the requirements of the law.

For these reasons, the judgment of the lower court is affirmed.

STONE v. LAMB et al.

(Court of Appeals of Kentucky. May 6, 1909.)

APPEAL AND ERROR (§ 839*)—TRIAL BY COURT — RECORD — FAILURE TO MOVE FOR NEW TRIAL OR SEPARATION OF LAW AND FACTS.

Where a jury was waived, and the law and facts submitted to the court, and no motion for a new trial was made, nor a separation of the law and facts asked, the only question for consideration on appeal is the sufficiency of the pleadings to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 839.*]

Appeal from Circuit Court, Calloway County.

"Not to be officially reported."

Action by B. F. Stone against James Lamb and others. Judgment for defendants, and plaintiff appeals. Affirmed.

N. B. Barnett, for appellant. A. D. Thompson, for appellees.

CARROLL, J. The appellant, B. F. Stone, as plaintiff below, brought this action in ordinary against the appellees, defendants below, to recover a small tract of land, which he alleged was wrongfully held by them, and \$50 for its detention. The appellees filed an answer, denying that the appellant was the owner of the land, and setting up title in themselves. After the pleadings were made up, a trial by jury was waived, and the law and facts submitted to the court. The court, after hearing the evidence, adjudged—and correctly, as we believe, from a reading of the record—in favor of the appellees. From the judgment, this appeal is prosecuted.

The appellant did not make any motion in the court below for a new trial, nor did he

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the appellants are sufficient to support the verdict there can be no doubt, and so the judgment must be affirmed.

ROSS v. THOMAS.

(Court of Appeals of Kentucky. April 30, 1909.)

APPEAL AND ERROR (§ 1008*)—REVIEW—QUESTIONS OF FACT.

Findings of fact in a case tried before the court will not be disturbed unless clearly wrong. [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Action by W. J. Ross against R. Y. Thomas, Jr. From a judgment for defendant, plaintiff appeals. Affirmed.

Willis & Meredith and Johnson, Wickliffe & Johnson, for appellant. Taylor & Eaves, for appellee.

BARKER, J. The appellant, W. J. Ross, who is an attorney at law, was employed by J. J. Farmer as next friend of his infant son, Ellis Farmer, to prosecute an action against the Louisville Cooperage Company to recover damages for injuries sustained by the infant caused by the negligence of the cooperage company. Appellant instituted the action, and, when the case was called for trial, the appellee, R. Y. Thomas, Jr., who is also an attorney at law, was associated with appellant to assist in the prosecution of the action. The case was tried out before a jury, with the result that a verdict was rendered in favor of the plaintiff for the sum of \$3,500. To reverse this judgment an appeal was prayed to this court, and here the judgment was affirmed. Afterwards the cooperage company paid over the full amount of the judgment to John S. Miller, guardian of Ellis Farmer, and the amount was deposited in the Muhlenberg County Savings Bank. The appellant, Ross, and the appellee, Thomas, having disagreed as to what part of the judgment Thomas was to receive for his services, the latter instituted this action in the Muhlenberg circuit court, making W. J. Ross, the Muhlenberg County Savings Bank, and John S. Miller, guardian of Ellis Farmer, parties defendant. In his petition he alleged his employment and services and the agreement to pay him the sum of 20 per cent. of the amount recovered, and prayed a judgment therefor. Ross denied all the material allegations of the petition, and alleged that under his contract of employment with J.

J. J. Farmer as next friend of plaintiff agreed to give Thomas 10 per cent. of the amount recovered which was coming to the infant. This was denied by Thomas, and the issue was made up; the question being simply whether Thomas was to receive a sum equal to 10 per cent. or 20 per cent. of the judgment recovered for his services. The case was tried before the court without the intervention of a jury. The trial court held that the next friend had no authority to make a contract for the infant; but, it being proved that the services of the attorneys were reasonably worth a sum equal to 50 per cent. of the judgment recovered, this was allowed on a quantum meruit. As neither the infant nor his guardian is complaining of this allowance, it must stand; but by this we do not mean to be understood as questioning the judgment of the lower court in this particular. As between the attorneys the circuit judge awarded Thomas two-fifths of the amount allowed counsel for their fee and Ross three-fifths. From this judgment Ross has appealed.

The question is one wholly of fact, and we are unable to say that the trial court erred in sustaining Thomas' side of the contention. The record indubitably shows that Thomas did much more than one-half of the work involved in the recovery; and, if the question was one simply of merit, he should have received certainly not less than one-half of the allowance.

A careful reading of the record convinces us that no injury was done to the rights of the appellant by the judgment; and it is therefore affirmed.

COMMONWEALTH v. POINDEXTER et al. (Court of Appeals of Kentucky. May 7, 1909.) SODOMY, (§ 1*)—NATURE OF OFFENSE—"BUGGERY."

The word "sodomy" is derived from Sodom, where the crime was prevalent, and the crime consists in carnal copulation by human beings against nature with penetration, but penetration of the mouth is not sufficient to constitute the crime, and consent does not affect its criminality, but makes the consenting party an accomplice; and buggery is the same offense between a man and a beast.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 1, p. 887; vol. 7, p. 6539.]

Appeal from Circuit Court, Caldwell County.

"To be officially reported."

C. H. Poindexter and Frank Moore were convicted of sodomy. The verdict was set

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

aside, a demurrer to the indictment sustained, and the Commonwealth appeals. Affirmed.

James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, C. J. The appellees, C. H. Poin-dexter and Frank Moore, both negroes, were indicted in the court below for the crime of sodomy. Upon being arraigned for trial they severally entered a plea of guilty, and the trial jury by the verdict returned found them guilty, and fixed their punishment at confinement in the penitentiary two years each. After the return of the verdict appellees entered a motion and grounds for a new trial. The principal ground urged for the new trial was that in entering the plea of guilty on the trial they and their counsel labored under a misapprehension of the law, in that he and they believed the acts charged in the indictment, of which they still admitted their guilt, constituted the crime of sodomy, whereas they did not as they were advised after the trial constitute that crime or any other under the law. The circuit court set aside the verdict, and granted appellees a new trial. Thereupon they, by counsel, interposed a demurrer to the indictment, which the court sustained on the ground that the acts charged therein did not constitute sodomy, and dismissed the indictment. From the judgment entered pursuant to that ruling the commonwealth has appealed.

The acts charged against the appellees are so disgusting that we refrain from copying the indictment in the opinion. They, however, manifest the perpetration between appellees and by each against the other of an offense against nature committed by the insertion of the private part of the one into the mouth of the other and thereby producing an emission. The question for decision is: Did these acts constitute the crime of sodomy? We have in this state a statute which makes sodomy a felony, and prescribes the punishment to be inflicted for its commission, but the statute does not define the crime. As it is nevertheless a crime at common law in this state, we must look to that source to ascertain its constituent elements and meaning. However, the word "sodomy" is derived from the city of Sodom, where the crime against nature had its origin, and was universally prevalent until that city was destroyed by the wrath of God.

In 2 Bishop's New Criminal Law, § 1191, it is thus defined: "Sodomy is a carnal copulation by human beings with each other against nature, or with a beast." By many of the common-law writers sodomy is spoken of as "the infamous crime against nature"; the terms "sodomy," "buggery" and "crime against nature" being often used as synonymous. Strictly speaking, however, sodomy is

the crime when committed between two human beings, or man and man, while buggery is the same offense committed by a man with a beast. Sodomy in ano is the most common form of the offense between man and man; penetration being necessary to complete the crime. Unlike the crime of rape, the consent of the victim in the crime of sodomy does not remove the criminal element, but simply makes the consenting party an accomplice. 20 Am. & Eng. Ency. of Law (New Ed.) 1146; 2 Bishop's New Criminal Law, § 1193.

After thus considering the derivation and meaning of the word "sodomy," it remains to be seen whether the form of carnal copulation adopted by appellees, viz., penetration of the mouth, constituted sodomy in the meaning of the law. With one accord the authorities hold that it does not. Again referring to Bishop's New Criminal Law, we find in volume 2, § 1194, this statement from the learned author: "A penetration of the mouth is not sodomy." The same conclusion is expressed in 2 Russell on Crimes, p. 698, Wharton's Crim. Law, § 579, and McClain's Crim. Law, § 1153, and likewise announced in the following cases, in which the question was considered and passed on, viz.: Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833; Mitchell v. State, 49 Tex. Cr. R. 535, 95 S. W. 500; People v. Boyle, 116 Cal. 658, 48 Pac. 800; Rex v. Jacobs, Russ. & Ry. 331. We must confess that we are unable to see why the act with which appellees stand charged is not as much a crime against nature as if done in the manner sodomy is usually committed; but as the only authorities we have been able to discover decide otherwise, we regard it our duty to follow precedent, and for this reason alone we hold that the circuit court properly held the indictment bad, and dismissed it. It is to be hoped, however, that the Legislature will by proper enactment make such an infamous act as that of which appellees confess themselves guilty a felony and punishable as such.

For the reasons indicated, the judgment is affirmed.

JACKSON'S ADM'RS v. McHARGUE et al.
(Court of Appeals of Kentucky. May 12, 1900.)

1. **MUNICIPAL CORPORATIONS (§ 518*)—WALK IMPROVEMENT—ERROR IN ASSESSMENT—INTEREST ON WARRANT.**

Where there is an error in the apportionment for a walk improvement, the property owner is not liable for interest on the apportionment warrant until the error has been corrected and the amount has been definitely fixed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1218, 1219; Dec. Dig. § 518.*]

2. **APPEAL AND ERROR (§ 1009*)—REVIEW—SUBSEQUENT APPEALS—CONCLUSIVENESS OF FORMER DECISION.**

Where the questions raised on appeal in an action to enforce an assessment for a sidewalk were the validity of the proceedings and the

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and they cannot be raised on a second appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4370; Dec. Dig. § 1099.*]

Appeal from Circuit Court, Laurel county.
"Not to be officially reported."

Action by Millie McHargue and others against John C. Jackson's administrators. From a judgment for plaintiffs, defendants appeal. Affirmed.

Henry C. Hazelwood, for appellants. E. H. Johnson, for appellees.

CLAY, C. This is the second appeal of this case. The opinion on the first appeal may be found in 106 S. W. 871. The board of trustees of the town of London, in Laurel county, Ky., passed an ordinance for the improvement of Main street by making a flagstone sidewalk, five feet in width, in front of the property owned by the appellants. The cost of the improvement, amounting to \$659, was assessed against appellant's property on March 12, 1904. Appellants refused to pay said warrant, which had been sold to appellees. Thereafter appellees instituted an action to enforce their lien. Instead of a judgment for \$659, the trial court rendered judgment in favor of appellees for the sum of \$646, with interest from March 12, 1904, and the costs of the action. On appeal to this court, the judgment was attacked on the ground that the proceedings leading up to the construction of the sidewalk were invalid, and that a personal judgment was given against the appellants. After a consideration of the questions raised, this court held the proceedings valid, but reversed the judgment for the sole reason that a personal judgment was rendered against appellants. On the filing of the mandate in the lower court, judgment was entered setting aside the personal judgment. Appellants then paid off said judgment in full, with the interest thereon and the costs from the date of the filing of the mandate, with the exception of the sum of \$100 which they offered to pay. Appellees declined to accept same in full settlement and satisfaction of said judgment, claiming that the balance was the sum of \$287, which is the true amount if appellants were liable for the interest on said debt from March 12, 1904, until paid, together with the costs that accrued in said action prior to the filing of the mandate. As appellants declined to pay the full amount of the judgment, the lower court directed a sale of appellants' property. Appellants filed exceptions to the report of sale and objected to the confirmation of same. The exceptions were over-

tionment, the property holder is not liable for interest and costs on an apportionment warrant until the error has been corrected and the amount has been definitely fixed, either by the town authorities or the court in which an action has been brought. There can be no doubt as to the correctness of this proposition of law. *Boone v. Gleason*, 4 Ky. Law Rep. 1001; *Conner v. Clark*, 15 Ky. Law Rep. 126; *Gosnell v. City of Louisville*, 104 Ky. 201, 46 S. W. 722. But this question should have been raised upon the former appeal. It was not, however, made. The only questions raised were the validity of the proceedings leading up to the construction of the sidewalk, and the fact that a personal judgment had been rendered against the appellants for the enforcement of the lien. As the judgment on the former appeal was reversed for the sole reason that a personal judgment was given, the effect was to affirm the judgment of the lower court in all other respects. As the judgment provided for a recovery of the sum of \$646, with interest from March 12, 1904, that part of the judgment was affirmed. The question now raised was fully determined by the judgment of this court on the former appeal, and is therefore *res adjudicata*.

So far as the question of costs is concerned, appellants should have made a motion in this court to have the costs retaxed in case any mistake was made in the taxation of the costs. The procedure adopted by appellants for raising the question was not proper.

For the reasons indicated, the judgment is affirmed.

BROWN v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 7, 1909.)

1. LARCENY (§ 55*) — SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for stealing chickens *held* not sufficient to authorize a conviction.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 55.*]

2. CRIMINAL LAW (§ 534*) — CONFESSION AS EVIDENCE TO SUSTAIN CONVICTION.

A confession, by one accused of stealing, that he stole the articles he was charged with stealing, is not sufficient, standing alone, to justify a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1222; Dec. Dig. § 534.*]

Appeal from Circuit Court, Fayette County.
"Not to be officially reported."

Will Brown was convicted of stealing, and appeals. Reversed and remanded.

lant seeks the reversal of a judgment entered by the court below upon the verdict of a jury finding him guilty of chicken stealing and fixing his punishment at confinement in the penitentiary one year. The indictment in the usual terms charged appellant with the larceny, and that the value of the chickens exceeded \$2. He filed three or more grounds in support of his motion for a new trial, and the same are now urged for a reversal.

The complaint that the jury were not properly instructed is not well taken. The instructions correctly presented the law, if the case should have gone to the jury. We also find that the complaint as to the admission of incompetent evidence is unsupported by the record.

The only tenable ground relied on for the reversal asked is that there was not sufficient evidence to support the verdict and that the court should have peremptorily instructed the jury to find appellant not guilty, and this ground we shall proceed to consider. The evidence of the commonwealth conduced to prove that appellee is a negro boy 18 years of age; that Jackson and wife, who are also negroes, lost 11 chickens, of "frying size," a year or more before appellant was indicted. The latter lived with his mother on a lot adjoining that of the Jacksons. The wife of Jackson testified that on Sunday afternoon, the day before the loss of the chickens was discovered, she saw appellant and another negro boy chasing a hen belonging to her and some of the chickens from his mother's lot. She did not claim that the boys caught any of the chickens, but, on the contrary, admitted that when she spoke to them they quit running after the chickens. Whether appellant was merely driving the chickens from his mother's lot, or was after them for some other purpose, does not appear. The loss of the chickens was not discovered until after Jackson's wife returned from a neighbor's the following day. The manner of their disappearance was not stated, nor does it appear that any effort was made by Jackson and wife to ascertain whether or not the chickens had wandered to the premises of a neighbor.

Testimony was furnished by a negro woman of the neighborhood that, two or more months after the loss by the Jacksons of their chickens, she purchased of appellant four or five chickens; but there was no attempt by the commonwealth to prove that they were of the size, age, or description of the chickens lost by the Jacksons. The only evidence that tended in the remotest degree to connect appellant with the theft of the Jackson chickens was the statement, made by Jackson, that

money, that what appellant then said amounted to a confession of guilt. They were in a quarrel, and it is hardly reasonable that such an admission would have been made by appellant to an enemy and the owner of the chickens, who might be expected to immediately have him indicted for stealing the chickens. There was also a discrepancy between the testimony of Jackson and that of his wife as to the time of the loss of the chickens. She said they were lost two years before appellant was indicted, while the husband fixed the time at something over a year. Moreover, if appellant took the chickens, it was not reasonable that he would have kept them two months or more before selling them. It would have been far more natural for him to have sold them at once.

So, weighed as a whole, there was nothing in the evidence, aside from his alleged confession, which can fairly be said to connect appellant with the theft of the chickens. Manifestly, his confession alone, if made at all, was not sufficient to authorize his conviction. To have done so, it must have been accompanied by other proof showing that the crime with which he was charged had been committed. There was not evidence sufficient to prove that the chickens of the Jacksons were stolen. Viewed as a whole, the evidence more strongly tends to establish a feud or negro quarrel between appellant and the Jacksons than it does a theft of the chickens. In other words, there was not enough evidence to authorize a submission of the case to the jury. Therefore the court should have given a peremptory instruction directing a verdict for appellant.

Wherefore the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

CITY OF LATONIA v. EBENSCHWEIGER. (Court of Appeals of Kentucky. May 7, 1909.)

1. MUNICIPAL CORPORATIONS (§ 821*)—TORTS—DEFECTS IN STREETS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where plaintiff knew that there was a hole in the street on which she was walking, but the night was dark, and she did not see the hole at the time of the accident, and did not know she was near it until she fell into it, the question of contributory negligence is for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1754-1756; Dec. Dig. § 821.*]

2. MUNICIPAL CORPORATIONS (§ 821*)—TORTS—DEFECTS IN STREETS—ACTIONS—EVIDENCE—NEGLIGENCE—QUESTION FOR JURY.

Evidence, in an action against a city for injuries from falling into a hole in a public street, held to make the question whether the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Not to be officially reported."

Action by Mary Ebenschweiger against the City of Latonia. Judgment for plaintiff, and defendant appeals. Affirmed.

D. A. Glenn and J. L. Elliston, for appellant. L. T. Applegate and Lewis L. Manson, for appellee.

HOBSON, J. Ohio avenue in Latonia runs practically east and west. McKee avenue runs practically at right angles to it, but does not cross it. Along the north side of Ohio avenue there was a cinder walk. There was no walk on the south side. The street had not been macadamized. Mary Ebenschweiger lived on the north side of Ohio avenue, and near where McKee avenue runs into it from the south. In putting down a sewer the city had dug a ditch in Ohio avenue, and when the sewer had been put in, and the ditch filled up, the earth settled, leaving a hole about 2½ feet wide, and from 1 to 2 feet deep, which was on the side of the street, and not far from the cinder walk. On November 28, 1907, Mary Ebenschweiger, as she returned home, stopped to visit a friend on McKee avenue, and after seeing her friend came on from her friend's house to her house walking northward on McKee avenue. When she got to the intersection of Ohio avenue, she undertook to cross the street so as to get to her house. It was so dark that she could not see, and in crossing the street in the dark she veered a little from a direct line across the street, and fell into the hole referred to, breaking some of her ribs, injuring her arm, and lacerating the muscles of her chest. She brought this suit against the city to recover for her injuries. A trial was had which resulted in a judgment in her favor for the sum of \$1,000. The city appeals.

The instructions given by the court are, in substance, the same as those approved by this court in *City of Latonia v. Hall*, 103 S. W. 354. They fairly submitted the case to the jury. But it is earnestly insisted that under the evidence the jury should have been peremptorily instructed to find for the defendant. The plaintiff testified that she saw the hole there four or five weeks before, but that she left her house every morning before light, and went to her work at an infirmary, going along the cinder walk, and returning in the evening after dark the same way; that at the time she fell into the hole it was so dark that she could not see the hole, and that she fell into it before she knew that she was near it. This court has held in several cases that, where the person injured lives

See *City of Covington v. Manwaring*, 113 Ky. 592, 68 S. W. 625. But that is not this case. Here the plaintiff was walking in the dark, and could not see where she was. While she knew there was a hole in Ohio street, she did not know she was near it. If the hole was of the size stated by the plaintiff, it was a dangerous defect in the street. It had existed for months. The rule that cities must keep their streets in reasonably safe condition is based on the ground that people must be expected on the streets, and that, too, at times when they will not be able, by the exercise of ordinary care, to avoid the danger incidental to an unsafe condition of the street. The case of *Maysville v. Gullfoyle*, 110 Ky. 670, 62 S. W. 493, is not unlike this case. There the plaintiff admitted that she knew of the hole into which she fell, but she was going along the street hurriedly in the dark, on a mission of necessity, and fell into the hole before she knew she was near it. In *City of Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 381, a barbed wire was stretched across the street. The plaintiff was injured by it in the nighttime. It was held that he could recover, and that, without being chargeable with contributory negligence, he might leave the sidewalk to cross the street at any point. The same rule was, in effect, applied in *City of Louisville v. Brewer's Adm'r* (Ky.) 72 S. W. 9. It was a question for the jury under the evidence whether the street was reasonably safe for travel by persons using ordinary care, and whether the plaintiff exercised ordinary care in crossing it as she did under the circumstances. These matters were fairly submitted to the jury by the instructions of the court, and the verdict is not against the weight of the evidence.

Judgment affirmed.

CITY OF LOUISVILLE v. GAGEN.

(Court of Appeals of Kentucky. May 7, 1909.)

1. INTOXICATING LIQUORS (§ 75*)—LICENSES—DISCRETION—"ARBITRARY" EXERCISE—APPEAL.

An unreasonable exercise of discretion by a city license board in refusing a saloon license is within the rule authorizing an appeal in case the discretion of the board has been arbitrarily exercised.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 74, 76; Dec. Dig. § 75.*

For other definitions, see *Words and Phrases*, vol. 1, p. 487.]

2. INTOXICATING LIQUORS (§ 59*)—LICENSES—SALOON—LOCATION—PROXIMITY TO CHURCH.

Where petitioner had occupied certain premises in the business portion of a city as a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

saloon for 10 years and the premises had been used for saloon purposes for 50 years, it was an abuse of discretion to deny petitioner's application for a new license because a church had been constructed in the meantime on the opposite side of the street.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 59; Dec. Dig. § 59.*]

"To be officially reported."

On rehearing. Petition overruled.

For former opinion, see 116 S. W. 745.

HOBSON, J. In *Thompson v. Koch*, 98 Ky. 400, 83 S. W. 96, it was held that it should appear that the judgment of the board was the exercise of an arbitrary discretion before the circuit court would disregard its judgment. In *Hodges v. Metcalfe* County Court, 116 Ky. 527, 76 S. W. 381, it was said that the action of the county judge in granting a license will not be interfered with unless manifestly erroneous. In *Commonwealth v. Campbell* (Ky.) 107 S. W. 797, it was said that the board is invested with broad discretion in granting or refusing licenses, and that its decision, in the absence of an abuse of discretion, ought to prevail. In the opinion in this case the following language was used: "And unless it appears from the evidence heard by the board that the discretion lodged in it has been abused, or, to put it in another way, not reasonably exercised, the court should not reverse or set aside its finding." We are unable to see that there is a substantial difference between any of these statements of the law. The purpose of allowing an appeal in cases of this sort is to correct any injustice that may have been done by the action of the board, and when the decision of the board is not a reasonable exercise of discretion it is within the meaning of the rule heretofore laid down the arbitrary exercise of discretion.

We have upon the petition for rehearing carefully read the record a second time, and adhere to the statement of the facts of the case therein made. We are satisfied from the proof that the real objection of those who made the remonstrance is not so much to the appellee's saloon as it is to there being any saloon across the street from the church. In other words, the real reason of the remonstrance is that there should not be a saloon on the opposite side of the street from the church. A saloon has existed at this point for 50 years. The appellee has been there for 10 years. The church has been built there in the meantime. A saloon business, like any other, is built up at a place, and the appellee should not be deprived of the business which he has built up upon a mere sentiment. The saloon business is legalized in Louisville, and there must necessarily be saloons in the neighborhood of churches, where the churches are built in the business part of the city.

Under all the facts, we are of opinion that the board abused a sound discretion in refusing the license.

Petition overruled.

CUNNINGHAM v. AYER & LORD TIE CO.
(Court of Appeals of Kentucky. April 30, 1909.)

NEGLIGENCE (§ 32*)—DUTY TOWARDS LICENSEES—DRUNKEN PERSONS.

The captain of a steamboat moored to a bank sent an employé to fetch decedent to do some work on the boat. Decedent had been drinking, but was not drunk, and voluntarily started for the boat with the employé. On the way they visited a saloon, took a drink, and decedent bought a bottle of whisky. When they reached the boat, another had been engaged to do the work, but decedent remained on the boat, and, after drinking from his bottle, attempted to pass from one part of the boat to another along a narrow passageway, and fell into the river and was drowned. *Held*, that in view of the fact that the boat was moored to the bank, and that decedent was not in such a drunken condition that his mentality was impaired, those in charge of the boat were not required to guard him to prevent his falling overboard, and the owner was not liable for his death.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Death action by Minnie Cunningham, administratrix of D. C. Cunningham, against the Ayer & Lord Tie Company. There was a directed verdict for defendant, and plaintiff appeals. Affirmed.

Hendrick, Miller & Marble, for appellant.
C. C. Grassham and Wheeler, Hughes & Berry, for appellee.

LASSING, J. Appellant instituted suit in the McCracken circuit court wherein she sought to recover damages for the death of her husband, who fell from the steamer *Margaret* in June, 1907, and was drowned. The petition alleged that his death was due to the negligence and carelessness of the employes of appellee in taking him to and upon said boat, and leaving him unattended in a place of danger while he was in a drunken and practically helpless condition. Appellee answered, denying liability, and pleaded contributory negligence as a defense. In a reply the affirmative matter in the answer was traversed, and upon the issue thus joined the case was submitted to a jury. At the close of appellant's evidence a peremptory instruction was given to find for defendant, which was done. From the judgment predicated upon this verdict, this appeal is prosecuted.

Appellee was the owner of the towboat *Margaret*, which was then undergoing repairs at the wharf or landing on the river front opposite Paducah. The services of a

brick mason were needed to lay the furnace work, and D. C. Cunningham, being skilled in that line, was called upon by the agents of appellee to render this service. The facts as brought out in the evidence, and upon which appellant relies, as shown by the record, are as follows: The said boat was to be inspected at 2 o'clock on the day upon which deceased was drowned. On the morning of that day Capt. Baker directed Joe Lord, one of their employes, to find or get Daniel Cunningham, or Uncle Dan, as he was commonly called, and have him complete the brickwork around the boiler. It appears that Nimmo, another employe, heard this order delivered, and whether on his own initiative, or under the direction of Lord, to whom the message was delivered, he set out to find Uncle Dan. He located him at his own home, asleep. He had been drinking, and Nimmo was so notified by Mrs. Cunningham. She aroused her husband, and he and Nimmo went into his kitchen, where they each took a toddy, and Mrs. Cunningham stated, in substance, to Nimmo that if her husband was kept away from liquor, and not allowed to drink any more, he would be all right. He was not drunk at this time, though drinking. Together they walked from his home to the river, and on the way passed a saloon, in which they took a drink of beer, for which Uncle Dan paid, and he also purchased a pint of whisky in this saloon. From there they went on to the river, where they met Lord. While waiting for a boat to take them across the river, Uncle Dan stumbled or staggered into the water, although he did not fall. He was taken out, and they all got into a boat, and together went across the river to the Margaret. When they went upon the boat, they found that the services of another brick mason had been secured, and that Uncle Dan was not needed. They went back into the boiler room where the work either had been or was being done, and Uncle Dan took another drink of whisky from his bottle. Some time thereafter, just exactly how long it is not clear, while attempting to walk from the boiler room to another part of the boat along a passageway something less than three feet in width, he fell into the river and was drowned.

For appellee it is insisted that, conceding all that appellant claims, she has failed to make out a case; that none of the authorities relied upon by appellant are in point, or support her contention; that the relation of master and servant did not exist between appellee and deceased, but that, at most, he was a mere licensee; that he was invited or requested to go over to appellee's boat and perform certain services; that he accepted the invitation and accompanied the servant of appellee from his home to the river, and was there by appellee provided with a means of conveyance over to the boat; that he was so long in reaching the boat that appellee

had procured the services of some one else to do the work, and hence did not employ deceased; that at this time, although drinking, and to some extent under the influence of liquor, the proof does not show that deceased was in the condition as he is described in the pleadings, to wit, drunk and helpless, but, on the contrary, he was able to go about, and, as far as could be observed, knew what he was doing. He was familiar with boats, it appearing in the evidence that he was skilled in the line of business for which his services on this occasion were sought, and, while he had stumbled into the river before being brought over to the boat, there was nothing in his conduct after reaching the boat that would indicate to the employes of appellee on the boat that there was danger that he would fall overboard.

There is no merit in the claim that the servants or agents of appellee took deceased from his home over to the boat. On the contrary, the proof shows that the employment was offered him, and he voluntarily went to accept same, and this with the full knowledge, consent, and acquiescence of his wife. Nor was appellee in the least responsible for his being under the influence of liquor. Upon this point the record shows that he was partially so when he left home; that he voluntarily contributed to intensify this condition before reaching the river, and again after arriving at the boat. Certainly appellee is in nowise responsible for these acts on the part of deceased, and this brings us, then, to the question as to whether or not appellee owed deceased a duty to guard and protect him while on its boat, knowing that he was more or less under the influence of liquor. If it did, then the peremptory instruction should not have been given, and this is the sole question in the case.

This court has on several occasions been called upon to pass upon the degree of care which common carriers are required to exercise in dealing with trespassers found upon their cars or about their premises in a drunken condition. In the case of *C. N. O. & T. P. R. R. Co. v. Marrs*, 119 Ky. 954, 85 S. W. 188, 70 L. R. A. 291, 115 Am. St. Rep. 289, deceased was run over and killed by a switch engine of appellant in its yards, and it developed in the proof that those in charge of the switchyard had seen him helped from a train while in a drunken condition, and later found him lying in a stupor between the tracks in the yard in the nighttime. In upholding the ruling of the lower court in refusing to give a peremptory instruction, this court held that, having found deceased in this condition, the employes of the company could not arouse him, and start him wandering in the dark through the network of switches and tracks, and then afterwards run over him, and say they owed him no lookout duty because he was a trespasser; but it was their duty when they aroused him

have relieved itself from all liability by exercising ordinary care to avoid injuring deceased while in its yard, although in an intoxicated condition. In the case of Fagg's Administrator v. L. & N. R. R. Co., 111 Ky. 30, 63 S. W. 580, 54 L. R. A. 919, a trespasser was ejected from a freight train in a drunken and helpless condition in a cut on a dark night, and he was later run over and killed by a train which followed, and it was held that the company was liable because, notice of the drunken and helpless condition of the deceased having been brought home to the company, it was its duty to have exercised ordinary care to save his life, and that its failure so to do rendered it liable. Here, again, the negligence upon which a recovery was justified was the failure of the company to exercise ordinary care to avoid injuring deceased after notice of his helpless and drunken condition was brought home to it. In the case of L. & N. R. R. Co. v. Ellis, 97 Ky. 330, 30 S. W. 979, deceased was put off a train in a drunken and helpless condition because he refused to pay his fare, and was later run over and killed by another train. This court held that the company was liable in damages for his death because deceased was put off the train in a cut, away from a station, with banks and fences on either side of the track, and at a time when he was in such a helpless condition, mentally and physically, that he was incapable of taking care of himself, and because the deceased at the time he was ejected had neither the physical ability to avoid danger nor mental capacity to discern it. In this case all the authorities in this state bearing upon this question are reviewed, as are also authorities in many other states; and the court there concluded from a consideration of all such that if the deceased was ejected from the train when he was in such a physical or mental condition from intoxication or other cause as to render him incapable of caring for himself, and the officers or agents in charge of the train knew of his then helpless condition, and, knowing this, put him off in a place where he would necessarily or probably be exposed to death or great bodily harm from passing trains, and he was thereafter run over and killed, the company would be liable. In all these cases where a liability has been upheld, it has been upon the ground that the negligent acts complained of were the proximate cause of the resulting injury, and in each particular case it will be observed the party injured was so intoxicated as to be mentally incapable of appreciating the danger in which he was placed and physically unable to avoid it.

Measured by this rule or standard, did ap-

perer or stumbled into the water, although he did not fall. Considered by itself, this would tend to show that he was drunk to such an extent as that he did not have entire control over his movements, and yet in going from his home to the river, a distance of some eight or ten squares, there is no evidence from his movements or deportment that he was not capable of taking care of himself; and after the river had been crossed, and he had gone upon the boat, there is no evidence tending to show that he could not intelligently direct his movements, and, in fact, it is urged with a great deal of earnestness that his fall into the river, which is supposed to have resulted in his death, was due to heart failure or a stroke of apoplexy rather than to his inability to walk along the passageway which he was traveling when he fell into the water, nor is there any evidence which would justify the conclusion that he was drunk to such an extent that his mentality was impaired. Hence we conclude that the facts brought out in evidence do not bring this case within the rule announced in the various decisions of this and other courts, relied upon by appellant, and, while the record shows conclusively that deceased was drinking, it fails to show that he was drunk enough to bring his case even within the rule announced in the case of L. & N. R. R. Co. v. Ellis, in which the principle here contended for was carried to its extreme limit. Appellee had been guilty of no act of negligence or breach of duty in offering deceased employment. It had not exposed him to danger, but he had voluntarily gone to the boat to accept employment. The boat was not moving, but was moored to the bank, and was in as safe a condition as a boat of that character could reasonably be made. Appellee did nothing to cause deceased to fall into the river, and is no more responsible for his doing so than it would have been for an injury he might have received had he fallen from his doorstep when starting from his home with the agent of appellee, or had he fallen in the street and hurt himself, or when he staggered into the water at the river's edge, if he had fallen and been drowned before he could have been rescued. It will hardly be contended that, had the accident happened to him in any of these ways, appellee would have been responsible therefor; and yet there would be as much reason for so holding in these cases as in the case at bar. A different case would be presented if, after deceased had voluntarily gone to the boat, he had been taken charge of by the officers or other agents of appellee and exposed to the danger, and by means thereof met his death. It might then, with some degree of

while in an intoxicated condition, and 2., upon discovering that he was intoxicated after he had reached his house, should tell him that he had decided not to have the work done, and B., when in the act of leaving, should fall out of the door and down the steps to his injury, would A. be responsible therefor? Clearly not; and the case at bar is no stronger. A man cannot voluntarily drink to intoxication, and while in this condition negligently bring an injury upon himself, and hold another responsible therefor on the ground that the latter should have guarded or restrained him so as to have prevented the injury, unless such person owed him some duty. In such a case the injury is the result of his own wrong, and he alone must suffer. In the case at bar it does not appear that appellee owed any duty to deceased, and the trial court, having so found, did not err in taking the case from the jury. Judgment affirmed.

STEVENSON v. MOORE.

(Court of Appeals of Kentucky. May 4, 1909.)

1. TRIAL (§ 11*) — DOCKETS — TRANSFER OF CAUSES.

The trial judge is not required to transfer a case involving a complicated account to the equity side of the docket on his own motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 29; Dec. Dig. § 11.*]

2. JURY (§ 88*)—COMPETENCY—PECUNIARY INTEREST—STOCKHOLDERS.

Stockholders in a bank are not disqualified to sit as jurors in a case in which the bank's teller alone is interested.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 409, 410; Dec. Dig. § 88.*]

3. APPEAL AND ERROR (§ 692*) — RECORD — QUESTIONS PRESENTED — RESERVATION OF GROUNDS—OBJECTIONS—EXCLUSION OF EVIDENCE.

A ruling excluding a question put to a witness will not be reviewed, in the absence of an avowal as to what the answer would have been.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

4. MONEY RECEIVED (§ 19*)—TRIAL—INSTRUCTIONS.

Where plaintiff proved that she borrowed \$5,000 from defendant, and that he paid over to her and for her use only \$4,000, leaving \$1,000 due her, and defendant proved that he merely aided her in discounting her notes in certain banks, and paying off her debts, a charge that if he advanced to her the money on her notes, and retained \$1,000 of the same or any less sum, or if he discounted the notes for her and retained \$1,000 or any less sum, then the jury should allow her such sum as he retained "in excess of the interest thereon" not exceeding \$1,000, was proper, and was not misleading because of the use of the quoted words.

[Ed. Note.—For other cases, see Money Received, Dec. Dig. § 19.*]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

6. APPEAL AND ERROR (§ 1002*)—QUESTIONS OF FACT—CREDIBILITY OF WITNESSES.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

7. APPEAL AND ERROR (§ 237*)—PRESENTATION IN LOWER COURT OF GROUND OF REVIEW—MOTION—TRANSFER OF CAUSE.

A party who has elected to try a case involving complicated accounts before a jury cannot, after an adverse verdict, complain of the court's failure to transfer the case to equity on its own motion.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 237.*]

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by Allene Stevenson against E. W. Moore. From a judgment for defendant, plaintiff appeals. Affirmed.

Robert G. Hill, for appellant. Little & Slack and Ben D. Ringo, for appellee.

BARKER, J. The purpose of this litigation was the recovery by appellant, Allene Stevenson, of \$1,000 from E. W. Moore, which she alleged he without legal authority retained out of money of hers coming through his hands. The facts out of which the litigation grows are, briefly, as follows: When the plaintiff, Allene Stevenson, arrived at the age of 21 years, she desired to borrow the sum of \$5,000, to secure which she proposed to execute a mortgage upon a business house which belonged to her in Owensboro, Ky. She alleged in her petition that she borrowed the money from the appellee, E. W. Moore, and delivered to him her notes secured as aforesaid; that out of the proceeds coming to her he paid certain debts which she owed and other debts which members of her family owed, and gave her some cash, but retained out of her money the sum of \$1,000. The pleadings were somewhat confused and prolix, but, when properly analyzed, this was the sole issue presented, to wit: Whether or not Moore kept back \$1,000 of the money he proposed to loan the appellant. This issue was submitted to a jury under instructions which we shall hereafter notice, with the result that they returned a verdict in favor of appellee, Moore. During the trial of the case Moore in his testimony showed that he did not loan the appellant any money whatever, but that he was the teller of Eagle Bank, and, when applied to for the loan, he told the appellant that he had no money to loan, but referred her to Henry Cline as one who would probably negotiate the loan for her

for a consideration; that she did go to Cline and paid him \$85 to secure the money for her; that Cline indorsed the notes himself, and discounted \$2,000 of them to the Mechanics' Bank and \$3,000 to the Eagle Bank. He then testifies to the various notes which were the indebtedness of appellant and those of her family, which were paid by her direction, and the amount that he paid over to the appellant in cash; thus showing, if his testimony was true, that she received all the money coming to her. He testifies that he was acting only in a friendly way, and had no interest in the transaction himself. These various notes made a rather complicated account, and undoubtedly the trial court would have transferred the case to equity had there been a motion so to do; but, in the absence of such a motion, we do not think he erred in failing to transfer it upon his own motion.

Appellant complains that the court refused to allow her counsel to interrogate the jurors as to whether they were stockholders in the Eagle Bank. We do not think this was error. The Eagle Bank was not a party to the litigation or interested in it in any way. While Moore was teller in the bank, he was sued as an individual, and the stockholders in the bank were no more interested in the issue than the stockholders in any other bank in Owensboro would have been.

Appellant also complains that the court erred in refusing to allow her brother to answer certain questions propounded to him by her attorneys. No avowal is made as to what the witness would have said had he been allowed to answer the questions, and we have uniformly refused, in the absence of such an avowal, to reverse the case for the supposed error.

The court instructed the jury as follows:

"(1) If the jury believe from the evidence that the plaintiff turned over to the defendant the notes mentioned in the pleadings and evidence for \$5,000 signed by herself and one Henry Cline, negotiable and payable at the Bank of Commerce, and defendant either advanced to her the money on said notes and retained \$1,000 of same or any less sum, or that the defendant discounted said notes in the Mechanics' Bank and Eagle Bank, or either of them, and retained out of the proceeds \$1,000 or any less sum, then the jury should find for the plaintiff such a sum as the defendant retained in excess of the interest thereon not exceeding \$1,000.

"(2) If the jury believe from the evidence that the defendant accounted to the plaintiff for all the money he received belonging to the plaintiff, and paid it to her or to persons or banks for her, or if the jury believe from the evidence that the defendant did not cash the notes and charge her any usury, then they should find for the defendant."

These instructions we think fully cover

the law of the case. They include the theories which were developed in the pleadings and the evidence: First, that contained in appellant's petition, that she undertook to borrow \$5,000 from appellee, and that he paid over to her and for her use only \$4,000, leaving \$1,000 due her; and, second, the theory that was developed by the appellee that he merely aided her in discounting her notes and paying off her indebtedness. The court told the jury (1) that if they believed appellee advanced to her the money on her notes and retained a thousand dollars of the same, or any less sum, they should find for the plaintiff the sum so retained; and (2) if the defendant discounted the notes for appellant in the Mechanics' or Eagle Bank, or either of them, they should find for the plaintiff such sum that he retained in excess of the interest thereon, not exceeding \$1,000. The first instruction is criticised because the court used the words "in excess of the interest thereon." These words relate only to the second proposition in the instructions; that is, if the defendant discounted the notes for appellant in the banks. The interest means the discount retained by the banks. Of course, appellee was not to be held liable for that sum, whatever it was. Therefore he was to be allowed a credit for whatever discount was retained by the banks, and the appellant was to have a judgment for the remainder. The instruction is perfectly plain and lucid, and covers the whole case, and no jurymen of ordinary mind could misunderstand it. The second instruction is merely the converse of No. 1, giving affirmatively appellee's side of the case.

Appellant insists in her brief that she was entitled to a judgment non obstante veredicto, and produces certain figures from the evidence which she insists show that her motion for a judgment notwithstanding the verdict should have been sustained. It is hardly necessary to say that a judgment non obstante veredicto must be based upon what the pleadings show, and not from deductions from the evidence; but we do not think the evidence justifies the assumption on the part of appellant that the verdict of the jury did her an injustice. From the testimony of E. W. Moore, the cashier of the Eagle Bank, and from the testimony of B. H. Poindexter, the cashier of the Mechanics' Bank & Trust Company, we have constructed the following statement of appellant's account, showing the amount that she received as the proceeds of her notes and what became of the money. Of course, we do not undertake to say that this evidence is true, where it is contradicted by the evidence of appellant, if it is so contradicted; but, if this evidence is true (and of this the jury were the judges), then appellant has no just cause of complaint of the verdict against her. The following is the statement of her ac-

Notes of appellant amounting to..... \$90 00

Less discount of.....	\$2,910 00
Produced	
Out of this balance there was paid by the direction of appellant:	
On notes to Mrs. Meredith.....	\$ 885 00
On two other notes of Mrs. Meredith	457 50
In payment of note of appellant....	450 00
Payment of another note of appellant	64 00
Payment of note of Mrs. Alice H. Johnson	673 50
Cash paid to appellant.....	380 00
Total	\$2,910 00

Statement of Appellant's Account with Mechanics' Bank & Trust Co., as Appears from Deposition of B. H. Poindexter, Cashier.	
Notes of appellant indorsed by Henry Cline.....	\$2,000 00
Discount	70 00

Produced	\$1,980 00
Paid on notes on bank.....	\$1,280 00
Cash paid to Henry Cline.....	670 00
	\$1,930 00

Mr. Poindexter does not give the item of \$70 discount, but his omission to do so is clearly a mistake on his part. Of course, the bank charged the usual discount on the notes, and, if this addition is not made to the account, it would appear that the bank still owes appellant \$70; but this would not affect appellee's account with appellant, as the evidence, without contradiction, shows that he had only to do with the \$670 cash paid to Henry Cline. Of this \$670 Cline deducted \$65 as pay for his trouble in assisting appellant to raise the money on her notes. Cline, after deducting \$65, turned over to appellee, for the benefit of appellant, his check for \$605. Of this appellee paid a check of appellant on Eagle Bank for \$385.62 in favor of the Pearson Drygoods Company, leaving a balance of \$219.38, which he placed to her credit in the Eagle Bank, and which he testifies she checked out in small amounts. As said before, if the foregoing account, which is supported by the evidence for appellee, be correct, appellant received every penny of the \$5,000 which was due her, certainly all of it which was due from so much as went into the hands of appellee. Whether the evidence was true was submitted to a jury, and they found adversely to appellant's interest. She cannot now be heard to complain that the court did not of its own motion transfer the case to the equity side of the docket. On the surface it was much to her interest to try her case against the money lender before a jury rather than before an accountant; and it was this consideration, no doubt, which

the result.

Judgment affirmed.

ANDERSON v. DAWSON et al.

(Court of Appeals of Kentucky. May 6, 1909.)

1. VENDOR AND PURCHASER (§ 343*)—DEFICIENCY IN QUANTITY OF LAND SOLD—REMEDY.

Where land is sold in gross, and the words stating the quantity are mere words of description, there can be no recovery for a deficiency in the absence of fraud and mistake, unless the deficiency is substantial; but, where the sale is by the acre, a recovery may be had for any deficiency.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1024; Dec. Dig. § 343.*]

2. VENDOR AND PURCHASER (§ 343*)—DEFICIENCY IN QUANTITY OF LAND SOLD—REMEDY.

A deed with covenant of general warranty described the land by courses and distances as "containing 74.30 acres, more or less." The vendor represented that the land consisted of 74.30 acres, while, in fact, it consisted of a little over 68 acres. Held that, as the sale was in gross, the purchaser could not recover for the deficiency in the absence of fraud or mistake.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1024; Dec. Dig. § 343.*]

Appeal from Circuit Court, Logan County.
"To be officially reported."

Action by B. C. Anderson against S. N. Dawson and another. From a judgment of dismissal rendered after sustaining a demurrer to the amended petition, plaintiff appeals. Affirmed.

Browder & Browder, for appellant. S. R. Crewdson, for appellees.

CLAY, C. On September 11, 1906, appellee S. N. Dawson and his wife executed and delivered to appellant B. C. Anderson a deed conveying the following tract of land: "A certain tract or parcel of land in Logan county, Ky., on the waters of Little Whippoorwill creek and bounded and described as follows: Beginning at a rock in center of land in Faullin line corner to Fletcher; thence N. 85¼° W. 39.17 chains with Fletcher line to a rock in Rob't Carr's line; thence with Carr's line S. 57¼° E. 20.25 chains to a rock corner to Carr; thence S. 45¼° W. 5.80 chains, to center of Schochoh road; thence S. 35° E. 16.52 chains; thence S. 69° E. 5.00 chs.; thence S. 77° E. 14.26 chains to rock; thence N. 4° E. 30.00 chs., to the beginning, and containing 74.30 acres, more or less." The consideration set forth in the deed is the sum of \$2,311 paid and payable as fol-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

forever, with covenant of general warranty releasing all rights of homestead and dower." Some time thereafter appellant Anderson instituted this action against appellees S. N. Dawson and E. F. Dawson to recover the sum of \$248.33 $\frac{1}{4}$, charging in his petition that he purchased said land from appellees, not as a whole, but by the acre, and that said transaction was based on the valuation per acre; that appellee represented to appellant, and the deed in addition thereto states, that the land conveyed consisted of 74.30 acres; and that, by the terms of said deed, appellee warranted the said title and the quantity of said land to be 74.30 acres, whereas, as a matter of fact, said tract of land contains only 68 acres, 3 rods, and 30 poles, a difference of 5.3625 acres. He further charges that he agreed to and did pay \$46.31 per acre for said land, and, there being a deficit of 5.3625 acres, appellee is indebted to him in the sum of \$248.33 $\frac{1}{4}$. Thereafter appellant filed an amended petition, stating certain facts, with reference to the note for the deferred payment, and charging that the note was negotiable, and that on the date of its delivery the appellee then knew of the deficiency in the land, and, with the view of preventing appellant from recovering on account of said deficiency, when the same should be by him subsequently discovered, sold and transferred said note to one Herring, so that the same would pass out of appellee's hands and into the hands of an innocent holder for value, thus depriving appellant of any defense to said note. A demurrer was sustained to the petition and the amended petition, and, appellant declining to plead further, the petition was dismissed. From that judgment this appeal is prosecuted.

In the well-considered case of *Harrison v. Talbot*, 2 Dana, 258, the various kinds of cases in actions to recover for a deficit in the quantity of land sold are classified as follows: "First, sales strictly and essentially by the tract, without reference in the negotiation or in the consideration to any estimated or designated quantity of acres; second, sales of the like kind, in which, though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description, and under such circumstances or in such manner as to show that the parties intended to risk the contingency of quantity, whatever it might be or how much soever it might exceed or fall short of that which was mentioned in the contract; third, sales in which it is evident from extraneous circumstances of locality, value, price, time, and the conduct and conversation of the parties that they did not contemplate or intend to risk more than

in gross,' are in fact sales by the acre, and so understood by the parties." The court then says: "Contracts belonging to either of the two first-mentioned classes, whether executed or executory, should not be modified by the chancellor when there has been no fraud. But in sales of either the latter kinds an unreasonable surplus or deficit may entitle the injured party to equitable relief, unless he has by his conduct waived or forfeited his equity." In the recent case of *Anthony v. Hudson* (Ky.) 114 S. W. 782, the description was as follows: "First. The northwest quarter, and the northwest quarter of the southeast quarter of section thirty-four (34) in township fifteen (15) north of range eight (8), east of third principal meridian, containing according to United States survey two hundred (200) acres. Second. * * * Containing according to the United States survey three hundred and sixty (360) acres." In that case it was held that the expression, "containing according to United States survey" 200 acres in the one instance and 360 acres in the other instance, constituted mere words of description. The court in the latter case used the following language: "A contract for the sale of land must be gathered from the writing. No outside conversation or oral statement, which is not directed to the end of impeaching a writing for fraud or mistake, which takes place before the writing is drawn, can explain, modify, or change it."

In the case of *Russell v. Phillips* (Ky.) 22 S. W. 220, the following from *Worvelle on Vendors* (volume 2, p. 925) was quoted with approval: "Mere enumeration of quantity at the end of a particular description of the premises, where there has been no fraud or gross mistake, has ever been regarded as matter of description only, and not of the essence of the contract; and in such cases the purchaser is not entitled to an abatement of price because on survey the tract is found to contain a less number of acres than that specified." There is nothing on the face of the deed to show that the sale was made by the acre, and it is manifest that the words, "containing 74.30 acres, more or less," are simply words of description. The question, then, is: Is the deficit sufficient to justify a recovery without an allegation of fraud or mistake? The petition merely charges that appellee represented, and in addition thereto the deed states, that the land so conveyed consisted of 74.30 acres. In a number of cases this court has granted relief where there was a deficit of 10 per cent. or over. *Smith v. Smith*, 4 Bibb, 81; *Shelby v. Smith's Heirs*, 2 A. K. Marsh. 504; *Hazlip v. Austill*, 4 Ky. Law Rep. 982; *Hall v. Ely* (Ky.) 76 S. W. 848. In these cases it was held that the deficiency, considering the quantity and

tity were mere words of description, this court has never allowed a recovery in the absence of an allegation of fraud and mistake where the deficit was less than 10 per cent. Of course, if the deed itself showed that the transaction was a sale by the acre and there was a deficit, a recovery could be had. As the deed under discussion uses the language, "and containing 74.30 acres, more or less," and as under the uniform ruling of this court such words are regarded as words of description, it is manifest that, where the deficit is as small as it is in this case, there can be no recovery. That being the case, the mere representation by the appellee that the land sold contained 74.30 acres, in the absence of fraud or mistake, would not justify a recovery any more than the language employed in the deed itself.

We deem it unnecessary to pass upon the other questions raised, as the demurrer was properly sustained for the reasons set out above.

Judgment affirmed.

ASHER et al. v. TENNIS COAL CO.

(Court of Appeals of Kentucky. May 11, 1909.)
VENDOR AND PURCHASER (§ 239*)—BOND FOR DEED—RIGHTS OF PURCHASER.

Where a title bond provided for the execution of a deed on payment of the purchase price, the vendee took title subject to the lien, and one thereafter taking an assignment of the bond and a deed from the vendor, with notice of a prior conveyance of the mineral rights by the original vendee to plaintiff, took subject to plaintiff's rights.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 239.*]

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Action by the Tennis Coal Company against W. N. Asher and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Cleon K. Calvert, for appellants. Bailey P. Wootton, Jesse Morgan, and Greene, Van Winkle & Schoolfield, for appellee.

HOBSON, J. On March 6, 1902, R. M. Wilson and wife executed to John Ledford the following bond for title for 150 acres of land: "This bond, made and entered into March 6, 1902, by R. M. Wilson and wife, of the county of Leslie and state of Kentucky, of the first part, and John Ledford, of the second part. I, R. M. Wilson, and wife, do sell and convey to John Ledford, of the county of Harlan, a certain tract or parcel of land containing one hundred and fifty acres of land, more or less, lying on the waters of the Middle Fork on Sam's Branch in Leslie county,

and fifty dollars to be paid November 1, 1903. I, R. M. Wilson, and wife, of the first part, do bind ourselves to make a deed to said land, Sam's Branch land, when John Ledford, of the second part, pays the purchase money on said land. Said land is to stand good for the purchase money until paid. [Here follows description.]" Ledford took possession of the land and settled on it. On April 28, 1902, he sold the Tennis Coal Company the mineral rights under the land, and bound himself to make it a deed when the purchase money was paid, and executed to it a title bond to this effect, which was regularly acknowledged and then recorded. The bond which he had from Wilson was then also recorded, although it had not been acknowledged, and was not, therefore, a recordable paper. On November 25, 1903, the purchase money for the mineral rights, amounting to \$125, having been paid him, he executed to the Tennis Coal Company a deed therefor, which was duly acknowledged and recorded. He made to Wilson two payments on the purchase money due him, and when there was still \$144 due Wilson, he assigned the bond Wilson had given him to W. N. Asher, in November, 1904, and thereupon Asher paid to Wilson the balance of the purchase money due from Ledford to him, and Wilson executed to Asher a deed for the land. The Tennis Coal Company then brought this suit against Wilson, Asher, and Ledford, setting up the above facts, and praying that the mineral rights purchased by it be conveyed to it and that its title thereto be quieted. On final hearing the circuit court adjudged it the relief prayed, and the defendants appeal.

Wilson knew of the purchase of the mineral rights by the Tennis Coal Company when he made the deed to Asher. He had been approached by the agent of the company and requested to make it a deed. Asher also knew of the purchase of the coal company when he took the assignment of the bond; for he says himself, when asked how long before this time was it that Ledford told him that he had sold the mineral rights off the land, he answered, "It couldn't have been over four or five days; he said he had contracted it." The bond executed by Ledford and the deed which he had made were both recorded, and so he had also constructive notice. It is insisted that, as Ledford had not paid Wilson all the purchase money, he had nothing to sell the coal company. The bond does not properly bear this construction. Wilson had a lien on the land for the balance of the purchase money due him; but it was Ledford's land, subject to this lien. He had not a legal title; but he had the equita-

that part which had been sold for the unpaid purchase money. The part which Asher bought was worth much more than the balance due Wilson, and as the Tennes Coal Company had the older equity, and he purchased with notice of its claim, the circuit court properly adjudged its rights superior to his.

Judgment affirmed.

ROUNDS BROS. v. McDANIEL.

(Court of Appeals of Kentucky. May 4, 1900.)

1. PARENT AND CHILD (§ 6*)—WAGES OF CHILD—RECOVERY BY PARENT—EXPENSES.

Where the father of a nonemancipated minor sues to recover wages, the child's employer is entitled to have deducted from the recovery sums paid for board and clothes not furnished by the father.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 83; Dec. Dig. § 6.*]

2. PARENT AND CHILD (§ 3*)—DUTY TO SUPPORT.

A parent is bound by positive law to protect, educate, and support the child.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 33; Dec. Dig. § 3.*]

3. PARENT AND CHILD (§ 5*)—EARNINGS OF CHILD—RIGHTS OF PARENT.

A parent, being legally bound to support his child, is entitled to the child's services and earnings during minority.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 70; Dec. Dig. § 5.*]

4. PARENT AND CHILD (§ 5*)—EARNINGS OF CHILD—RIGHTS OF FATHER—RELINQUISHMENT.

A parent may lose his right to his child's earnings by failing to provide a home for his child if he is able to do so; by such cruel conduct, ill treatment, or neglect as forces the child to abandon his home; by becoming so degraded or dissolute that his child cannot in morals or decency live with him; or by emancipation.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 72, 73; Dec. Dig. § 5.*]

5. PARENT AND CHILD (§ 16*)—"EMANCIPATION"—"EXPRESS EMANCIPATION"—"IMPLIED EMANCIPATION."

"Emancipation" of a child is the relinquishment by a parent of control and authority over his child, conferring on the child the right to his earnings and extinguishing the parent's legal duty to maintain and support the child. Emancipation is "express" when the parent voluntarily agrees with the child, who is able to take care of and provide for himself, that he may go from home, earn his own living, and control his earnings, or when the father voluntarily transfers the custody and keeping of the child to another. An express emancipation cannot be renounced by the parent. An "implied emancipation" results where the parent, by his acts or conduct, impliedly consents that the minor may leave home and shift for himself; the father, under these circumstances, however,

6. PARENT AND CHILD (§ 16*)—EMANCIPATION—REVOCATION.

A child having reached the age when he could make his own living, the father consented in 1902 that he might leave home and continue in his employment. For nearly two years thereafter the child so remained with the father's knowledge and consent, during which time he received his own wages and disposed of them as he desired. The father did not object to the employment nor demand his wages until 1906, nor did he request the child to return to his home. Held, that the father's delay barred his right to revoke the implied emancipation thereby established.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 170; Dec. Dig. § 16.*]

Appeal from Circuit Court, Daviess County.
"To be officially reported."

Action by A. J. McDaniel against Rounds Bros. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Sweeney, Ellis & Sweeney, for appellant.
W. E. Aud and J. R. Hays, for appellee.

CARROLL, J. This case presents the interesting question: What acts and conduct of a father will constitute an emancipation of his minor child so as to deny the father the right to recover the child's wages during his minority?

The mother of Byrne McDaniel died in 1900, when he was about 12 years old, leaving his father, the appellee, A. J. McDaniel, with six children to care for. The father, who was a poor but kindly disposed man, a carpenter by trade, did not own any property, and found it necessary to place the other children—all of whom were younger than Byrne—in orphan homes; but after doing so he aided in their support. After this the father and Byrne boarded with a sister of the father, and for two or three years thereafter Byrne worked at different places, earning a few dollars a week, which he contributed towards his support. In 1902 Byrne, who was then about 14 years old, commenced to work for appellant, Rounds Bros. They paid him small wages in the beginning, but, finding him to be an industrious, sober, well-behaved, and capable boy, gradually increased his compensation, until at the time this suit was brought in 1907 he was receiving some \$8 or \$10 a week. During the first two years that he worked for them he lived with his father at his aunt's, and contributed all or the greatest part of his wages towards paying for his board and clothing. In 1904, Byrne becoming dissatisfied with the accommodations received at his aunt's, left her house and procured board and lodging elsewhere. The evidence does not disclose any substantial reason why Byrne left the home

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tribute anything toward his support or maintenance or expend anything in his behalf. In fact, he did not, after leaving his aunt, need the assistance of his father, as he was earning sufficient money to take care of himself. His father did not object to his leaving home, nor did he make any provision or arrangement for another home for him, although it cannot be said that his acts or conduct or treatment of Byrne furnished any sufficient reason why Byrne should have abandoned the home provided for him by his father. His father was at all times aware of the fact that Byrne was working for the Rounds Bros., and knew that from 1904 to 1906 they paid him his wages, and that he was expending them for his own use and benefit; but he did not object or make any demand that the wages be paid to him until April, 1906, when he notified Rounds Bros. that they must pay him what the boy earned. This they declined to do, and in 1908, he brought this action to recover the amount Byrne earned after he notified the Rounds Bros. to pay the wages to him. The lower court rendered a judgment in favor of the father against the Rounds Bros. for the amount of the boy's wages after the notification, less the sum expended during this time by Byrne for board and clothes. It may be here stated that, if the father had not emancipated his son and was entitled to his wages, no just complaint could be made of the judgment. Having the view the lower court did of the law of the case, it was correctly held that there should be deducted from the wages received by the son the amount necessary to defray his expenses. *Culberson v. Alabama Construction Co.*, 127 Ga. 599, 56 S. E. 765, 9 L. R. A. (N. S.) 411, 9 A. & E. Ann. Cas. 507. From the judgment the Rounds Bros. prosecute this appeal, and ask a reversal upon the ground that the father had emancipated his son, and therefore was not entitled to recover his wages, and in this insistence they are joined by Byrne. The father's contention is that the facts before stated are not sufficient to amount to an emancipation of his son, and consequently he was entitled to recover from the Rounds Bros. the boy's wages after he notified them that he claimed them. He also makes the further point that even if it should be held that, by permitting his son to leave home and earn his own living, he impliedly emancipated him, yet he had the right at any time during the child's minority to revoke this constructive emancipation and resume parental control and authority, and that, after he had so revoked it by notifying the Rounds Bros. that he claimed his son's wages, the status of parent and child was re-established the same as if there had never been any emancipation.

tions of each, has furnished so much interesting matter for text-book writers, and has so frequently been considered by courts of other jurisdictions, that there is ample precedent and authority, both ancient and modern, from which to gather and formulate the general rules of law applicable to this relation. But this case presents some features of the law that are not so well settled, and concerning which there is conflict of authority. The duties and obligations of parent and child are, in a sense, at least reciprocal. Upon the parent is imposed by nature, as well as law, the obligation of supporting and caring for his offspring. As said by Blackstone (volume 1, p. 447): "The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world, for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation to endeavor, so far as in them lies, that the life which they have bestowed shall be supported and preserved." In Schouler on Domestic Relations, p. 415, it is said: "Three leading duties of parents as to their legitimate children are recognized at the common law: First, to protect; second, to educate; third, to maintain them. These duties are all enjoined by positive law, yet the law of the natural affection is stronger in upholding such fundamental obligations of the parental state." From this duty resting upon the parent comes the right to the services of the child during his minority, intended to be at least in some measure compensation for the care and attention bestowed upon the child in infancy; and this right of the parent to the services of the child during his minority is everywhere recognized. *Jones v. Tevis*, 14 Ky. 25, 14 Am. Dec. 98; *L. & N. R. R. Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124; *Illinois Central R. Co. v. Henon* (Ky.) 68 S. W. 456; Blackstone, Commentaries, vol. 1, p. 454; Schouler on Domestic Relations, p. 334; *Tyler on Infancy & Coverture*, p. 200; 29 Cyc. 1623; 21 Am. & Eng. Ency. of L. p. 1039.

It is equally well settled that the parent, although entitled to the services and earnings of his minor child, may relinquish or surrender this right: First, by failing to provide for his child a home if he is able to do so; second, by such ill treatment, neglect, or cruel conduct as forces the child to abandon his home; third, by becoming so degraded or dissolute a character that his child cannot in

ner, or if he had so grossly neglected his parental duties as to cause him to leave his home, or if his life was so unworthy or discreditable that his son could not in decency or self-respect longer continue to recognize his authority, we would have little difficulty in reaching the conclusion that the father could not, after driving him away, or by his acts or conduct forcing him to shift for himself and make his own living, thereafter lay claim to his earnings. All the books are agreed upon this point, and indeed, in the absence of authority, we could have no doubt that under a state of case like this the father could not have the assistance of the courts to aid him in securing the services or wages of his child whom he had compelled by neglect, cruel treatment, or dissolute habits to secure another home. 29 Cyc. p. 1627; Godfrey v. Hays, 6 Ala. 501, 41 Am. Dec. 58; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Swift & Co. v. Johnson, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; Tyler on Infancy & Coverture, p. 200. But the facts of this case do not warrant us in putting our decision upon any of these grounds, and so, if the judgment below is to be reversed, it must be because the father had emancipated his son. The doctrine of "emancipation," looking at it from a legal standpoint, is a recognition of the right of the parent to relinquish control and authority over his child to whose custody and service he is entitled; or to surrender, if he so elects and desires, to his minor son, who is capable of making his own living, the right to do so, and the privilege of receiving the wages that he earns. When this right of emancipation has been granted, it follows as a matter of course that the person for whom the child labors may pay him his wages, and that the child may do with them as he pleases. In other words, when a child has been emancipated, he occupies the same legal relation towards the parent as if he had arrived at full age. The legal duty of the parent to maintain and support him and defray his necessary expenses is extinguished, and so is the right of the parent to claim the services and wages of the child.

There are two kinds of emancipation that may be termed "express" and "implied." We should say that an "express emancipation" takes place when the parent freely and voluntarily agrees with his child, who is able to take care of and provide for himself, that he may go out from home and earn his own living and do as he pleases with his earnings, or when he willingly transfers to another the custody and keeping of his child without reference to his age. Where the emancipation is expressly agreed upon, the parent cannot afterwards renounce or set aside the

the services of his child. An "implied emancipation" results when the parent, without any express agreement, by his acts or conduct impliedly consents that his minor son may leave home and shift for himself, have his own time, and the control of his earnings, and it may be inferred from and shown by circumstances. But where the child leaves home and goes out to make his own living under the assumption that his parent has emancipated him, his rights to his services and earnings are not absolute, as in the case of an express emancipation, and the parent may, by taking timely action, resume parental authority and reclaim the services of his child, but he must not delay until his implied emancipation has ripened into an express relinquishment, or wait until it would be hurtful to the best interest of the child to interfere with his individual aims and plans. It should, however, be kept in mind that whether or not the father emancipates his minor child rests with the father, and not with the child. The father may by his acts or conduct relinquish parental control and authority, but the child of his own volition, in the absence of mistreatment or other like cause, cannot sever the relation so as to deny the father the right to his services and wages during his minority.

Contenting ourselves with these broad statements of general principles, we will proceed to inquire whether the facts of this case authorize us in holding that the father had emancipated his son. After Byrne had reached an age when he could make his own living, and was mentally and physically able to do so, his father voluntarily consented that he might leave his home, and continue in the employment of the Rounds Bros. for whom he had been working, and for something like two years he remained in their services, with the knowledge and consent of his father. During this time he received his own wages, and made such disposition of them as he desired. That he was an industrious, economical, and capable boy, there is abundant evidence. He had the respect and confidence of his employers, and in a business way was rapidly advancing. His father did not object to his employment until 1906, or demand his wages until that time. He did not request him to return to his home, nor did he manifest any particular interest or concern in his welfare. He seemed to recognize that his son was well situated and comfortably provided for, and that his usefulness was being promoted by the service he was engaged in and the interest his employers were manifesting in his welfare, and so he was willing to give him an opportunity to make his own way in the world.

In our opinion these facts were not suff-

cient to establish an express emancipation, such as the parent could not afterwards revoke or set aside; but they do show the son left home under circumstances that amounted to an implied emancipation. But, when the appellee attempted to resume parental control and authority after the expiration of more than a year, it was too late to reclaim the right. In this time the interest and welfare of the child had become an important factor in determining the rights of the parties. In judging a case like this, the court will not look exclusively to the rights of the parent, but will consider what is best for the child. The father, when his child was in some measure at least a burden to him, voluntarily allowed him to go out and care for himself, and after the child, prompted by prudent and industrious motives, had become more than self-sustaining, sought to withdraw the consent he had given. To permit him to do so would, under the circumstances of this case, be detrimental to the best interest of the child. To deprive the boy of his wages or force him to abandon his employment would seriously check his aspirations and impair, if not destroy, the fine prospects for future success that were opening up to him by reason of his attentive, honest, and sober habits.

We do not wish to extend this doctrine of implied emancipation to cases which do not justify its fullest application, and do not mean to hold that every time a child who is old and strong enough to work becomes tired of or dissatisfied with his home he may leave, although without objection on the part of his parents, and live at some other place and work for other persons, and thereby sever the obligation he owes to his parents and destroy their right to his services and wages. Minor children cannot in this way cancel the duty they are under to the parent, who by acting promptly may reclaim the services of the child and the right to his earnings; but the parent must interpose his authority within a reasonable time. When a father gives freedom to a grown boy and tells him, in effect, if not in words, to go out and make his own living, and be his own man, and the boy, acting on this implied consent or direction, does commence for himself the battle of life, and is successfully meeting all its requirements, the father will not, unless he acts in seasonable time, be permitted to reclaim the boy's services or resume the parental authority he surrendered.

The conclusion we have reached finds support in the following authorities: In *Abbott v. Converse*, 4 Allen (Mass.) 530, the court said, in considering a similar question: "The basis of the father's right to the services of his children is his duty to support and educate them; but this duty is subject to many modifications growing out of the circumstances and conduct of the parties, and the right is not absolute or inalienable. It may be forfeited by misconduct, but cases may arise

where the forfeiture would be held to be temporary. The cases referred to establish the doctrine that it may be transferred to the minor. It is to be regarded as being in the nature of property, and, as a minor may hold other property independently of his father, there seems to be no valid reason why he may not thus hold the right to his own time and earnings. As he may hold it by a contract with his father under seal, or for a valuable consideration, there is no more reason for holding that the father may revoke this contract, at his pleasure, than any other contract. On principle he should be as fully bound by it as by a conveyance of land or other property to his child. As it may be held by gift or license, without any consideration, there is no reason why the gift, when accepted, should be any more revocable, without the consent of the donee, than any other gifts."

In *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101, Chief Justice Parker said: "But where the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, there is no principle, but that of slavery, which will continue his right to receive the earnings of the child's labor. Thus, if the father should refuse to support a son, should deny him a home, and force him to labor abroad for his own living, or should give or sell him his time, as is sometimes done in the country, the law will imply an emancipation of the son, and, although it will not enable him to contract to his prejudice, it will give him the benefit of such contracts as are made with him for his services, and a payment to the son, in such circumstances, will be a good discharge of such contract."

The same learned judge, in *Whiting v. Earle*, 3 Pick. (Mass.) 201, 15 Am. Dec. 207, said: "Although the general principle is clear that a father is entitled to the earnings of a son while under age, yet the court thought it equally clear that he might transfer to the son the right to receive them. This is necessary for the encouragement of young men, and it is often convenient for a father, wishing to be relieved from the burden of supporting his son, to allow him in this manner to support himself. Where such a contract is entered into without any fraud, for the advantage of the son, on the principles of common justice, and according to decided cases, he is entitled to the profits of his own labor. We go so far as to say that where a minor son makes a contract for his services on his own account, and the father knows of it and makes no objection, there is an implied assent that the son shall have his earnings." To the same effect is *Morse v. Welton*, 6 Conn. 547, 16 Am. Dec. 73; *Wodell v. Coggeshall*, 2 Metc. (Mass.) 89, 35 Am. Dec. 391.

In *Beaver v. Bare*, 104 Pa. 58, 59 Am. Rep. 567, the court said: "The exercise of parental authority is not necessarily for

the profit of the parent, but for the advantage of the child; the duty of service by the child being deemed necessary to the proper exercise of parental authority for its own good. Although we still recognize the right of the father to the personal services of his children, that right is simply incidental to the duty of the father to discipline and direct them. His right to personal custody and personal service is secured to him therefore in order that through them, prompted by natural affection, he may successfully impart to them habits of industry, methods of thrift, and the means of personal success in life. * * * The right to their service being merely for their good, whenever the father finds their interest, or his own, better subserved by their emancipation, he can liberate them."

In Schouler on Domestic Relations, p. 346, it is said: "The father may by his own delay forfeit the right of action for his son's wages; as where the minor agrees to work at certain monthly wages to be paid to himself, and the father, knowing of the agreement, gives no notice of his objection, but waits until the work has been done and payment is made to the child, before making a demand. But if the father has given seasonable notice of his dissent and demand to the stranger hiring his son, the fact that the son continues to work against his express dissent, and that the stranger notified him to come and take his son away, and he neglected to do so, will not preclude him from recovering the wages." And so on page 370 the learned author says: "It is a well-settled rule in this country that if the parent absconds, turns his child out of doors, or leaves him to shift for himself, the son is entitled to his own wages; and our courts are very liberal in allowing children to avail themselves of any breach of parental obligation so as to earn an honest livelihood by their own toil. The presumption raised in such cases may be termed a presumption of necessity. So where the husband abandons his child to the care of his mother, his subsequent claims for the earnings of either are to be regarded with very little favor. Even slighter circumstances, which impute no misconduct to the father, but evince a consent for his

son to leave the parental roof and go into the world to seek his own fortune, are often construed into emancipation."

In *L. & N. R. R. Co. v. Davis* (Ky.) 105 S. W. 455, which was an action by the father to recover damages for a personal injury sustained by his minor son while in the employment of the railroad company, the court said: "Assuming that the boy was under 21 years of age, did his father consent or acquiesce in his employment? It may be admitted at the outset that the father did not know of the original employment, but his own testimony shows that, while his son was engaged at work on the railroad in making a fill, the father went out to where he was at work and saw him performing the duties of his employment. The father talked to the foreman, whom he told the boy was only 16 years of age, and upon the foreman's saying in reply that he hated to give him up, he was such a good boy, the father left without saying more, and went home. * * * Afterwards the father testified that his son came home on Sunday and then went back to work, and the evidence shows without contradiction that the boy was paid off several times before he was hurt. During all the time the father lived within 2½ miles of where his son was working in the employ of the railroad, and made no protest or objection to his remaining at work on the fill. We think that this was a consent on the part of the father to the employment of his son by the appellant. He had no right, if he objected to the employment, to remain silent about it until his son was hurt, and then complain that the employment was without his consent. He allowed the boy to draw his own wages, and it does not alter the case that the money was delivered to the father. If the father allowed the boy to keep the money, this was a practical manumission of him. If he required him to bring it home, this was a ratification of the employment."

After carefully considering this case, our conclusion is that the father was not entitled to the wages earned by his son, and therefore, the whole court sitting, the judgment is reversed, with directions to dismiss the petition.

EVERSOLE v. FIRST NAT. BANK.

(Court of Appeals of Kentucky. May 11, 1909.)

1. HOMESTEAD (§ 51*)—PROPERTY CONSTITUTION—SETTING ASIDE—PLEADING.

Under St. 1909, § 1702 (Russell's St. § 4661), exempting a homestead including the dwelling house to a bona fide housekeeper with a family, an owner is not entitled to homestead unless he occupies the property, unless he is temporarily absent from it, and a pleading praying for the setting aside of a homestead to a married woman, which fails to allege that she is a housekeeper, or that she and her husband occupy the land, does not show her right to a homestead.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 51.*]

2. DOWER (§ 46*)—BAR—FORECLOSURE—INCHOATE INTEREST.

A married woman's inchoate right of dower in land is not affected by a judgment against her husband and a third person for a debt secured by a mortgage on the land, which adjudges that the debt is a lien on the land, and directs that the interests therein, except her interest, shall be sold to pay the judgment.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 46.*]

Appeal from Circuit Court, Perry County.

"Not to be officially reported."

Action by the First National Bank against W. C. Eversole and others. From a judgment for plaintiff, defendant Della Eversole appeals. Affirmed.

Eversole & Eversole, for appellant. Bailey P. Wootton, Jesse Morgan, and Greene, Van Winkle & Schofield, for appellee.

NUNN, J. On July 9, 1907, W. C. Eversole executed and delivered a note to R. C. Newberry, promising to pay him \$700 on or before the 1st day of July, 1908. The note was transferred for a valuable consideration to appellee bank. To secure the payment of the note, the Eversoles, together with their wives, duly executed and delivered to Newberry a mortgage of even date with the note, upon two tracts of land in that county. One of the tracts belonged to W. C. and the other to H. C. Eversole. Appellee brought this action, January 6, 1909, to recover a personal judgment and to enforce the mortgage lien on the land for the payment of the judgment. The only defense made was by Della, the wife of H. C. Eversole. She filed an answer, the first paragraph of which controverted the allegations of the petition in so far as they applied to her. The second paragraph is as follows: "The defendant Della Eversole states: That she and her husband, H. C. Eversole, were duly and legally married in the town of Hazard, Ky., on the 7th day of November, 1906; that at the date of said marriage she was an infant, only 16 years of age, and at the date of the execution of the mortgage sought to be foreclosed herein she was an infant only 17 years of age; that they have constantly resided together as husband and wife since the date of said marriage; that on the 1st day of November,

1908, and before the institution of this action, there was born to them an infant son, who was named Berry; that her family now consists of herself, her husband, H. C. Eversole, and their infant son, Berry. She states that at the time of her marriage, her husband, H. C. Eversole, was the owner of the tract of land first described in plaintiff's petition, and that she and her husband, H. C. Eversole, have continuously cultivated and held said boundary of land for the purpose of making and earning their support from the date of their marriage until the present, and are still continuing to so use said land. She states: That they have no other land, in this state, from which to earn a support for themselves and family. She states that said boundary of land is not worth more than \$500 and was acquired before the debt sued on was created. Her husband, H. C. Eversole, and W. C. Eversole, formed a partnership to do a general merchandise business in the town of Hazard, Ky. That said \$700 note sued on was a debt created by them to R. C. Newberry as part payment on a stock of merchandise. That through the undue influence exercised over her and the persuasions used by her husband, H. C. Eversole, she was induced, against her will, to sign said mortgage. That at the time she signed the mortgage she did not know the import thereof. That she was then and is now an infant under the age of 21 years, and the said R. C. Newberry and the officials and agents of the plaintiffs herein knew that she was an infant and unable to contract. That by reason thereof the said mortgage is void and of no effect, and should be canceled, set aside, and held for naught, and said property set apart to her and her family as a homestead. She states that the partnership formed by W. C. Eversole and H. C. Eversole continued until the 15th day of December, 1908, at which time they became heavily involved financially, and since said date all the property owned by her husband, H. C. Eversole, except the boundary of land first described in plaintiff's petition, has been sold to satisfy the debts of said firm. She states that her husband, H. C. Eversole, has failed and refused to unite with her in this defense, and she elects to defend this action alone for the benefit of herself, her husband, H. C. Eversole, and their infant son, Berry Eversole." She then prayed that the mortgage be canceled to the extent that it affected the H. C. Eversole land, and that it be set apart and adjudged to her and her family as a homestead. The court sustained a demurrer to the answer, and rendered judgment against H. C. and W. C. Eversole for the debt, and adjudged a lien on the land, directing that the interest of the defendants, other than Della, in the land, be sold to pay the judgment, and Della alone appeals.

She asks a reversal under the provisions

edged and recorded in the same manner as conveyances of real estate," etc. Appellee's demurrer to her answer admitted that she was under 21 years of age, and she contends for that reason she was not bound by her signature to and acknowledgment of the mortgage, and it is invalid, and therefore the homestead, the tract of land owned by her husband, was not affected by the mortgage, and that appellee did not secure a lien upon it. Conceding this claim of hers to be true, it does not follow that the court erred in sustaining a demurrer to her answer. By section 1702, Ky. St. (Russell's St. § 4661), it is provided that the exemption of a homestead is only to a bona fide housekeeper with a family, and the homestead shall include the dwelling house. The owner of property is not entitled to a homestead, unless he occupies it, except he be temporarily absent from it. *Brown v. Martin*, 4 Bush, 47, *Carter v. Goodman*, 11 Bush, 228, and many other cases to the same effect could be cited, but we deem it unnecessary. As will be observed appellant did not allege in her answer that she was a bona fide housekeeper, or that she kept house at all, or that she and her husband resided upon or occupied the land. It may be, in so far as it appears from the pleading, that she never occupied the land as a homestead. The tenor of her pleading is to the effect that her husband owned the land and cultivated it for the purpose of making their support. The inference is that they lived elsewhere and had never occupied the land since their marriage. If the allegations in her pleading are true, she has an inchoate right of dower in the land, which is not affected by the judgment appealed from.

For these reasons the judgment of the lower court is affirmed.

WALLACE v. SOUTH COVINGTON & C. ST. RY. CO.

(Court of Appeals of Kentucky. May 5, 1909.)

MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

An employé, who had worked four months in a street car barn, was injured in the daytime while at work by falling into a pit which was necessary to enable workmen to go under the cars to make repairs. He was aware of the existence of the pit and the fact that it was not guarded, but by walking too near the pit and the unexpected swinging of a screen which he and another were moving he was thrown into the pit and injured. *Held*, that plaintiff assumed the risk of his injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Appeal from Circuit Court, Campbell County.

ant on a directed verdict, plaintiff appeals. Affirmed.

Horace W. Root and B. F. Graziani, for appellant. L. J. Crawford, for appellee.

HOBSON, J. C. W. Wallace was a carpenter in the service of the South Covington & Cincinnati Street Railway Company, working at its barn, where the street cars are repaired. There were five tracks in the barn. In the center track, to enable the workmen to get under the cars to be repaired, a pit had been constructed four feet deep, about as long as a car, and as wide as the track. Wallace and another man were taking the screen off a car which stood on this track west of the pit. The screen was heavy and made of soft wire, which made it wobble as they carried it; Wallace being at one end and his assistant at the other. He had the east end. As he was passing by the pit, the wobbling of the screen caused him to lose his balance and he fell into it; the pit being unguarded. He brought this action to recover for his injuries, which were very painful. At the conclusion of his testimony the court instructed the jury peremptorily to find for the defendant, and his petition having been dismissed, he appeals.

He was the only witness introduced as to how the accident occurred. His testimony is as follows: "Q. Tell the jury what you did in reference to it and how you fell in the pit? A. I caught hold of one end of the screen and walked back. Q. How did you walk back? State how you walked back. A. If you will allow me to describe it in my own way, I took the screen in both hands and walked back this way (indicating) and watched him, and the pit was right here in front of him, and I carried the screen walking backwards, and I wanted to give him a chance to swing his end out, and as I done that he swung clear and I stepped away from the hole, and just then it wobbled and it throwed me back. Q. Did you remember of that pit being there at that time? A. I couldn't think of it for that moment. Q. State, if you will, Mr. Wallace, why, if you had forgotten it, what caused you to forget. A. A man in working that way is very apt to forget anything of that kind. He can't have his mind at two things. Q. State to the jury what distracted your mind. A. The wobbling of the screen and giving him a chance to get out. Q. Who? A. The man who was helping me. Q. Was your mind on that? A. Yes, sir. Q. Will you state what, if any, difficulty there was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

were stepping backwards, whether or not your mind was on that work, or did you remember of this hole or pit being there? A. I didn't remember of the hole. My attention was watching him, watching the wabbling, at the same time balancing myself. Them screens, if you get them down and twist them, they wabble, and they throw you out of your balance, if you don't watch; that is what they do. That is what throwed me down, and if I fell right square down across the track I would have busted my brains out; but I am naturally quick on my heels, and I turned and swung myself around and fell lengthwise in it."

Wallace had been working in the barn about four months. The pit was put in there a few days after he entered the service of the company. He knew of its existence, as he had worked around it for months. The accident occurred in daytime, and there was no defect of light. His own testimony shows that he was not acting under any emergency, but for his own convenience, with full knowledge of the pit, was walking along close beside it carrying a screen, and wanted to give his assistant a chance to swing his end out so that he could swing clear. His assistant thereupon swung clear, and the plaintiff stepped away from the hole, but just as he did this the screen, coming back like a pendulum, threw him off his balance and he fell in the pit. His own evidence shows clearly that he knew at the time that the pit was there, for as a precaution he stepped away from it, and in endeavoring to give his assistant a chance to swing his end out he fell into the pit himself, because he and his assistant walked nearer to it than they should have done. In *Harper v. Illinois Central R. R. Co. (Ky.)* 115 S. W. 198, a case not unlike this, where the court sustained a peremptory instruction, it was said: "The master is not an insurer. Every employé in every business must assume some of the risks and dangers that are incident to it, or that may happen even with the utmost care on the part of the employer to prevent or guard against them. Liability ought not to be fastened on the master for every injury that his servants receive. He ought not to be held responsible for accidents that inflict harm, when they are caused by the servant's inattention to his duties or his careless performance of them. If this rule were established, there would be no limit to the employer's liability, and the employé would be absolved from the duty of exercising care to prevent injury to himself." The case is practically

"An ash pit is a necessary adjunct of the railroad business in cleaning out engines employed by the company, and it is necessarily used at all hours of the day and night; and persons employed by the railroad company in such yards are bound to take notice of the existence, location, condition, and manner of use of such ash pits, and assume all the risks ordinarily incident to such location." It was necessary to have a pit in the barn, so the workmen could get under the cars. The plaintiff was well aware of its existence, and his falling into it was due to no negligence on the part of the defendant. He knew it was not guarded, and cannot complain that there were no guards to protect him from falling into it. He knew he would fall into it if he walked close to it and lost his balance.

Judgment affirmed.

BAKER et al. v. LANE et al.

(Court of Appeals of Kentucky. May 4, 1909.)

1. TRUSTS (§ 198*)—MANAGEMENT OF TRUST ESTATE—PURCHASE BY TRUSTEE.

One occupying a fiduciary relation to an estate cannot purchase at his own sale the property of the cestui que trust, whether the sale is private or under decree of court; and where he does so purchase he holds the property as trustee for the beneficiaries.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 258; Dec. Dig. § 198.*]

2. EXECUTORS AND ADMINISTRATORS (§ 365*)—PURCHASE BY ADMINISTRATOR—ESTOPPEL.

An administrator, who purchased the decedent's land at a sale under decree of court, must prove facts necessary to estop the adult heirs from contesting the validity of the purchase, which is not done where he fails to show that they consented to the sale or purchase.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1500; Dec. Dig. § 365.*]

3. EXECUTORS AND ADMINISTRATORS (§ 389*)—PURCHASE BY ADMINISTRATOR—AVOIDANCE OF SALE—LIEN.

An administrator, who in good faith brought an action to have the land of decedent sold to settle the estate, and who paid out of his own means the price at the sale, and who also paid out as administrator, on account of the funeral expenses of decedent, a specified sum, was, on avoidance of the sale, entitled to a lien on the land for the sums, subject to the homestead right of an infant child of decedent.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1586; Dec. Dig. § 389.*]

4. EXECUTORS AND ADMINISTRATORS (§ 389*)—PURCHASE BY ADMINISTRATOR—AVOIDANCE OF SALE—IMPROVEMENTS.

Where an administrator purchased his decedent's land at a sale ordered by the court, and made improvements thereon, which were paid out of the rents, the administrator was not, on avoidance of the sale, entitled to any-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thing on account of the improvements as against the heirs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1584, 1585; Dec. Dig. § 389.*]

5. GUARDIAN AND WARD (§ 58*)—DISBURSEMENTS IN EXCESS OF INCOME—LIABILITY OF WARD'S REAL ESTATE.

Under Ky. St. 1906, § 2034 (Russell's St. § 4151), providing that no disbursements shall be allowed the guardian for the maintenance and education of the ward beyond the income of the estate, except in enumerated cases, unless authorized by deed or will under which the estate is derived, a guardian cannot charge his ward's interest in the land of the deceased ancestor with any amount expended by him as guardian for the ward's benefit.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 275; Dec. Dig. § 58.*]

6. HOMESTEAD (§ 145*)—RIGHTS OF SURVIVING CHILDREN—ABANDONMENT.

An infant cannot abandon his homestead rights to the use and enjoyment of the land of the deceased ancestor, worth less than \$1,000.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 285; Dec. Dig. § 145.*]

Appeal from Circuit Court, Graves County.
"Not to be officially reported."

Action by T. J. Baker and others against Etta Lane and others. From a judgment granting partial relief, T. J. Baker and others appeal, and defendant G. H. Latham files cross-appeal. Reversed.

Oliver, Shemwell & Reeder, for appellants.
James T. Webb and B. C. Seay, for appellee.

CARROLL, J. T. J. Baker died intestate in 1896, leaving surviving him five children, one of them the wife of G. H. Latham. Two of the children, Etta Baker (now Etta Lane) and Jettie Baker, were 13 and 8 years old, respectively, when their father died. The decedent did not leave any personal property subject to the payment of his debts, but owned 40 acres of land, worth between \$600 and \$800. G. H. Latham was granted letters of administration on the estate, and also qualified as guardian of the infants, Etta Lane and Jettie Baker, and soon thereafter instituted a suit under section 428 of the Civil Code of Practice to settle the estate of the decedent. In this action the land was sold, and purchased by Latham for \$50. In 1907, all of the children were of age, except Jettie Baker, and she, by her then guardian, H. W. Jones, and three of the other children, brought this suit against Latham and the other children, in which they set up the sale to Latham, and asked that it be set aside, that the infant Jettie Baker be adjudged entitled to a homestead, and that the land, which was alleged to be indivisible, be sold, and the proceeds distributed among the heirs.

To this action Latham filed an answer and counterclaim, in which he pleaded the statute of limitations, and also set up that as guardian of Etta Lane he made a final settlement with her when she became 21, and paid

to her \$76, the amount in his hands as guardian, which sum, together with other amounts paid her during her infancy, was derived from the rents of the land after he purchased it. He further averred that since he purchased the land he had made valuable and lasting improvements on it, of the value of \$300, and he asked that, if the sale be set aside, he be adjudged a lien on the land for the value of the improvements, and for \$50 that he paid as the purchase price of the land, and for \$28 that he expended for burial expenses, and also that the land be sold subject to the homestead right of Jettie Baker. He also averred that while Jettie Baker was an infant of tender years he was compelled to take charge of her, and that her income, which was only one-half of the rents of the 40 acres of land, was not sufficient to maintain and support her, and that he was obliged to and did expend in her nurture and care \$275 over one-half of the rents of the land, and for this sum he asserted a lien on her interest in the land.

The record does not disclose any settlements made by Latham as guardian of the infants, Etta Lane and Jettie Baker; but there is a check, dated January 14, 1904, payable to Etta Baker for \$76.20, which recites that it "is a settlement as guardian in full of all liability." It appears from the evidence that the reasonable rent of the land from the time Latham bought it was about \$50 a year, and that Latham, as guardian, paid out for Jettie Baker some \$275 more than her half of the rents of the land would amount to. The court adjudged that T. J. Baker and Babe Baker, now Reid, two of the five children of T. J. Baker, were not entitled to any interest in the land, and the petition as to them was dismissed, and Latham was adjudged to be the owner of their two-fifths interest in the land. Etta Baker, now Lane, was adjudged to be the owner of an undivided one-fifth, Jettie Baker the owner of an undivided one-fifth, and Early and Late Latham, the children of Allie Latham, who was a daughter of T. J. Baker, were awarded the other one-fifth jointly. It was further adjudged that Jettie Baker had abandoned her homestead in the land, and that, as the land was in the possession of Latham, Etta Lane, and the two Latham children, and indivisible, it should be sold.

From so much of this judgment as awarded Latham the interest of T. J. Baker and Babe Baker (Reid), they appeal; and Jettie Baker, by her guardian, appeals from so much of the judgment as refused to allow her the land as a homestead. Latham prosecutes a cross-appeal, insisting that the lower court should have dismissed the petition and adjudged him to be the owner of the land, or allowed him a lien for the several amounts paid out by him as before stated.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. When Latham bought the land, he was administrator of the decedent whose land was sold, and also guardian for two of the children, who owned an undivided interest in the land. The general rule is that a person who occupies a fiducial relation to an estate cannot purchase at his own sale, whether it be made privately or under decree of court, the property of the cestui que trust, and, if he does so purchase, he will be treated as holding the land or property as trustee for the beneficiaries. *Grider v. Payne*, 9 Dana, 188; *Faucett v. Faucett*, 1 Bush, 511, 89 Am. Dec. 639. If, however, the beneficiaries are of age, and freely and understandingly consent to the purchase by the trustee, their action and conduct might estop them from attempting to avoid the sale. It is not, however, necessary to consider this view of the case. It is true Latham averred in his answer that T. J. Baker and Babe Reid were over 21 years old at the time the sale was made, and were parties to the action and consented to the sale and purchase; but these averments were denied by them, and this placed upon Latham the burden of establishing the facts necessary to work an estoppel. The transcript before us does not exhibit the record or orders of court in the suit in which the land was sold, nor is there any evidence showing that these heirs consented to the sale or purchase. With the record in this condition, we cannot say that T. J. Baker or Babe Reid are estopped from asserting their right to an interest in the land.

2. It appears that the \$50 he paid for the land at the judicial sale was expended in the payment of costs and fees; but as Latham in good faith brought an action to have the land sold to settle the estate, and paid out of his own means the purchase price of \$50, he should have a lien on the land for this money, with interest thereon from the time it was paid, and also a lien for the \$28 paid by him as administrator on account of the funeral expenses of T. J. Baker. But these liens are subject to the homestead right of Jettie Baker.

3. The evidence is not sufficient to warrant us in holding that Latham is entitled to anything on account of the improvements put on the land after his purchase. If any improvements were made, they were paid for out of the rents.

4. We do not find in the record any settlement made by Latham as guardian of Jettie Baker, and therefore cannot say how much, or what estate, came into his hands as guardian; nor, indeed, is it shown how much she received from him as guardian, except by a statement that he paid her one-half the rent. But, without reference to this, he is not entitled to charge her interest in the land with any amount expended by

him as guardian for her use and benefit. Ky. St. § 2034 (Russell's St. § 4151); *Fidelity Trust Co. v. Butler* (Ky.) 91 S. W. 676; *Wilson v. Fidelity Trust Co.* (Ky.) 97 S. W. 753.

5. As the land is of less value than \$1,000, Jettie Baker is entitled to the use and enjoyment of the whole of it as a homestead during her minority, or until she marries. Being an infant, she could not abandon her homestead rights. When the homestead right of Jettie Baker terminates by her death, marriage, or arrival at age, the land should be sold, and out of the proceeds Latham be first paid \$78 and interest, and the balance of the proceeds be divided equally between the heirs of T. J. Baker.

Wherefore the judgment is reversed on the original and cross-appeal, and the lower court will enter a judgment in accordance with this opinion.

LEXINGTON RY. CO. v. WOODWARD.

(Court of Appeals of Kentucky. April 11, 1909.)

1. APPEAL AND ERROR (§ 1097*)—SUBSEQUENT APPEALS—LAW OF CASE.

The decision of the Court of Appeals on a former appeal, directing certain instructions to be given on remand, is binding on the Court of Appeals on a subsequent appeal, if the evidence is the same on the second trial; nor can it be contended on a subsequent appeal that the pleadings, which were the same as on the former trial, did not warrant the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

2. EVIDENCE (§ 509*)—PERSONAL INJURY—PHYSICAL EXAMINATION.

In a personal injury action against a street railroad company, a duly qualified expert, who had examined plaintiff, could testify to any physical fact he found to exist, if evidence thereof was admissible under the pleadings.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2312, 2313; Dec. Dig. § 509.*]

3. DAMAGES (§ 158*)—ISSUES AND PROOF—NATURE OF INJURY.

Though plaintiff sued for injuries to her hip and spine, any symptom or condition of the lower part of her leg which would corroborate the testimony as to the condition of the spine and hip was admissible, so that a physician could testify that plaintiff's left leg below the knee was smaller than her right, which was, in his judgment, caused by a lack of nutrition.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 158.*]

Appeal from Circuit Court, Fayette County.
"Not to be officially reported."

Action by Anna Woodward against the Lexington Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Allen & Duncan and Stoll & Bush, for appellant. Maury F. Kemper and W. D. Nicholas, for appellee.

HOBSON, J. The facts of this case are stated in the opinion delivered on the former appeal. See *Lexington R. R. Co. v. Wood-*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiff again for \$3,000. The defendant appeals.

The opinion on the former appeal is the law of the case. It was incumbent on the circuit court to give the instructions directed by this court, and this court is as much bound by the opinion on the former appeal as the circuit court. There was no substantial change in the evidence, making it proper for the circuit court to vary the instructions which had been indicated by this court. It is said that the pleadings do not warrant the instructions; but the pleadings were not changed after the former appeal, and that question cannot be made now. There was abundant evidence to warrant an instruction to the jury allowing them to find damages on account of loss of time, and upon the whole case we cannot see how the defendant could have been prejudiced by the wording of the instructions.

The plaintiff introduced on the last trial Dr. Buckmaster, who had made an examination of her person and testified that her injuries were in his judgment permanent. The witness qualified himself to testify as an expert, and the examination which he testified he made was sufficient to enable him to give an opinion on the extent of her injuries. He could testify to any physical fact which he found to exist. He was properly allowed to state that the left leg below the knee was smaller than the right, and that this indicated in his judgment a lack of nutrition. It is true the plaintiff sued for an injury to her spine and hip; but any symptom on the lower part of the leg, which would be confirmatory of the testimony as to the condition of the spine and hip, was properly admitted. It often happens in cases, especially of spinal injury, that the effects of the injury are shown in other parts of the body, and if there were no such evidence in other parts of the body it would be a circumstance indicating that the plaintiff's spine was not so badly affected as she claimed.

On the whole case, we are of opinion that the defendant had a fair trial on the merits, and that none of its substantial rights were prejudiced.

Judgment affirmed.

NICKELL et al. v. NICKELL

(Court of Appeals of Kentucky. May 7, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 496*)—COMPENSATION—EXCESSIVE ALLOWANCE.

Ky. St. 1909, § 3883 (Russell's St. § 3914), provides that the allowance to executors, administrators, and curators shall not exceed 5 per cent. on all the amounts received and distributed, but authorizes further allowances where there have been extraordinary services. The

and \$50 for attorney's services, and the administrator should be charged with interest after two years from the date of administration to the dates of settlement on the amount received by him and allowed credit for the sums paid out with like interest from the date of payment, where it was not shown that any extraordinary services were performed or any unusual expenses incurred.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 496.*]

2. PRINCIPAL AND AGENT (§ 82*)—COMPENSATION.

Where an agent of the heirs of a decedent was in charge of the lands for about 12 years, and received as rents about \$2,000 and the lands increased in value from \$400 to \$600, an allowance to him of \$700 for his services as agent and \$300 for attorney's fees was excessive, where the services were not extraordinary, and the litigation was not of much moment, and the allowance to him as an agent should be reduced to 20 per cent. of the amount of rents received and \$200 attorney's fees, and he should be charged with interest on all rents received by him from the first of the year after the rents were received, and credited with the amounts paid out of the rents, with interest from the date of payment.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 82.*]

3. APPEAL AND ERROR (§ 339*)—TIME OF TAKING.

An appeal from a judgment more than two years after rendition is too late under the Code.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 339.*]

Appeal from Circuit Court, Rowan County.
"Not to be officially reported."

Proceedings for the allowance to F. C. Nickell of compensation as administrator of the estate of Greenup Nickell, deceased, and as agent for decedent's heirs. From a judgment allowing certain compensation, decedent's widow and heirs appeal. Reversed and remanded.

Reuben Gudgell & Son, for appellants.
William A. Young, for appellee.

NUNN, J. Greenup Nickell died in Rowan county in July, 1893. Soon thereafter his son, F. C. Nickell, was appointed and qualified as his administrator. The inventory of the estate indicated that there came to his hands about \$2,700 in notes and accounts; all the visible personal property having been set apart to the widow under the statutes. All the notes and accounts charged to him in the inventory were reported as doubtful and worthless, and were credited to him in his settlements, except about \$400 worth of them. By the judgment appealed from, the lower court allowed him the sum of \$300 for his services as administrator and \$70.70, his expenses during the administration, and also allowed him \$210 for compensation to his attorneys in winding up the estate. Shortly

after appellee administered upon the estate, all the children and heirs of the estate, except one, executed a writing by which F. C. Nickell was appointed as their agent to take charge of, care for, and rent out the lands of decedent, consisting of nine small tracts. This duty he performed for about 12 years, and received as rents during this time about \$2,000. According to the evidence, he improved the land, or the lands had increased in value from \$400 to \$600. It is not made clear that this increase in value came solely from the improvements, or whether from a general increase of the value of land in the whole county. In the judgment referred to he was allowed the sum of \$700 for his services as such agent and an attorney fee of \$300. The proof does not show that there was any litigation of much consequence either in the settlements of the personal estate or with reference to the real estate, which he was managing as agent. The record discloses only two actions. One was an action brought by appellant Catherine Nickell to set aside a deed or writing by which she relinquished her rights as widow in the personal and real estate and agreed to accept a share equal with the children. There were four or five depositions taken in this action on each side. On the trial of the case in the lower court the writing referred to was upheld, and she complains of that ruling on this appeal. It is sufficient to say that the judgment was rendered more than two years before she took the appeal, which, under the Code, bars her from relief from that judgment. The other action referred to was one brought by one Alderson against appellee as administrator on a note for \$300. Appellee answered, denying responsibility, and pleading a set-off and counterclaim. It appears that this action never came to trial. It was compromised by paying to Alderson \$200.

There was testimony introduced to the effect that the allowances to the administrator, agent, and attorneys were reasonable, the witnesses stating in a general way and from the best information they had without giving their information that the claims were reasonable. It was not shown that any extraordinary services were performed by either appellee or the attorneys, nor were there any unusual expenses incurred. Section 3883, Ky. St. (Russell's St. § 3914), provides: "The allowance to executors, administrators and curators shall not exceed five per cent on all the amounts received and distributed"—and continues by providing for further allowances when the fiduciary has been required to perform extraordinary services. It appears in this record that the administrator, appellee, did not receive and distribute funds belonging to the estate amounting to over the sum of \$500, and the indebtedness amounted to something over a half that sum. To these

sums add the allowances made to appellee as administrator, \$300, and the \$210 to pay his attorneys, and it consumes largely more than the estate which came to his hands and which he distributed, and the excess is made a charge against the real estate of the heirs. This should not be sanctioned. If upheld, it would have been better for the heirs if the personality belonging to the estate had been destroyed and no administration granted. The same may be said with reference to appellee's services as agent.

In view of these facts, the allowances referred to cannot be upheld, and we have arrived at the conclusion that an allowance to appellee for his services as administrator of the personal estate which came to his hands, including his expenses, should have been fixed at \$100, and a fee of \$50 should have been allowed his attorney for services in the settlements of the personal estate. Appellee's compensation for his services as agent of the heirs in the management of the real estate should have been fixed at 20 per cent. of the amount of rents received, and a fee to his attorney as such agent of \$200. On the return of this case to the lower court the matter should be referred to a commissioner with directions to ascertain the amount received by appellee as administrator, on which he should be charged with interest at 6 per cent. after two years from the date of administration to the dates of settlements, but he should be allowed credit for the sums paid out with like interest from the date of payment. All the rents received by appellee should also be ascertained, and he should be charged with interest from the first of the year after the rents were received, but should be credited with the amounts paid out of the rents with interest from the date of payment. He should also be credited with the allowances to himself as agent and administrator and with those made to the attorneys, as above stated.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

ILLINOIS SURETY CO. v. GARRARD HOTEL CO.

(Court of Appeals of Kentucky. May 7, 1909.)

1. DAMAGES (§ 80*) — BREACH OF BUILDING CONTRACTS—FAILURE TO COMPLETE WITHIN SPECIFIED TIME—LIQUIDATED DAMAGES—REASONABLENESS.

Three dollars per day was a reasonable sum to be agreed on as liquidated damages to be paid by the contractor to the owner for failure to complete a \$13,000 hotel within the time specified in the contract.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 170-175; Dec. Dig. § 80.*]

2. PRINCIPAL AND SURETY (§ 139*)—BUILDING CONTRACTS—NOTICE OF DEFAULT.

Where a building contract required the completion of the building by December 6th, but the time was extended to December 23d, in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

within 24 hours after the occurrence thereof.
[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 139.*]

8. PRINCIPAL AND SURETY (§ 100*)—BUILDING CONTRACTS—RELEASE OF SURETY.

Where a building contract provided that changes in the plan should be agreed on before the change was made, and required that the amount, whether an increase or decrease in cost, must be indorsed on the contract, the failure of the parties to sign agreed changes indorsed on the contract did not release the surety on the contractor's bond.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 100.*]

4. CONTRACTS (§ 231*)—BUILDING CONTRACTS.

Where a building contract made the agreed price of changes and extras a part of the cost to be added to the original price, the total so ascertained was controlling under a clause permitting the owner to retain a certain per cent. of the contract price until the completion of the building.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 231.*]

5. PRINCIPAL AND SURETY (§ 117*)—BUILDING CONTRACTS—CONTRACTOR'S BOND.

Where a contractor's bond obligated the surety to protect the owner from loss growing out of laborers' or materialmen's liens, the owner was entitled, in good faith, to discharge debts that might have been asserted as liens against the property.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 283-285; Dec. Dig. § 117.*]

Appeal from Circuit Court, Garrard County.

"Not to be officially reported."

Action by the Garrard Hotel Company against the Illinois Surety Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. H. Shield and Walter S. Lapp, for appellant. J. E. Robinson, Lewis L. Walker, W. I. Williams, and Greene, Van Winkle & Schoolfield, for appellee.

NUNN, J. On August 6, 1907, appellee made and entered into a written contract with the firm of Lewis & Glanz, contractors, for the furnishing of the material and erecting a hotel in Lancaster, Ky., at the price of \$13,000. The plans and specifications prepared by the architect were made a part of the contract. Lewis & Glanz gave a bond for the completion of the building in accordance with the contract, and appellant became their surety.

This action was instituted by appellee against the contractors and their surety, appellant. It was alleged, in substance, in the petition that Lewis & Glanz had failed to erect the building as they had obligated themselves to do; that they had abandoned their work before the completion of the building; that it, appellee, had to expend

the architect; that after this materialmen and laborers enforced liens on the building to the extent of more than \$5,000, which it was compelled to pay; that the contractors failed to complete the building by December 6, 1907, as per agreement, but kept them out of the use of it for 80 days, for which they were entitled to \$3 a day according to the terms of the contract. The total amount sued for was something over \$3,500; the amount recovered, \$2,979.

Appellant alone made defense, and based the same on three propositions: First, that appellee violated its obligation under the contract, in that it advanced the contractors during the progress of the work more than the contract stipulated; second, that changes were made in the specifications and extras added in direct nonconformity with the provisions of the specifications and contract; third, that, after the default of the contractors, appellee failed to give appellant notice as required by the terms of the bond. We copy the parts of the contract, specifications, and bond with reference to the above three defenses. The clause of the contract is as follows: "Said contract price of \$13,000.00 is to be paid as the work progresses and is certified to by the architect, George Hitchins, provided that no time they are to receive more than 75 per cent. of the amount of work finished and completed, and 25 per cent. of said contract price is to be retained until the building is finally accepted by the said hotel company as satisfactory and complete." The clause referred to in the specifications is as follows: "Should any extra work or change of the plan be required, whereby the cost may be increased or diminished, all such changes must be determined and agreed upon before the change is made, and amount, whether an increase or decrease in cost, must be indorsed upon the back of the contract." The paragraph in the bond to which appellant referred is as follows: "That said surety shall be notified in writing of any act, omission, or default on the part of said principal, or his, their, or its agents, or employes, which may involve a claim or loss for which the said surety is or may be responsible hereunder, within twenty-four hours after the occurrence of such act, omission or default shall have come to the knowledge of the owner or his, its, or their agents, officers, or representatives; said notification must be given by a United States post office registered letter mailed to the said surety at its principal office in Chicago, Illinois." There is another provision of the contract which seems to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

do what is known as a 'turn key job,' within four months from this date, that is, to have same completed by the 6th day of December, 1907. Said contractors are to have \$3.00 per day for each day that said building is completed prior to the 6th day of December, 1907, and they are to pay said hotel company \$3.00 per day for each day that said building or job remains incomplete after the 6th day of December, 1907, except they shall not be responsible for delays caused by strikes and what is known as acts of God."

We will consider these propositions in the reverse order. The preponderance of the testimony shows that the contractors were delayed in the erection of the building on account of strikes and unavoidable circumstances for at least 17 days, and they were entitled to have the time within which they were to complete the building extended an equal number of days, or to December 23, 1907. Therefore appellee was not entitled to the \$3 a day from the 6th of December, but from the 23d to the time the building was ready for occupancy. There is no contention made that the \$3 per day was unreasonable. It seems that the parties contemplated that the hotel would be worth at least \$3 per day, and this was a reasonable sum to agree upon as liquidated damages. *Whitehead & Bro. v. Lodge (Ky.) 62 S. W. 873*. It is agreed that notice was given appellant of the default of the contractors on the 23d of December, 1907, in manner provided for in the contract; but the point appellant makes is that this was 17 days after the default actually occurred. It is true that the original contract required the building to be completed by the 6th day of December, but the time was extended 17 days; the contractors having been delayed that length of time on account of strikes in accordance with the terms of the contract. Therefore the contractors did not default on the 6th but on the 23d of December, 1907.

With regard to the second proposition, requiring extra work and changes of the plans in the erection of the building to be determined and agreed upon and indorsed upon the back of the contract, the facts shown in the testimony with reference to same are as follows: On September 9, 1907, the parties in interest met and agreed upon certain changes in the plans, which increased the cost, as set out in the original contract, \$72. The agreed changes were reduced to writing, signed by the parties, and attached to the contract. On the 29th day of September they again met and agreed upon certain other changes in the plans which increased the price agreed to be paid the contractors \$160. These changes were also reduced to writing

agreed changes made on the 9th of September, which were signed by the parties and attached to the bond; but it contends that the changes agreed to upon the 29th, which were also attached to the bond, were of no effect because they were not signed by the parties. It will be observed that the contract does not specifically require that the parties sign the agreed changes, but only provides that such agreement be indorsed on the contract. Evidently it was the purpose of the parties to make the changes in the plans and specifications a part of the contract, and the overwhelming evidence shows that these changes were made and agreed to between the parties, and it did not require any writing to be signed by the parties to make them valid, and the failure of the parties to sign could not have affected appellant to any extent.

As to the first proposition stated, wherein appellant contends that it was released from its obligation as surety for the contractors because appellee advanced to the contractors during the progress of the work more than three-fourths of the value of the work finished, and that it, appellee, failed to retain 25 per cent. of the contract price until the building was finally accepted, it was shown without contradiction that appellee advanced the contractors at different periods the sum of \$9,900. These advancements were made upon the certificates of the architect which purported to be strictly in accord with the contract. While the contract states that the architect was the agent of appellee, it does not appear by allegation or proof that the architect in issuing these certificates did not act from his fair and honest judgment as to the amounts due the contractors under the contract as the work progressed; and there was much testimony introduced showing that the amounts advanced were due the contractors as certified to by the architect. Appellant earnestly contends that when appellee paid the last payment of \$1,500 November 26, 1907, which made up the \$9,900 on the certificate of the architect, it did not retain 25 per cent. of the contract price; that it did not then have in its hands that portion of the contract price which it obligated itself to retain until the building was finally complete and accepted by it. This position would be correct if the original contract price of \$13,000 was alone to be considered in construing this clause of the contract. In our opinion this is not the proper construction of it. It, by express terms, made the price of extras or changes a part of the contract price; in other words, it made the agreed price of the changes and extras a part of the cost to be

appellee as if it had been so written in the original contract. It is thus seen that appellee then had in its hands more than the portion of the contract price it had agreed to retain until the building was completed.

The trouble in this case is that the contractors undertook the building of the hotel at too low a sum. The actual cost of the building, according to the proof, was near \$18,000, and at no time did appellee advance the contractors more than 75 per cent. of the cost of the work actually done. The testimony further shows that the whole of the money advanced on the contract during the erection of the building in the way of paying for material and labor. Under the contract which appellant signed, it obligated itself to protect appellee from loss growing out of liens that materialmen or laborers might assert against the property; and appellee had the right in good faith to discharge the debts that might have been asserted as liens against the property. *U. S. Fidelity & Guaranty Co. v. Trustees of Baptist Church of Columbus, etc. (Ky.) 102 S. W. 325; Cooke, etc., v. White School District Number 7, etc. (Ky.) 111 S. W. 686.*

The testimony in the case fully sustains the judgment of the lower court as to the amount recovered.

For these reasons, the judgment of the lower court is affirmed.

TAYLOR v. SPARKS et al.

(Court of Appeals of Kentucky. May 4, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—ELECTIONS—NOTICE—REQUISITES.

Ky. St. 1909, § 4481 (Russell's St. § 5672), provides that elections to take the sense of the voters as to whether or not bonds should be issued to provide suitable school buildings in a district shall be ordered by the trustees of the district, who shall give notice of the election. Section 4458 provides that notice of elections to raise taxes for the use of such districts shall be signed by the county school superintendent and by a majority of the district trustees. *Held*, that the provisions of section 4458 did not relate to, or affect the provisions of, section 4481 so as to require the notice of an election held under the latter statute to be signed by the county superintendent.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—ELECTIONS—PLACE OF HOLDING.

Ky. St. 1909, § 4458 (Russell's St. § 5672), provides that elections in school districts shall be held in the schoolhouse. Section 4481 (section 575S), relating to elections to determine whether bonds shall be issued, does not provide where the election is to be held, but requires the notice to fix the time and place. *Held*, that an

votes actually polled out of a possible 400.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—ELECTIONS—NOTICE—REQUISITES.

The fact that the notice of an election in a white graded school district to determine whether bonds should be issued did not set forth that only white voters were to participate in the election did not render the election invalid, in the absence of a showing that any other but white voters participated therein; the notice being addressed to the qualified voters of the district, and it being presumed that the officers having charge of the election knew the law, and permitted only legal qualified citizens to vote.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—ELECTIONS—ORDER—REQUISITES.

That the order for the election did not state that the bonds to be issued were to raise money for the benefit of the white children of the district did not render the election invalid, since it would not be presumed that a tax would be levied on property of the colored citizens of the district in violation of law, or that the fund raised from the sale of the bonds would be used for any other purpose than for the benefit of the district for which they were issued.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 24*)—PART OF COUNTY OUTSIDE CITY AS SCHOOL DISTRICT.

Where there is a city or town in any county which maintains a separate system of public schools, the balance of the county outside of such city or town, by the express provisions of Ky. St. 1909, § 4426a (Russell's St. § 5610a), becomes a school district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 42; Dec. Dig. § 24.*]

6. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—ELECTIONS—WHO MAY VOTE.

Under the express provisions of Ky. St. 1909, § 4458 (Russell's St. § 5672), widows and spinsters who are taxpayers of common school districts are entitled to vote in elections to raise taxes for the use of such districts.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 241; Dec. Dig. § 103.*]

7. ELECTIONS (§ 229*)—VALIDITY—EFFECT OF ILLEGAL VOTES.

An election is not invalid because certain persons not qualified were permitted to vote, where the result of the election would not be affected if all of the objectionable votes were deducted from those received by the prevailing side.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 201; Dec. Dig. § 229.*]

8. ELECTIONS (§ 227*)—PRESUMPTIONS AS TO VALIDITY.

It is the policy of the law to uphold elections for the purpose of advancing the educational interests of the children of the state, and not to annul them for light and trivial causes; and mere irregularities in the conduct of an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Action by C. W. Taylor against T. J. Sparks and others to restrain defendants as trustees of White Graded School District No. 14 of Muhlenberg county, Ky., from issuing school district bonds. From a judgment for defendants, plaintiff appeals. Affirmed.

Taylor & Eaves, for appellant. Willis & Meredith and Belcher & Sparks, for appellees.

BARKER, J. On March 30, 1909, the appellees, being the trustees of white graded school district No. 14 of Muhlenberg county, Ky., made an order calling an election to be held by the qualified voters of the district on April 17, 1909, for the purpose of taking the sense of the voters as to whether or not the trustees should issue bonds in order to provide suitable school buildings and furnish them for the use of the schools in the district. Notice of the election was given, and it was held pursuant to the order on the date for which it was called, and there were 350 votes cast; 316 of that number voting in favor of, and 34 voting against, the issue of the bonds. This vote having been legally canvassed and certified, the trustees were proceeding to issue the bonds so authorized when, on the 24th day of April, 1909, the appellant, a taxpayer of the district, instituted this action in the Muhlenberg circuit court for the purpose of enjoining the issue and sale of the bonds by the trustees. A general demurrer was interposed to the petition and sustained; and, the appellant refusing to plead further, his petition was dismissed, from which judgment he prosecutes this appeal.

It may be stated at the outset that the procedure leading up to the issuance of the bonds, so far as it went, exhibits the most careful effort on the part of the trustees to comply with the law regulating their proposed action, and the petition of the appellant shows the same painstaking care and accuracy in setting forth all the substantial facts upon which he bases his right to the injunction sought, in order that a general demurrer would present the whole question as to the validity of the bond issue. It is not deemed necessary to set forth specifically the allegations of the petition, or to state at large the action taken by the trustees to hold a valid election. It is all-sufficient for the purposes of this opinion to notice the objections of appellant; it being understood that, except where he points out a supposed defect, the procedure on the part of the

of the election was signed by the trustees of the school district, and not by the county school superintendent. It must be borne in mind that the school district involved here is a graded common school district. Therefore the election was held under section 4481 of the Kentucky Statutes (Russell's St. § 5758) and not under section 4458 (section 5672), which relates to elections held in common school districts. Section 4481 provides that elections for the purposes involved in this action are to be ordered by the trustees, and notice of the election shall be given by the trustees. No mention is made of the county school superintendent whatever. Section 4458, which relates to common school districts, provides that elections for the purpose of raising taxes for the use of such districts shall be held at the time and place and in the manner prescribed in section 4434 (section 5710), and that notice of such election shall be signed by the county school superintendent of the county in which the district lies, and by a majority of the trustees of the district. It is obvious, from an examination of these two sections, that the provisions of one are not intended to relate to the other. The manner of holding the two elections is set out with the greatest circumstantiality in the respective sections, thus showing a legislative intent that each should be held alone under the provisions of the section regulating it. The notice, therefore, of the election under discussion was only required to be signed by the trustees of the district.

The second objection is that the election was held in the courthouse of Greenville, and not in the schoolhouse of the district. This objection is based upon the same argument as that just disposed of. Section 4458, which relates to common school districts, does provide that the election shall be held at the schoolhouse, but section 4481, which relates to graded school districts, does not provide where the election is to be held. It does provide, however, that the time and place of the election shall be fixed in the notice, and this was done in the case at bar. It may also be stated in this connection that there is no allegation that any citizen entitled to vote was deprived of the privilege so to do by a want of knowledge of the place where the election was to be held. Undoubtedly the courthouse was the best known place in the city in which to hold the election, and the fact that there were 350 votes actually polled out of a possible 400, shows that the citizens generally had ample knowledge of the time and place of the election.

A third objection is that the notice did not set forth that only white voters were to par-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ified voters of the district was ample without adding the word "white." It is not alleged in the petition that any other but white voters participated in the election held, and we must presume, in the absence of a distinct allegation to the contrary, that the officers having charge of the election knew the law, and permitted only legally qualified citizens to vote.

The objection, that the order for the election does not state that the bonds to be issued are to raise money for the benefit of the white children of the district is equally untenable. We will not presume that a tax will be levied on property of the colored citizens of the district in violation of law, or that the fund raised from the sale of the bonds will be used for any other purpose than for the benefit of the district for which they were issued.

Section 4426a, Ky. St. (Russell's St. § 5610a) in no wise affects section 4481, so far as the district involved herein is concerned. Greenville, which is the county seat of Muhlenberg county, constitutes white graded common school district No. 14, and it falls within the very language of the exception of section 4426a, which provides that, where there is a city or town in any county which maintains a separate system of public schools, then the balance of said county outside of such city or town district shall constitute a school district. As we understand the record, the city of Greenville maintains a separate system of public schools, and comes, as said before, within the language of the exception of section 4426a.

The objection, that 19 widows and spinsters, who were taxpayers of the district, were allowed to vote at the election is without merit. In the first place, section 4458 especially permits such citizens to vote at school elections. But if we are mistaken in that, if these 19 votes are all assumed to have been in favor of the bond, they may be entirely eliminated without in any wise affecting the result of the election. The district seems to have been almost unanimously in favor of the issuance of the bonds; 316 being in favor of the issue, and only 34 opposed to it.

In conclusion, it is the policy of the law to uphold elections by the people for the purpose of advancing the educational interests of the children of the state, and not to annul them for light and trivial causes. Mere irregularities in the conduct of an election, which do not deprive the citizens of a full and fair opportunity of exercising their right of suffrage in regard thereto, are not, suffi-

v. Justice, 86 Ky. 596, 6 S. W. 457. The election, which was held by the trustees, seems to have been more than usually regular in the steps taken; and, as more than two-thirds of the votes cast were in favor of the issuance of the bonds, the general demurrer was correctly sustained, and the petition dismissed.

Judgment affirmed.

SEALEY v. COMBS et al. (two cases).

(Court of Appeals of Kentucky. May 5, 1909.)

1. APPEAL AND ERROR (§ 61*)—DECISIONS REPEALABLE—AMOUNT IN CONTROVERSY—SEPARATE ACTIONS.

Where two actions for money, though tried together, were based upon separate pleadings and separate verdicts, and separate judgments were rendered, jurisdiction of the Court of Appeals depends on the amount involved in each action, so that that court would not have jurisdiction of an appeal in one of the actions in which only \$95 was involved; Civ. Code Prac. § 734 prohibiting appeals to the Court of Appeals in actions to recover money if less than \$200 is involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 276, 277; Dec. Dig. § 61.*]

2. FRAUDS, STATUTE OF (§ 23*)—PROMISE TO ANSWER FOR ANOTHER'S DEBT.

Intervener contracted with B. to cut and haul timber, and the latter hired plaintiffs to haul the timber, and, after all the timber had been hauled, intervener orally promised plaintiffs to pay for hauling the timber under their contract with B. Held, that the debt was B.'s and not the obligation of the intervener, and his oral promise was within the statute of frauds, and unenforceable, under Ky. St. 1909. § 470 (Russell's St. § 1775), requiring agreements to answer for another's debt to be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

Appeal from Circuit Court, Perry County.

"Not to be officially reported."

Actions by John L. Combs against G. G. Brown, and by John Combs and another against G. G. Brown, in which W. O. Sealey intervened. From a judgment for plaintiff in each case against defendant and intervener, the latter appeals. Appeal in first case dismissed, and judgment in second case reversed and remanded, with directions to dismiss petition as to intervener.

O. H. Pollard, A. H. Patton, Miller & Ward, and J. J. C. Bach, for appellant. Bailey P. Wootton, Jesse Morgan, and Greene, Van Winkle & Schoolfield, for appellees.

CLAY, C. Appellee John L. Combs instituted an action against G. G. Brown to recover the sum of \$95.25 for work and labor done in hauling timber. At about the same time appellees, John Combs and Joe Brewer, instituted an action against G. G. Brown to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

recover the sum of \$243.04, also for work and labor performed in hauling timber. In each case the appellees secured a general order of attachment against the property of Brown, and had it levied upon certain timber. Thereafter, W. O. Sealey intervened in each action, and set up a claim to the property attached, executed bond therefor, and took possession of the property. The two cases were then consolidated and tried together. In the action of John L. Combs against G. G. Brown the defendant Brown filed an answer, confessing judgment for the amount sued for, and denied the grounds for attachment. In the case of John Combs and Joe Brewer against G. G. Brown the latter also filed an answer confessing judgment for the amount sued for, except the sum of \$22.50, which he pleaded as a set-off. He also denied the grounds for attachment. Upon the filing of the intervening petitions the plaintiff in each case pleaded, by way of answer and counterclaim, that the intervening petitioner, through his agent, promised and agreed to pay them for the work they had performed in hauling the timber. Sealey's demurrer to the answer and counterclaim in each case was overruled. In the case of John Combs and Joe Brewer against Brown the plaintiffs filed an amended petition, alleging a promise made by Sealey to pay the debt sued for. To this Sealey answered, and pleaded the statute of frauds and no consideration to support the promise. In each case, upon the verdicts of the jury, judgment was rendered in favor of plaintiffs against G. G. Brown and W. O. Sealey, and the latter appeals.

In the case of W. O. Sealey v. John L. Combs appellee has moved to dismiss the appeal upon the ground that the amount involved is not sufficient to give this court jurisdiction. The amount involved is only \$95.25. While this action was tried with the other action herein considered, they were separate actions, founded upon separate pleadings, and based upon separate verdicts and judgments. Under the circumstances the jurisdiction of this court must depend upon the amount involved in each instance. As the amount involved is less than \$200, exclusive of interest and costs, we are without jurisdiction to consider the appeal. Section 734, Civ. Code Prac.; Oswald, etc., v. Morris, 92 Ky. 48, 17 S. W. 167; Fehler v. Gosnell, 99 Ky. 894, 35 S. W. 1125.

In the case of W. O. Sealey v. John Combs and Joe Brewer, the main question is whether or not the oral promise, made by Sealey's agent, to pay Brown's debt was within the statute of frauds. The lower court held (and we think held correctly) that the timber attached belonged, not to Brown, but to Sealey. The latter had a contract with Brown by which Brown agreed, for a certain consideration, to cut and haul the timber to the river. At the time it is claimed that Sealey's agent

made the promise to pay Brown's debt, the timber had been cut and hauled to the river. There was nothing further to be done. Combs and Brewer were hired by Brown to do the hauling. Sealey was not known in the matter at all. Under his contract with Sealey Brown agreed to pay for the hauling. It is manifest, therefore, that the debt due Combs and Brewer was Brown's debt—not Sealey's. Appellees contend that the promise on the part of Sealey to pay the debt was not within the statute of frauds, and rely upon the case of Colvin, etc., v. Newell, etc., 8 Ky. Law Rep. 959. It is obvious, however, that the rule laid down in that case has no application to the case at bar. There the purchaser of certain land agreed, as a part consideration, to pay a debt of his vendor. The court held that, under the circumstances, the debt due by the vendor then became the debt due by the purchaser. There is no circumstance in this case showing that Brown's debt became Sealey's debt. If the timber had not been hauled at the time, and Brown had not paid for it, Sealey might have bound himself by promising to pay it. But the timber had been hauled. Appellees' work was completed. A promise, under these circumstances, on the part of Sealey to pay their debt was certainly within the statute, and unenforceable. Brown still remained liable. Section 470, Ky. St. 1909 (Russell's St. § 1775); Fessler v. Dressman, 15 Ky. Law Rep. 239; Jones v. Walker, 13 B. Mon. 356; Lieber, Griffin & Co. v. Levy, 3 Metc. 292.

For the reasons given, the appeal in the case of W. O. Sealey v. John L. Combs is dismissed. The judgment in the case of W. O. Sealey v. John Combs and Joe Brewer is reversed, and cause remanded, with directions to dismiss the petition and amended petition in so far as they affect appellant Sealey.

COMMONWEALTH v. ELLIS et al.

(Court of Appeals of Kentucky. Feb. 2, 1909.)

1. CONSPIRACY (§ 48*)—TRIAL—INSTRUCTIONS. Instructions, in a prosecution for conspiracy, held correct.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 109; Dec. Dig. § 48.*]

2. CONSPIRACY (§ 45*)—INTIMIDATION—ADMISSIBILITY OF EVIDENCE.

On a trial for conspiracy to intimidate a certain person, a witness for the commonwealth on direct examination was asked whether or not the person, who came to see him at the time defendant said he would have a person there, told him to turn off the switch that night, and answered in the affirmative. Held, that the question and answer were competent.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 100-102; Dec. Dig. § 45.*]

3. CONSPIRACY (§ 45*)—INTIMIDATION—ADMISSIBILITY OF EVIDENCE.

On a trial for conspiracy to intimidate a certain person, the court properly excluded a part of an answer of a witness for the common-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 100-102; Dec. Dig. § 45.*]

4. CONSPIRACY (§ 47*)—EVIDENCE OF DEFENDANT'S CONNECTION WITH CONSPIRACY.

In a prosecution for conspiracy, it must first be shown that defendant was a member of the band by which the intimidation was accomplished, but such evidence need not be direct or positive, and may be made up of isolated or fragmentary facts.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105, 106; Dec. Dig. § 47.*]

5. CONSPIRACY (§ 41*)—RESPONSIBILITY FOR ACTS AND DECLARATIONS OF CO-CONSPIRATORS.

When a defendant's guilty connection with a conspiracy is established, he is chargeable for all the acts and declarations of his co-conspirators made during its existence and in carrying it forward to its unlawful ends.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 74; Dec. Dig. § 41.*]

6. CRIMINAL LAW (§ 427*)—EVIDENCE—DECLARATIONS OF CONSPIRATORS.

It cannot be shown that defendant belonged to a band of conspirators by hearsay declarations of the conspirators themselves.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1014; Dec. Dig. § 427.*]

7. CONSPIRACY (§ 43*)—ISSUES AND PROOF.

Where a charge of conspiracy is limited to a single act of the conspirator to intimidate a certain person, the court properly excluded evidence of illegal or wrongful acts done subsequently by a band with whom defendant was not charged to be in concert or collusion.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-107; Dec. Dig. § 43.*]

8. INDICTMENT AND INFORMATION (§ 169*)—LIMITATION OF PROOF TO CHARGE.

The evidence must be limited to establishing the charge made in the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 535; Dec. Dig. § 169.*]

9. CRIMINAL LAW (§ 424*)—EVIDENCE—ACTS AND DECLARATIONS OF CO-CONSPIRATORS.

After the consummation of the conspiracy, the acts and declarations of the co-conspirators do not bind each other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1002; Dec. Dig. § 424.*]

10. CRIMINAL LAW (§ 412*)—EVIDENCE—COMPETENCY OF NOTES FOUND ON PRISONER.

Notes found on accused while confined in jail with other prisoners, and which he attempted to pass to a visitor, and which showed the writers were preparing to arrange for alibis at their trial, were competent evidence against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 911; Dec. Dig. § 412.*]

11. CRIMINAL LAW (§ 665*)—TRIAL—DISCRETION OF COURT—SEPARATION OF WITNESSES.

The exclusion of witnesses from the courtroom is largely a matter of discretion with the trial court, and parties who do not desire to suffer by operation of the rule for the separation of witnesses should exercise some diligence in seeing that their witnesses obey it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1559-1564; Dec. Dig. § 665.*]

Nunn, J., dissenting.

reach a verdict on the trial of Ellis alone, the defendants having demanded a severance, the jury were discharged, and the commonwealth certifies questions to the Court of Appeals, which certifies its answers to the trial court.

Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth. Speight & Acree, for appellees.

BARKER, J. The grand jury of Calloway county returned an indictment against the appellees, Jake Ellis, Will McClure, and Henry Taylor, charging them with conspiring together for the purpose of intimidating Mose Thornton, which indictment is as follows: "The grand jury of Calloway county, in the name and by the authority of the commonwealth of Kentucky, accuse Jake Ellis, Will McClure, and Henry Taylor of the crime of willfully confederating and banding together for the purpose of intimidating, alarming, and disturbing another, committed in the manner and form as follows, to wit: That said Ellis, McClure, and Taylor did in the county and state aforesaid, on the — day of —, 1908, and before the finding of this indictment, willfully and feloniously and corruptly confederate, agree, and enter into a conspiracy with each other, and with divers others to the grand jury unknown, for the purpose of intimidating, alarming, and disturbing Mose Thornton, and, in pursuance of said conspiracy theretofore entered into as aforesaid, did then on the — day of March, 1908, willfully and feloniously confederate and band themselves together and with each other, and go forth with said unknown persons for the purpose of intimidating, alarming, and disturbing said Thornton, and they did then and there by arms and threats call him, the said Thornton, out of his house, and order him to raise a crop of tobacco this year, 1908, to his great disturbance, intimidation, and alarm, against the peace and dignity of the commonwealth of Kentucky." To this indictment the defendants pleaded not guilty, and, the case being called for trial, they demanded a severance, whereupon the commonwealth elected to try Jake Ellis; and, a jury being impaneled, the case was tried, with the result that the jury were unable to reach a verdict, and were discharged by the court from further consideration of the case. Thereupon the commonwealth certified to this court the question of the sufficiency of the instructions given by the trial court, and also certain other questions of law concerning the admission and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed the jury as follows:

"(1) The court instructs the jury that a criminal conspiracy, as charged in the indictment herein, means a corrupt combination or agreement between two or more persons to do by concert of action an unlawful act, or to do a lawful act by unlawful means.

"(2) The court further instructs the jury that, if they believe from the evidence in this case beyond a reasonable doubt that in this county, and before the finding of the indictment herein, the defendant Jake Ellis did unlawfully, willfully, and feloniously conspire and confederate with his codefendants, Will McClure, Henry Taylor, and other persons to the grand jury unknown, or any one of said codefendants, McClure or Taylor, or with some other person, or persons, to the grand jury unknown, for the purpose of intimidating, alarming, or disturbing the witness Mose Thornton, and, in pursuance of said conspiracy and confederation or banding together, the defendant Jake Ellis, with any one or more of the defendants, Will McClure or Henry Taylor, or with any other person or persons to the grand jury unknown, acting with him and he with them, did in pursuance of said agreement or confederation go forth for the purpose of alarming, disturbing, or intimidating said Thornton, they will find the defendant guilty as charged in the indictment, and fix his punishment at confinement in the state penitentiary for not less than one year, nor more than five years, in their discretion.

"(3) The court further says to the jury that, if they believe from the evidence beyond a reasonable doubt that in this county, and before the finding of the indictment herein, the defendant Jake Ellis did unlawfully, willfully, and feloniously conspire and confederate with Will McClure, Henry Taylor, or other persons to the grand jury unknown, or with any one or more of them, or with some other person, or persons, to the grand jury unknown, for the purpose of alarming, intimidating, or disturbing Mose Thornton, and in pursuance and execution of said conspiracy or confederation the codefendants, Will McClure, Henry Taylor, or other person, or persons, to the grand jury unknown, or any one or more of said defendants, or any one or more of said unknown parties with whom defendants did conspire and confederate (if he did so conspire and confederate with any one or more of them), acting in pursuance of said conspiracy or confederation, did unlawfully, willfully, and feloniously go forth for the purpose of intimidating, alarming, and disturbing said Mose Thornton, and shall further believe from the evidence that defendant did not go forth with his code-

if they believe from the evidence beyond a reasonable doubt that he did so unlawfully, willfully, and feloniously confederate and conspire with Will McClure, Henry Taylor, or either of them, or with other person, or persons, to the grand jury unknown, or with any one or more of them for the purpose of alarming, intimidating, or disturbing Mose Thornton, and they will fix his punishment at not less than one year, nor more than five years, in their discretion.

"(4) The court further says to the jury, if they believe from the evidence that the witnesses J. L. Whitlock, Clarence Dyzer, W. B. Stewart, and Will Ingram did willfully, unlawfully, and feloniously conspire or confederate with the defendants, Jake Ellis, Will McClure, Henry Taylor, or any one of them, or with other person, or persons, to the grand jury unknown, for the purpose of intimidating, alarming, or disturbing the said Mose Thornton, then they or such one or ones of them as did so unlawfully, willfully, and feloniously conspire or confederate for said purpose of alarming, intimidating, or disturbing the said Thornton, is an accomplice, or accomplices, in the crime charged in the indictment, and the jury cannot convict the defendant upon the testimony alone of such accomplice, or accomplices, unless same be corroborated by other evidence in this case tending to connect the defendant Jake Ellis with the crime charged in the indictment, and such corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. But the court further says to the jury that, if they believe from the evidence beyond a reasonable doubt that the witnesses J. L. Whitlock, Clarence Dyzer, W. B. Stewart, and Will Ingram, or any of them, did not willfully or voluntarily conspire or confederate with the defendants, Jake Ellis, Will McClure, or Henry Taylor, or with any other person or persons to the grand jury unknown, but shall further believe from the evidence beyond a reasonable doubt that they, or any of them, were present at the time and place of such unlawful, willful, and felonious confederation or conspiracy for the purpose of alarming, intimidating, or disturbing said Thornton, and shall further believe from the evidence beyond a reasonable doubt that said witnesses, or any of them, did not willfully and voluntarily go forth for the purpose of alarming, intimidating, or disturbing the said Thornton, with said defendants, or any one or more of them, nor with said unknown person, or persons, or any one or more of them, but were forced and compelled against their will to so conspire and to go forth for the purpose named above, then they or such of them as were so

forced or compelled against their will to conspire or confederate with the parties named above, or any of them, would not be accomplices, and their testimony should be received and considered as the testimony of other witnesses.

"(5) The court further says to the jury that the law presumes the defendant to be innocent until he is proven guilty beyond a reasonable doubt; and, if upon the whole case the jury entertain a reasonable doubt or a reasonable doubt as to any fact necessary to establish his guilt, then he is entitled to an acquittal, and the jury should find him not guilty."

As an exposition of the law of the case we think the foregoing instructions are above criticism; but, on another trial, we suggest that the learned trial judge add to No. 5 an explanation that the facts which would warrant the conviction of the defendant are those so aptly stated in instructions 2 and 3. Ordinarily this precaution would not be necessary; but, as this prosecution is under a statute not often enforced in this state, and as the offense which is charged in the indictment involves the establishment of a multitude of facts, along with which will come unavoidably a vast deal of immaterial matter, we think, as a matter of precaution, lest the jury should be confused, that the suggestion above made be followed.

In the direct examination of the witness Whitlock, he was asked whether or not the person who came to see him at the time Ellis said he would have a person there told him to turn off the switch that night, to which the witness answered, "Yes, sir; he told me to." The commonwealth in its brief insists that the court ruled out this question and answer, but we do not so understand it. The record shows that, when the defendant objected to it and moved to exclude it, the commonwealth offered to withdraw the question and answer. The motion to exclude the whole of the witness' testimony was properly overruled, and we do not understand that the court excluded the question and answer above stated. It was clearly competent, and we see no reason for the withdrawal of it by the commonwealth. The record, however, leaves us in some doubt as to whether it was withdrawn, although it shows that the commonwealth offered to withdraw it. The court did exclude a part of an answer by this witness as to what some one he called "John" told him. As John was not one of the defendants in the case, and there is no evidence that he belonged to the band known as the "Night Riders," or any explanation as to who he was, or what connection he had with the subject-matter under investigation, the court was clearly right in excluding what he said.

The remaining objections of the commonwealth to the admission and rejection of testimony fall into three classes, and, without alluding to the testimony specifically, we can dispose of the objections by discussing them

in a general way in the classes into which they naturally fall.

The commonwealth sought to show by several witnesses that other members of the night riders told them that the defendant Jake Ellis was a night rider. All of these declarations were merely hearsay, and were not admissible to show that the defendant belonged to the band of conspirators mentioned. The rule is elementary that, where a defendant is charged with being a conspirator, evidence must be first shown which, in the absence of contradictory evidence, would establish that he was a member of the band. This evidence may not be direct or positive in its nature, and it may be made up, as it usually is, of isolated or fragmentary facts and circumstances which, when placed together, establish the guilty connection. When this is done, the defendant is chargeable with legal responsibility for all the acts and declarations of his co-conspirators made during the existence of the conspiracy and in carrying it forward to its unlawful ends. But this is not the question here. Here it was sought to be shown that the defendant belonged to the band of conspirators, by hearsay declarations of the conspirators themselves. This evidence, as said before, is clearly incompetent, and the trial judge correctly excluded it.

The second class of the objections made by the commonwealth is that the court excluded all evidence of illegal and wrongful acts done subsequent to the outrage perpetrated upon Mose Thornton. It will be observed that the indictment charges the defendant with being guilty, with others, of a conspiracy to intimidate Mose Thornton. The charge goes no further than this. It is limited to this one act. Now it would be clearly erroneous to permit evidence of acts done by a band of men with whom the defendant is not even charged as being in concert or collusion. So far as the charge in the indictment is concerned, the object of the conspiracy was consummated in the intimidation of Mose Thornton. The evidence must be limited to establishing the charge made in the indictment. It can take no wider range than the indictment warrants. If the commonwealth chose to limit the range of the charge against the defendant to the conspiracy to intimidate Mose Thornton, the defendant had a right to believe, and to rely upon that belief, that he would be required to meet only this charge, and to rebut evidence of the commonwealth against him tending to establish this charge. After the consummation of the conspiracy the acts and declarations of the co-conspirators do not bind each other. It is only while the conspiracy is in progress of consummation that each conspirator is bound by the acts and declarations of all who are in concert with him to perpetrate the unlawful act. Therefore the trial court was clearly right in excluding all testimony of

acts done and declarations made subsequent to the outrage charged in the indictment.

The third objection of the commonwealth relates to certain notes found on the defendant Ellis while in jail. A. S. Brooks, who held the position of city marshal of Murray, was introduced by the commonwealth, and testified that he went to the jail with Joe Bell, who ostensibly desired to give Ellis, and certain other prisoners in jail with him, some tobacco; that while standing at the window putting the tobacco through the bars, the prisoners "started to poke some notes through the bars. Mr. Bell went to take them, and saw me looking at them, and he dropped his hand by his side, and wouldn't take them, and they fell on the floor." Afterward L. W. Holland, a policeman, testified that he searched Jake Ellis while in jail and found the notes in his pocket. The witness had the notes in his possession, and the commonwealth offered to introduce them in testimony. Upon objection the court ruled them out. They were, however, filed with the stenographer for the purpose of testing their competency in this court. They are as follows:

No. 1: "Go to Bud Hall and tell him and Elbert Hall and Bruce Holland to say that me and Bob Duncan was at my home Wednesday night, April the first. [Signed] D. E. Thompson.

"And for Bruce to say the same and say my wife was sick on that night."

No. 2: "Joe you go to old Wilce Reeds and tell him to swear that I come to his house the night of the 26 of March to rent some land I was gone about 1 hour and a half and I got Fan Ellis to stay with Ella & the children while I went down hire and I told them that was going down hire rent some land and they will swear that and I want Reed to swear that I was thire on that date & I will come through all right. You press that man clost on that. [Not signed.]"

No. 3: "Dr. Blaylock and Clay Garland and I want you for witness. You know that you was at my house on that date to see my baby on the 23rd of March. [Signed] H. C. L."

No. 4: "Joe you post father and sister to swear that I was at home on the 23 of March. [Signed] damas m."

We think these notes were competent evidence against the defendant Ellis. They tell their own story, and show that the writers were preparing to arrange for the evidence of alibis when their trial came on. We do not comment upon their value as evidence; we simply say that they were competent for whatever they are worth as against the defendant upon whose person they were found by the officers of the law.

It is unnecessary for us to pass upon the action of the trial court in excluding certain

evidence which should have been offered in chief, but which was tendered after the defendant's evidence was in. Upon another trial the commonwealth can introduce this evidence in the proper order, and it would serve no good purpose for us to notice the ruling further. The same can be said as to the rulings of the court in excluding the evidence of certain witnesses who had remained in the court room in violation of the rule of the court in ordering a separation of the witnesses. This matter is largely in the discretion of the trial court, and parties who do not desire to suffer by the operation of the rule should exercise some diligence in seeing that their witnesses obey it. All of which is certified, as by law required, to the trial court.

NUNN, J. (dissenting). The only point of difference between myself and Associates grows out of the language of the opinion concerning the letters found in the possession of Ellis. I agree that it was proper to introduce the letters, but am of the opinion that the trial judge should at the time have admonished the jury that they were not to be considered as evidence against him, unless the jury believed that the commonwealth had by evidence connected him in some way with the writing or composition of the letters, and had reference to the charge laid in the indictment.

BUTTON v. CITY OF LOUISVILLE et al.
(Court of Appeals of Kentucky. May 11, 1909.)

1. MUNICIPAL CORPORATIONS (§ 669*)—OBSTRUCTION OF STREETS—RIGHTS OF ABUTTING OWNERS.

An abutting owner may make a reasonable use of the street in improving his property, provided the obstruction is not forbidden by the municipal authorities, and such authorities cannot legalize an obstruction which is unreasonable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1445; Dec. Dig. § 669.*]

2. MUNICIPAL CORPORATIONS (§ 669*) — OBSTRUCTION OF STREETS—RIGHTS OF ABUTTING OWNERS.

The court, in determining whether the obstruction of a street by an abutting owner improving his property is unreasonable, will give weight to the judgment of the city authorities and to the universal custom in the erection of buildings in cities.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1445; Dec. Dig. § 669.*]

3. RELEASE (§ 29*) — OF ONE OF SEVERAL JOINT TORT-FEASORS—EFFECT.

Where one having a cause of action against three defendants received from one of them as much money as the proof authorized him to recover in any view of the case, the court did not err in instructing the jury to find for the other defendants.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 64; Dec. Dig. § 29.*]

dismissal, plaintiff appeals. Affirmed.

Chas. Carroll, for appellant. O'Neal & O'Neal, for appellees.

HOBSON, J. E. N. Button had a grocery store on the north side of Green street, about midway between Fourth and Fifth streets. The Jefferson Realty Company owned a lot on the west corner of Fourth and Jefferson streets and running back to Green street. It erected on this lot what is now known as the Paul Jones Building, after the theater which had stood formerly on the lot was burned. While the building was going up the sidewalk on Green street and a part of the street itself was obstructed so that customers could not get into Button's store from that direction, and by reason of the obstruction of the gutter from building material the water was backed up in front of his house. He brought this suit against the city of Louisville, the Jefferson Realty Company, and the contractor, Herman Probst, to recover damages. The defendants filed an answer denying the allegations of the petition. After the answers were filed, and before the case came on for trial, a settlement was made between the Jefferson Realty Company and the plaintiff, by which it paid him \$250 in settlement of his claim against it. At the conclusion of the evidence for the plaintiff on the trial, the circuit court instructed the jury peremptorily to find for the other two defendants; and this having been done, and the plaintiff's petition having been dismissed, he appeals.

The citizen has a right to the use of the street or the right to complain if any unreasonable obstruction is placed in it, but this right to the use of the street is subject to the right of the owner of property to a reasonable use of the street in improving his property. How far the property owner may obstruct the street in improving his property depends upon the circumstances. He may not make an obstruction which the municipal authorities forbid, but the consent of the municipal authorities will not legalize an obstruction which the law forbids; that is, it will not authorize an unreasonable obstruction of the street. But the obstruction of sidewalks in front of large buildings which are in process of erection is unavoidable, and considering the size of the building and all the circumstances, the obstruction of the sidewalk, and of a part of the carriageway, as was shown here, next to the sidewalk, was not unreasonable. When the property was used as a theater, the cellar had been extended out under the sidewalk.

It is true that the obstruction continued here for about a year; but the building was a large one, and in the erection of such buildings an obstruction of the sidewalk and a part of the carriageway is, if not unavoidable, so common that it cannot well be said to be unreasonable. The property owner who fronts upon a street takes his rights in it subject to such obstructions as may be reasonably made, and it is hard to see how improvements could be made in cities if obstructions of the street to the extent that they were authorized by the city here were held unlawful. In matters of this sort some weight must be given the judgment of the municipal authorities and to the universal custom in the erection of buildings in cities. We therefore conclude that the plaintiff showed no right to recover against either Probst or the city on account of the obstruction of the street.

There was some evidence showing that the water had been dammed up in front of his house and had run over the pavement and into his cellar; but the damages shown from this did not amount to as much in any view of the proof as he had been paid by the Jefferson Realty Company; and, as he had received from one of the defendants as much as the proof offered by him authorized him to recover in any view of the case, the circuit court did not err in instructing the jury peremptorily for the other defendants. Louisville Mail Company v. Barnes' Adm'r, 117 Ky. 875, 79 S. W. 261, 64 L. R. A. 574, 111 Am. St. Rep. 273.

Judgment affirmed.

COMMONWEALTH v. McNUTT.

(Court of Appeals of Kentucky. May 5, 1909.)

1. SEDUCTION (§ 36*)—CRIMINAL RESPONSIBILITY—SUBSEQUENT MARRIAGE.

Under Ky. St. 1909, § 1214 (Russell's St. § 3790), providing that one seducing a female under 21 years of age shall be guilty of a felony, but that no prosecution shall be instituted where accused shall have married the female unless he shall without such cause as constitutes ground for divorce desert her within three years after the marriage, one seducing a female within the statute, and who subsequently marries her, may be indicted and punished, unless he brings himself within the exceptions.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. § 62; Dec. Dig. § 36.*]

2. INDICTMENT AND INFORMATION (§ 111*)—SUFFICIENCY—LANGUAGE OF STATUTE—EXCEPTIONS.

Under Cr. Code Prac. §§ 122, 136, providing that the indictment shall contain a statement of the acts constituting the offense, and that the words used in the statute need not be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 295; Dec. Dig. § 111.*]

8. SEDUCTION (§ 39*)—SUBSEQUENT MARRIAGE—ABANDONMENT—PRIMA FACIE CASE.

One charged with seduction under Ky. St. 1909, § 1214 (Russell's St. § 3790), providing that no prosecution shall be instituted where accused shall have married the female seduced unless he shall, without cause constituting a ground for divorce, desert her within a specified time, may show any ground he had for abandoning the female seduced after his marriage to her, but the prosecution shows a prima facie case by evidence that the female after the marriage behaved toward him properly, and that he abandoned her without apparent cause.

[Ed. Note.—For other cases, see Seduction, Dec. Dig. § 39.*]

4. STATUTES (§ 138*)—AMENDMENT—IDENTIFICATION OF ACT AMENDED.

A section of the Kentucky Statutes may be amended by its section number.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 206; Dec. Dig. § 138.*]

5. STATUTES (§ 138*)—AMENDMENT—CONSTITUTIONAL PROVISIONS—IDENTIFICATION OF AMENDED ACT.

Acts 1906, p. 253, c. 25, entitled "An act to amend section 1214 of the Kentucky Statutes," sets out the words which are added to the section, and then sets out in full the section as amended. A discrepancy occurs between the old section when the words are added to it as set out in the act and the section as amended as set out in the act. *Held* that, since the act declares that the section shall read as therein written, the amendment is valid within Const. § 51, providing that no law shall be amended by reference to its title only, but so much thereof as is amended shall be re-enacted and published at length.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 205; Dec. Dig. § 138.*]

Appeal from Circuit Court, Jefferson County, Criminal Branch.

"To be officially reported."

Laurence E. McNutt was indicted for seduction, and from a judgment sustaining a demurrer to the indictment the Commonwealth appeals. Reversed and remanded.

James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth. Chatterson & Blitz, for appellee.

HOBSON, J. Section 1214, Ky. St. (Russell's St. § 3790), is in these words: "Whoever, shall, under promise of marriage, seduce and have carnal knowledge of any female under twenty-one years of age, shall be guilty of a felony and, upon conviction thereof, shall be confined in the penitentiary not less than one year nor more than five years. No prosecution shall be instituted where the person charged shall have married the girl seduced, or offer and be willing to marry her, unless he shall willfully and

suspended in the party accused marry the girl seduced before final judgment; but the prosecution shall be renewed and proceed as though no marriage had taken place if the accused shall willfully and without such cause as constitutes a statutory ground of divorce to the husband abandon or desert his wife within three years after the marriage. All prosecutions under this section shall be instituted within four years after the commission of the offense." Laurence E. McNutt was indicted under this statute for seducing Mattie Lee Kesler. It was charged in the indictment that he promised to marry her, and under this promise of marriage seduced her in the year 1907; that in August, 1908, he married her, and in the same month without cause as defined in the act abandoned and deserted her. The circuit court sustained a demurrer to the indictment on the ground that he had married the girl before the indictment was found. The commonwealth appeals.

Previous to the act of 1906 (Acts 1906, p. 253, c. 25) the provision of the statute on this subject was as follows: "No prosecution shall be instituted where the person charged shall have married the girl seduced." Under this provision it was held by the court that if the defendant offered in good faith and was willing to marry the girl, and she refused to marry him, there could be no prosecution, and so by the act of 1906 these words were added, "or offer and be willing to marry her." But another mischief had come up. Men in this character of cases would marry the girls seduced as a matter of form and immediately abandon them, thus defeating the obvious intent of the Legislature; and so by the act of 1906 these words were added, "unless he shall willfully and without such cause as constitutes a statute ground of divorce to the husband, abandon or desert her within three years after the date of the marriage." The purpose of the Legislature was manifestly to provide that a mere form of marriage should not defeat the prosecution, and it is entirely immaterial whether the marriage takes place before the indictment is found or afterwards. The statute provides, in substance, that no prosecution shall be instituted where the defendant has married the girl, unless within three years after the date of the marriage he abandons her without cause for divorce. If the defendant has committed the offense, and he does not bring himself within the exception, he may be indicted and punished, as a prosecution will lie in every case covered by the statute, which is not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

guage of the statute, and it has been held in a number of cases of this sort that such indictments are sufficient. The defendant may show any ground that he had for abandoning or deserting his wife. But the prosecution will make out a prima facie case when it shows that his wife behaved toward him properly after the marriage, and that he abandoned her without apparent cause. To set out in the indictment all the statutory grounds of divorce to the husband and negative their existence would lead to too great prolixity. This would enlighten the defendant in no respect as to the nature of the accusation against him, and would be of no help to him in making his defense. If any of these grounds exist, this is a matter presumably within his knowledge, and so the general negative allegation following the language of the statute is sufficient. *Higgins v. Commonwealth*, 94 Ky. 54, 21 S. W. 231. The indictment contains "a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment, on conviction, according to the right of the case," as required by section 122 of the Criminal Code of Practice. Section 136 also provides: "The words used in a statute to define an offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used." The act of 1906 (see Acts 1906, p. 253) is not unconstitutional. It has been held in a number of cases that a statute may be amended by its title, and that a section of the Kentucky Statutes may be so amended. *City of Paducah, Ex parte*, 125 Ky. 510, 101 S. W. 898, and cases cited. It is true that in the first part of the act words are set out as added to the statute which are changed in the latter part of the statute, where the statute as amended is set out in full. The reason of this evidently was that the words, "without just cause," were too indefinite, and the act was amended so as to substitute for them "without such cause as constitutes a statute ground for divorce." The amended words were substituted in the latter part of the act where the statute as amended is set out in full, but by oversight the act as it was originally written is left unchanged in the opening clause where the words to be added are set out. When the whole act is read, it is manifest what the Legislature meant. Section 51 of the Constitution provides: "No law shall be revised, amended, or the provisions thereof extended

in full in the act. The preceding part of the act was merely intended to show how the result was reached. The fact that there is a discrepancy between the old section when the words were added to it which are proposed in the first part of the act and the section as amended which is set out in the latter part of the act is immaterial. The act declares that the section shall be read as therein written, and this is the law.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

CLOS' ADM'R et al. v. CLOS.

(Court of Appeals of Kentucky. May 5, 1909.)
WILLS (§ 601*)—CONSTRUCTION—ESTATE BEQUEATHED—FEE—LIMITATION OVER—VALIDITY.

Testator declared that all his property, real and personal, should be transferred to his wife to do with as she chose, and, "should she die before she has arranged matters, then the above mentioned is transferred to the children." *Heid*, that the wife took a fee, and not a life estate, so that the clause quoted construed as a limitation over in case the wife died without having consumed or disposed of the property was void, as an attempt to impose a limitation on a fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340-1350; Dec. Dig. § 601.*]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Jacob Clos' administrator and others against Grace Clos to construe the will. Judgment for defendant, and plaintiffs appeal. Affirmed.

Jas. C. Wright, for appellants. Horace W. Root and B. F. Graziani, for appellee.

O'REAR, J. The will of Jacob Clos is as follows:

"Highland Campbell county Kentucky. January 26, 1899.

"Be it known that I, Jacob Clos, hereby declare that all my personal and real property which I possess, in case I should die, shall be transferred to my wife Louise Clos (née Krummel) so that she without giving bond and without the intervention of any court may do with the bequeathed property realty, monies or valuables as she may choose or deem fit.

"Should she die, before she has arranged matters, then the above mentioned is transferred to the children.

"I further make known and public that those children who have borrowed from me for which I hold their notes, shall be chargeable in the division as stated by said notes, so that the children who have not borrowed shall be equal with the others.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"In case any of my children should have died, leaving children his or their share shall go to his or their children.

"Being of sound mind and memory I declare this to be my last will and testament. "Jacob Cloa."

The question presented for decision is whether the widow of the testator took a fee simple in the estate devised, or whether it was a life estate, with the power of appointment, failing which the children and descendants of the testator took in remainder. We think the widow took a fee-simple title. The unconditional power of disposition annexed to the devise to her creates the highest estate known to the law. Just what the testator had in mind by the expression "should she die before she has arranged matters" cannot be known. What matters he had reference to, or what arrangement he contemplated, cannot be gathered with any certainty from the writing. A number of conjectures arise, but which of them would be correct we have no way of determining. If he contemplated that his widow should die without having consumed or disposed of the property, then the attempt to dispose of it by the will is not allowed; for a limitation cannot be imposed upon a fee-simple title. Had he created a life estate in his widow, with power of appointment, it would have been competent for the testator to have anticipated the failure of the life tenant to exercise the power, and to have provided against that contingency. But we cannot say that such was his purpose; for he did not create a life estate in the widow. While it is the law of wills that the testator's intention, as gathered from the whole instrument, construed in the light of his surroundings, is to prevail, it is subject to the condition that the intention shall be consistent with the law of the land. It is not within the power of a testator who gives one the fee-simple title to then impose a limitation upon that fee. If such was the intention of the testator (and that is the utmost we can construe it to have been), it was ineffectual as being in contravention of the law. *Becker v. Roth* (decided January 29, 1909, Ky.) 115 S. W. 761.

Such was the judgment of the circuit court, and it is affirmed.

ROY v. ALLEN'S ADM'R.

(Court of Appeals of Kentucky. May 6, 1909.)

1. INFANTS (§ 80*)—APPOINTMENT OF GUARDIAN AD LITEM—PREREQUISITES.

Under Civ. Code Prac. § 38, providing that no appointment of a guardian ad litem shall be made until the defendant has been summoned or some person summoned for him as allowed by section 52, the appointment of a guardian ad litem for an infant defendant who is not sum-

moned, and for whom no person is summoned, is void.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 214; Dec. Dig. § 80.*]

2. INFANTS (§ 80*)—APPOINTMENT OF GUARDIAN AD LITEM—EFFECT OF INVALID APPOINTMENT.

A judgment ordering the sale of lands of a decedent's estate to pay a debt, rendered in a suit in which decedent's children were represented by a guardian ad litem whose appointment is void because of failure to summon the infants, or some one for them, is invalid.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 214; Dec. Dig. § 80.*]

3. EXECUTORS AND ADMINISTRATORS (§ 349*)—SALE OF DECEDENT'S PROPERTY—INVALIDITY OF PROCEEDINGS—PARTIES ENTITLED TO ASSERT.

Where a judgment ordering the sale of lands of a decedent's estate to pay a mortgage debt is void because of failure to summon the infant defendants, the invalidity of the judgment can be asserted by the mortgagee, who was also a defendant, where the sale under the judgment destroyed his lien and realized less than the debt, interest, and costs, and where it was not shown that the failure to serve the infant defendants was due to any fault of his.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1446; Dec. Dig. § 349.*]

4. EXECUTORS AND ADMINISTRATORS (§ 348*)—SALE OF DECEDENT'S PROPERTY—INVALIDITY OF PROCEEDINGS—MODE OF RAISING OBJECTIONS.

The proper course for a mortgagee to pursue on sale of property to pay the mortgage debt under a void judgment in proceedings in which the mortgagee was a party defendant, which sale brought less than the mortgage debt, interest, and costs, and destroyed the mortgage lien, is to move to set aside the invalid judgment, and, on the overruling of the motion, to appeal therefrom.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1448; Dec. Dig. § 348.*]

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by A. E. Allen's administrator for the settlement of the estate of decedent. From a judgment overruling a motion to set aside an order authorizing the sale of decedent's realty to pay a mortgage debt, the mortgagee appeals. Reversed and remanded.

James Denton, for appellant. Sharp, Bethurum & Cooper, for appellee.

CLAY, C. A. E. Allen, husband of Lela V. Allen, died, intestate, in Pulaski county, Ky. At the time of his death he owned a small tract of land which he had previously mortgaged to appellant, W. M. Roy. Upon the death of A. E. Allen, J. H. Allen, his brother, qualified as his administrator, and thereafter instituted this action for a settlement of the estate of the deceased. Appellant, W. M. Roy, was made a party defendant, as were also the widow and infant children of the deceased. The infant children were all under 14 years of age. Summons was properly issued for defendants Lela V. Allen and W. M.

Roy, but no summons was issued for the infant defendants. Both the adult defendants answered before judgment was entered, and R. L. Brown, a practicing attorney of the Pulaski circuit court, was appointed guardian ad litem to defend for the infant defendants. After his appointment he filed his report, stating that he had examined the record in the case, and investigated the facts, and was unable to make a defense for the infant defendants. He further stated that in his opinion the sale of the real estate, or a sufficiency thereof to pay Roy's mortgage debt, would be of benefit to the infants. After this report judgment was entered directing a sale of the property and requiring the commissioner to report said sale at the next term of court. The commissioner advertised the sale for the 16th day of March, and on March 19th, which was during the same term, he filed his report of sale. On the same day the following order was entered: "It appearing that the commissioner of this court has made his report of land sold herein, and the same having laid over for exceptions, and none having been filed, it is ordered by the court that said report be now ratified and confirmed." The land was purchased by Lela V. Allen, the widow of decedent, for the price of \$700. Appellant's debt, at the time of the sale, was about \$770. Before the next term of court, notice was served on the purchaser and the plaintiff that appellant, Roy, would, on the third day of the next term, move the court to set aside the order confirming the commissioner's report, and also to treat as void all other orders and judgments of the court entered in the action. This motion was made at the time, but the court did not finally dispose of the same until the October term, 1908, when the motion was overruled. From that judgment this appeal is prosecuted.

It is insisted by appellant that the judgment ordering the sale of the property in question is void. The reason assigned is this: No summons whatever was ever issued against the infant defendants, nor was section 52 of the Civil Code of Practice complied with; that being the case, the court had no power to appoint a guardian ad litem, as section 38 of the Code provides that no appointment of a guardian ad litem shall be made until the defendant is summoned, or until a person is summoned for him, as is authorized by section 52. Undoubtedly appellant's contention is correct. The infant defendants had no statutory guardian. Therefore it was necessary to have a guardian ad litem appointed. No guardian ad litem could be appointed until service was had, in accordance with section 52. Not only was service not had, as therein provided, but no summons was issued at all against the infant defendants. They were not therefore parties to the suit. Our conclusion, then, is that the judgment of sale is absolutely void.

The next question is: Can appellant, Roy, complain of the void judgment? It appears that the sale brought less than appellant's debt, interest, and cost. As the infant defendants were not before the court, it is manifest that the only interest in the tract of land actually sold was the interest belonging to the widow of the decedent. Appellant's lien, by the judgment of the court, is extinguished and destroyed. He cannot subject the interest of the infant defendants in another action. Being a party to the action, and being interested in having the whole title to the property involved sold, we are of opinion that he has a right to complain of a judgment that is void as to the principal owners of a tract of land embraced in his mortgage and which is sought to be sold in the action. Furthermore, the record does not disclose the fact that the failure to serve process on the infant defendants was due to any fault on his part.

The next question is: Did appellant pursue the proper course? We are of opinion that he did. The judgment being void, it was proper, under section 763 of the Civil Code of Practice, to move to set it aside before taking an appeal to this court.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. MOTTLEY et ux.

(Court of Appeals of Kentucky. May 4, 1909.)

1. STATUTES (§ 263*)—CONSTRUCTION—PROSPECTIVE CONSTRUCTION.

Statutes will not be given a retrospective construction, unless the language precludes a reasonable doubt that the Legislature intended a prospective construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 844; Dec. Dig. § 263.*]

2. CARRIERS (§ 23*)—REGULATIONS—CONSTRUCTION—RETROSPECTIVE OPERATION.

Act Cong. June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), prohibits any common carrier from directly or indirectly giving any interstate free transportation for passengers. Section 2 prohibits carriers from charging any different compensation for carrying passengers between points named in its tariff, as filed, than the fare specified therein, or from refunding any part of the fares, or from extending to any person any privileges except as specified in such tariff. *Held*, that the statute applied to the contract under which any pass, etc., was issued, and not simply to its issuance, and was not retrospective, so that it would not apply to a contract made in 1871, by which a carrier agreed to issue an annual pass to one injured, in settlement of his claim for damages, though annual passes were issued under the contract after the statute was enacted.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 23.*]

3. CONSTITUTIONAL LAW (§ 48*)—OBLIGATION OF CONTRACTS—IMPAIRMENT—POWER OF CONGRESS—PRESUMPTIONS.

The federal Constitution does not inhibit Congress from impairing the obligation of con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tracts, but the same moral obligation not to enact such unjust laws rests upon it as upon the states, and it will be presumed that Congress did not intend to impair contract obligations, unless a clear intent to do so appears.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

4. CARRIERS (§ 35*)—STATUTORY REGULATION—FEDERAL ANTI-PASS LAW—"FREE PASSES."

Annual passes, issued pursuant to a contract by which a carrier agreed to issue an annual pass for life to one injured by it in settlement of his claim for damages, are not "free passes" within Act Cong. June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), prohibiting any common carrier from directly or indirectly giving any interstate free pass or ticket for passengers except to employes, nor did the contract violate section 2, prohibiting carriers from charging any different compensation between points named in its tariff than the fare specified therein, or from extending to any person any privileges except as specified in its tariff; it not appearing that the contract discriminated in favor of the person injured.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. § 85.*]

For other definitions, see Words and Phrases, vol. 3, p. 2967.]

5. CARRIERS (§ 253½*)—CARRIAGE OF PASSENGERS—PASSES—LEGALITY.

A contract made in 1871, by which an interstate common carrier agreed to issue annual passes for life to one injured, in settlement of his claim for damages, was legal and valid when made.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1019; Dec. Dig. § 253½.*]

Appeal from Circuit Court, Warren County.

"To be officially reported."

Action by Erasmus L. Mottley and wife against the Louisville & Nashville Railroad Company to compel specific performance of a contract of carriage. From a judgment for plaintiffs, defendant appeals. Affirmed.

See, also, 150 Fed. 406; 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. —.

Henry L. Stone and Sims, Du Bose & Rodes, for appellant. Clarence U. McElroy, Wright & McElroy, and G. Duncan Milliken, for appellees.

BARKER, J. In 1871 the appellees, Erasmus L. Mottley and Annie E. Mottley, his wife, were seriously injured in an accident occurring to one of appellant's passenger trains while they were being transported as passengers from their home, in Bowling Green, to Louisville, Ky. In full settlement of all claims for damages on the part of the appellees, the appellant agreed, in writing, to furnish them free transportation over its line for the remainder of their lives. The contract is as follows: "Louisville, Ky., Oct. 2, 1871. The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released said company from all damages or claims for damages for injuries received

by them on the 7th of September, 1871, in consequence of a collision of trains on the road of said company at Randolph's Station, Jefferson county, Ky., hereby agrees to issue free passes on said railroad and branches, now existing or to exist, to said E. L. Mottley and wife, Annie E. Mottley, for the remainder of the present year and thereafter to renew said passes annually during the lives of said Mottley and wife, or either of them. Thos. J. Martin, Vice President Louisville & Nashville Railroad Company. Willis Raney, Secretary. [Seal.]" This contract was faithfully carried out by the appellant until after the enactment by the Congress of the United States, on June 29, 1906, of "An act to amend an act, entitled an act to regulate commerce, approved February 4, 1887" (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]), When, becoming apprehensive lest the further issuance of passes to appellees under the contract was within the prohibition of the act of Congress, it declined to carry out its agreement any further, whereupon the appellees first instituted an action for the specific enforcement of the contract in the Circuit Court of the United States for the Western District of Kentucky, where a judgment was rendered as prayed for in the petition. *Mottley v. L. & N. R. Co.* (C. C.) 150 Fed. 406. But upon appeal to the Supreme Court of the United States this judgment was reversed upon the ground of want of jurisdiction in the federal court to entertain the cause of action. See *L. & N. R. Co. v. Mottley*, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. —. Whereupon the appellees instituted this action in the Warren circuit court, with the result that a judgment was rendered requiring the appellant to perform the contract. To review this judgment this appeal has been prosecuted.

The Louisville & Nashville Railroad Company is a common carrier engaged in the business of interstate and intrastate commerce, and the specific performance of the contract in question involves both interstate and intrastate commerce. Therefore one of the questions arising upon this record is whether or not the contract is specifically enforceable under the provisions of the act of Congress before referred to, and which is fully pleaded and relied upon by the appellant as a bar to appellees' cause of action. So much of the federal statute pleaded by the appellant as is deemed necessary to be herein set forth is as follows:

"Section 1. * * * No common carrier subject to the provisions of this act shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employes.

"Sec. 2. * * * No carrier, unless other-

wise provided by this act, shall engage or participate in the transportation of passengers, or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of the act; nor shall any carrier charge, or demand, or collect, or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner, or by any device, any portion of the fares, rates and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. * * *

The violation of these sections of the statute is punishable by heavy fine.

No question of the good faith of the parties in making the contract is raised, and the length of time it has existed prior to the enactment of the federal statute precludes the possibility of any intent to evade its provisions. The first question, then, arising upon the record is whether or not the Congress, in the enactment of the statute, intended to abrogate existing contracts such as the one in question—in other words, whether the statute was intended to be retroactive in its effect on pre-existing contracts, or whether it was intended to be prospective in its effect—and, second, whether or not the contract in question is within the purview of the federal statute at all.

The rule is well settled that statutes will always be construed to be prospective, and not retrospective in their effect, unless the language so plainly expresses a retrospective intent as to preclude a reasonable doubt that the Legislature meant it to be prospective. Cooley, in his work on Constitutional Limitations, in speaking of this rule of construction (page 529), says: "Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." And Endlich, in his work on the Interpretation of Statutes (section 271), uses this language: "Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. * * * They are construed as operating only on cases or facts which come into existence after the statutes were passed, unless a retrospective effect be clearly intended." There is nothing in the language of the enactment by Congress, under discussion, which purports to give a retrospective effect to its

operation; on the contrary, the intent that the statute should have a prospective effect only appears from a most cursory reading of the language used, unless it is applied to the actual issuance of the passes and not to the contract under which they are issued. We do not think it admissible to so construe the language of the statute as to hold that it applies simply to the issuance of a pass or ticket for transportation, rather than the contract under which the pass is issued. It is true that, in the execution of the contract made in 1871, it has been the custom of the railroad company to issue passes to the appellees annually, and therefore, if we fix our attention exclusively upon this annual issuance of tickets for transportation, it might seem that these fall within the letter of the statute because they are actually issued since the enactment; but this narrow view of the matter is inadmissible. The passes or tickets actually issued are in execution of the contract made in 1871, and, unless this contract is invalidated by the statute, its language cannot be applied to the mere issuance of the tickets. If the contract remains legally in force, the means by which it is executed cannot be invalid or illegal.

Passing now to the second question, we are of opinion that the contract between the appellant and the appellees does not fall at all within the meaning of the language used in the statute. The statute inhibits the issuance by common carriers doing interstate commerce of free tickets or passes for transportation, except to employes. The tickets or passes issued to the appellees in execution of the contract cannot in any real sense be called free. They are paid for in money, just as certainly as if the actual cash was handed over to the agent of the railroad by the appellees in payment for a trip ticket. The appellees had received serious bodily injuries caused by the negligence of the railroad, and the latter was liable to them for damages, which, unless the matter was settled amicably, would have to be liquidated by the verdict of a jury and the judgment of a court. It was entirely competent for the parties thus standing towards each other to settle this unliquidated claim or demand for money and agree upon its value. They did so, and it was stipulated that the amount of damages suffered by appellees was equal in value to such transportation as they should afterwards choose to make over its line during their natural lives. At the time this agreement was made, it was entirely legal and valid, and, as said before, it was made in absolute good faith by the parties. Now, suppose, instead of carrying out the contract in the manner adopted, the railroad had agreed that it was liable to appellees for the sum of \$10,000, and had paid over to them that sum, and then appellees had chosen, as they might have done, to hand back the amount received, and thus purchased from the railroad with

actual cash transportation for life—would tickets issued under this agreement be called "free tickets," or "free passes"? We think not, and yet it would be difficult to find a difference in principle between the contract actually made and that supposed. It does not require more than a slight investigation to reach the conclusion that the contract made by the parties was very much to the advantage of the railroad as against the payment by it of such sum as the jury might assess in actual cash if the matter had progressed to a judgment for damages.

It may be admitted, for the purposes of this case, that Congress could have framed the statute so as to abrogate the contract under discussion. There is no constitutional inhibition upon Congress passing laws to impair the obligation of contracts as there is against the states passing such laws; but the same moral obligation against such unjust laws rests upon the general government as upon the state government, and we must presume that the general government never intends to impair the obligation of existing contracts, unless an imperative necessity exists for so doing, and a clear intent to do so is expressed. It would be a great hardship upon appellees to invalidate the contract between them and appellant. The time has long since passed under the operation of the statute of limitations, when they could institute or maintain an action against the railroad for the injuries received by them in 1871, so that if the contract is invalidated now, they would lose absolutely what remaining value it has. This property right will be taken from them without any consideration, and we would be justified in reaching the conclusion that Congress intended to invalidate the contract and thus take from appellees their property rights without remuneration only because the language used precludes any other construction.

In the case of *United States v. Kirby*, 74 U. S. 486, 487, 19 L. Ed. 278, the Supreme Court said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will also therefore be presumed that the Legislature intended exceptions to its language, which would avoid results of that character. The reason of the law in such cases should prevail over the letter." In the case of *Carlisle v. United States*, 16 Wall. 153, 21 L. Ed. 428, the rule is thus stated: "All general terms in the statutes should be limited in their application, so as not to lead to injustice, oppression, or unconstitutional operation, if that be possible. It will be presumed that the exceptions were intended which would avoid results of that character." And in *Market Co. v. Hoffman*, 101 U. S. 116, 25 L. Ed. 782, it was said: "In *Brewer's Lessee v. Blougher*, 14 Pet. 178, 10 L. Ed. 108, it was said to be the undoubted duty of the court to ascertain the meaning

of the Legislature, from the words used in the statute and the subject-matter to which it related, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of the language would extend to cases which the Legislature never designed to include in it." See, also, *Chew Heong v. United States*, 112 U. S. 555, 5 Sup. Ct. 255, 28 L. Ed. 770; *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Bate Refrigerator Co. v. Sulzberger*, 157 U. S. 37, 15 Sup. Ct. 508, 39 L. Ed. 601.

As we have said before, the very case we have here was decided in the Circuit Court of the United States for the Western District of Kentucky in favor of the appellees. *Mottley v. L. & N. R. R. Co.*, supra. It is true, the judgment was reversed by the Supreme Court of the United States because of want of jurisdiction in the federal court to entertain the cause of action set up by appellees; but we think the painstaking and thorough opinion rendered by the learned federal judge upon the merits of the case is very instructive, and we rely upon it with confidence. Nor are we unmindful of the opinions in *Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co.*, 38 Mo. App. 191, and *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 22 Atl. 76, 77, 13 L. R. A. 70, which hold that existing traffic contracts discriminating as to rates between shippers were repealed by the interstate commerce act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 8154]). The opinions in these cases rest, in part, at least, upon the fact that the discriminating contracts by common carriers between their patrons were illegal at the common law, and could not be upheld in any event; but, without examining this phase of the case too minutely, it is sufficient to say that, in our opinion, they can be distinguished from that at bar. Those contracts were wholly executory, and fell within the precise reason for the enactment of the act of Congress prohibiting discrimination in interstate commerce. In the case at bar the appellees' part of the contract was entirely executed. They had paid over to the railroad company the whole consideration moving from them for the contract. To annul this contract now would be to confiscate the consideration paid by them. Nor was that contract in any wise illegal or questionable at the time it was made. On the contrary, as we understand it, it was entirely legal and valid. There is nothing in this record to show that the contract in any wise discriminates in favor of appellees. On the contrary, we think it highly probable that they pay for their railroad transportation under its terms a very much larger sum in money than the ordinary passengers do. In other words, judging from ordinary experience in such cases, where neither the liability nor the extent of

which they actually receive in the contract. Of course, this is somewhat problematical; but, as the railroad thought it was to its interest to make the contract, we cannot believe that our supposition is overstrained.

For these reasons we are of opinion that the contract under discussion does not fall within the terms of the federal statute, and that the judgment of the trial court should be affirmed, and it is so ordered.

DEThERAGE v. HAWN.

HAWN v. LUNSFORD et al.

(Court of Appeals of Kentucky. May 6, 1909.)

1. SALES (§ 366*)—ACTION FOR PRICE—PLEADING—CONSTRUCTION.

Where a petition in an action for the price of an engine alleged that under the original contract of sale between the seller and the buyer the engine was to be paid for in lumber, but that after sawing the lumber that the seller was to receive the buyer and his partners appropriated it to their own use and then promised to pay the price in money, plaintiff was entitled only to a money judgment, as he abandoned his right to recover the lumber and rested his case upon the ground that the first contract under which he was to receive lumber was merged in the contract under which he was to be paid in money.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1078; Dec. Dig. § 366.*]

2. SALES (§ 348*)—ACTION FOR PRICE—RIGHT TO COUNTERCLAIM.

Where an original contract for sale of an engine, which provided that it should be paid for in lumber, was modified, and it was agreed that it should be paid for in money, and that out of the money due the seller the buyer and his partners would satisfy a mortgage on the engine, paying the seller the balance, in an action for the price of the engine the buyer and his partners could not counterclaim for damages from the seller's failure to take the lumber or from decay of the lumber caused by delay in removing it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 973; Dec. Dig. § 348.*]

3. SALES (§ 348*)—ACTION FOR PRICE—COUNTERCLAIM.

Where a buyer, when purchasing an engine, knew of a defect therein, and that the engine was mortgaged, and he and his partners promised to satisfy the mortgage, they could not counterclaim, in an action for the purchase price, because of the defect or mortgage, and where, instead of paying the mortgage before sale of the engine thereunder and obtaining credit on the purchase price for the sum so paid as permitted by the contract of sale, they allowed the engine to be sold, the seller purchasing it, they could counterclaim only the amount it sold for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 973; Dec. Dig. § 348.*]

4. SALES (§ 220*)—ACTION FOR PRICE—LIABILITY OF BUYER'S ASSIGNEES.

Where a buyer of an engine sold interests therein to other persons, who assumed as his

Appeal from Circuit Court, Knox County.
"Not to be officially reported."

Action by M. W. Hawn against W. H. Detherage and others. There was a judgment for plaintiff against the mentioned defendant, and a judgment of dismissal as to the other defendants, and plaintiff and the mentioned defendant appeal, respectively, from the judgments against them. Judgment for plaintiff affirmed. Judgment of dismissal reversed, with directions.

Jas. M. Gilbert and James D. Black, for plaintiff. J. M. Robison, for defendants.

CARROLL, J. These two appeals, involving the same question of law and fact, are heard together. To present clearly the issues, we will take from the pleadings the substantial points of difference between the parties.

In April, 1905, Hawn sold to Detherage a sawmill engine for \$775, which sum he alleged Detherage agreed to pay in lumber at the price of \$9 per 1,000 feet for buckeye and \$9.50 per 1,000 feet for other kinds, the lumber to be manufactured at the mill out of logs then at the mill or near by; and, if the lumber so manufactured amounted to more than the price of the engine, Hawn was to have the surplus at the price mentioned. He averred that soon after Detherage purchased the engine, he sold a one-third interest therein to Lunsford, another one-third interest to Lawson, retaining a third himself, and that all of them agreed to carry out the contract made by Detherage, but that in violation of the contract they manufactured the logs into lumber and refused to let him have any of it, but sold the same, promising to pay him in money the price of the engine in place of the lumber. He asked judgment against all three of them for the amount of his debt and interest. Detherage filed a separate answer and counterclaim, in which he admitted the purchase of the engine and the agreement upon his part to pay for the same in lumber at the price stated by Hawn, but denied that he or Lunsford or Lawson ever agreed with Hawn to pay him money in lieu of lumber, and set up that the lumber necessary to pay for the engine was sawed and tendered to Hawn, but he refused to accept the same and permitted it to remain in the lumber yards until it was damaged to the extent of \$400, for which amount he sought judgment on his counterclaim against Hawn. He further set up that one Mason had a mortgage on the engine at the time it was sold to him by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Hawn, of which mortgage lien he had no notice, and furthermore that there was a defect in the engine that greatly impaired its working capacity, and upon this account he also asked damages upon his counterclaim. Lunsford and Lawson also filed answers in which they admitted having bought from Detherage an interest in the engine, but averred that, when they discovered there was a mortgage on it, they rescinded the contract. They further denied any agreement to pay the purchase price or any part of it in money. The Masons came into the case by appropriate pleadings and set up their mortgage lien, and asked for personal judgment against Hawn, and that their lien upon the engine be enforced and the property sold for the purpose of satisfying the same. Other pleadings completed the issues, which are, in substance, as before stated, and in March, 1907, an order was entered directing a sale of the engine to satisfy the lien of Mason, which amounted to some \$600. In May, 1907, the engine was sold under this order, and purchased by Hawn for \$305. A large amount of evidence was taken in support of the respective contentions of the parties, and, the case coming on for hearing, a judgment was rendered in favor of Hawn against Detherage for the amount of the purchase price of the engine with interest, credited by \$305, May 25, 1907, but his petition as to Lunsford and Lawson was dismissed.

It is the contention of Detherage upon this appeal that the judgment should be reversed because: (1) Under the contract the purchase price of the engine was to be paid in lumber and in no other way, and hence it was erroneous to render a judgment for money; (2) that Hawn violated his contract in refusing to accept the lumber, which was tendered to him in payment of the engine; (3) because of a want of consideration growing out of the fact that the engine at the time of the sale was incumbered by a lien and afterwards sold to satisfy it; (4) because the court erred in refusing to award him damages upon his counterclaim growing out of the failure of Hawn to take the lumber when tendered, and his misrepresentations as to the condition of the engine.

Hawn in his petition does state that under the original contract between himself and Detherage he was to be paid in lumber for the engine, but he also states that, after sawing the lumber that he should have received, Detherage and his partners appropriated the lumber to their own use and then promised to pay him in money the price of the engine. A direct issue was made upon this point by the pleadings, and in our opinion Hawn under the pleadings was only entitled to a money judgment, as he abandoned his right to recover the lumber and rested his case upon the ground that the first contract under which he was to receive lumber was

merged in the contract under which he was to be paid in money.

And this brings us to the second point, which involves a question of fact, namely, whether or not the contract was modified as claimed by Hawn. If the contract under which Hawn was to receive lumber in payment of the mill was never modified, and if the purchaser tendered to Hawn the lumber agreed upon in payment of the mill, it would follow as a matter of course that Hawn was not entitled to a money judgment, or indeed to any relief. The evidence upon this issue is very conflicting, but there is sufficient to justify us in sustaining Hawn's theory of the transaction. Three facts stand out prominently in this record. One is that Detherage bought the mill from Hawn for \$775; the other is that neither he, Lunsford, nor Lawson ever paid him a cent; and yet another is that Hawn did not receive any lumber.

In reference to the third point, it is conceded that, at the time the engine was sold, it was incumbered by a mortgage executed by Hawn to Mason; but the evidence tends to show that Hawn notified Detherage of this fact when he sold him the engine, and it is clearly established that the mortgage debt did not amount to as much as Detherage agreed to pay for the engine. So that, even if it should be conceded that Detherage did not know of the mortgage lien when he purchased the engine, yet his rights were not prejudiced by the existence of the mortgage, because he knew of it long before any action was taken by the mortgagee and could at any time have satisfied the mortgage debt out of the amount due Hawn for the property.

In reference to the charge that Hawn practiced a fraud upon Detherage when he sold him the engine by concealing from him the fact that there was a defect in the engine and the further fact that it was incumbered by a mortgage, the weight of the evidence tends to show that Detherage when he bought the engine knew that Mason had a mortgage on it, and the amount of it, and also that there was a defect in it.

Concerning the claim asserted by Detherage for damages growing chiefly out of the fact that Hawn refused to take the lumber, and it was thereby permitted to decay at the mill, we may repeat that in our opinion the evidence conduces to show that the trade by which Hawn was to take the lumber in payment of the engine was so modified as that he should be paid in money, and hence it follows as a matter of course that Detherage cannot assert any claim for damages against Hawn on account of his failure to take the lumber. It is further shown by the evidence, and without contradiction, that Detherage, Lunsford, and Lawson, or one of them, sold nearly all of the lumber.

To sum up our conclusion on the appeal

of Detherage v. Hawn, we are of the opinion, from a careful reading of the record: (1) That, when Detherage sold an interest in the engine to Lunsford and Lawson, the original contract was modified, and it was agreed that Hawn should be paid in money, and that out of the money due Hawn these parties would satisfy the mortgage lien and pay to Hawn the balance due on the engine, and hence they have no cause of action against Hawn on account of his failure to take the lumber or because it was damaged by delay in removing it from the mill. (2) That Detherage and his partners are not entitled to any reduction in the purchase price because of the defect in the engine or growing out of the fact that there was a lien on it at the time of the purchase. The weight of the evidence is to the effect that, when Detherage purchased the mill, he knew of the defect in the engine, and also that there was a mortgage, and both he and his partners promised to satisfy the mortgage debt, and by paying it at any time before the sale of the engine under the order of court they could have prevented the sale, retained the engine, and have credit on the amount due Hawn by the sum paid to extinguish the mortgage; but they did not see proper to pursue this course, and, if they were deprived of the engine, it was their own fault, and so the only relief they are entitled to on this score is to have credit by the amount the engine sold for at the decretal sale, and this the lower court allowed in rendering judgment against Detherage. (3) We are further of the opinion that the weight of the evidence favors the view that, when Lunsford and Lawson purchased an interest in the engine, they assumed in connection with, and as partners of, Detherage to pay Hawn for the engine in money, and therefore they are jointly and severally liable with Detherage for the amount due on the engine.

Wherefore the judgment on the appeal of Detherage v. Hawn is affirmed; and the judgment on the appeal of Hawn v. Lunsford and Lawson is reversed, with directions to enter a judgment in favor of Hawn against Lunsford and Lawson for \$775, with interest from April 8, 1906, subject to a credit of \$305, May 25, 1907.

TRAVIS v. TAYLOR.

(Court of Appeals of Kentucky. May 6, 1909.)

1. DEEDS (§ 70*) — VALIDITY — FRAUDULENT REPRESENTATIONS.

Fraudulent representations of a third person will not permit the purchaser to rescind the deed and cancel a note, and to recover the purchase money paid, in the absence of a showing that they were authorized, or that the vendor knew or approved thereof.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 172; Dec. Dig. § 70.*]

2. EVIDENCE (§ 400*)—VARYING WRITINGS BY PAROL—CONTRACT OF SALE.

A contract of sale of a farm, which shows on its face the number of acres sold, cannot be controlled or altered by any oral statements, made before its consummation, as to the number of acres the farm contained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1781; Dec. Dig. § 400.*]

3. APPEAL AND ERROR (§ 1009*)—REVIEW — CONFLICTING EVIDENCE.

A finding of fact by the chancellor on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3972; Dec. Dig. § 1009.*]

4. VENDOR AND PURCHASER (§ 168*)—LIABILITY FOR CONSIDERATION—FACT OF MISSING DEED.

A purchaser, who agreed to take an indefeasible title as it was, with the understanding that if missing deeds were discovered, they were to be placed on record by the vendor, cannot, after taking possession under her deed and holding the land as her own, be heard to say that she will not pay the balance of the consideration because of a missing deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 842; Dec. Dig. § 168.*]

5. VENDOR AND PURCHASER (§ 176*)—ABATEMENT OF PRICE—SHORTAGE IN LAND CONVEYED.

Where a sale of land is in gross, and not by the acre, the price will not be abated because of a shortage, unless so great as to impress the mind that the parties could not have contemplated such a difference between the acres actually conveyed and that mentioned in the deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 334-336; Dec. Dig. § 176.*]

6. VENDOR AND PURCHASER (§ 176*)—ABATEMENT OF PRICE—SHORTAGE IN LAND CONVEYED.

Where a sale of two tracts of land was in gross, the price will not be abated because of a shortage of 12 acres in the 149 acres which the deed purported to convey.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 334-336; Dec. Dig. § 176.*]

Appeal from Circuit Court, Simpson County.

"Not to be officially reported."

Action by Bertie B. Taylor against Bettie H. Travis on a promissory note, and to enforce a vendor's lien. From a judgment for plaintiff, defendant appeals. Affirmed.

G. W. Whitesides and C. W. Milliken, for appellant. Roark & Finn and C. B. Moore, for appellee.

BARKER, J. On the 19th day of September, 1907, the appellee, Bertie B. Taylor, conveyed to the appellant, Bettie H. Travis, by deed with general warranty, two tracts of land, which are set out by metes and bounds in the petition, containing, in the aggregate, 149 acres. In consideration of this conveyance the appellant paid to appellee at the time \$1,500 in cash, and executed and delivered to her a promissory note for \$1,000 due January 1, 1908. The appellant took possession of the farm under this deed, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

still holds it. The note having fallen due and remaining unpaid, appellee instituted this action to recover judgment for her debt and interest, and to enforce her lien upon the land which she had sold, as above set forth. The appellant, by her answer, seeks to vacate and have rescinded the deed of appellee to her, and the cancellation and surrender up of her note to appellee, and the recovery of the \$1,500 cash paid, because she alleges she was defrauded in the contract by certain false and fraudulent statements made by W. J. Taylor, the father of appellee, concerning the land which appellant was proposing to buy. She states that W. J. Taylor falsely and fraudulently represented to her that the farm contained 160 acres, and it was well fenced with a wire fence, and that it had two springs upon it, all of which was false and fraudulent. There is no allegation, however, in the answer that W. J. Taylor was the agent of his daughter, the appellee, or had any authority to act or speak for her. In an amended answer, however, she states that the representation that the farm contained 160 acres was made by W. J. Taylor in the presence of his daughter, who acquiesced in, or approved of, the statement. The representations in regard to the springs and fencing may be now laid entirely on one side, and left out of view, because of the absence of an allegation that they were made by any one authorized so to do, or that appellee knew of or approved of them. We think the representation that the farm contained 160 acres may be disposed of by saying that it was made before the contract was reduced to writing, and, as the conveyance itself shows on its face that appellee was proposing to sell appellant only 149 acres, this contract cannot be controlled or altered by any oral statements made before its consummation.

As a further ground for rescission the appellant alleges that before she accepted the deed, it had been discovered, by an examination of the title, that appellee did not have a complete record title to the land she was proposing to sell. In other words, there were two deeds, constituting a part of appellee's chain of title, which had not been recorded, but that appellee assured appellant that these deeds were in her possession, and would be turned over at once to be recorded, that, relying upon this promise, she accepted the deed, and paid over the cash payment, and delivered the note for the balance of the consideration, but that, in violation of her agreement so to do, appellee had failed to furnish the lost or missing deeds, and that appellant found herself in possession of an unmerchantable title to the farm in question. This defect in the title of appellee arose in the following manner: Her father, who conveyed the land to her, purchased it from two different persons, and it was the deeds from W. J. Taylor's vendors which were supposed to be missing. It seems that the courthouse

of Simpson county, several years before this contract arose, was burned, and all of the records of the county destroyed. Among these were the conveyances to W. J. Taylor from his vendors of the two tracts which make up the farm in question. It may be well to say here that it has since been discovered that the deed to one of the tracts purchased by W. J. Taylor was found to have been re-recorded since the fire, and, so far as this tract is concerned, there is no further trouble. In regard, however, to the other tract of 83 acres, no deed has ever been found. The truth of these allegations of appellant concerning the missing deed was traversed by appellee, and her evidence tends to show that, when the deeds were found to be missing, appellee's father thought he had them at his home, but appellee said to appellant that she did not believe this was correct; that she had never seen them at her father's house, and did not believe they were there; that thereupon a consultation took place, and it was represented to appellant that W. J. Taylor, the father of appellee, had been living on and occupying the farm in question as his home for more than 40 years before the contract was made between appellant and appellee; that therefore she had a perfect title by reason of so long, continued, open, and notorious possession on the part of herself and her vendor; and that thereupon appellant agreed to take the deed for the land, with the understanding that, if the missing deeds were discovered, they would be placed upon record. The evidence upon this point is very conflicting, and, as the chancellor gave judgment in favor of appellee, we do not feel authorized to disturb his finding upon this question of fact. The record shows, however, beyond contradiction, that appellee and her vendors had been in the actual, open, and notorious possession of the farm in question, using and claiming it as their own, for more than 40 years next before the conveyance. Appellant does not dispute that her vendor had a good title to the land under the statute of limitations. Her complaint is that her title is less merchantable by reason of the fact that the deed to one of the tracts which make up the farm is missing; but, if she agreed to take the title as it was (and this the chancellor found), she cannot, after taking possession under the deed of appellee and holding the land as her own, be heard now to say that she will not pay the balance of the consideration because of the missing deed. Her title, as shown by the evidence, is indefeasible; and, as said before, if appellee's evidence on the subject of the missing deed is true, appellant has no ground upon which to ask a rescission.

It turned out, upon an actual survey, that there were only 137 acres of the land, and, as appellant has alleged this fact, and prayed for an abatement of the price because of the difference between the number of

by the acre; the sale was in gross. The contract for the sale was discussed only from the point of view of the sale of the whole farm for so much money. Appellee wanted \$3,000 for her farm. This appellant was unwilling to give, but offered \$2,500. The two tracts of land are described in the deed as "containing sixty-six acres, more or less," and "eighty-three acres, more or less." The rule is well settled that, where a sale of land is in gross, and not by the acre, the court will not abate the price because of a shortage, unless the shortage be so great as to impress the mind that the parties could not have contemplated the contingency of so great a difference between the acres actually conveyed and that mentioned in the deed. In the case of *Anthony v. Hudson* (Ky.) 114 S. W. 782, we had occasion to examine the question now under discussion at considerable length, and to review the authorities bearing upon the subject of abatement in price for deficit in the acreage conveyed. It was there held that, where a sale was in gross, no abatement in the price would be made, unless the deficit was so great as to raise a presumption of fraud. In that case there were 560 acres named in the deed, which were sold for the sum of \$58,800, being at the rate of \$105 per acre. The deficit was 9.71 acres, which, at the named price of \$105 per acre, amounted to \$1,019.55, about four times the amount in value as in the case at bar, although the number of acres in the deficit were slightly less. We there held after reviewing the cases on the subject in this state, that, the sale being in gross, no abatement could take place in the purchase price for the deficit in the acreage. The principle laid down in the case cited is conclusive of the question now under discussion, and it is only necessary to cite the opinion without further elaboration here.

It seems that, some time prior to the contract with appellant, appellee had given a lease for the mineral privileges of her farm; it probably being supposed that there was oil or gas beneath the surface. Appellant alleged this outstanding lease as an additional ground for rescission of the contract, but appellee replied by filing a cancellation of the lease by the lessee. This, of course, eliminated the question from further consideration.

In conclusion, we are of opinion, upon the whole case, that the chancellor's judgment is correct, and meets the equities of the case.

Judgment affirmed.

The state courts take judicial notice of the public statutes of the United States.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 49, 50; Dec. Dig. § 34.*]

2. STATUTES (§ 279*) — PLEADING PUBLIC STATUTES.

Under Civ. Code Prac. § 119, providing that neither the evidence relied on by a party nor presumptions of law nor facts of which judicial notice is taken, excepting private statutes, shall be stated in a pleading, it is unnecessary for a plaintiff in an action against a common carrier brought under Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1907, p. 909), known as the "Carmack amendment to the interstate commerce act," making a common carrier liable for loss of an interstate shipment, to plead such federal statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 378; Dec. Dig. § 279.*]

3. COURTS (§ 489*)—JURISDICTION OF STATE COURTS—INTERSTATE SHIPMENTS—CARMACK ACT.

The fact that Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1907, p. 909), known as the "Carmack amendment to the interstate commerce act," making a common carrier liable for damages to an interstate shipment, designates the remedies which the aggrieved party may have, does not deprive a state court of jurisdiction over an action to recover damages to an interstate shipment of live stock; the statute providing that no remedy or right of action which the shipper had under the existing law should be taken away by this statute, and, if the amount in controversy is less than \$2,000, the action cannot be brought in the United States Circuit Court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1326; Dec. Dig. § 489.*]

4. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—AUTHORITY AND FUNCTIONS.

The Interstate Commerce Commission is not a court and cannot try actions for damages to interstate shipments, but has jurisdiction to hear complaints in regard to rates and rebates.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 138; Dec. Dig. § 85.*]

5. COMMERCE (§ 80*)—VALIDITY OF INTERSTATE COMMERCE ACT.

Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1907, p. 909), known as the "Carmack amendment to the interstate commerce act," providing that any common carrier receiving property for interstate transportation shall be liable to the holder of the bill of lading for any damage caused by it or any common carrier to which such property may be delivered, and that no contract shall exempt such carrier from the liability imposed, is a valid regulation of interstate commerce, and does not operate to take private property for public purposes.

[Ed. Note.—For other cases, see *Commerce*, Dec. Dig. § 80.*]

Appeal from Circuit Court, Henry County.
"To be officially reported."

Action by N. P. Scott against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

HOBSON, J. On March 3, 1907, N. P. Scott delivered to the Louisville & Nashville Railroad Company at Campbellsburg, Ky., a car load of horses and mules to be shipped to Waycross, Ga., and there delivered to him in good order. It was stipulated in the bill of lading that the Louisville & Nashville Railroad Company agreed to transport the stock to the place where it was received by the next connecting carrier for transportation, and that its liability should cease at its terminus, when the stock was delivered to the carrier who was to take the stock on from that point. The Louisville & Nashville Railroad Company carried the stock to Montgomery, Ala., and there delivered it to the Atlantic Coast Line in good condition. The Atlantic Coast Line carried the stock from Montgomery, Ala., to Waycross, Ga., and there delivered it to the plaintiff; but when delivered seven of the horses and mules were in a bad condition and damaged to the extent of \$275. Scott brought this suit against the Louisville & Nashville Railroad Company to recover the loss, and, a judgment having been entered in his favor in the circuit court, the railroad company appeals.

The case turns on what is known as the "Carmack amendment to the interstate commerce act, which is in these words: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof." Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595, pt. 1 (U. S. Comp. St. Supp. 1907, p. 909).

It will be observed that by this act the initial carrier which issues the bill of lad-

erty may pass, and that no contract shall exempt the initial carrier from the liability imposed. As this was a shipment from a point in this state to a point in another state, the act applies to it, and the defendant is liable for the loss if the act is valid. But it is insisted for it that the plaintiff did not in his pleadings show that he relied upon the Carmack amendment, and that therefore he cannot recover by reason of it. Section 119 of the Civil Code of Practice provides as follows: "Neither the evidence relied on by a party, nor presumptions of law, nor facts of which judicial notice is taken, excepting private statutes, shall be stated in a pleading." The statute referred to is a public law of the United States, and state courts no less than courts of the United States must take notice of the acts of Congress. In 1 Wharton on Evidence, § 287, the rule is thus stated: "An ordinance or statute of the United States is not 'foreign,' so far as concerns the particular states. Hence it has been held that a state court will take judicial notice of the federal Constitution and its amendments, and of federal public statutes. And it has been held that a state court will recognize without proof state statutes incorporated in acts of Congress. The state courts under this rule take cognizance of federal statutes and the federal courts take cognizance of state statutes." To the same effect, see Greenleaf on Evidence (16th Ed.) § 6b. In *Clafin v. Houseman*, 93 U. S. 136, 23 L. Ed. 833, the United States Supreme Court said: "The laws of the United States are laws in the several states and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights, and not restrained by its Constitution in the exercise of such jurisdiction." The acts of Congress within the sphere of its jurisdiction are the law of the land no less than the acts of the state Legislature within the sphere of its jurisdiction, and as the court must take judicial notice of these laws, and as facts, of which it must take judicial notice, by the Code, need not be stated in the pleadings, it was unnecessary for the plaintiff to refer to the United States statute in his petition. Accordingly, we have uniformly given judg

states the facts in his pleadings entitling him to recover under the law of which the court must take judicial notice, he has stated a cause of action. The plaintiff here sues for an injury to his property. The defendant relies on the special contract to shield it from liability. The court must take notice that under the act of Congress the special contract is ineffectual to that end and therefore must disregard it in giving judgment.

It is also insisted that the state court is without jurisdiction to render a judgment by reason of the provisions of the act, because it designates the remedies which the aggrieved party may have. We have examined the act with care and do not think it is properly capable of this construction. This is an action by the shipper against the carrier to recover for an injury to his property. There is nothing in the act to deprive the state courts of their jurisdiction in cases of this sort. This is not an action based on a violation of a statute. The action is based on the injury to the property. The defendant relies on the special contract which the statute declares invalid. The rule that, where a statute provides a remedy for its violation, that remedy is exclusive, has no application. To leave no room for doubt on this subject, the following words are inserted in the statute: "Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

The Interstate Commerce Commission is not a court. It cannot try controversies like this between shipper and carrier, and give judgment against the carrier for the damages sustained. It was not contemplated by the act that the time of the Interstate Commerce Commission should be consumed by such controversies. The commission is given jurisdiction to hear complaints in regard to rates, rebates, and the like, and the language of the statute in reference to complaints to the commission must be construed as relating to those subjects which are within the jurisdiction of the commission. The Circuit Courts of the United States are without jurisdiction in an action where the matter in controversy is less than \$2,000, and so this action could not have been brought in the United States Circuit Court, as the amount in controversy is only \$275. It was not the purpose of the interstate commerce act to give the United States courts jurisdiction of cases of this sort where the amount in controversy is less than \$2,000. If therefore the state court is without jurisdiction to hear the matter, the plaintiff is

not run within the carrier's liability, and that if it does the act is invalid. The defendant received the property for transportation from a point in this state to a point in Georgia and issued a through bill of lading therefor. This is precisely the case which the amendment was designed to cover. Congress has power to regulate interstate commerce, and if, as has recently been held, it may regulate the relation of master and servant where the master is engaged in interstate commerce, manifestly it may regulate the effect of the contract which the carrier makes with the shipper and provide that certain provisions of the contract shall be ineffectual. We have in our Constitution a provision that a common carrier shall not make any contract limiting its common-law liability. Similar provisions have been made in other states by statute or by the Constitution, and we are not aware that in any case such a provision has been held invalid. The act of Congress is simply a regulation as to the effect to be given such contracts. It is not, in this case at least, a taking of private property for public purposes; for the defendant voluntarily received the property for transportation by it and its connecting lines. What its liability would be if it had refused so to receive the property is a question not presented. The act applies to carriers "receiving property for transportation from a point in one state to a point in another state." A carrier who voluntarily enters into the relation of connecting carrier with another and receives property for through transportation is bound by the act; and whether or not he may, if he so elects, stay out of such relations and only receives property for transportation over his own line is not necessary to be determined here. There is no reason why Congress within its jurisdiction may not establish any such regulations as a state Legislature might establish within its jurisdiction in matters of this sort.

Judgment affirmed.

RYAN et al. v. CITY OF LOUISVILLE et al.
(Court of Appeals of Kentucky. May 6, 1909.)

1. **WATERS AND WATER COURSES (§ 183*)—WATERWORKS—TRANSFER TO CITY—VALIDITY.**

The capital stock of a water company was owned by a city, and its council adopted an ordinance directing the commissioners of its sinking fund, custodians of the stock, to vote the whole of it for the transfer of the property to the city, to be, when transferred, under the control of the board of waterworks. The commissioners voted the stock at a regular meeting for the purpose indicated, and thereafter the president and secretary of the corporation, by resolu-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of its board of directors adopted at a regular meeting, executed and delivered a deed conveying the property to the city. *Held*, that the transfer of the property to the city was valid.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 278; Dec. Dig. § 183.*]

2. TAXATION (§ 217*)—EXEMPTION—CITY WATERWORKS PROPERTY.

The waterworks system, owned and operated by a city for the benefit of its inhabitants, is used for public or governmental purposes, and is exempt from taxation, under Const. § 170, exempting from taxation public property used for public purposes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 356; Dec. Dig. § 217.*]

3. TAXATION (§ 453*)—ASSESSMENT—RELIEF FROM IMPROPER ASSESSMENT.

Where the assessed valuation of property is excessive, or there is an attempted assessment of omitted property, the remedy is by an application to the board of supervisors, and to appeal from their action, except on the question of valuation, and injunction does not lie; but it is otherwise where the property is not liable to taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 809; Dec. Dig. § 453.*]

4. TAXATION (§ 251*)—EXEMPTION—RELIEF FROM IMPROPER ASSESSMENT.

Where the assessment for taxation of waterworks property of a city will create an apparent lien thereon, and a cloud on the title should the city wish to contract for an improvement of the property, or sell it, before litigation by the ordinary statutory methods to determine whether the property is exempt, equity will interfere, by injunction, to prevent the threatened cloud, because the property is exempt from taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 845; Dec. Dig. § 251.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by the City of Louisville and others against Thomas Ryan and others. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

Joe Selligman, Chealey H. Searcy, and Jas. Breathitt, Atty. Gen., for appellants. Carroll & Middleton, for appellees.

SETTLE, C. J. This appeal presents for review a judgment of the Jefferson circuit court, chancery branch, second division, by which the appellant Thomas Ryan, assessor of Jefferson county, was perpetually enjoined from assessing, for state or county taxation for the year 1908, the property of the appellee city of Louisville known as the "Louisville Waterworks"; the action for the injunction having been instituted against the assessor by the appellee city of Louisville.

In the case of *Bell, Sheriff, v. Louisville Water Company*, 106 S. W. 862, this court held that the same property was subject to taxation because the title was at that time vested in a corporation known as the Louisville Water Company, although the

whole of the capital stock of that company was owned by the city of Louisville. Immediately following the decision in that case, the water company paid all taxes then due or claimed, together with the interest and penalties resulting from their previous nonpayment. Since that time, however, and prior to September 1, 1908, the entire waterworks plant, its franchise, and effects were transferred and conveyed by the Louisville Water Company to the appellee city of Louisville, and the title thereto, at the time it would have been assessed by appellant but for the injunction preventing its assessment, was vested in the city of Louisville. No doubt can exist as to the validity of this transfer. It was effected in the following manner: The general council of the city, by ordinance duly enacted, directed the commissioners of its sinking fund, custodians of its stock in the Louisville Water Company, to vote the whole of it for the transfer to the municipality of the entire waterworks property, to be, when transferred, under the control of its board of waterworks. The board of sinking fund commissioners, as directed by the ordinance, at a regular meeting voted all the stock of the city in the Louisville Water Company for the purpose indicated. Thereafter the president and secretary of the Louisville Water Company, by resolution of its board of directors, adopted at a regular meeting, executed and delivered a deed conveying the waterworks plant, and property of every kind, of the Louisville Water Company to the city of Louisville, thereby legally consummating the transfer and vesting the title thereto in the municipality.

Conceding the transfer of the property to the city to be valid, does that relieve it from the burden of taxation? The question must be given an affirmative answer, unless this court should conclude to overrule numerous recent cases, in which it was held that such property cannot be taxed, because relieved of that burden by section 170 of the Constitution, which declares: "There shall be exempt from taxation public property used for public purposes." As the city of Louisville is but a political subdivision of the state, and may under its charter own and maintain, for the health, safety, and comfort of its inhabitants, the system of waterworks to which it has legally acquired title, such use of the property, being a use for public or governmental purposes exclusively, exempts it from taxation. This conclusion is so well supported by the subjoined list of authorities that further discussion of the matter would be a work of supererogation. *Commonwealth v. City of Covington (Ky.)* 107 S. W. 231, 14 L. R. A. (N. S.) 1214; *City of Frankfort v. Commonwealth (Ky.)* 94 S. W. 648; *City of Owensboro v. Commonwealth*, 105 Ky. 344, 49 S. W. 320, 44 L. R. A. 202; *City of Covington*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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ton v. District of Highlands (Ky.) 110 S. W. 338.

It is, however, insisted for appellant that the city of Louisville cannot enjoin the assessor from assessing its property for taxation, although the property may be exempt from taxation. We think this contention untenable. It is true that a mere informality or irregularity in the assessment of property or collection of a tax will not authorize an injunction. The same is true where the assessed value is too high, or there is an attempted assessment of omitted property, for the statute affords a remedy in such cases. Application for relief may be made to the board of supervisors, and from their action, except on the question of valuation, an appeal may be taken to the quarterly court; but we do not understand that the property owner or taxpayer is confined to the statutory remedies, where there is an illegal assessment, or attempted assessment, of property or the collection of a tax, and the property is exempt from taxation. In such case the property owner or taxpayer may, in a court of equity, enjoin the illegal assessment or collection. Time and again the State Board of Valuation and Assessment has been enjoined from placing its valuation upon the franchise of a railroad or other corporation. *L. & N. R. R. Co. v. Commonwealth* (Ky.) 94 S. W. 655; *Hager v. American Surety Company*, 121 Ky. 791, 90 S. W. 550. No reason is perceived for not also resorting to this remedy to prevent the assessor from assessing property which is not subject to taxation. It is alleged in the petition that the assessment for taxation of appellee's waterworks plant and property will create an apparent lien upon it, and cloud upon its title, should it wish to contract for its improvement, or to sell it, before litigation, by the ordinary statutory methods, to determine whether it is liable to taxation would end. This being true, a court of equity will interfere, by injunction, to prevent such threatened cloud upon the title to its property.

The only authority cited by appellant in support of his contention is the case of *Baldwin v. Shine*, 84 Ky. 502, 2 S. W. 164, but a close examination of the opinion in that case will show that it does not furnish the support claimed. It was therein decided that the county judge could be enjoined from fixing a final valuation upon the property sought to be assessed, after reaching which conclusion the court further said: "Of course this rule does not apply to an ordinary assessment, not final in its character, where the party may apply to the board of supervisors or the county judge for relief." Manifestly, the last statement was mere dicta, for the relief sought in the case did not result from an act of the assessor, but of the county judge. The case of *Baldwin v. Shine* was based on a statute which is not now in force,

viz., the act of 1873 (Gen. St. 1873, c. 92, art. 7, § 2), which provides that: "A person improperly charged with any tax or county levy, before he has paid the same, may make proof thereof to the county court in which the assessment was made and the court may correct the same." Under the present statute it has been decided by this court that, where the assessment of the property is void, the property owner is not required to appeal to the board of supervisors or quarterly court for relief, but may by injunction obtain it. *Mt. Sterling Oil & Gas Company v. Ratliff* (Ky.) 104 S. W. 903.

The injunction in the instant case was properly granted. Wherefore the judgment is affirmed.

TOWN OF BELLEVIEW v. ENGLAND.

(Court of Appeals of Kentucky. May 5, 1909.)

1. MUNICIPAL CORPORATIONS (§ 770*)—STREETS—DUTY TO KEEP IN SAFE CONDITION.

If a city negligently allowed water from a broken main to escape into the street, which formed ice that remained so long that the city had sufficient notice to have repaired the condition, it would be liable for an injury therefrom.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1626; Dec. Dig. § 770.*]

2. MUNICIPAL CORPORATIONS (§ 803*)—DEFECTIVE STREETS—CARE REQUIRED OF TRAVELER.

A person using a city street must exercise such care for his own safety as an ordinarily prudent person would exercise under the same or similar circumstances.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1673, 1682; Dec. Dig. § 803.*]

3. MUNICIPAL CORPORATIONS (§ 807*)—DEFECTIVE STREETS—CARE REQUIRED OF TRAVELER.

One is not compelled to keep off a street because he knows it to be in an unsafe condition, but he must exercise a care commensurate with the danger exposed to him, and, if there are other ways safer than the one he travels, he will be negligent if, with knowledge of the conditions, he voluntarily assumes the more hazardous.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1679-1681; Dec. Dig. § 807.*]

4. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

In an action against a city for injuries from a defective street, a charge permitting compensation for any diminution of plaintiff's power to pursue the course of life he might otherwise have done was erroneous as calculated to lead into a field of speculation too indefinite to afford the basis of legal compensation.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 552, 553; Dec. Dig. § 216.*]

5. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

An erroneous instruction as to the probable result of plaintiff's injuries was not prejudicial, where the verdict was for only \$575, while the injury was very painful, incapacitating plaintiff, who was an engineer receiving \$15 a week, from labor for 13 weeks, and leaving his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. § 1063.*]

Appeal from Circuit Court, Campbell County.
"Not to be officially reported."

Personal injury action by Joseph England against the Town of Bellevue. Judgment for plaintiff, and defendant appeals. Affirmed.

A. M. Caldwell, for appellant. F. B. Bassmann, for appellee.

O'REAR, J. An addition to Bellevue, known as "Bonnie Leslie," was annexed to the city some years ago. Its principal street was not in very good condition at the time of annexation, perhaps. At any rate, it grew worse, because of lack of repairs, so that deep gullies were washed in the street. The sidewalk, a board affair, was allowed to fall in such disrepair that it had to be abandoned by pedestrians. Appellee, who lived in Bonnie Leslie, was traveling on December 26, 1906, along this street, when he slipped on the ice which had formed in one of the gullies, and fell, breaking his kneecap. He sued the city to recover damages. In addition to the bad condition of the street surface, he alleged: That a water main in the street had sprung a leak some months previous, and that the escaping water found its way down the street into these gullies; that the city authorities had been notified a number of times, and for several months before his injury, of the condition of the water main, but negligently failed to cause it to be repaired. The condition of the street was such that it was necessary in traveling upon it to walk through these gullies. The court told the jury that, if the defendant negligently failed to keep its street in reasonably safe condition for those traveling upon it, and negligently allowed the water from the broken main to escape into the street, forming ice, when the city had notice of the condition long enough to have repaired it, it was liable. The jury were also told that the plaintiff must exercise due care for his own safety, and that such care was that which an ordinarily prudent person would have exercised for his own safety under the same or similar circumstances. We think these instructions fairly submitted the question of liability and duty in the premises.

It is argued that, as the plaintiff in the daytime walked upon the dangerous place, he cannot recover, as he had not the right to voluntarily go into the danger. Pedestrians have the right to use a city street to walk upon it. If the city has not made it reasonably safe, pedestrians may nevertheless walk upon it, but are required to exer-

he travels, he will be held to be negligent if he, with knowledge of the conditions, voluntarily assumes the more hazardous; but the proof by the plaintiff was that this was the only way of travel, and that he had no option of a safer way.

In the measure of damages submitted to the jury, the court erroneously included an element which ought not to have been submitted. In addition to the plaintiff's mental and physical suffering, loss of time, expenses incurred, and impairment of his capacity to earn money, the court told the jury that they might compensate the plaintiff for any diminution of his power to pursue the course of life he might otherwise have done. If that meant a diminution of his power to earn money (and we think it did), it was already covered by the instructions. If it meant anything else, then it was an element which the law does not authorize. Its form is calculated to lead into a field of speculation too indefinite to afford the basis of legal compensation. However, the verdict of the jury was for only \$575. The injury was very painful and incapacitated the plaintiff from labor for 13 weeks. He was an engineer receiving \$15 a week. His physician's bill was \$50. His leg is left weak, and he cannot walk without a cane or crutch. It interferes seriously with his ability to get about and perform labor at his calling. The jury could not have wandered very far afield in their verdict, when, after compensating the plaintiff for his time lost and his doctor's bill, they allowed him only \$330 for his suffering and the impairment for the future of his earning capacity. We cannot regard the error as prejudicial in view of the size of the verdict. When the record shows affirmatively, as this one does, that the error was harmless, the judgment will not be reversed for it.

The jury found the fact to be that the negligence of the city in suffering the street to be out of repair and escaping water from a hydrant to run into the places in freezing weather, where pedestrians had to walk, was the direct and proximate cause of the plaintiff's injury. There is enough evidence, if believed, to support this verdict.

Judgment affirmed.

WHITE v. HOLDER et al.

(Court of Appeals of Kentucky. May 12, 1909.)

1. DOWER (§ 59*)—ELECTION TO TAKE DOWER OR HOMESTEAD—EFFECT.

A widow is entitled to either dower or homestead in the lands of her deceased husband, at her election, which she has a reasonable time to make after her husband's death; but she can elect at once, and, having elected to take

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a homestead, she cannot thereafter surrender the homestead right and take a dower interest.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 207; Dec. Dig. § 59.*]

2. DOWER (§ 59*)—ELECTION BETWEEN DOWER AND HOMESTEAD—EVIDENCE.

Evidence held to show that a widow elected to take a homestead, in lieu of dower, in her deceased husband's land.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 207; Dec. Dig. § 59.*]

3. DEEDS (§ 56*)—VALIDITY—DELIVERY—CONSIDERATION.

Where a deed was never delivered to the grantees, but they surreptitiously took it from the grantor and paid nothing for it, no interest passed to them thereunder.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 121; Dec. Dig. § 56.*]

Appeal from Circuit Court, Casey County.

"Not to be officially reported."

Action by Mary C. White against Lillie Holder and others. From part of the judgment, plaintiff appeals. Reversed and remanded.

McQuown & Beckham and Godbey & Moore, for appellant. N. H. W. Aaron, for appellees.

LASSING, J. Thomas White, a resident of Casey county, died intestate in September, 1904, leaving surviving him, as his only heirs at law, his wife, Elizabeth White, and two daughters, Mary C. White and Lillie Holder. At the time of his death he owned a small farm worth less than \$1,000, upon which he resided. After his death his widow, Elizabeth White, continued to reside thereon, using and occupying the entire farm, and receiving the profits therefrom, as a homestead. On September 10, 1907, or about three years after the death of her husband, she married one J. T. Allen. After her marriage to Allen, she left the home of her former husband, and went to live with her present husband, and has since continued to reside with him upon his farm. About a month after she had so married and left the farm, her daughter, Mary C. White, brought suit in the Casey circuit court against her sister, Lillie Holder, and her husband, in which she sought to have the farm divided between herself and her sister. On the 2d day of December following, her mother, Elizabeth Allen, filed her petition to be made a party to this suit, and asked that her petition be taken as her answer. In it she alleged that, as the widow of her deceased husband, Thomas White, she was entitled to a dower interest in his land, and she asked that same be allotted to her. The plaintiff filed a reply to the answer of Elizabeth Allen, in which she denied the material allegations thereof, and pleaded affirmatively, in the second paragraph of her reply, that her mother had elected to take a homestead in the premises described in the pleadings, and had done so, and after having used and enjoyed same for a time, to wit, up to the

date of her second marriage, she abandoned it, and thereby forfeited all of her rights therein. Thereafter the defendants Lillie Holder and her husband, as next friend for their three children, filed a petition to be made parties, and made same an answer to the petition of plaintiff, and to the petition of Elizabeth Allen to be made a party, in which they alleged that they were the owners of the dower interest of Elizabeth Allen in said land, and filed as an exhibit a deed from Elizabeth Allen, conveying to them her dower interest in said land. To this petition Elizabeth Allen filed a reply, in which she traversed the material allegations thereof and pleaded affirmatively that the said deed had never been delivered by her to them, and that they had paid her no part of the purchase money stipulated therein, and had obtained possession of the deed without her knowledge or consent. She prayed that the deed be canceled and held for naught. Plaintiff filed a reply to the answer of Lillie Holder, in which she traversed the affirmative allegations therein. The allegations in the second paragraph of the reply of plaintiff to the answer of Elizabeth Allen were not traversed or denied by Elizabeth Allen, nor were the allegations in the reply of Elizabeth Allen traversed or denied by her codefendant, Lillie Holder. The only evidence in the case is the deposition of Elizabeth Allen. Upon the pleadings and this deposition, the case was submitted for judgment, and the court found and adjudged that the deed filed by Lillie Holder, etc., was inoperative, null, and void, and adjudged that the defendant Elizabeth Allen was entitled to dower in said land, and appointed commissioners to lay off and allot same to her and divide the remainder equally between the plaintiff, Mary C. White, and the defendant Lillie Holder. From so much of the judgment as awards dower to Elizabeth Allen, and denies to plaintiff, Mary C. White, a right to a half interest in the land owned by her father at his death, the plaintiff, Mary C. White, prosecutes this appeal.

It is well settled that a widow is entitled to either dower or homestead in the lands of her deceased husband, at her election, and it is equally well settled that she has a reasonable time after the death of her husband to make said election; but she can exercise this right but once, and, having elected to take either homestead or dower, she may not thereafter change her mind and take the other. As said by this court in the case of Phillips v. Williams, 118 S. W. 908: "When a widow elects to take a homestead in lieu of dower, and abandons the homestead by a sale or otherwise, this ends her right to a homestead in the land. That she cannot repossess herself of a homestead, or take dower therein instead of the homestead. * * * If she elects to take homestead, she takes no

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tion shows conclusively that the widow, after the death of her husband, consulted with her daughters, her son-in-law, and her neighbors as to her rights in the premises, and, having done so, she elected to take a homestead in the land, as is evidenced by the following questions and answers taken from her deposition: "Q. Was there ever any agreement or arrangement between you and the children of Thomas White as to whether you were to have dower or homestead in said lands? A. They agreed that the land was mine, that there was no more than a homestead." And again: "Q. You were advised after the death of your husband that you could hold the whole of this farm as a homestead, were you not? A. Yes, sir; I was advised by my neighbors that joined the land and by my son-in-law that came to town and saw about it. Q. After you had been advised, you decided to use and occupy the whole of this land, did you not? A. Yes, sir; I also proposed to Mary C. White that she could come and live with me, and that she could have a support out of the lands. And I also proposed to Lillie and her husband that they could come and live with me, and that we would do the best we could out of the land. I had no one to live with me." As said in the case of *Phillips v. Williams*, supra, the mere fact that the widow remains a few years after the death of her husband, upon the premises, and occupies the house, is not alone, or of itself, conclusive evidence that she elected to take a homestead in the land. While such conduct would raise a presumption that she had so elected, still, as said in that opinion, it is not conclusive; but where she has conferred with the other heirs at law of her husband, and claims the entire property as a homestead, and occupies it during her widowhood, and until she has married again, and gone off to the home of her new husband, she will not be heard to say that she had not made an election; nor can she surrender the homestead right so taken and acquired by her, and take a dower interest in lieu thereof.

During the years of her widowhood, appellee, by every word and act, indicated that she had made an election to take a homestead rather than a dower interest in said land, and, so far as the evidence shows, she made no pretense to be holding it otherwise until about the time she was to marry again and leave the place. Then, it seems, she proposed selling her interest in the land to the wife and children of Billie Holder, her son-in-law, for \$75. The record shows that they paid her no money, and she held the deed and refused to deliver it, but that afterwards

paid nothing for it, and the trial court properly held that no interest passed to them thereunder. But, even had the deed been valid, they would have acquired no interest thereunder, for the reason that Elizabeth Allen, having elected to take homestead in said land, forfeited all right to same by her abandonment thereof, and, under the authority of *Phillips v. Williams*, supra, a purchaser from her would get nothing by the conveyance.

The land in question belongs to the appellant, Mary C. White, and the appellee Lillie Holder jointly, and appellee Elizabeth Allen has no interest whatever therein.

The judgment is reversed, and the cause remanded for further proceedings consistent herewith.

BARNES et al. v. BARNETT, County Judge. (Court of Appeals of Kentucky. May 12, 1909.)
COURTS (§ 120*)—COURTS OF GENERAL JURISDICTION—AMOUNT IN CONTROVERSY.

The circuit court has no jurisdiction of a suit to enjoin a county judge's judgment imposing a fine of \$5 on the ground that his judgment is void, Civ. Code Prac. § 284, precluding the maintenance of suits to enjoin a judgment of a county court, where the amount in dispute is less than \$25.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 120.*]

Appeal from Circuit Court, Pulaski County. "Not to be officially reported."

Action by C. O. Barnes and another against N. L. Barnett, county judge. From a judgment for defendant, plaintiffs appeal. Affirmed.

T. Z. Morrow and Simpson Phelps, for appellants. O. H. Waddle & Son, for appellee.

LASSING, J. C. O. Barnes was arrested on a warrant issued by appellee, N. L. Barnett, county judge of Pulaski county, charged with violating the stock law by suffering and permitting his cattle to run at large within magisterial district No. 1 of Pulaski county. He was tried, found guilty, and his punishment fixed at a fine of \$5. He replevied the fine and costs, and, when the replevin bond became due, an execution was had thereon, and placed in the hands of the sheriff, who returned it unsatisfied. On the day that this execution was returned unsatisfied, the appellant Barnes and his surety, J. W. Simpson, brought suit in the Pulaski circuit court against appellee, as county judge, in which they sought to enjoin him from issuing another execution, on the ground that the judgment imposing the fine

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the voters asking for the election was not filed in the county court; that both the fiscal and county courts for said county could not meet on the same day; and that either the order filing the petition or the order of the fiscal court authorizing the election was void; and, also, that the fiscal court did not decide whether the vote should be taken in the entire county or in a magisterial district or voting precinct.

Upon the filing of this suit a temporary restraining order was granted by the clerk of the circuit court. A general demurrer was filed to the petition, and a motion was made to quash the restraining order issued by the clerk. Pending the ruling of the court upon the demurrer the appellee filed his answer in which he set up fully the manner in which the stock law had been attempted to be put in force in magisterial district No. 1, and filed with his answer the orders of the fiscal and county courts made with reference thereto, and, upon the issues as joined, the case was submitted for judgment. Whereupon an order was entered dismissing the petition and discharging the injunction, and from that order this appeal is prosecuted.

Several questions are raised upon this appeal, but from the conclusion which we have reached it is necessary to consider but one, to wit, that the court was without jurisdiction to grant the injunction, and upon this ground, no doubt, sustained the demurrer to the petition. Section 284 of the Civil Code of Practice provides: "No injunction shall be granted to stay proceedings upon a judgment of a justice of the peace, or of a county court, if the value of the matter in dispute do not exceed twenty-five dollars." This provision was adopted by the Legislature for the express purpose of preventing vexatious litigation over inconsequential matters. The ruling of the trial court might be upheld upon other grounds, but for the reason indicated it is unnecessary to consider them.

Judgment affirmed.

GARNES v. FRAZIER & FOSTER.

(Court of Appeals of Kentucky. May 12, 1909.)

1. FRAUDS, STATUTE OF (§ 44*)—CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR.

A verbal contract for hire for a term of four years and for the use of a house, garden, and orchard for that period is not enforceable under St. 1909, § 470, subsec. 7 (Russell's St. § 1775, subsec. 7), as a contract which is not to be performed within one year.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 66; Dec. Dig. § 44.*]

ute of, Cent. Dig. § 268; Dec. Dig. § 126.*]
3. FRAUDS, STATUTE OF (§ 126*)—EFFECT OF PROMISE TO REDUCE CONTRACT TO WRITING.

The fact that one party to an oral contract unenforceable under the statute of frauds promised the other to reduce the contract to writing, and did not do so, would not change the rights of the parties.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 279; Dec. Dig. § 126.*]

4. CONTRACTS (§ 143*)—CONSTRUCTION—OFFICE OF COURTS.

The courts cannot make a contract to suit one of the parties, but must take the contract as they find it and determine the rights of the parties from it as they themselves make or leave it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 723; Dec. Dig. § 143.*]

Appeal from Circuit Court, Carter County.
"Not to be officially reported."

Action by M. W. Garnes against Frazier & Foster. Judgment of dismissal, and plaintiff appeals. Affirmed.

Armstrong & Duvall, for appellant. H. R. Dysard, for appellees.

SETTLE, C. J. This is an appeal from a judgment of the Carter circuit court sustaining a demurrer to appellant's petition and dismissing the action. The action was instituted by appellant against appellees to recover of them \$2,000 damages for the alleged breach of a contract which he claimed to have made with appellees in West Virginia, and by the terms of which, as averred in the petition, he undertook to work for them as foreman of their rock crusher for a term of four years from March 15, 1907, for which they agreed to bear the expense of his removal from West Virginia and to pay him \$3.25 per day for each working day, during the four years, whether their rock crusher was operated or not. It was further alleged in the petition that appellees also agreed to furnish appellant, free of cost, during the four years, what coal he would need, a good, roomy dwelling house, fertile garden, thrifty bearing orchard, and five acres of productive, tillable land, for the use of himself and family, and to furnish him during the four years all necessary supplies for family use at a profit to appellees of 10 per cent. upon the cost price of such supplies. The petition contains the further averment that appellees also agreed to reduce the contract they made with appellant to writing and give him a copy thereof after it was signed by the parties, but that they failed to do so. It was further alleged in the petition that appellant removed to Carter, Carter county, Ky., and began work for appellees March 15, 1907, as he

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he remained in their service, but that they wrongfully discharged him, failed to furnish him a house, orchard, and five acres of land as agreed, and also that they failed to furnish him coal and other supplies as stipulated.

The demurrer filed by appellees to the petition was sustained in the court below, for the very obvious reason that the petition admitted the contract was not in writing, and also that it was not to be performed within one year. Therefore it was within the statute of frauds and not enforceable, and, not being an enforceable contract, appellant could not recover of appellees damages for its breach. The statute (subsection 7, § 470, Ky. St. [subsection 7, § 1775, Russell's St.]) applies to oral or verbal contracts that are not to be performed by either party within a year. So, in all cases where the contract is such that it cannot be performed by either party within a year, then it is necessary that the agreement should be in writing and signed by each party, to make it binding on both. *Klein v. Liverpool Ins. Co.*, 57 S. W. 250; *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394; *Holloway v. Hampton*, 4 B. Mon. 415. There is nothing in a verbal contract for hire, not to be performed within a year, that differentiates it from other contracts. Therefore it is within the statute of frauds. 20 Cyc. 207.

It is likewise true that a contract for the sale of real estate, or any lease thereof for a longer term than one year, must be in writing, and it has been held by this court that a lease of land for the term of one year from a future date is not enforceable, unless the contract is in writing. *Greenwood v. Strother*, 91 Ky. 482, 16 S. W. 138. So in the instant case appellant was in no better attitude to recover damages for the alleged failure of appellees to furnish him the house, orchard, and five acres of land, than he was to recover for any other alleged breach by appellees of their contract with him.

The fact, alleged in the amended petition, that the contract was made in West Virginia, cannot prevent the application of the statute of frauds, as it is admitted in the petition that it was to be performed in Kentucky. Besides, if it were not true that the laws of this state would govern the rights of the parties under the contract, it is not sufficiently alleged in the petition that it is not within the statute of frauds in West Virginia.

The averments of the petition as to the alleged promise of appellees to reduce the contract to writing, and their failure to do so, cannot change the rights of the parties. As this is not a suit in equity to enforce performance of this alleged agreement, we need

it and also recovery of them damages for its alleged breach, such a proceeding would destroy the usefulness of the statute of frauds. The courts cannot make a contract to suit one of the parties, but must take the contract as they find it, and determine the rights of the parties from it as the parties themselves make or leave it.

As appellant's petition did not state a cause of action, the demurrer was properly sustained.

Wherefore the judgment is affirmed.

STANDARD LUMBER CO. v. COLDWELL.
(Court of Appeals of Kentucky. May 12, 1909.)
JUDGMENT (§ 570*)—RES JUDICATA—DISMISSAL OF PETITION.

A judgment dismissing a petition because not stating a cause of action is no bar to a new action on a good petition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1039; Dec. Dig. § 570.*]

"Not to be officially reported."

On motion for rehearing. Portion of main opinion withdrawn, and motion denied.

For former opinion, see 117 S. W. 286.

CARROLL, J. The record does not show what disposition, if any, was made of the action as to any of the defendants except the Ohio Valley Tie Company. It appears that the demurrer filed by the Ohio Valley Tie Company to the petition as amended was sustained, and, declining to plead further, the petition as amended was dismissed. As stated in the opinion, the only parties to this appeal are the Standard Lumber Company appellant, and the Ohio Valley Tie Company appellee. Therefore the opinion did not in any manner whatever adjudicate or determine the rights of the Standard Lumber Company against any of the defendants other than the Ohio Valley Tie Company. As to the Ohio Valley Tie Company the general demurrer was sustained upon the ground that the petition did not state facts sufficient to constitute a cause of action.

In our opinion the demurrer of the Ohio Valley Tie Company was properly sustained. In view of the indorsement on the margin of the record, and the further fact that the record did not show any assignment of the notes by Patton, the petition should have affirmatively stated facts sufficient to avoid the release purporting to have been made by Patton, and showed by appropriate averments that Howard was not authorized to sign Patton's name, and that Campbell was not authorized to attest the release. As the petition did not state a cause of action, the dismissal

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of it does not prevent the Standard Lumber Company from instituting a new action at law against the Ohio Valley Tie Company, a solvent corporation, to recover from it the value of the timber alleged to have been wrongfully converted by it. *Potter v. Bengé* (Ky.) 87 S. W. 1005. If a new suit is instituted against the Ohio Valley Tie Company, the question as to the sufficiency of the release of the mortgage, and the effect, if any, of the failure by Patton to transfer the notes on the record, as well as the declarations, if any, made by Patton to the Ohio Valley Tie Company that the lien was satisfied, can be raised by the pleadings and evidence and determined by the court.

So much of the opinion as considers the validity or sufficiency of the release is withdrawn, and the petition for rehearing is overruled.

UNITED STATES FIDELITY & GUARANTY CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 12, 1906.)

1. MERCANTILE AGENCIES (§ 1*)—OCCUPATION —“INQUIRING INTO AND REPORTING ON CREDIT.”

A corporation whose business is to guarantee, indorse, secure payment of debts and obligations, insure fidelity of persons and concerns holding positions of trust, and through guaranteed attorneys furnish direct to subscribers of a quarterly publication, and not through the company, the commercial standing of merchants and other persons is engaged in the business of inquiring into and reporting on the credit and standing of persons engaged in business within Ky. St. 1900, § 4224 (Russell's St. § 6157), requiring persons or concerns so engaged to secure a license.

[Ed. Note.—For other cases, see *Mercantile Agencies*, Dec. Dig. § 1.*]

2. LICENSES (§ 42*)—OCCUPATION—FAILURE TO OBTAIN LICENSE—PROSECUTION—DEFENSES.

In the prosecution of a corporation for engaging in a specified business without an occupation license, it is no defense that in engaging in such business defendant exceeded its corporate powers.

[Ed. Note.—For other cases, see *Licenses*, Dec. Dig. § 42.*]

Appeal from Circuit Court, Fleming County. “To be officially reported.”

Proceedings by the Commonwealth against the United States Fidelity & Guaranty Company for failure to obtain an occupation license. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Power and Allen D. Cole, for appellant. M. J. Hennessey, for appellee.

CARROLL, J. One of the subsections of section 4224 of the Kentucky Statutes of the 1900 edition (Russell's St. § 6157) provides that “each and every person, partnership or corporation having representatives in this state, who engage in the business of inquiring into and reporting upon the credit and

standing of persons engaged in business in this state, shall pay a license tax of one hundred dollars. Any person having such license shall print in his letter head a statement of the fact. The payment of the tax shall be made direct to the Auditor, and his receipt therefor shall exempt the company or party carrying on said business from the payment of such tax in any county, and payment of such tax shall not be required of any subagent or correspondent of the party for the company carrying on said business in this state; and any such person acting as correspondent or subagent of such agent or company, and who shall transact any business, make report to such company, whether within or without this state, without the party or company having first paid the tax herein provided, shall be liable to all penalties for carrying on the business without paying the tax.” The appellant was proceeded against by penal action for violating this section by failing to procure the license therein mentioned, and upon a trial on an agreed state of facts was found guilty and fined \$100. Insisting that it was not engaged in the business described in the statute, it asks that the judgment against it be reversed.

It appears from the agreed statement of facts that the company is a Maryland corporation, with power to guarantee, indorse, secure payment, and punctual performance and collection of notes, debts, bills of exchange, contracts, bonds, accounts, and other evidences of debt. It is further authorized to insure the fidelity of any person, partnership, association, corporation, or company holding any place or position of trust or responsibility, or owing any duty, contractual, or otherwise, to any person or persons. It further appears that the company issues a publication styled “Guaranteed Attorneys Quarterly,” and that, in consideration of the fee paid to it by attorneys throughout the country, it inserts their names in these quarterlies, and guarantees merchants and other persons sending to these attorneys claims that they will promptly and faithfully pay over all money collected. It also furnishes to merchants and other persons for a consideration its list of guaranteed attorneys, and provides both the attorneys and the subscribers with blank forms upon which information respecting the financial standing of persons whom the subscribing merchants desire to deal with may be furnished by the attorneys. J. H. Power and T. L. Gibbons, attorneys at law in Fleming county, were among the guaranteed attorneys of this company, and these attorneys from time to time, and when requested, answered such inquiries concerning the business and commercial standing of persons as subscribing members to the list of guaranteed attorneys desired. These

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doing the business described in the section of the statute supra? It had as representatives in Fleming county Powers and Gibbons, and guaranteed to all of its subscribers that they would diligently and faithfully transact business committed to their care. As a part of the consideration for being thus listed and bonded by this company, these attorneys agreed that they would furnish reports of the financial credit and standing of persons to any subscribers for the book published by the company containing a list of its bonded attorneys. Under this arrangement, the company received a fee from the attorneys whose integrity and fidelity it guaranteed, and also a fee from the merchants and others to whom it sold its book containing the names of these attorneys. It is true that these attorneys did not make reports of the financial standing of individuals directly to the company, but it did make such reports to all persons who were authorized by the company to request them. In our opinion the company within the meaning of the statute was engaged through its attorneys in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this state. The fact that the attorneys were not exclusively engaged in the business of furnishing information concerning the financial standing of merchants and others, or the fact that the company guaranteed their fidelity generally, did not alter the fact that they did as the agents and representatives of the company make these reports. We are not able to perceive any difference, so far as the result desired to be accomplished is concerned, between sending the report direct to the company to be furnished by it to the merchant and sending it immediately to the merchant. In each instance the company through its agents gathered the information and distributed it to the persons entitled to receive it. There are several concerns distinctly known as commercial agencies, such as Dunn and Bradstreet, that are engaged exclusively in this business. These agencies obtain through their representatives or attorneys information as to the financial standing of persons and furnish this information to their subscribers; but in the end the only difference between their methods and those employed by the appellant company is in the means by which the desired end is attained and the volume of business done. The contract entered into between the appellant company and its attorneys required them to furnish the information free to all subscribers for

torney because he is a bonded representative of the company, and the attorney gives the subscriber the information desired because his contract with the company obliges him to do so. So that, in every detail of the transaction, the attorney is acting as a representative of the company. The statute should be construed liberally to carry out its intent, and its purpose is clearly expressed in the sentence declaring that "each and every person, partnership, or corporation, having representatives in this state, who engage in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this state, shall pay a license tax of one hundred dollars." We do not deem it necessary to inquire into the power of the company under its charter to do the character of business for which it was prosecuted. It assumed the right under its charter to engage in this business, and will not be heard to say, when prosecuted for failing to obtain the necessary license, that in doing so it exceeded its charter powers.

Wherefore the judgment of the lower court is affirmed.

BRUTON'S ADM'R v. EDDINGTON-GRIFFITHS CONST. CO. et al.

(Court of Appeals of Kentucky. May 5, 1909.)

1. MASTER AND SERVANT (§§ 101, 102*)—SAFE PLACE TO WORK.

The master must use ordinary care to furnish the servant a reasonably safe place in which to work.

[Ed. Note.—For other cases, see Master and Servant Cent. Dig. §§ 171, 173; Dec. Dig. §§ 101, 102.*]

2. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

In an action for death of a person in a tunnel, where a witness for plaintiff testified as to the location of deceased when killed by a falling stone, defendant on cross-examination could go into new matter and prove any facts as to which the witness could testify, including the result of his prior inspection of the roof.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 942; Dec. Dig. § 268.*]

3. TRIAL (§ 140*)—QUESTION FOR JURY—CREDIBILITY OF WITNESSES.

Where the testimony of one witness is inconsistent with that of others, it is a question for the jury to decide which witness they will believe.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

4. TRIAL (§ 139*)—QUESTION FOR JURY—SUFFICIENCY OF EVIDENCE.

If there is any evidence warranting a finding for plaintiff, the question is for the jury, though one of plaintiff's witnesses may contradict his other witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 332; Dec. Dig. § 139.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

under the evidence, to be for the jury.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1010; Dec. Dig. § 286.*]

Appeal from Circuit Court, Laurel County.
"Not to be officially reported."

Death action by James Bruton's administrator against the Eddington-Griffiths Construction Company and another. There was a directed verdict for defendants, and plaintiff appeals. Reversed and remanded for a new trial as to the mentioned defendant, and affirmed as to the other.

W. E. Evans and C. C. Williams, for appellant. J. W. Alcorn, for appellees.

HOBSON, J. The Eddington-Griffiths Construction Company entered into a contract with the Louisville & Nashville Railroad Company to make a tunnel for it in Laurel county. James Bruton was a colored laborer in its service, and while at work in the tunnel was killed by a stone which fell from the roof of the tunnel upon him, mashing him so that he died almost immediately. This action was brought by his administrator against both the railroad company and the construction company to recover for his death. At the conclusion of the evidence for the plaintiff, the court instructed the jury peremptorily to find for the defendants. A verdict and judgment having been rendered for the defendants, the plaintiff appeals.

The peremptory instruction as to the railroad company was proper, as the deceased was not in its service, and there was nothing in the evidence to make it responsible for his death. As to the construction company, a different question is presented. The relation of master and servant existed between the deceased and it. It was incumbent on it to use ordinary care to furnish the deceased a reasonably safe place to work. The rock which fell was a large piece of slate, and is called by one of the witnesses a "horseback." It was 2 or 3 feet wide, 2 feet broad, and a foot or more thick. It fell about 20 feet from the mouth of the tunnel. The tunnel had been cut for about 50 feet. For about 35 feet it was completed, and for about 15 feet the bench had not been taken out. The deceased was working on the floor of the tunnel cleaning it up. He belonged to what was called the "night shift," and had only been at work a few minutes when the rock fell upon him. The roof of the tunnel, so far as it had been completed, was not braced or protected in any way to prevent the stone above from falling down, although preparation had

around that were streaks and muddy seams where the water had seeped through, and where it looked like plugs would drop out at any time on any little jar. He also proved by J. W. Hodges: That about two days before the deceased was killed he was at the tunnel and looked at the roof; that he saw some rocks fall while he was working there; there were seams in the rock, and the rock looked loose up in there, and looked like they might fall out at any time; at places it looked like the rock was seamy; that this condition existed at the point where the deceased was killed, and at all points along about there; the seams looked like dirt seams; it was bad rock in there. Timbers had been hauled there for the purpose of bracing up the tunnel, but had been used for another purpose. The witness had worked in coal mines and had eight years of experience in such mines. Some of the cracks were two inches wide. The plaintiff also introduced Thomas Potter and proved by him the location of the deceased about 20 feet from the mouth of the tunnel at the time he was killed. On cross-examination the defendant showed by Potter: That he was foreman in charge of the gang; that on that afternoon before Potter went to work he had taken a sounding bar and scaled the roof, knocking on the roof of the tunnel to ascertain if anything was loose, and get it down; that the roof was of solid slate at that time; that he discovered nothing wrong, did not see any cracks there; and that the place that fell was a horseback which would give no notice of its liability to fall until it came down. The plaintiff also showed that the tunnel was dark, was only lit by some gasoline torches which would throw light upon the floor, but would not throw light on the roof overhead so that the deceased could see the condition of the roof.

When the plaintiff introduced Potter, the defendant was at liberty on cross-examination to go into new matter and to prove by the witness any facts which he could testify to; but, if his testimony was inconsistent with the testimony of other witnesses given on the trial, it would be a question for the jury which witness they would believe. If the testimony of the witnesses Nickolson and Hodges was true, the condition of the roof of this tunnel was very different from that which the witness Potter testified to on cross-examination, and, if their testimony was true, it was a question for the jury whether the master had used ordinary care to furnish his servant a reasonably safe place to work; for if the rock of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The rule is that, if there is any evidence warranting a finding for the plaintiff, the question is for the jury, and the rule is not different although one of the witnesses introduced on behalf of the plaintiff may contradict the other witnesses introduced by him. The plaintiff read on the trial also the deposition of Eb Nelson, which tends to confirm the testimony of Nickolson and Hodges.

The judgment as to the Louisville & Nashville Railroad Company is affirmed; but as to the Eddington-Griffiths Construction Company the judgment is reversed, and cause remanded for a new trial.

RICHARDSON v. ISAACS et al.

(Court of Appeals of Kentucky. May 12, 1909.)

1. EVIDENCE (§ 419*)—CONTRACT RELATING TO LAND—PAROL EVIDENCE.

Under Ky. St. § 470 (Russell's St. § 1775), declaring void oral contracts for the conveyance of land, and providing that the consideration need not be expressed in writing, but may be proved or disproved by parol or other evidence, the vendor of land under a contract cannot show by parol evidence that the amount recited in the contract to have been paid was not paid, but in lieu thereof there was an oral promise to convey certain other land on demand.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 419.*]

2. FRAUDS, STATUTE OF (§ 103*)—TRANSFER OF LAND.

The execution of a deed to land and a tender thereof to the grantee as a compromise of a dispute between the parties which the grantee refused, is not a sufficient written acknowledgment of an oral contract to convey the land to take it from the operation of the statute of frauds so as to entitle such grantee to a specific performance.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 103.*]

3. WITNESSES (§ 144*)—COMPETENCY—TRANS-ACTION WITH PERSON SINCE DECEASED.

A contract with a person since deceased cannot be shown by the testimony of the other party thereto.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 625-643; Dec. Dig. § 144.*]

4. WITNESSES (§ 176*)—COMPETENCY.

The surviving party to a contract is not rendered competent to testify as to the contract by the testimony of the heirs of the deceased party, where they did not testify as to the matter in question.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 176.*]

Appeal from Circuit Court, Estill County.
"Not to be officially reported."

Action by Curtis Richardson against Robert Isaacs and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. B. White and Hazelrigg, Chenault & Hazelrigg, for appellant. Riddell & Friend, for appellees.

"Article of agreement between C. Richardson of the first part and C. M. Isaacs of the second part. The party of the first part has sold to the party of the second part a certain tract of land known as the lower farm of Barker Gum, deceased, for seven hundred dollars, two hundred dollars in hand paid the receipt of which is hereby acknowledged, which may be paid as follows: One tract of land in Jackson county known as the Sucky Isaacs, decd., farm supposed to be 150 acres more or less at two dollars and fifty cents per acre to go as a credit on the remainder of the five hundred dollars when said land is surveyed. Of general warranty on said land. This 22d day of February, 1894. Curtis Richardson. C. M. Isaacs." The petition alleges that the sum of \$200, recited to have been paid by Isaacs to Richardson as part of the consideration for the conveyance from Richardson to Isaacs, was not, in fact, paid nor intended to be paid, but that, instead of paying the \$200, C. M. Isaacs verbally agreed that he would, upon demand, convey to Curtis Richardson by deed of general warranty 150 acres of land in Jackson county, Ky., and give him a quitclaim deed to Isaacs' interest in another tract in Jackson county supposed to contain 550 acres. The appellees, who are the children of C. M. Isaacs, deceased, answered, denying all of the material allegations of the petition and pleading that Richardson had assigned the benefit of the written contract sued on to Capt. John Wilson. By reply Richardson, while admitting the assignment of the contract to Wilson, as set out in the answer, alleged that, by the assignment, it was only intended to transfer to Wilson the Sucky Isaacs farm mentioned in the contract, but that it was not intended to transfer to him any other interest in the contract. There were several amendments filed by the respective parties, and the pleadings are somewhat prolix and confused, but we think the material issues were substantially made by the pleadings mentioned. The chancellor, upon the trial of the case, dismissed the petition, and to review that judgment the plaintiff has appealed.

The verbal contract to convey the two tracts of land, as before stated, is clearly within the provisions of the statute of frauds. Section 470, Ky. St. (Russell's St. § 1775), provides that: "No action shall be brought to charge any person * * * upon any contract for the sale of real estate, or any lease thereof for a longer term than one year; * * * unless the contract or some memorandum or note there, be in writing, and signed by the party to be charged therewith, or by his authorized agent; but the consid-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

could not in fact paid as alleged; but he could not, under the statute, inject into this written contract a verbal agreement to convey two tracts of land in lieu of the \$200 which he says was not the real consideration for the contract. This would produce the very evil which the statute was intended to prevent.

But it is insisted for appellant: That, even assuming that the verbal contract set up in the petition is unenforceable under the statute, the evidence of plaintiff shows that Isaacs in his lifetime prepared a deed for 150 acres of land in Jackson county, Ky., which he and his wife signed and acknowledged, and that he afterwards tendered it to Richardson in full settlement of the claim of the latter under the contract sued on, but that Richardson refused to accept the deed as full settlement, and therefore it was not delivered; that this deed, signed by Isaacs, is a sufficient compliance with the statute of frauds; and that there should be a specific performance decreed for the 150 acres described in the deed. The answer to this proposition is that the evidence indubitably shows that the deed was prepared and tendered as a compromise on the part of Isaacs with Richardson, and that the latter refused to make the compromise or accept the deed as tendered. Isaacs did not admit that there was due from him, under the contract, the duty of conveying 150 acres of land to Richardson. On the contrary, the witness Winn, who prepared the deed and tendered it for him to Richardson, testified that Isaacs was thereby trying to buy his peace, and this deed cannot therefore, in any fair sense, be said to have been an acknowledgment in writing of the verbal contract set up in the petition.

There was no evidence, except the testimony of Richardson himself, which tended to show that the \$200, recited in the written contract to have been paid, was not in fact paid by Isaacs, and his testimony on this point was clearly incompetent as against the dead man; nor was it made competent by the subsequent testimony by the heirs at law of Isaacs, as they did not testify on this point.

Upon the written contract between Richardson and Isaacs, hereinbefore set out, there was this indorsement: "March 1, '95. I assign the benefit of the within bond to Capt. John Wilson. C. Richardson." This assignment is admitted in the reply of the appellant. There is no evidence in the record, except the testimony of Curtis Richardson himself, which tends to limit the full scope of the assignment. Richardson's testi-

PHILADELPHIA CASUALTY CO. v. CAN- NON & BYERS MILLINERY CO.

(Court of Appeals of Kentucky. May 12, 1909.)

1. INSURANCE (§ 432*)—CREDIT INSURANCE— CONSTRUCTION OF POLICY—"EXPERIENCE."

A policy of credit insurance made the "experience" of the insured in dealing with its customers the basis of credit, and then provided that the highest previous indebtedness should be taken as an "experience" which would justify the indemnified in again extending credit to an old customer. *Held*, that the term "experience" meant a business transaction which was closed, since until the goods for which the credit was extended were paid for, and the transaction closed, the creditor would not be justified in extending further credit.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 432.*]

2. INSURANCE (§ 432*)—CREDIT INSURANCE— CONSTRUCTION OF POLICY—ADDITIONAL CREDIT—EFFECT OF RETURN OF GOODS PRE- VIOUSLY SOLD.

Where goods shipped C. O. D. were returned because the customer was unable to pay for them, this would be such an experience as would not warrant the extension of further credit to him, within the provision of a policy of credit insurance providing that the highest previous indebtedness should be taken as an experience, which would justify the indemnified in again extending credit to an old customer, but, if the goods were returned because not of the character bought or contracted for, the transaction should be entirely ignored, and credit might be extended to such customer as though the transaction had never taken place.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 432.*]

3. INSURANCE (§ 432*)—CREDIT INSURANCE— CONSTRUCTION OF POLICY—PREVIOUS EX- PERIENCE—EXECUTION OF NOTE—"EXPERI- ENCE."

The execution of a note in payment for goods sold on credit did not, until payment of the note, close the transaction, so as to render it an "experience" which would justify the creditor in again extending credit to an old customer.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 432.*]

4. INSURANCE (§ 511*)—CREDIT INSURANCE— CONSTRUCTION OF POLICY.

A policy of credit insurance provided that, before being entitled to payment under the policy, the insured must first sustain an "initial loss," which was fixed at three-quarters of 1 per cent. of the gross business done by the insured, based upon his experience the previous year, and provided also that, if his total gross business should exceed the sum used as a basis, then the initial loss should be correspondingly increased. By a "rider" the policy was made to relate back to cover all outstanding accounts which had been created during the regular course of business in the six months preceding the date of the policy. *Held*, that the effect of the rider was simply to antedate the policy six months, and hence accounts made during such time must be treated as a part of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. INSURANCE (§ 511*)—CREDIT INSURANCE—CONSTRUCTION OF POLICY—"FIRST BILL."

A policy of credit insurance insured a dealer against loss which he might sustain on account of nonpayment of the first bill for goods sold to new customers, which was not to be in excess of \$400. *Held*, that "first bill" meant the particular articles contracted for at one time, without regard to the time within which the bill therefor should be paid, and did not include all goods, not exceeding \$400, which were sold and delivered between the first sale and the maturity of the bill therefor.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 511.*]

6. INSURANCE (§ 511*)—CREDIT INSURANCE—SALVAGE—APPLICATION OF.

Where a policy of credit insurance makes no provision as to the application of salvage, the insured is entitled to make such application of the salvage recovered by him as is beneficial to his interests, and hence may apply it to the discharge of those debts for which he holds no security and for the loss of which he is not indemnified.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 511.*]

7. INSURANCE (§ 665*)—ACTION ON POLICY—EVIDENCE.

Where a policy of credit insurance provided that the insured should be indemnified against loss on account of sales of goods of the kind usually dealt in by the insured, and the accounts taken from the books of the insured showed the character of goods to be such as the insured dealt in, the items themselves furnished the best evidence as to the character of the goods sold, and hence no additional proof as to their character was required.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

8. INSURANCE (§ 168*)—CREDIT INSURANCE—CONSTRUCTION OF POLICY.

A policy of credit insurance should not be so narrowly construed as to place upon the insured any unreasonable or unnecessary labor or expense in the presentation of his claim, nor should it be so liberally construed as to place upon the insurance company a liability which, by the fair construction of the terms of the policy, it had not contracted to assume.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 325; Dec. Dig. § 168.*]

9. INSURANCE (§ 665*)—CREDIT INSURANCE—ACTION ON POLICY—EVIDENCE—SUFFICIENCY.

Where, in an action on a policy of credit insurance, insured showed by evidence of its bookkeeper, speaking from the books of account before him, that he had sold and delivered to its various customers, whose accounts were involved in the action, the particular bills of goods set forth in the items of account filed with his deposition, and that these goods were not paid for, and accompanied his statements with such evidence of debt or insolvency in each particular case as the insured had received after investigation made, it established a prima facie case entitling it to judgment, in the absence of any claim or showing to the contrary.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

peals, and plaintiff takes a cross-appeal. Reversed on the original appeal, and affirmed on the cross-appeal, and remanded, with instructions.

Gifford & Steinfeld, for appellant. R. C. Kinkead, for appellee.

LASSING, J. The Philadelphia Casualty Company issued to the Cannon & Byers Millinery Company a "credit bond," or policy of insurance, whereby it insured said millinery company against loss not exceeding \$3,000, which it might sustain by reason of credit extended to its customers between July 1, 1908, and July 1, 1904. At the end of the period covered by the policy, the millinery company claimed that it had sustained a loss in excess of \$3,000, and demanded payment of the full amount of the indemnity provided for in the policy. The insurance company denied liability, and the millinery company brought suit on the bond. Issue was joined on the question of liability under the terms of the policy, and because of the conflicting nature of the matters of account involved the case was, on motion of defendant, transferred to equity and referred to the commissioner to hear proof. This was done, and the result of the commissioner's finding reported to court. On exceptions to this report, the case was tried by the chancellor, and judgment was returned in favor of plaintiff for \$1,140.87. From that judgment this appeal is prosecuted by the casualty company, and the millinery company has prosecuted a cross-appeal.

As the ultimate liability of the insurance company is made to depend upon the construction that is placed upon the many provisions and conditions with which the policy is hedged about, when read in connection with the various "riders" thereto subsequently attached, it becomes necessary to analyze, consider, and determine the meaning of each of said provisions, conditions, and "riders" when taken in connection with the others. For, in this way only, can the rights of the parties to this litigation be determined.

The introduction of credit insurance in commercial life is of practically recent date, not only in Kentucky, but in the United States as well, and this court has not heretofore been called upon to construe any contract of this character; nor are we familiar with the decision of any court construing a contract of insurance similar to that presented in this case. Most all insurance of this character is based upon credit ratings as given by recognized commercial agencies, such as Dunn or Bradstreet; but this contract is based upon "experience," and the "ex-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

perience" of the insured, in dealing with its customers, is made the basis of credit. Some confusion has arisen in the practical application of this term. Appellee contends that it means "business transactions," while appellant's interpretation of it is "a business transaction which is closed"; that is, the sale of a bill of goods for which the purchaser has paid. This latter is evidently the meaning that should be given the term as used in the policy, for, in fixing the basis of credit, the policy further provides that the highest previous indebtedness shall be taken as an "experience" which will justify the indemnified in again extending credit to an old customer. Now an indebtedness which has not been paid could not be called a "previous" indebtedness, for it would be a present indebtedness. An experience which would justify a creditor in again extending credit to a debtor must be a satisfactory experience, and no experience could be said to be satisfactory unless the goods sold were paid for.

Two questions of difference have arisen in the construction of this clause of the contract: First, where goods have been sold, and later returned; and, second, where the evidence of the indebtedness for the goods sold has been changed by the execution of a note for the account. In each of these instances it is the contention of appellee that it was entitled to extend to such creditor further credit; whereas, appellant takes the contrary view. In regard to goods returned, it seems that the reason for their being returned would have to be taken into consideration in determining whether or not further credit might be extended to such customer. If the goods had been shipped C. O. D., and were returned because the customer was unable to pay for and receive them, this would be such an experience as would not warrant further credit. On the other hand, if they were returned because not of the character bought or contracted for, then this transaction should be entirely ignored, and credit might be extended to such customer as though the transaction in which the return of the goods was involved had not taken place. The execution of a note for an account in no wise lessened the creditor's liability. It merely changed the form of the evidence of debt, and could not be accepted as satisfying the indebtedness. While, by the execution of a note, the indebtedness might be said to be placed in a more satisfactory form, still it could only be satisfied by payment, and the execution of a note for an account does not constitute such an experience as would justify further extension of credit.

The policy does not insure against all losses, but only such as may be incurred under certain stipulations. It appears that the insured must first sustain what is termed the "initial loss," and this is, by the policy, fixed at three-fourths of 1 per cent. of the gross business done by the insured, based

upon his experience the previous year, when his total business was \$200,000. The initial loss which the insured must stand was, on this basis, fixed at \$1,500; but the policy provided that, if his total gross business should exceed \$200,000, then the initial loss would be correspondingly increased. No difficulty arose over this clause of the policy; but, by an agreement entered into after the date of the policy, and evidenced by what is termed a "rider," the policy was made to relate back, so as to cover all outstanding accounts which had been created during the regular course of business in the six months next before the date of the policy. Appellee contends that these accounts are covered by the policy, no matter how created, while appellant insists that they are to be treated as though they were created after the issue of the policy, and are subject to the restrictions and limitations thrown around such accounts. As the supplemental agreement, or "rider," provides that these accounts shall be "covered upon the same conditions, and shall be included in the same manner as if the goods had been shipped since July 1, 1903," there is left little room for doubt upon this point, for the effect of this clause in the "rider" is simply to antedate the policy six months, and hence all accounts created in that period are governed and controlled by the policy just as though they had been created after its issue. As these accounts are covered on the same conditions as accounts created after the date of the policy, they must be treated as constituting a part of the gross business done by the insured during the life of the policy, and hence must be taken into account in determining the initial loss. The effect of the supplemental agreement covering the accounts for goods sold during the six months next before the date of the policy was simply to increase the gross business done by the company during the life of the policy to the amount of such accounts, and, as the initial loss is to be determined by taking three-fourths of 1 per cent. of the gross business, the chancellor erred in not taking these accounts into consideration as constituting a part of the gross business.

Another item of dispute is as to the meaning of the term "first bill," as used in the policy. Appellee contends that there should be included in this term all goods, not exceeding \$400 in value, that are sold and delivered between the date of the first sale and the maturity of the bill therefor; whereas, appellant urges that only such goods as were actually sold at one time should be treated as a "first bill." This latter is the only reasonable construction that can be placed upon the term. Any other construction would enable the insured to hold the company liable for all goods, up to \$400 in value, that it might sell during the period covered by the policy, if the time of payment of the bill of goods first ordered should be extended to

the particular articles contracted for at one time, without regard to the time within which the bill therefor should be paid.

Two classes of customers are dealt with in the policy; those with whom the insured had previously dealt being termed "old customers," and all others "new customers." The insured, under the terms of the policy, is indemnified against loss on account of goods sold to old customers where the sale does not exceed the highest previous indebtedness of said old customer to the insured within 12 months next before the issue of the policy, and he is indemnified to the extent of 50 per cent. of any loss he may sustain on account of goods sold to new customers; provided, however, that no sale to any new customer shall exceed \$400. All customers, new and old alike, under the terms of the policy, are permitted to make additional purchases during the life of the policy, and such new purchases may, at any time, equal the full amount of the previous indebtedness, and 50 per cent. thereof in addition. Such addition is treated as a sale to a new customer, and is only covered to the extent of 50 per cent. Thus, if an old customer had, during the year, purchased and paid for a bill of \$800, he would be permitted, under the terms of the policy, to purchase a bill of goods of the value of \$1,200, being the value of the amount of the highest previous indebtedness, plus 50 per cent. thereof; but the insured would only be indemnified, on account of this credit, to the extent of \$800, plus one-half of the increase, which is \$200, making his total indemnity \$1,000. And, it is further provided that the insurance company shall, in no event, be liable for more than \$1,000 on any single account.

Another difference of opinion has arisen as to the proper application of salvage. The policy makes no provision as to the application thereof. Appellant urges that the credit for salvage should be applied, in the absence of a contract to the contrary, to the discharge of that debt upon which, or for which, it was bound; whereas, appellee contends that any salvage recovered should be applied to the discharge of those debts for which it held no security, and for the loss of which it was not indemnified. We are of the opinion that as the policy of insurance, which is the contract between the parties, is silent upon this question, appellee had a right to make such application of the salvage as was most beneficial to its interests. In this particular the insured is certainly to be placed at no greater disadvantage than any other creditor, and the rule is well settled in this state and elsewhere that, where a creditor

and, applying this rule to the case at bar, appellant is in no condition to complain because appellee allowed credit for salvage received, upon accounts for which appellant was not liable.

The policy provides that the insured shall be indemnified against loss on account of sales of goods of the kind usually dealt in and owned by the insured, and appellant insists that the evidence in this case fails to show that appellee was the sole owner of the goods sold to the various customers whose accounts are involved in this litigation, or that such goods as it did sell were of the kind usually dealt in by appellee. This contention is highly technical. The accounts taken from the books of the insured, in each instance, show the character of goods to be such as appellee dealt in. The items themselves furnish the best evidence as to the kind or character of goods sold and delivered in each instance. This being true, and these various items being the character of goods in which appellee dealt, no further evidence upon this point should or could reasonably be required. Additional proof should not be required to supplement the evidence furnished by the account itself, unless the items of goods as shown in the account fail to disclose the fact that they were of the character usually carried and dealt in by the insured. With the books of the insured open for the inspection of appellant, it could have easily discovered that the respective bills, or any of them, were not of the kind or character dealt in by appellee if such had been the case, and the fact that appellant cites no case where the goods so sold and delivered were not of the character usually dealt in by appellee, after it has had an opportunity to inspect the books while the proof was being taken before the commissioner, is the best evidence that there is no merit in this contention.

The policy should not be so narrowly construed as to place upon the insured any unreasonable or unnecessary labor or expense in the presentation of its claim. On the other hand, it should not be so liberally construed as to place upon the insurance company a liability which, by a fair construction of the terms of the policy, it had not contracted to assume. When the appellee showed, by the evidence of its bookkeeper, speaking from the records before him, that it had sold and delivered to its various customers, whose accounts were involved in this litigation, the particular bills of goods set forth in the items of account filed with his deposition, and that these goods were not paid for, and accompanied his statement with such evidence of debt or insolvency in each partic-

ular case as the insured had received after investigation made, it established a prima facie case—one upon which the chancellor was warranted in entering judgment in the absence of any claim or showing to the contrary. It is true that, in most instances, appellee might have made its claim stronger by introducing other evidence to show the failure of the different creditors whose accounts were involved; but this would have entailed, necessarily, much additional, and perhaps unnecessary, expense, which, in the end, if any liability attaches, would have to be borne by the appellant. When appellee had furnished to appellant such evidences showing insolvency in each particular case as it had at hand, appellant could have shown, had the facts warranted it, that these various creditors, for whose accounts appellee was seeking to be indemnified, were not in fact insolvent. Its failure to do so, or to make any effort to do so by introducing evidence of any character, while not conclusive, is persuasive that it was unable to do so.

Thirty-nine different accounts are involved in this litigation. There is a wide difference between the finding of the commissioner and the judgment by the court as to the extent of the insurance company's liability. This difference grows out of the different construction which the commissioner and the chancellor placed upon the various conditions and "riders" contained in and attached to the

policy. The construction placed by the chancellor upon the provisions of the policy, and the "riders" thereto attached, were, with two exceptions, in accordance with the view herein expressed. His interpretation of what constituted a "first bill" was more favorable to the insured than it should have been, inasmuch as he included in this item all goods furnished to a new creditor by the insured, up to the value of \$400, before the maturity of the claim for the first items of such account; whereas, he should have construed the term "first bill" as hereinbefore indicated. Likewise, his interpretation of the initial loss clause was more favorable to the insured than it should have been, in that he excluded from his consideration in fixing the initial loss the accounts for bills of goods sold during the six months next before the date of the policy. These should have been taken into account by him in determining the initial loss, as they clearly constituted a part of the gross business done by the company within the meaning of the provisions of the policy.

For these reasons, the judgment is reversed on the original appeal, and affirmed on the cross-appeal, and the case is remanded, with instructions to the chancellor to enter judgment in favor of the insured in accordance with the interpretation of the various provisions of the contract of insurance as above set out.

Where appellant failed to comply with Supreme Court Rule 9, requiring instructions given and refused to be set out in the abstract, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2776-2782; Dec. Dig. § 635.*]

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

Action by Fybush Bros. against J. Karatofsky. Judgment for plaintiffs, and defendant appeals. Affirmed.

S. W. Leslie, for appellant. Greaves & Martin, for appellees.

HART, J. Appellees, Fybush Bros., brought suit against appellant, J. Karatofsky, in the Garland circuit court, to recover the sum of \$1,000.30 alleged to be due upon account for goods, wares, and merchandise sold appellant by appellees. There was a trial before a jury, and a verdict returned in favor of appellees for the sum of \$917.17. The case is here on appeal.

The only assignment of error is based upon the action of the trial court in refusing to give a certain instruction asked by appellant. This instruction is set out in appellant's abstract, but it appears that other instructions were given by the court, and that they are not set out in appellant's abstract. Rule 9 of this court requires that the instructions given, as well as those refused, by the court should be set out. The rule was adopted for the purpose of facilitating the work of the court, and is a very salutary one. Appellees have moved to affirm the judgment for noncompliance with this rule, and the motion will be granted. For cases in point, where the rule has been enforced, we refer to the cases of *Mine La Motte L. & S. Co. v. Coal Co.*, 85 Ark. 123, 107 S. W. 174, and *Files v. Law* (Ark.) 115 S. W. 373, in which earlier cases applying the rule are cited.

Judgment affirmed.

BATTLE, J., absent.

PRICE v. GREER.

(Supreme Court of Arkansas. April 26, 1909.)

1. APPEAL AND ERROR (§ 1140*)—DISPOSITION OF CAUSE—REMISSION OF PART OF RECOVERY.

In trespass for cutting timber from several tracts, where the evidence did not show that plaintiff had more than color of title to one of the tracts, and a special verdict was rendered in his favor as to all the tracts, finding separately the amount of damage for cutting timber from each of them, the error could be cured by re-

acts done by a person who has acquired title to land by occupancy and payment of taxes for seven years under color of title, in recognition of the claim of the original owner, would only be important as a circumstance tending to show the character of the possession, whether adverse or not.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 501-503; Dec. Dig. § 85.*]

3. APPEAL AND ERROR (§ 216*)—PRESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—INSTRUCTIONS.

Where a party made no request for submission of a question to the jury, he cannot complain that the court failed to instruct on the point.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216;* Trial, Cent. Dig. § 627.]

On rehearing. Former opinion modified.

For former opinion, see 116 S. W. 676.

McCULLOCH, C. J. We said in the former opinion: "The evidence does not show the amount and value of timber cut from each tract, and the verdict of the jury fixes the gross value of timber cut from all the land." We erred in this, and our attention is now called to it. The court, at defendant's request, instructed the jury to state in the verdict the amount of timber cut from each tract, and the jury returned a special verdict finding separately the amount of damage for cutting timber from each of seven tracts. The amounts aggregated \$721, for which the court rendered judgment for the plaintiff, and only one of the tracts was embraced in the suit of Andrews against Greer to quiet title. The amount of damages for cutting timber on this tract was fixed by the verdict at \$160, and it is contended that a remittitur of this sum will cure the error which we found in the proceedings.

The other six tracts were embraced in the deed from Andrews to Greer executed pursuant to the contract of September 24, 1902, which was after the statute bar had attached in favor of Greer. With respect to that we said in the former opinion that: "The fact of Greer having accepted a conveyance from Andrews of lands not embraced in the suit to quiet title would not necessarily have been a recognition of Andrews' title and ownership so as to remove the statute bar in Greer's favor which had already attached." In the case of *Hudson v. Stillwell*, 80 Ark. 575, 98 S. W. 356, we announced the law on this subject as follows: "Any act done after seven years' occupancy in recognition of the claim of the original owner would only be important when done by the same person who held for the statutory period, as a circumstance tending to show the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
118 S.W.—64

deed from Andrews at that time estopped him to claim title adverse to Andrews and his former grantee, Price. He cannot therefore complain that the court failed to instruct on this point.

We are of the opinion that a remittitur of \$160, which the plaintiff offers to enter, and which reduces the judgment to \$561, will eliminate the error in the proceedings.

Rehearing is therefore granted, and judgment will be entered accordingly.

**HUDDLESTON & TAYLOR et al. v.
COFFMAN.**

(Supreme Court of Arkansas. April 26, 1909.)

1. DRAINS (§ 36*)—PROCEEDINGS FOR ESTABLISHMENT—ALLOWANCE OF ATTORNEY'S FEES—RIGHT TO APPEAL THEREFROM.

Const. art. 7, § 33, provides that appeals from all judgments of county courts may be taken to the circuit court, under restrictions prescribed by law, and section 14 provides that circuit courts shall exercise appellate jurisdiction over county courts and other designated courts. *Held*, that there was a right of appeal from an order of the county court allowing fees to attorneys for a drainage district, though the right was not conferred by Kirby's Dig. § 1428, relating to appeals in proceedings under such act, and it could be exercised under the general act; Kirby's Dig. §§ 1487-1493, governing appeals from the county court.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 44; Dec. Dig. § 36.*]

2. DRAINS (§ 36*)—PROCEEDINGS FOR ESTABLISHMENT—ALLOWANCE OF ATTORNEY'S FEES—RIGHT TO APPEAL.

Const. art. 13, § 16, provides that any citizen of any county may sue in behalf of himself or of others interested to protect the inhabitants thereof against the enforcement of illegal exactions. *Held*, that a citizen of a county owning land in a drainage district was an interested party and not a mere interloper, and, if an order of the county court allowing fees to attorneys for the district was improperly made, it amounted to an illegal exaction, and he was individually interested in the order and could appeal therefrom.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 44; Dec. Dig. § 36.*]

Appeal from Circuit Court, Greene County; Frank Smith, Judge.

Application by Huddleston & Taylor and others for an allowance of fees as attorneys for Eight-Mile Drainage District No. 2. From the allowance thereof, M.-R. Coffman appealed to the circuit court, and, from the judgment fixing the fees in such court, the applicants appeal. Affirmed.

Huddleston & Taylor and Johnson & Burr, for appellants. J. D. Block, Jeff Bratton, S. R. Simpson, and Murphy, Coleman & Lewis, for appellee.

tofore duly appointed attorneys of record for Eight-Mile drainage district No. 2, and move the court to make to them an allowance for reasonable attorney's fees as attorneys for said district aforesaid, and in the fixing of said fee they ask that the court hear oral evidence as to what would be a reasonable attorney's fee in said cause, and for all other proper and needful relief." Upon hearing the application the county court made the following order: "On this the 13th day of April, 1908, the same being an adjourned day of the regular April, 1908, term of this court, this matter came on to be heard further upon the petition of Huddleston & Taylor and Johnson & Burr, attorneys heretofore appointed by the court to represent the said district as such, for the allowance of a reasonable attorney's fee herein, and upon the evidence of the following witnesses, to wit, W. S. Luna, J. T. Craig, and Basil Baker, each members of the bar. And the court after considering the same, and being duly advised in the premises, doth grant said petition and allow to said attorneys a fee of \$4,000, which sum the court doth adjudge a reasonable fee herein." M. R. Coffman, an owner of real estate in said drainage district, duly prosecuted an appeal to the circuit court. On a trial anew in the circuit court, the presiding judge fixed the fee at \$3,000, and judgment was rendered against said drainage district for that sum. Appellants in turn have duly prosecuted an appeal to this court.

Section 1424 of Kirby's Digest, among other things in regard to the construction of drains and ditches, provides that: "The county court shall also allow a reasonable attorney's fee in case an attorney has been appointed by the court to assist in the work provided for by this act." Section 1428 of the same act provides for an appeal from the county court to the circuit court in certain cases, and also specifies the time and manner of taking the appeal. The matters concerning which an appeal may be taken from the orders and judgments of the county court in relation thereto are expressly enumerated in the section. The matter of attorney's fees is not one of the subjects enumerated. The appeal in the present case was not taken under section 1428 of Kirby's Digest, relating to the drainage act, but under sections 1487-1493 of Kirby's Digest, being the general act regulating appeals from the county court. The provisions of section 1428 in regard to the time and manner of taking appeals from the county court must govern in regard to the particular cases mentioned in that section. *Mills v. Sanderson*, 68 Ark.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

130, 56 S. W. 779. The allowance of attorney's fees not having been enumerated as a question from the decision of which an appeal is provided for under the drainage laws, can an appeal be taken from such order under the general law regulating appeals from the county court?

Section 33, art. 7, of our Constitution provides that: "Appeals from all judgments of county courts or courts of common pleas, when established, may be taken to the circuit court under such restrictions as may be prescribed by law." Section 14, art. 7, of the Constitution provides that circuit courts shall exercise appellate jurisdiction over county courts and other designated courts. It follows, then, that the right of appeal from the order of the county court in question existed; and, that right not having been conferred in the matter of allowing attorney's fees by the drainage act, it could be exercised under the general acts governing appeals from county courts. Phillips County v. Lee County, 34 Ark. 240. Coffman was a citizen of Greene county and owned land in the drainage district. He was therefore an interested party, and not a mere interloper. Section 13, art. 16, of the Constitution provides that: "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." The order of the county court, if improperly made, amounted to an illegal exaction, and Coffman, being individually interested in the order, had the right of appeal. This seems to us to be the plain and natural construction of these clauses of the Constitution. To hold otherwise would be to place the interested parties at the mercy of the county court, and might have the effect of imposing a grievous burden upon them without any right whatever of appeal.

This rule of construction was applied in the case of Lee County v. Robertson, 66 Ark. 82, 48 S. W. 901, in which the court held: "Where a citizen and taxpayer of a county appeared in the levying court, and asked to be made party to an order misappropriating county funds, and made objections thereto, and was treated as an adversary party in that court, though not formally made a party, he will be entitled to appeal to the circuit court from the order making such appropriation." See, also, Phillips County v. Lee County, supra. This being manifestly the construction intended by the framers of the Constitution and recognized by this court in adjudicated cases, it is unnecessary for us to discuss or review in this opinion the decisions of the courts of other states cited by the counsel for appellants.

Appellants do not contend that the reduction of the fee by the circuit court was error, and that question is not before us.

We are of the opinion that an appeal lay from the judgment of allowance of the county court in the matter of the attorney's fees, and, no appeal having been provided for in the act under which drainage districts are created, such appeal could be taken under the general acts governing appeals from the county courts, and that Coffman, being a citizen and landowner of the drainage district, had the right to appeal.

Therefore the judgment will be affirmed.

PLUMMER & DAVIS et al. v. SCHOOL DIST. NO. 1 OF MARIANNA et al.

(Supreme Court of Arkansas. April 26, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 86*)—CREDITORS OF BUILDING CONTRACTOR—REMEDIES.

Creditors of a contractor of a school district for labor and materials furnished in the erection of a building are without remedy at law to have the funds in the hands of the directors applied to the payment of their debts against the contractor, and they are without any remedy in equity which will involve the diversion of funds from the channel to which they have been turned by public authority.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 203-205; Dec. Dig. § 86.*]

2. MECHANICS' LIENS (§ 13*)—CREDITORS OF BUILDING CONTRACTOR—REMEDIES.

Since public policy forbids liens on public buildings for labor and materials, claimants for labor and materials furnished a contractor constructing a building for a school district cannot have liens declared under Kirby's Dig. § 4979, and they can only reach the fund which the district owes the contractor by resorting to the remedies common to creditors for the collection of their debts.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 15; Dec. Dig. § 13.*]

3. CREDITORS' SUIT (§ 36*)—LIEN—PRIORITIES.

The lien obtained on the equitable assets of a debtor by a creditors' suit attaches thereto from the time of service of process, or on the filing of the bill and suing out of process.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 146; Dec. Dig. § 36.*]

4. CREDITORS' SUIT (§ 36*)—LIEN—PRIORITIES.

Since claimants for labor and materials furnished to a contractor for a school district building are simple contract creditors and have no lien on the fund which the district owes the contractor, suits by them against the district and contractor to apply the funds to the payment of their debts are governed by the law governing the priority of claims of simple contract creditors, and claimants who first file their suits and obtain service are entitled to a preference over claimants subsequently filing suits and obtaining service.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 146-153; Dec. Dig. § 36.*]

Appeal from Lee Chancery Court; Edward D. Robertson, Chancellor.

Consolidated suits by Plummer & Davis and others, and by H. W. Paslay and others,

appeal. Reversed and remanded.

The appellants, Plummer & Davis, O. C. Sutton, M. Lesser, Twen Cen Granite Company, and Hays & Sturdivant, filed their suits in the Lee chancery court alleging: That the defendants O. A. Alstead and G. B. Thomason were indebted to them in various sums on account of material furnished to the defendants as contractors engaged in the erection of a school building for the defendant Special School District No. 1 of Marianna; that the said school district was indebted to the said Alstead & Thomason in a sum greater than the amounts sued for; that the said defendants Alstead & Thomason were insolvent; that the plaintiffs had no remedy at law by which they could obtain satisfaction of their debt, and praying for judgment against the defendants in various sums set out in their complaints, and further praying that the said school district be required to answer as to what sum of money it was indebted to Alstead & Thomason; that the said sum of money be impounded and garnished, and that a lien be declared and established against the same in favor of the plaintiffs, and that the said school district be required to pay such judgment as might be recovered against the defendants Alstead & Thomason. On the 30th day of April, 1906, the appellants H. W. Paslay, J. T. Johnson, and ——— Brewer also filed their complaint, setting up substantially the same facts, and asking the same remedy against the defendants Alstead & Thomason and the school district. On the 22d day of May, 1906, G. H. Vineyard filed a similar suit for \$71.25. On May 27, 1906, L'Anguille Lumber Company filed their suit for \$709.40, alleging substantially the same facts, and on the 22d of May, 1907, the Coffeyville Brick Company brought suit for \$952.81, alleging substantially the same facts as set forth in other complaints. The school district answered and denied that it was indebted to Alstead & Thomason in any amount, but alleging that the said school district had complied in every way with the contract, that the same provided for liquidated damages of \$25 per day for all the days that the said school building remained incomplete after the time mentioned in the contract, and that the said Alstead & Thomason were indebted to the school district in the sum of \$669, and that the said school district was not indebted to the said Alstead & Thomason in any sum whatever.

The causes were consolidated and heard upon the pleadings and depositions in the various cases. On the 27th of May, 1907, a decree was rendered finding that the said school district was indebted to the contract-

for \$94.70; to Twen Cen Granite Company, \$197.99; to Hays & Sturdivant, \$94.20; to Paslay & Johnson et al., \$325; to ——— Brewer, \$126; to G. H. Vineyard, \$71.25; to L'Anguille Lumber Company, \$709.40; and Coffeyville Brick Company, \$952.81. On the 20th day of May, 1908, the plaintiffs Plummer & Davis, O. C. Sutton & Co., Twen Cen Granite Company, and Hays & Sturdivant filed their motion and petition in said court asking that they be declared entitled to priority in the distribution of said fund, alleging and showing that their actions were filed prior to the actions of any other of the plaintiffs and were for the purpose of impounding, garnishing, and attaching the funds in the hands of the school district of Marianna. The plaintiffs Paslay & Johnson and Brewer also asked to be made parties to the motion and asked that they have priority in the distribution of the fund. The court found: That the plaintiffs, Plummer & Davis, O. C. Sutton & Co., Twen Cen Granite Company, and Hays & Sturdivant had filed their suit on the 10th day of May, 1906; that the other plaintiffs had filed their suits subsequent to said dates; that all of the debts sued for by all of the plaintiffs amounted to the sum of \$3,632.01; and that the pro rata amount, if distributed among all the creditors, would amount to the said .476 per cent. The decree directed that the funds in the hands of the clerk be distributed accordingly among all the creditors. Thereupon Plummer & Davis, O. C. Sutton & Co., Twen Cen Granite Company, Hays & Sturdivant, Paslay & Johnson, and ——— Brewer excepted and appealed.

H. F. Raleson, for appellants. P. D. McCulloch, for appellees.

WOOD, J. (after stating the facts as above). In Boone County v. Keck, 31 Ark. 337, this court held that public municipal corporations are not subject to the process of garnishment. The court said: "Public policy, indeed public necessity, requires that the means of public corporations, which are created for public purposes with powers to be exercised for the public good, which can contract alone for the public, and whose only means of payment of the debts contracted is drawn from the corporators by a special levy for that purpose, should not be diverted from the purposes for which it was collected, to satisfy the demands of others than the parties contracted with." This was said in a case where the interests of a county were involved, but the rule and the reason for it are the same in the case of a school district, so that the appellants were remediless at law to have the funds in the hands of the

and for the same reason, if the question were one of diverting the public funds from the channel to which they have been turned by public authority; but as the school building has been completed, and the purpose consummated for which the fund was raised, the public interest cannot be injuriously affected by further withholding the fund from distribution to those who are justly entitled to it. No reason is assigned here on behalf of the school district why the creditors of the contractors should not come into equity to have the funds in the hands of the district subjected to the payment of their debt. But for the public policy which forbids liens to be declared on public buildings, all those who had claims for labor done, materials furnished, etc., on the school building, could have their liens declared on same and be on an "equal footing" under section 4979, Kirby's Dig.; but this doctrine of public policy forbids such procedure. Then, how are they to reach the fund which the district owes the contractor and which the contractor owes them?

In the absence of a statute giving them a lien upon the fund superior to that of the contractor, and making them to share pro rata in its distribution when impounded, their relation to the contractor is simply that of creditor, and they can only resort to the remedies common to creditors for the collection of their debts. *Riggin v. Hillard*, 56 Ark. 476, 20 S. W. 402, 35 Am. St. Rep. 113. In the absence of legislation or contract affecting the status of the parties otherwise, their relation is simply this: The school district owes the contractors a certain amount which it has in its possession, and the contractors owe the various claimants who brought these suits the respective amounts that the court found due them. Says Judge Cockrill in the above case of *Riggin v. Hillard*: "Every equitable proceeding wherein a remedy is devised to apply the debt of a third person to the extinguishment of the plaintiff's demand against his debtor is an equitable garnishment." The complaints in this case, as in that, alleged insolvency of the contractors, and that no relief could be had at law, and other facts, which laid the proper foundation for a creditor's suit to subject the funds in the hands of the directors. Therefore, as the plaintiffs in these various suits are nothing more nor less than simple contract creditors, the law governing the question of the priority of their respective claims is well established. "The lien obtained on the equitable assets of a debtor by a creditor's suit attaches thereto from the time of the service of process, or, as stated in some of the cases, on

commencement of their respective suits either in law or equity which they could enforce; but the commencement of their suits to subject the fund in controversy created the lien by equitable garnishment of the assets in the hands of the directors, and these garnishments are subject to privities. *Watkins v. Field*, 6 Ark. 391; *Martin v. Foreman*, 18 Ark. 249; *Adams v. Penzell Gro. Co.*, 40 Ark. 531. See *Jones, McDowell & Co. et al. v. Ark. Mech. & Agl. Co.*, 38 Ark. 17; *Little Rock T. & E. Co. v. Wilson*, 66 Ark. 585, 53 S. W. 43; *Green v. T. Robertson*, 80 Ark. 1, 96 S. W. 138.

Equity follows the law as to priority in garnishment proceedings. It follows that appellants *Plummer & Davis*, *O. C. Sutton*, *M. Lesser*, *Twen Cen Granite Co.*, and *Hays & Sturdivant*, who filed their suits on the same day and obtained service at the same time, for aught that appears to the contrary, are entitled to preference in the satisfaction of their claims, and that *Paslay & Johnson* and *Brewer*, who made their complaint a general creditors' bill, and the subsequent claimants, are entitled to share in the residue pro rata.

The decree is therefore reversed, and the cause is remanded, with directions to enter a decree in accordance with the opinion.

AMES SHOVEL & TOOL CO. v. ANDERSON et al.

(Supreme Court of Arkansas. April 19, 1909.)

1. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

One in constructing a railroad having no right to injure the lands of an upper proprietor by flooding them with surface water which had naturally passed over the right of way, when by reasonable care it might, consistently with the enjoyment of the right of way, leave a free passage for the water, the use of the words "sufficient openings or culverts," in an instruction that it was the duty of defendant in building its road to use ordinary care to provide proper and sufficient openings or culverts for the escape of all water crossing its roadbed by natural drains and depressions so as not to obstruct and cause the water to overflow the lands of upper proprietors, which by exercise of such care could have been foreseen and guarded against, was not prejudicial, as a free passage of water could not be otherwise provided.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

2. TRIAL (§ 278*)—INSTRUCTIONS AS A WHOLE—SPECIFIC OBJECTIONS.

The instruction that it was defendant's duty, in constructing its road, to use ordinary care to provide proper openings or culverts for escape of all waters crossing its roadbed by means of natural drains and depressions so as not to cause the water to overflow the lands of upper proprietors, which by such care could have been guarded against; and if defendant failed to provide such openings, and by reason thereof plaintiff's lands were overflowed, and his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

crops injured, defendant was negligent, and verdict should be for plaintiff—considered as a whole, shows an intent to charge that, if defendant failed to use ordinary care to provide sufficient openings for escape of the water, and by reason of such failure plaintiff's lands were overflowed and his crop injured, he could recover, so that specific objection, pointing out the failure to do so by proper words, was necessary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 689; Dec. Dig. § 278.*]

Appeal from Circuit Court, Little River County; Jas. S. Steel, Judge.

Actions by James S. Anderson and John Anderson against the Ames Shovel & Tool Co. From judgments for plaintiffs, defendant appeals. Affirmed.

J. O. Livesay, J. S. Lake, and Glass, Estes & King, for appellant. J. T. Cowling and J. D. Head, for appellees.

BATTLE, J. Two actions were brought against the Ames Shovel & Tool Company of Texas to recover damages to crops in 1906 and 1907, caused by the unskillful and careless construction of a railroad. One of these actions was brought by James S. Anderson, and the other by the said James S. and John Anderson. They involved practically the same facts and questions of law, and were consolidated and tried as one action. A verdict in the former was rendered in favor of the plaintiff for \$954, and in the latter in favor of the plaintiffs for \$391.50. Defendant appealed.

In the first action the plaintiff alleged: That he was the owner of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 30, township 13 S., range 31 W., and the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 25, township 13, range 32 W., in Little River county, in this state; that he had a farm on the lands, in cultivation, during the year 1906; that some time in May, 1906, the defendant, in the course of its business, and for the purpose of transporting timber to one of its mills, constructed and maintained a railroad running a short distance north of the farm and across a natural depression, which sloped from the plaintiff's farm to the north and east and carried off from the farm water that fell upon the same and upon the surrounding territory; "that there was another slough or lake or depression which extended through the northwestern part of section 25 and across into section 24, which carried off waters that fell in the territory adjacent to same, across which the defendant unlawfully, negligently, and carelessly constructed its railroad; that in constructing same the defendant carelessly and negligently built it in such a manner as to obstruct the passage of water along the said natural drains, by building an embankment out of earth and logs to the height of about one foot, and by negligently and carelessly failing to leave any spaces or openings

in the said embankment through which the water, ordinarily and customarily flowing from the farms and lands in that vicinity, could pass. Further, that the appellant carelessly and negligently constructed its road-bed across a slough in section 24, by filling the same with logs, earth, and brush, so that the waters flowing through the said slough could not escape through that channel, and, further, negligently and carelessly obstructed the said slough on the south of the track, by throwing brush and logs therein. Further, that the defendant negligently piled, or caused to be piled, just south of its roadbed, great quantities of logs, brush, and trash which had the effect to stop the flow of water; that during 1906 appellee cultivated all of section 30 except 20 acres, on which cultivated land he had cotton, with the promise of a large yield; that about the last of July the obstructions on the track caused the water to be dammed up and accumulate, over the appellee's farm, and upon the cotton, and damaged it one-half, for which \$1,200 is asked."

"The second cause of action was alleged in that in the year of 1907 another crop of cotton was planted, and was destroyed in the same way, with the result that he lost 40 acres of cotton, of the value of \$800.

"In the second action there was the same plaintiff as in the first, with the addition of John Anderson. The same allegations of negligence were made; about the only difference being in the land that was injured.

"In the second action it was claimed that in 1906 20 acres of cotton were cultivated jointly by the plaintiffs in the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 30, which was destroyed during the month of July, 1906."

The defendant specifically denied all the material allegations in the complaint.

The testimony in this case is voluminous. It would require too much time and space to set it out, substantially, in this opinion, and it would serve no useful purpose to do so. It is sufficient to say that, the instructions of the court being correct, there was enough to sustain the verdict of the jury.

The court, over the objections of the defendant, gave the following instruction to the jury:

"The court instructs the jury it was the duty of the defendant company in building its road to use ordinary care to provide proper and sufficient openings or culverts for the escape of all water crossing its road-bed by means of natural drains and depressions in the earth so as not to obstruct and cause the water to overflow the lands of upper proprietors, whether at times of ordinary stages of such drains or depressions, or from excessive rains which, by the exercise of such care, could have been foreseen

*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

the plaintiff were overflowed, and his crops injured as alleged in the complaint, then you are instructed that defendant was guilty of negligence, and your verdict should be for the plaintiff."

In *Little Rock & Ft. Smith Railway Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280, this court held: "A railroad company has no right, in the use of its right of way, to injure the lands of upper proprietors by flooding them with surface water which had been used to pass over the right of way, when, by reasonable care and expense, it might, consistently with the enjoyment of the right of way, leave a free passage for the water."

Baker v. Allen, 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93, was "an action to recover damages for the obstruction of the natural flow of surface water, caused by the construction of a levee across a swale or depression which extended across the lands of both plaintiff and defendant, and along which the surface water passed in times of rain and melting snow." In that case this court held: "It is only where a landowner obstructs the natural flow of surface water unnecessarily, when by reasonable care and expense he might have avoided such injury, that he becomes liable to an upper proprietor for the damages thus occasioned."

This rule is applicable to this case. Appellant objects to the instruction given over its objection, because of the use of the words "sufficient openings or culverts," and because the court unqualifiedly instructed the jury to return a verdict in favor of the plaintiff if they found that the defendant failed to provide sufficient openings for the escape of all water, without regard to the use of ordinary care.

As to the first objection, we cannot see how the use of the words objected to could be prejudicial, for how could a free passage of water be otherwise provided?

The second objection is based on an incorrect construction of the instruction. It should be considered as a whole. It is only in this way the intention of the court can be ascertained. When read in this way, it is evident that the court intended to tell the jury that, if they found from the evidence that the defendant failed to use ordinary care to provide such openings, and that by reason of such failure the lands of the plaintiff were overflowed and his crops injured, their verdict should be for the plaintiff. The court certainly did not intend to contradict itself. It is true that the instruction is defective, but it is obvious that the court was endeavoring to follow the ruling of the court

A general objection was insufficient. Judgments in both actions affirmed.

BARRINGER et al. v. BRATCHER.

(Supreme Court of Arkansas. April 26, 1909.)

APPEAL AND ERROR (§ 907*)—PRESUMPTIONS.

The record in a chancery case showing it was heard on oral evidence, and this not being brought into the record, and there being nothing on the face of the record showing error, the decree will be presumed to be correct.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3873; Dec. Dig. § 907.*]

Appeal from Polk Chancery Court; Jas. D. Shaver, Chancellor.

Suit by J. H. Bratcher against T. O. Barringer and others. Decree for plaintiff. Defendants appeal. Affirmed.

This suit was begun in the circuit court; the appellee alleging in his complaint that he was the owner of the lot in controversy by virtue of a deed from the commissioner of state lands, executed June 22, 1907, and that the lands were forfeited for the nonpayment of the taxes for the year 1904. He alleges that appellants were in the unlawful possession of the lot, prays that he may have possession, etc., and exhibits his deed with the complaint.

The appellants answered, denying appellee's title, alleging that the lands were wrongfully and through the fraudulent connivance of appellee returned as delinquent, setting up title through a deed from one W. H. Tobin, and possession thereunder. The answer was made a cross-complaint, and alleged for matters of cross-complaint the following: "That on the ——— day of May, 1905, and within the time in which said taxes upon said property could be paid for the year of 1904, the defendant Edna E. Barringer went to the office of the collector for Polk county, Ark., and there in said office exhibited to said collector a description of said property and tendered and offered to pay the taxes thereon, but that she was informed that said taxes had been paid. * * * (4) That in the year of 1906, the defendants were residing at Heavener, Ind. T., and that prior to the 1st day of June, of said year, the defendant T. O. Barringer mailed from said point to the collector of taxes at Mena, Polk county, Ark., an express money order for the sum of \$4.50 to pay the taxes for 1905 on said lot. That said letter was not returned to him, nor was any credit given him for said amount by said collector. (5) That on the 6th day of June, 1907, he paid to the collector the sum of \$4.12, on which a penalty of 30 cents was charged and collected of him, as will appear

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by the receipt hereto attached and marked 'Exhibit B,' and by the payment of said taxes and penalty defendants believed that said lot was clear and that nothing further as taxes were required. (6) Defendants are informed and believe that the plaintiff was acting with and for the collector of taxes for Polk county, Ark., at the time the defendant Edna E. Barringer offered to pay the taxes for the year of 1904 as above set forth, and charges the truth to be that he either himself fraudulently concealed the truth, or was instrumental in having a misrepresentation of the condition of said lot as to the payment of the taxes thereon made to her. (7) That at the date said lands were bid in for the state, and prior thereto, the said plaintiff was a deputy collector for said county, and well knew of the efforts that said defendants had made to pay said taxes for the year of 1904, and two years next thereafter. (8) Defendants aver that said lands were advertised in the name of W. H. Tobin, and without a proper or sufficient description thereof, as will appear by a copy of said advertisement hereto attached marked as 'Exhibit C.' The defendants bring into court and offer to pay all taxes, penalty, and costs due or taxed against said lot, together with the lawful interest thereon. Wherefore defendants pray that for the reasons herein set forth they be allowed to redeem said lot, that the deed to the plaintiff from the land commissioner be canceled as a cloud upon their title, and for other and further relief."

Appellants made their deed from Tobin an exhibit to their cross-complaint. They also exhibited a tax receipt for the year 1902 showing that T. O. Barringer had paid the taxes on the lot in controversy for that year. The appellee answered the cross-complaint as follows: "That he does not know whether it is true, as alleged by defendant T. O. Barringer, that he sent \$4.50 to the collector of Polk county to pay the taxes for the year of 1905 on the lot in question, neither does he know whether said lot was returned to the said Barringer; but this plaintiff says that, since allegations were made by the defendant, he has inspected the matter to some extent, and is informed that the \$4.50 actually covered the personal taxes of the defendant, and, if sent by them as alleged, was applied to the payment of same. (2) This plaintiff denies that he was acting with and for the collector of Polk county in either 1904, 1905, or at any other time, and denies that he was deputy collector, or that he had anything to do whatever with the collection of taxes for the years of 1904 or 1905, and denies the fact that he concealed the fact that said lot has been sold for taxes, from the defendant, or that any person in the capacity of tax collector concealed the same from said defendants, but alleges that the sale was open, notorious, and matter of record. (3) Plaintiff denies, as alleged by defendants, that the advertisement for the sale of said lot as delin-

quent at said tax sale was insufficient in the description of said lot, or that the sale or any of the proceedings relating thereto were in any manner improperly conducted. Wherefore he prays that his reply hereto be accepted and for judgment."

The cause on motion of appellants was by consent transferred to the chancery court. The decree recites, among other things, the following: "That the cause was set for trial on this the 29th day of November, 1907, to be heard upon oral evidence, and, both parties appearing and announcing ready for trial, the said defendants filed their substituted answer and cross-bill, to which the plaintiff filed his reply, and, the issues being made up, the court proceeded to try and determine said cause, and it appearing to the court from the evidence introduced on the part of the plaintiff that he claims to be the owner of the above-described lands because of a deed held by him from the state land commissioner dated June 22, 1907, and that the said lot was forfeited as shown by said deed to the state of Arkansas for the nonpayment of taxes for the year 1904, and it appearing to the court that the said deed is in all respects regular, and that the expiration of the right of redemption had expired at the time the said state land commissioner executed said deed to the plaintiff June 22, 1907, it further appearing to the court that the defendants, Edna E. Barringer and T. O. Barringer, claim said land under a deed executed to them, on March 14, 1903, for which said land or lot was forfeited to the state for the nonpayment of taxes, and it further appearing that, since the date of the deed from Tobin to the defendants, they paid the taxes in the year of 1907, for the year of 1906, and it further appearing from the oral evidence introduced in this cause and from the records presented in evidence that the said forfeiture of said lot to the state for the nonpayment of taxes in 1905, for the year 1904, was in all things regular so far as the court has been able to determine from the pleadings and the evidence introduced herein, and it therefore appears that the plaintiff has a paramount and superior title to that of the defendants and is entitled to recover said lot against defendants: It is therefore the judgment and decree of this court that the plaintiff have and recover possession of the E. 1/2 of lot 2 in block 5, Eureka addition to the city of Mena, Polk county, Ark., from the defendants Edna E. and T. O. Barringer, and all the costs of this suit."

The defendants except to the judgment and decree of the court herein and pray an appeal to the Supreme Court of this state, which is granted, and 60 days is given the defendants in which to prepare and file their bill of exceptions.

Pale McPhetriges, for appellants.

WOOD, J. (after stating the facts as above). The recitals of the decree show that the

cause was heard upon oral evidence, and that "60 days were given the defendants in which to prepare and file their bill of exceptions."

We find no bill of exceptions in the record, and nothing in the record proper to show that the decree of the court was erroneous. Where the record shows that the cause in chancery was heard upon oral evidence, and such evidence is not brought into the record by bill of exceptions or otherwise, and there is nothing on the face of the record itself to show that the court erred, it will be presumed that the decree is correct. *Murphy v. Citizens' Bank of Junction City*, 84 Ark. 100, 104 S. W. 187, 934.

Decree affirmed.

BIRMINGHAM v. RICE et al.

(Supreme Court of Arkansas. April 12, 1909.)

1. APPEAL AND ERROR (§ 787*)—DISMISSAL—DELAY IN PROSECUTION.

Kirby's Dig. § 1193, provides that unless the appeal is granted by the inferior court, or the appellee enters his appearance in the Supreme Court, he shall be summoned to answer the appeal. *Held*, that the notice or summons calls the appellee's attention to the fact of removal, and the appeal is complete, and the Supreme Court can dismiss it if appellant neglects to cause the notice to answer it to be given in a reasonable time or fails to prosecute it in any other way.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8129, 8130; Dec. Dig. § 787.*]

2. APPEAL AND ERROR (§ 787*)—DISMISSAL—DELAY IN PROSECUTION.

A decree was rendered August 27, 1907, and an appeal was granted August 12, 1908. Summons was issued on that day, but was never served on appellees, one of whom had removed from the county; the other being a resident of another county. Nothing further was done until after motion of appellees to dismiss the appeal March 23, 1909, when appellant had process served on them. *Held*, that appellant did not exercise due diligence, and the appeal should be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8129, 8130; Dec. Dig. § 787.*]

Appeal from Circuit Court, Lawrence County; W. E. Beloate, Judge.

Action between John L. Birmingham and William Rice and others. From the decree, Birmingham appeals. On motion to dismiss. Granted.

C. T. Burns, for appellant. McCaleb & Reeder and H. L. Ponder, for appellees.

PER CURIAM. The decree appealed from was rendered by the chancery court of Lawrence county on August 27, 1907, and the appeal was granted by the clerk of this court on August 12, 1908. Summons was issued on that day to the sheriff of Lawrence county and sent to one of the attorneys for appellant, who delivered it to the sheriff with instructions to serve same, and also paid the

sheriff his fee for the service. At that time one of the appellees had removed from the county, and the other one was a resident of Independence county. The summons is not accounted for further than by a sworn statement, made here by the deputy sheriff into whose hands it was placed, which says that the writ was lost and was not served on the appellees. Nothing further was done towards bringing appellees into court until after their motion was filed here on March 23, 1909, to dismiss the appeal. They entered their appearance for the sole purpose of moving to dismiss the appeal. Since then appellant has sued out process and had it served on them during the pendency of this motion.

The statutes of this state provide that: "Unless the appeal is granted by the inferior court, or the appellee enters his appearance in the Supreme Court, he shall be summoned, actually or constructively as provided by law for the service of a summons, to appear and answer the appeal or writ of error." Kirby's Dig. § 1193. In *Robinson v. Ark. Loan & Trust Co.*, 72 Ark. 475, 81 S. W. 609, the court, speaking on this subject, said: "The notice or summons does not aid in the removal, but calls the attention of the appellee to the fact that it has been removed. The appeal is complete, and the appellate court can dismiss it if the appellant neglects to cause the notice to answer it to be given in a reasonable time, or fails to prosecute it in any other way."

It will be seen from this that the only question presented to us on this motion is whether or not appellant has, within a reasonable time after the granting of the appeal, caused summons to be issued and served on appellees; in other words, whether he has proceeded with due diligence to bring his adversaries into court, for, unless he has done so, his appeal should be dismissed. In the present case neither the appellant nor his attorneys have done anything at all in that direction, except to cause a summons to be issued on August 12, 1908, which was just two weeks before the expiration of the time allowed for taking the appeal. They placed this summons in the hands of the sheriff in whose county appellees had ceased to reside and where they could not be found. They took no further steps to ascertain whether service was had upon appellees or not. It can scarcely be urged with any show of plausibility that this was the exercise of due diligence, or that the appellees have been summoned within a reasonable time. More than seven months elapsed from the filing of the transcript in this court before the appellees were brought in by service of process, and this was done after they had moved to dismiss the appeal, and within a week before the case was set for hearing in this court.

We are of the opinion that no diligence on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

CHILDERS v. WM. H. COLEMAN CO. et al.
(Supreme Court of Tennessee. April 24, 1909.)

1. QUIETING TITLE (§ 7*)—ADVERSE CLAIM OF TITLE.

The purchaser of land, suing to have title decreed in him as against one claiming standing timber under a sale thereof and extension of time for removal by complainant's vendor, may question the making of the extension; it vitally affecting his title.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 7.*]

2. ACKNOWLEDGMENT (§ 53*)—UNACKNOWLEDGED INSTRUMENT—RIGHT TO RECORD.

An assignment of a conveyance of standing timber, not being acknowledged, is not entitled to registration.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 42, 270; Dec. Dig. § 53.*]

3. ACKNOWLEDGMENT (§ 53*)—RIGHT TO RECORD—DEFECTIVE ACKNOWLEDGMENT.

The omission of the words "for the purposes therein contained" from the certificate of acknowledgment of a notary is fatal to registration of the instrument.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 54, 270; Dec. Dig. § 53.*]

4. LOGS AND LOGGING (§ 3*)—ASSIGNMENT OF CONTRACT OF SALE—NECESSITY OF RECORD—TRANSFER OF INTEREST IN LAND.

Assignments of a contract of sale of standing timber and extensions of time for removal thereof transfer an interest in land, and so have to be registered.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 7; Dec. Dig. § 3.*]

5. FRAUDS, STATUTE OF (§ 56*)—SALE OF STANDING TIMBER—"REALTY."

Growing trees are part of the realty, so that a contract of sale thereof must be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 86; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 4, p. 3700; vol. 7, pp. 5947, 6625-6626.]

6. FRAUDS, STATUTE OF (§ 58*)—LEASES.

A conveyance extending time to remove standing timber, even if considered as a lease, is within the statute of frauds, and so, to be good for more than a year, must be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 58.*]

7. FRAUDS, STATUTE OF (§ 60*)—LICENSE TO ENTER LAND.

An irrevocable license to enter land is in the nature of an easement, and so must be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 94, 95; Dec. Dig. § 60.*]

8. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE—UNAUTHORIZED REGISTRATION.

A registration of an instrument, either not acknowledged or defectively acknowledged, so that in either case it is not entitled to registration, is not constructive notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 538, 539; Dec. Dig. § 231.*]

O. A. Miller and C. G. Bond, for appellants. J. A. Foster, Isaac Orme, and Ben Childers, for appellee.

McALISTER, J. Complainant filed this bill, alleging his ownership in fee of a tract of land in Hardeman county comprising 300 acres, and that the defendants Wm. H. Coleman and J. M. and F. L. Marshall had entered upon said land and were committing waste by cutting and removing timber. Defendants answered the bill, averring that on March 7, 1904, and prior to complainant's purchase of said land, its then owner, J. S. Neely, sold and conveyed to one W. E. Small all of the white oak timber on said land, and that on July 12, 1906, the said W. E. Small, for value received, assigned all of his rights and title to said timber contract to the William H. Coleman Company without recourse.

It is averred in the answer that under the original contract the said W. E. Small was allowed three years from the date of said contract to cut and remove said timber, and that thereafter J. S. Neely, the vendor, extended the time for the removal of said timber for a period of two years from July 12, 1906. Hence it is seen that the defense interposed on behalf of defendants is that the William H. Coleman Company had acquired title to the white oak timber on said tract of land by assignment of a contract made with J. L. Neely, the vendor of complainant, some time prior to the sale of said land by the said Neely to complainant, Childers.

On the coming in of the answers, complainant filed an amended bill, alleging:

"That on the 3d of October, 1907, J. S. Neely and wife, E. A. Neely, were in the actual possession of the lands described in the original bill, and represented to him that said land was unincumbered; that he paid to them \$800 the cash consideration, and executed his two promissory notes, due in one and two years, for \$800 each, and delivered the same to J. S. Neely and wife, and prior to that time complainant had no notice, actual or constructive, of any alleged claim of defendants; that, when he purchased said land, defendants were not in possession, and so far as complainant knew, were not claiming any right to enter upon said land; and he states on information and belief that defendants had never been in actual possession of said land or the timber, had never cut or removed, and had never attempted to cut or remove, any white

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

oak or other timber from said land up to and for some time after complainants had purchased said land."

Complainant further states as follows:

"He was put in possession of the land by said J. S. Neely on the 3d of October, 1907, and knew nothing of the claim of defendants until after he filed his original bill; that he is an innocent purchaser for value, and had no notice of the sale or transfer of the white oak timber then standing on said land, and that he paid a valuable consideration for the same; that defendants had entered upon said lands, without the knowledge of complainant or his consent, cut and removed and wasted valuable timber, and otherwise damaged complainant to the extent of \$300."

It is further charged in the amended bill:

"That the instruments purporting to be deeds of conveyance under which defendants claim a superior title were neither actual nor constructive notice to complainants, for the reason that said assignment did not describe the land, and the instrument purporting to extend the time limit, contained in the original contract for the removal of the timber, was obtained through fraud, and was not properly acknowledged, and the certificate of the notary was not in compliance with the statute."

It was therefore charged that said instruments were not entitled to registration and that no notice was thereby conveyed to complainant.

The prayer of the amended bill is that complainant be declared an innocent purchaser for value without notice, and that he be decreed the title and possession of said land, etc.

Proof was taken, and on the hearing the chancellor, Hon. E. L. Bullock, presiding, decreed that the title of complainant to the land and timber was superior to any claim of the defendants, and that the conveyances under which defendants claimed title constituted a cloud on complainant's title. The chancellor made perpetual the injunction restraining the defendants from cutting and removing timber or otherwise committing waste, and pronounced a decree in favor of complainant for the value of timber already cut, and the damages accruing by reason of said waste, and ordered a reference to the master to take proof and report the amount of said damages. At the March term, 1909, the chancellor rendered a judgment in favor of complainant against the defendants for the sum of \$150 for the trees cut and removed by the defendants, and the further sum of \$9 as damages caused to the small timber by reason of the trees cut falling against and injuring same. The W. H. Coleman Company appealed from all of said decrees and has assigned errors.

The first assignment is as follows:

"The chancellor erred in decreeing that the title of complainant, E. J. Childers, is superior to the claim of defendants in and to the land and timber described in the pleadings, and that the claim of the defendants to the white oak timber on said lands is not valid, but constitutes a cloud on complainant's title, because the proof in the record shows that the contract under which the Wm. H. Coleman Company claimed ownership and title to the white oak timber was prior in time, and therefore superior in right, to any claim or title that complainant, E. J. Childers, had to said white oak timber. J. S. Neely, from whom both complainant, E. J. Childers, and the defendant Wm. Coleman Company claim title, conveyed and transferred all of the white oak timber on the 300 acres of land described in the pleadings to W. E. Small, by contract dated March 7, 1904; that on July 12, 1906, he extended the time for the cutting of the white oak timber on the lands sold to Small, and later sold to W. H. Coleman Company, to two years from date."

The second assignment of error will be considered in this connection, and is as follows:

"Second. The chancellor erred in making the injunction perpetual. The weight of the proof is that the appellee had notice of the timber contract of J. S. Neely with appellant at the time that he bought the land. The rule 'caveat emptor' applies to him."

The facts established by the record are that in October, 1907, complainant, Childers, who resided at Pulaski in Giles county, purchased this land, lying in Hardeman county, through a resident agent, one Camody. At the time of the sale Mr. Isaac Orme represented the vendor, J. S. Neely and wife. An abstract of title to the land was prepared at the instance of the vendor and sent to Mr. Childers at Pulaski; and, the title having been pronounced perfect by the abstractor, Mr. Childers accepted the deed and made a cash payment of \$800, executing his notes for the two deferred payments of \$800 each. The deed was executed on the 3d of October, 1907, and Mr. Childers was immediately put in possession of the land. The complainant had no actual or constructive knowledge, at the time he purchased the land, that the defendant W. H. Coleman Company claimed any right, title, or interest in the white oak timber on said land. It also appears that, at the time Childers was put in possession, no agent or employé of the defendant W. H. Coleman Company was in possession of said land nor did the complainant become apprised of any trespass on said land until after the lapse of about two weeks, when some of the defendant's agents went upon said land and began to cut and remove timber; the number of trees cut not exceeding 18. Thereupon complainant filed the present bill, as-

serting his title in fee to the land, and seeking to restrain the defendants against trespassing and committing waste.

As already stated, the defendant Coleman relied on a contract assigned to that company by W. E. Small July 12, 1906. The contract is as follows:

"For and in consideration of \$400 to me in hand paid, I (or we) hereby sell and convey to W. E. Small, or assigns, all of the white oak timber on my land situated in Hardeman county, state of Tennessee, district No. 11, bounded as follows: On the east by Trim, on the north by Mills, on the west by Rogers and Mills, and on the south by Campbell—containing about 300 acres. Said land known as the ——— place, and lies ——— miles of ———. Said Small shall have three years from this date to work same, and shall have right of way to land and timber, with men and teams, to cut and remove same at his pleasure. There is no incumbrance or claim on said land that will interfere with said Small working said timber.

"Signed at Pocahtontas, Tenn., this 7th of March, 1904. [Signed] J. S. Neely.

"Witnesses:

"B. D. Irby.

"G. L. Paris."

It will be noticed this instrument was not acknowledged, and expired by limitation on March 7, 1907, seven months before the conveyance to Childers. On the back of this instrument, is the following indorsement:

"July 12, 1906.

"For value received, I assign all of my rights and title to the within timber contract to Wm. Coleman Co., without recourse.

"W. E. Small."

It appears that on July 12, 1906, the day on which this assignment was executed, J. M. Marshall, as agent for Wm. Coleman Company, went to Dr. Neely to procure an extension of the time limit of three years contained in the original contract. Dr. Neely testified that Marshall stated to him:

"That he would like to get an extension of the time for cutting the timber, provided he could buy the contract from Small. I told him, if he could arrange to get Small's contract, that I would give him one year's time from that date, and he wrote out an agreement, as I supposed, in keeping with our conversation to that effect, and, being busy at the time, I did not take time to read it, but signed it, and he went away."

It appears that one year's extension of the time limit of three years, contained in the original contract, would have extended the time for cutting the timber until July 12, 1907, or three months before the date of the deed to Childers, which was executed by Dr. Neely, as already stated, October 3, 1907.

It appears, however, that on April 23, 1907, Marshall, accompanied by M. Wilson, a notary public, returned to Dr. Neely with the contract, which had already been signed by Dr.

Neely, for an extension of the time, for the purpose of having the instrument acknowledged. The instrument produced, instead of extending the time for one year, extended it to two years from date, and was as follows:

"Pocahtontas, 7—12—1906.

"This is to certify that I have extended the time for cutting the white oak timber on my lands, sold to W. E. Small, and later transferred to W. H. Coleman Company, to two years from date. J. S. Neely."

Dr. Neely declined to execute this instrument, although he had previously signed it, for the reason that it contained an extension of the time limit to two years, instead of one year, as he had agreed, and which he supposed had been properly inserted in the contract. Several witnesses, who were present, testify that Dr. Neely refused to acknowledge this instrument on the ground that it did not embody his agreement with Mr. Marshall. This fact is admitted by Mr. Marshall himself, as well as by Mr. Wilson, the notary public, who was present.

But, despite the fact that Dr. Neely had repudiated the instrument and refused to acknowledge it, Marshall procured the notary public to attach his notarial certificate, certifying to the acknowledgment. The form of the certificate, however, was in the following language:

"State of Tennessee, Hardeman County:

"Personally appeared before me, M. Wilson, a notary public in and for said county and state, the within named J. S. Neely, the bargainer, with whom I am personally acquainted, and who acknowledged that he executed the within instrument.

"Witness my hand and official seal at Middleton, Tenn., this 23d day of April, 1907.

"M. Wilson, Notary Public."

It will be observed that the words "for the purposes therein contained," required by the statutory form of certificate, are omitted, and this fact is explained by the notary, who testifies that he marked out these words for the reason that Dr. Neely had never acknowledged the instrument for the purposes therein contained.

It will be further noticed that this instrument of extension contains no description of the land, and the proof is that at the time it was signed by Dr. Neely it was on a separate slip of paper, and not attached to the original contract for the sale of the white oak timber by Dr. Neely to W. E. Small. It is also in proof that, at the time this alleged extension was acknowledged, the original conveyance to Small of the white oak timber had not been assigned by Small to Wm. Coleman Company and none of these papers had been offered for registration. It appears, however, that afterwards these separate papers were pasted together, and, together with the notarial certificate of acknowledgment, were recorded in the register's office of Hardeman county.

Counsel for appellee, in answer to the two assignments of error already stated, says:

"(1) The alleged extension of two years was never in fact executed by Dr. Neely, and there was no consideration for it.

"(2) Both the assignments of Small to Coleman Company and the alleged extension of time are void under the statute of frauds.

"(3) All three of the instruments relied on by the defendants are lacking in any proper words of conveyance, and are insufficient and void as conveyances.

"(4) All of said instruments are insufficient under the laws relating to the acknowledgment of instruments of conveyances; none of them having a sufficient certificate of acknowledgment.

"(5) Said instruments were not entitled to registration and could not constitute constructive notice to Childers.

"(6) E. J. Childers was an innocent purchaser for value and without notice, either constructive or actual, of any of the instruments relied on by the defendants."

It has already been seen that the conveyance of the white oak timber from J. S. Neely to W. E. Small, dated March 7, 1904, and under which the William Coleman Company claims by assignment, provides on its face a three-year limit for the removal of the timber, and this time limit expired March 7, 1907, six months prior to the conveyance of the land by J. S. Neely to complainant, Childers, on October 3, 1907; but the defendant Coleman Company relies on an extension of two years to the original time limit, granted by J. S. Neely July 12, 1906, which contention, if established, would carry the time limit for the removal of the timber beyond the time of the purchase of the land by complainant, Childers. As a matter of fact, we are satisfied from an examination of the record that no such extension was granted by J. S. Neely. While there is some evidence to the contrary, the great preponderance of the evidence overthrows this contention. We think there is no doubt of the right of Childers to make this question in the present controversy, since it vitally affects his title to the property. In *Iron Co. v. Iron Co.*, 58 Tenn. 434, this question was reserved upon the ground that the purchaser of the property had notice, but in the present case, as we shall see, the purchaser had no notice, of the prior incumbrance, actual or constructive. The assignment from W. E. Small to Wm. Coleman Company was not acknowledged at all, and was not, therefore, entitled to registration. It has already been observed that in the notarial certificate to the alleged "extension of time" conveyance the phrase "for the purposes therein contained" is entirely omitted. This was purposely done, as we have seen from the evidence of the notary already quoted.

It has frequently been held by this court that the omission of this language from the certificate of the notary is fatal to the regis-

tration of the instrument. *Currie v. Kerr*, 79 Tenn. 138; *Hughes v. Powers*, 99 Tenn. 485, 42 S. W. 1; *McGuire v. Gallagher*, 95 Tenn. 355, 32 S. W. 209; *Ellett v. Richardson & Co.*, 68 Tenn. 295.

These instruments, providing for the assignment of a contract for the sale of growing trees and an extension of the time limit for the removal thereof, transferred an interest in land, and under our statutes were required to be registered.

In *Ives v. Atlantic, etc., R. R. Co.*, 142 N. C. 131, 55 S. E. 74, 115 Am. St. Rep. 732, it is said:

"It may now be taken as settled that growing trees are a part of the realty and a contract to sell or convey them, or any interest in or concerning them, must be reduced to writing. They are 'fructus naturales,' and, being rooted in the soil, are by nature as much annexed to the freehold as any permanent fixture can be"—citing authorities.

This case is reported in 9 Am. and Eng. Ann. Cases, followed by an elaborate note of the editor, in which all the cases are collected, and the result was stated to be that the rule laid down in the reported case, to the effect that growing trees are a part of the realty, and that consequently a contract for the sale of standing timber is within the meaning and intent of the statute of frauds, and must be evidenced by a writing, has the support of the decided weight of authority. This question was considered by Judge Cooper in the case of *Knox v. Haralson*, 2 Tenn. Ch. 232, wherein it was held that a sale of so many cords of wood now standing in the tree is within the statute of frauds and must be in writing.

An exception to the general rule is found in the case of *Iron Co. v. Iron Co.*, 58 Tenn. 441, where it appeared the contract was for a sale of timber at 10 cents per cord, to be paid for as fast as used. The court held that this was a sale of personalty, for the reason:

"The property did not pass in the timber until it should be used or received by the purchaser—at any rate, not until cut and corded up, as it was to be paid for by the cord, as used."

In the case of *Dorris v. King* (Tenn. Ch. App.) 54 S. W. 683, there was a contract for the delivery of timber by the vendor at the mill, already cut, and, following the case of *Iron Co. v. Iron Co.*, supra, the Court of Chancery Appeals properly held the contract was not within the statute of frauds. In the note to *Ives v. Atlantic, etc., R. R. Co.*, 9 Am. & Eng. Ann. Cas. 188, the editor, in speaking of this exception to the general rule, says:

"In several jurisdictions, which recognize the general rule, it has been held that there may be a valid parol contract for the sale of timber as a chattel, where it is to be cut

And citing, among other cases, *Dorris v. King*, supra, and *Iron Co. v. Iron Co.*, supra, the editor further states:

"That such a contract is not a contract for the sale of trees in their standing condition, but rather a contract whereby the vendor agrees to bestow work and labor upon his own material, and deliver it in its changed condition to the plaintiff."

In *Tiffany on Real Property*, § 228, it is said:

"A sale of growing trees, or of other growths of a semipermanent character, such as grass or fruit growing on trees, is, by the weight of authority, *prima facie* a sale of an interest in land, and consequently it must be in writing under the fourth section of the statute of frauds; and so it has been held that a mortgage or sale of standing timber must comply with the same requirements as if it were of the land itself. If, however, the title is not to pass until the products have been severed from the soil, as when one contracts to sell lumber to be cut, the contract is for the sale of goods."

In *Beach on Contracts*, § 540, the rule is thus stated:

"Contracts for the sale of grass and growing trees have been held to concern an interest in land. The word 'land,' in its legal signification, embraces more than the word literally imports. It is a comprehensive term, and includes standing trees, buildings, fences, stones, and waters, as well as the earth, and all pass under the general description of land in a deed. Standing trees pass to the heir as a part of the inheritance, and not to the executor as emblements or chattels. For this reason it has been usually held that a sale of growing trees, with a right at any future time, whether fixed or indefinite to enter upon the land and remove them, conveys an interest in the land; but, when severed from the freehold, it is settled learning that they become chattels."

It may be observed that, if the conveyance extending the time be considered as a lease, it would be within the statute of frauds, and good for only one year. So, if it be viewed as creating an irrevocable license to enter, this is in the nature of an easement, and must be in writing. *Nunelly v. Iron Co.*, 94 Tenn. 397, 29 S. W. 381, 28 L. R. A. 421.

It follows, therefore, that, since these conveyances transferred an interest in realty, they were required to be registered; but since there was no acknowledgment at all

complaint, Childers, had no actual notice of the original contract between Neely and Small, or of its assignment to the William Coleman Company, or of the alleged extension of the time limit. We are satisfied that Childers was an innocent purchaser for value of this property, without notice, actual or constructive, of any prior incumbrances or equities, and that he is entitled to a decree for this land, and for damages for the unlawful cutting of his timber. The decree of the chancellor will be in all respects affirmed.

PALMER v. STATE.

(Supreme Court of Tennessee. Nov. 11, 1908.)

1. JURY (§ 132*)—COMPETENCY OF JURORS—EXAMINATION—INTRODUCTION OF NEWSPAPER ARTICLES.

Where a juror on his *voir dire* stated that he had not formed or expressed an opinion, that he was a subscriber of a newspaper and usually read it carefully, but did not remember reading articles about the case, and that, if he had read them, he would have formed an opinion which would have required evidence to remove, the refusal to permit accused's counsel to exhibit to the juror the articles was proper.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 583; Dec. Dig. § 132.*]

2. JURY (§ 100*)—COMPETENCY OF JURORS—READING NEWSPAPER ARTICLES.

A juror, who on his *voir dire* states that he has read the accounts of the crime in newspapers, but has not formed or expressed any opinion, is not disqualified.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 449; Dec. Dig. § 100.*]

3. APPEAL AND ERROR (§ 1024*)—REVIEW OF QUESTIONS OF FACT—COMPETENCY OF JURORS.

Whether the nature and strength of a juror's opinion are such as in law necessarily raise the presumption of partiality is a question of mixed law and fact, to be tried as far as the facts are concerned like any other issue of fact, and the finding of the trial court will not be set aside, except for manifest error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3843; Dec. Dig. § 1024.*]

4. JURY (§ 132*)—COMPETENCY—BURDEN OF PROOF.

The burden is on the challenger of a juror to show the actual existence of a disqualifying opinion.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 584; Dec. Dig. § 132.*]

5. JURY (§ 100*)—COMPETENCY—FORMATION OF OPINION—SOURCE OF INFORMATION.

The opinion of a juror as to the guilt or innocence of accused is not always a disqualification, and those opinions which are based on personal knowledge of the facts of the case, or on a statement of the facts made by the witnesses themselves, or by others who have heard the

Under Acts 1890, p. 891, c. 383, providing that a juror who has formed an opinion based on newspaper statements is not disqualified, on his testifying that he can impartially render a verdict in accordance with the evidence, newspaper statements, to disqualify a juror, must be such as fall within the disqualifying sources of information, and purport to be detailed by those who profess to know the facts, and any other statement only amounts to rumor, and will not disqualify.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 450, 451; Dec. Dig. § 100.*]

7. JURY (§ 103*)—COMPETENCY—FORMATION OF OPINION—INFLUENCE ON VERDICT.

A juror, testifying on his voir dire that he had formed an opinion based on mere rumor, that he could render a verdict on the law and the evidence, that his opinion was a fixed one, which would require evidence to remove, that he had talked generally about the matter, but did not know whether he had talked with witnesses or not, but had accepted the matter as mere rumor, and that he had read a newspaper, was not disqualified.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 471-474; Dec. Dig. § 103.*]

8. RAPE (§ 59*)—EVIDENCE—INSTRUCTIONS.

Where, on a trial for rape, accused was under the evidence either guilty of the charge or of nothing, the refusal to charge on the subject of assault with intent to commit the rape was proper.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 99; Dec. Dig. § 59.*]

9. CRIMINAL LAW (§ 946*)—MOTIONS FOR NEW TRIAL AND IN ARREST.

Motions for a new trial and in arrest of judgment cannot be made together and at the same time, for a motion in arrest is a waiver of a motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 946.*]

10. INDICTMENT AND INFORMATION (§ 140*)—QUASHING INDICTMENT—DUTY OF COURT.

The trial judge is not bound to quash an indictment because of defects therein, even on motion of accused.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 474; Dec. Dig. § 140.*]

11. CRIMINAL LAW (§ 1032*)—OBJECTIONS IN LOWER COURT—DEFECTS IN INDICTMENT.

Objections to the indictment must be made in the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2627; Dec. Dig. § 1032.*]

12. INDICTMENT AND INFORMATION (§ 196*)—OBJECTIONS—WAIVER.

Objections to the form of the indictment are generally waived by going to trial without calling the attention of the trial judge to them.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 628-635; Dec. Dig. § 196.*]

13. CRIMINAL LAW (§ 972*)—MOTION IN ARREST OF JUDGMENT.

A motion in arrest must rest on matter of record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2423; Dec. Dig. § 972.*]

14. RAPE (§ 25*)—INDICTMENT—SUFFICIENCY—"RAVISH".
Under Shannon's Code, §§ 7077, 7080, 7083, providing that the statement of facts constituting the offense shall be in ordinary language, stated with such degree of certainty as to enable the court to pronounce judgment, etc., an indictment, alleging that accused on a designated date did have carnal knowledge of a designated female forcibly and against her will, charges rape, defined by section 6451 as the carnal knowledge of a woman forcibly and against her will, though it does not charge that accused "ravished" the female; the word "ravish" implying no more than that the act was done forcibly and against the will of the female.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 29; Dec. Dig. § 25.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5919-5925; vol. 8, p. 7778; vol. 7, p. 5933.]

Appeal from Circuit Court, Wilson County; Jno. H. Richardson, Judge.

Cecil Palmer was convicted of rape, and he appeals. Affirmed.

Turney & Turney and Frank McMillan, for appellant. Chas. T. Cates, Jr., Atty. Gen., for the State.

NEIL, J. The plaintiff in error was indicted and convicted in the circuit court of Wilson county for the crime of rape, committed upon the person of Mrs. Sophronia J. Yates, and was sentenced to be hanged. He thereupon appealed to this court and assigned errors. We have fully considered the evidence, and all of the errors assigned, in a memorandum opinion filed with record, and we do not deem it necessary, in the present opinion, to refer more particularly to the facts, and to certain of the errors assigned, than in the manner just mentioned. In this opinion, prepared for publication, we shall advert to only two or three matters of law which arose upon the hearing.

It is insisted that the trial judge erred in passing to the counsel for the prisoner the following veniremen as competent jurors, thereby rendering it necessary for the prisoner to challenge them peremptorily, viz.: J. V. Nettles, J. S. Hamilton, Albert Hawkins, J. S. Steed, R. W. Lannon, P. B. Smith, J. B. Young, Lea Ballinger, Jim Heran, R. B. Malone, Cates Bingham, E. P. Mitchell, Sam Lannis, and H. H. Smith. The latter was the twelfth juror, who was tendered to the prisoner's counsel after they had exhausted all of his peremptory challenges.

Most of the veniremen referred to stand upon the same ground, and can be disposed of together; but there are peculiarities about one or two of them, and they will be mentioned specially.

J. V. Nettles stated on his voir dire that he

matter; that, if he had read the Banner news items and editorials, he would have formed an opinion which would require evidence to remove. The bill of exceptions continues: "The defendant offered to show the news items and editorials of the Banner, marked Exhibits D, E, and F to the defendant's affidavits for a continuance, to the venireman, asking the question if he had read them. The court refused to allow the venireman to read the articles, upon the ground that, if they were not disqualifying, they were not material, and, if disqualifying, it would not be proper now to disqualify a juror."

It is insisted that the trial judge erred in not permitting the counsel for the prisoner to exhibit to the proposed person the articles referred to and have him read them. We do not think there was any error in this action of the court. It is clear, from the examination of the venireman, that he had no opinion whatever as to the guilt or innocence of the prisoner. It would have been an idle thing to have him read a newspaper article in order to see if he would form an opinion. It is said the court held in *Ward v. State*, 102 Tenn. 730, 52 S. W. 996, that it was error in the trial court not to permit such a thing to be done. The facts in that case were far different from those in the present case. In *Ward's Case* it appeared that the prisoner was on trial for one of a series of forgeries of the same character; that there had been a former trial of one of these cases, in which the particular transaction which was the subject of the case then on trial had been testified to by the leading witness for the prosecution; that his evidence had been reported in a newspaper, and that this newspaper had been read by the venireman; and that from the facts so stated by the witness he had formed an opinion. The court held, under these facts, that the prisoner's counsel should have been permitted to exhibit the newspaper to the venireman and examine him thereon; that is, it was held that the counsel for the prisoner had the right to examine the venireman touching the very newspaper report which the venireman said he had read, and from which he said he had formed an opinion, and which evidence related to the particular transaction which was the subject of the case for which the venireman was being examined as a prospective juror. In the present case, as already stated, the venireman testified that he had formed no opinion and did not remember that he had ever read the article in the paper.

J. S. Steed and several others of the per-

veniremen mentioned testified that they had formed an opinion, but that it was based merely on rumor; that it would require evidence to remove such an opinion, but that they could go into the jury box, and do fair and impartial justice between the state and the prisoner, and decide the case upon the law and the evidence. This was the case, also, of H. H. Smith, who went upon the jury as the twelfth juror after the prisoner had exhausted all of his challenges.

The case of R. B. Malone is thus stated in the bill of exceptions:

"R. B. Malone otherwise qualified, but said he had formed an opinion; that it was based on mere rumor; that he could go into the jury box, and do fair and impartial justice between the state and the defendant, and would decide the case upon the law and the evidence; that his opinion was a fixed one, which would require evidence to remove; that he had talked generally about the matter, but did not know whether he had talked with witnesses or not, but had accepted or received it as mere rumor; that he read the Lebanon Democrat."

The determination of the question arising as to the two veniremen last mentioned requires a reference to our cases.

We have quite a number of cases upon the subject of the competency of jurors.

The following may be mentioned as cases wherein it clearly appeared that the veniremen had been disqualified by the formation of an opinion: *Rice v. State*, 1 Yerg. 432; *Troxdale v. State*, 9 Humph. 422; *Riddle v. State*, 3 Heisk. 401; *State v. Collie*, 3 Shan. Tenn. Cas. 803, 807; *Carter v. State*, 9 Lea, 440; *Cartwright v. State*, 12 Lea, 620; *Hoard & Fite v. State*, 15 Lea, 318; *Ward v. State*, 102 Tenn. 724, 52 S. W. 996; *Turner v. State*, 111 Tenn. 593, 69 S. W. 774.

The following cases stand upon somewhat peculiar grounds: *Henry v. State*, 4 Humph. 270; *Moses v. State*, 10 Humph. 456; *Norfleet v. State*, 4 Sneed, 341, 343, 344.

There are several cases concerning the effect of an opinion formed on rumor. These are *Howerton v. State*, Meigs, 262; *Payne v. State*, 3 Humph. 375; *Moses v. State*, 11 Humph. 232; *Brakesfield v. State*, 1 Sneed, 215, 218, 219; *McLean v. State*, 1 Shan. Tenn. Cas. 478, 483, 484; *Johnson v. State*, 11 Lea, 47; *Spence v. State*, 15 Lea, 539, 543-547; *Woods v. State*, 99 Tenn. 182, 41 S. W. 811; *Leach v. State*, 99 Tenn. 584, 597, 42 S. W. 195; *State v. Robinson*, 106 Tenn. 204, 206, 61 S. W. 65. There is also the case of *Watkins v. State*, 1 Leg. Rep. 10, 2 Shan. Tenn. Cas. 206, which is out of

line with the other cases upon the same subject.

We have also several cases which discuss the question of the competency of jurors in respect of matters of opinion generally. These are *McGowan v. State*, 9 Yerg. 184; *Alfred & Anthony v. State*, 2 Swan, 581; *Eason v. State*, 6 Baxt. 466; *Conatser v. State*, 12 Lea, 436; *Spence v. State*, supra; *Woods v. State*, supra; *Wilson v. State*, 109 Tenn. 167, 169, 170, 70 S. W. 57.

There is some conflict in the early cases. The dividing line between the early and later cases may be placed with *Conatser v. State*, supra, opinion by Mr. Justice Cooper, in which that great judge discusses the prior cases, and with infinite tact and delicacy indicates the transition from the earlier to the later view. The beginning of the modern doctrine may be placed with the case of *Spence v. State*, supra, in an opinion by the same eminent judge. That case contains a redaction of the *Conatser* Case. We shall not discuss or endeavor to reconcile the conflict between the present and the early doctrine, but shall begin our statement of the present doctrine with the *Spence* Case.

In this latter case the court said:

"The first error relied on for reversal is in the action of the court in pronouncing W. J. Taylor a competent juror. After the defendant had exhausted all his challenges, Taylor was presented as a juror. He stated on his *voir dire* that he had an opinion, formed from reading the newspapers and from talk in the neighborhood; that it would require evidence to remove this opinion; he had heard *Spence* had killed *Wheat* about a settlement, and that was all he had heard or read; did not know either of them; that, if taken on the jury, he would try the case on the evidence as sworn to by the witnesses, and would not try the case on what he had read or heard, and could do fair and impartial justice between the state and the defendant; that he did not remember having read the testimony given before the coroner's jury.

"In *Conatser v. State*, 12 Lea, 436, we had occasion to review the decisions of this court upon the competency of jurors in criminal cases, and to ascertain the general principles which might be considered as settled thereby. We found that the question whether the nature and strength of a juror's opinion are such as in law necessarily raise the presumption of partiality, is one of mixed law and fact, to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence, and that the finding of the trial court, before whom the juror gave his testimony in person, would not be set aside by the reviewing court, except for manifest error. The burden is upon the challenger to show the actual existence of a disqualifying opinion.

We held that if the opinion of the juror go only to the fact that a person has been killed, and that the defendant killed him with a particular instrument, in a case where these facts could not be disputed, he would not necessarily have a disqualifying opinion. We also held that, if the opinion of a juror be clearly such as disqualifies him, no inquiry is permissible whether, notwithstanding his opinion, he will be governed by the evidence alone, but that it is otherwise when the opinion is not based upon evidence or information that disqualifies, and that the law does not regard what the juror may call an opinion as an opinion at all, unless based upon knowledge or reliable information of facts, and the state of the mind of the juror in such case as to what weight he would give to the evidence to be introduced becomes an important element in ascertaining his competency. As a result we held that a juror was competent in the particular case who had heard persons say that the prisoner had killed the deceased with a hoe at a road working, who did not know whether these persons were witnesses or not, nor whether they had heard the evidence or not, who had the same opinion still, which was a fixed opinion from rumor, and that it would take evidence favorable to the prisoner to remove it, but that he could disregard that opinion, and be governed in his verdict by the evidence.

"In the case before us it is conceded that, if the juror had merely said that he heard that the defendant had killed *Wheat*, he would, upon the statements on his *voir dire*, have come within the rulings of the *Conatser* Case. But it is argued that the additional statement that the killing was 'about a settlement' took the case out of the rule. The fact that the juror had heard that the defendant had killed the deceased with a particular instrument, if undisputed, is, as we have held, immaterial; and it is difficult to see how the additional fact of the cause of the killing, if equally undisputed, could change the result, for the cause would not ordinarily fix the blame on either party, or show the nature of the offense. That is certainly so in the present case. And the testimony, as we have seen, is that the defendant himself, at the time and always, said that the difficulty originated in his wanting to get a settlement from the deceased. But the answer to the argument is that what the witness had heard and read was mere rumor. He had not read the testimony given before the coroner's jury, nor, so far as appears, any detailed statement. What he had read and heard was merely that defendant had killed deceased about a settlement, facts about which there was no dispute. Newspaper statements, to disqualify a juror, must be such as fall within the disqualifying sources of information, and

rumor alone, then the case falls exactly within the ruling of *Conatser v. State*." 15 Lea, 543-546.

In *Woods v. State*, 99 Tenn. 182, 41 S. W. 811, the court said, upon the same subject:

"It is contended that the record discloses several errors of law, on account of which a new trial should be granted. It is said that the trial judge made an erroneous ruling as to the competency of E. W. Epperson, who was presented as a juror. When examined on his *voir dire*, Epperson said that he had read a detailed account of the killing in the newspapers; that he accepted what he read as true, and from it formed an opinion as to the guilt or innocence of the accused; but that the account he read did not mention any witnesses, report any evidence, or refer to the coroner's inquest, and that he had no information about the homicide, except what he had read in the newspapers; and, finally, that he was without bias or prejudice as to the defendant, and thought he could render a fair and impartial verdict solely on the law and the evidence, if he should become a juror in the case. The defendant, by his counsel, challenged the proposed juror on account of his opinion. The court ruled that he was competent, and the defendant thereupon challenged him peremptorily, and he was excused.

"The defendant exhausted his other 23 peremptory challenges, and after that peremptorily challenged another person, who was accepted by the court over defendant's objection. Thus the defendant was compelled to take a juror whom he did not want, and whom he would have been able to avoid, had he not been forced to spend 1 of his 24 peremptory challenges upon Epperson, whom he first challenged for cause, and whom he now insists was incompetent. * * * A man who has prejudged the case upon its real facts is necessarily partial, and therefore incompetent to sit as a juror at the trial. An opinion as to the guilt or innocence of the accused, however, is not always a disqualification. Some opinions are disqualifying, and others are not; the difference in effect being due to the difference in character and origin. Those opinions which are based upon personal knowledge of the facts of the case, or upon a statement of the facts made by the witnesses themselves, or by others who have heard the witnesses relate them, disqualify; but those formed from rumor do not disqualify. *Rice v. State*, 1 Yerg. 432; *McGowan v. State*, 9 Yerg. 184; *Payne v. State*, 3 Humph. 376; *Moses v. State*, 10 Humph. 456; *Moses v. State*, 11 Humph. 232; *Alfred & Anthony v. State*, 2 Swan, 581; *Eason v. State*, 6 Baxt. 466;

cence of the defendant,' from the reading of a newspaper which 'purported to give an account of the facts of the case, but did not purport to give the testimony in the case, and that, if accepted and sworn as jurors in this case, they believed they could give a fair and impartial verdict on the law and the testimony.' The trial judge pronounced those persons competent as jurors, and the defendant challenged them peremptorily. On appeal in error, this court reversed the ruling of the trial judge, and declared the enactment (chapter 51, p. 78, Acts 1870-71) on which it was based null and void, because in contravention of the constitutional right of trial by an impartial jury. 6 Baxt. 467, 477, 478.

"In *Conatser's Case* it was said that the newspaper account referred to in the *Eason Case* was treated 'as falling within the disqualifying sources of information, probably because detailed by those who professed to know the facts,' and that 'whether this assumption and the adjudication that the act of Legislature was unconstitutional are correct are questions not now before us.' 12 Lea, 442, 443. The latter suggestion has been regarded as raising some doubt as to the correctness of the decision in *Eason's Case*.

"The *Spence Case* lays down the following rule: 'Newspaper statements, to disqualify a juror, must be such as fall within the disqualifying sources of information, and purport to be detailed by those who professed to know the facts. Any other statement would only amount to rumor, whether in parol or printed.' 15 Lea, 546.

"Tested by this rule, Epperson was, undoubtedly, competent. His information was not derived from any one of the 'disqualifying sources.' He had no personal knowledge of the facts, had heard no statement of the facts by the witnesses, nor by others to whom the witnesses had related them, nor did the 'detailed account of the killing,' which he read in the newspapers, purport to be made 'by those who professed to know the facts.' The 'account' he read amounted to rumor only, and it was none the less rumor because circulated by newspapers, and not by oral deliverance. It follows that the opinion entertained by the proposed juror was based on rumor, and that he was, therefore, not disqualified by reason of that opinion. Nothing is better settled in criminal procedure in this state than that rumor is not a source of disqualification."

To the same effect, *Leach v. State*, 99 Tenn. 584, 596, 597, 42 S. W. 195.

These gentlemen, on their voir dire, stated that they had formed and expressed an opinion as to the merits of the case and the guilt of the defendant; that this opinion was based upon information which they relied upon and believed to be true; that they had read the newspaper accounts of the killing, but that they did not know that those from whom they obtained their information knew or professed to know the circumstances of the case; that they had a fixed opinion, based upon this information, which they regarded as true and reliable, and one which it would require proof to remove; that they could, however, try the case according to the law and evidence, and give the defendant a fair and impartial trial. The parties were held by the court to be competent, were accepted by the state, but challenged by the defense, and were placed on the jury over the protest of the defendant.

"The defendant exhausted all his challenges in making up the jury, and was forced to accept a juror over his peremptory challenge. This is assigned as error.

"We are of opinion that under the ruling of this court in *Woods v. State*, 99 Tenn. 182, 41 S. W. 811, there was no error in accepting these parties as competent jurors. They could not say that the accounts which they had heard and read were given by persons who knew or professed to know the facts, and they stated that they could render a verdict impartially upon the evidence, notwithstanding these preconceived opinions, which were formed, as we think, from rumor, and not from any account by any one purporting or assuming to know or state the facts. We think the statements they had read and heard of the facts must be treated as rumor and do not disqualify the persons from acting as jurors."

At the same term of the court, in the case of *Morrison v. State*, from Robertson county, an opinion was delivered by the present Chief Justice; but it has been lost, and the record also has been mislaid. We have had recourse, however, to the original bill of exceptions, and the action of the lower court, which was approved in that case, is thus disclosed:

"John Durrett testified on his voir dire: That he had a fixed opinion as to the guilt or innocence of the defendant, founded upon reading an account of the killing in the newspaper, and that it would require proof to remove said opinion. The court then asked the said John Durrett if he believed that he could fairly and impartially render a verdict in this case in accordance with the law and evidence. He replied that he

Durrett. The defendant challenged him for cause. The court overruled and disallowed the challenge for cause, to which the defendant excepted. The defendant then and there challenged said John Durrett peremptorily.

"J. M. Birdwell was tendered as a competent juror. He also stated that he had a fixed opinion as to the guilt or innocence of the defendant, which was formed from reading a detailed account of the shooting in the *Robertson County News*, a newspaper published at Springfield, soon after it occurred, and that it would take proof to remove said opinion. The court then asked J. M. Birdwell if he believed that he could fairly and impartially render a verdict in this case in accordance with the law and evidence. He replied that he thought he could. The court held J. M. Birdwell competent as a juror. The state passed him. The defendant challenged him for cause. The court overruled and disallowed said challenge, to which the defendant excepted. The defendant then peremptorily challenged the said J. M. Birdwell.

"John Crosswy was tendered as a competent juror. He also stated that he had a fixed opinion as to the guilt or innocence of the defendant, which was formed by reading an account of the killing in the *Robertson County News* soon after it occurred, and that it would take proof to remove said opinion. The court then asked John Crosswy if he believed he could fairly and impartially render a verdict in this case in accordance with the law and evidence. He replied that he thought he could. The court held John Crosswy competent as a juror. The state passed him. The defendant challenged him for cause. The court disallowed and overruled said challenge for cause, to which the defendant then and there excepted. The defendant peremptorily challenged John Crosswy."

This court held that all of the foregoing persons tendered as jurors were competent, and also held that chapter 383, p. 891, of the Acts of 1899, was constitutional. That act reads:

"That hereafter, in the trial of any criminal case, the fact that a person called as a juror has formed an opinion or impression based upon newspaper statements shall not disqualify him to serve as a juror, if he shall, upon oath, swear that he believes he can fairly and impartially render a verdict therein in accordance with the law and evidence, and the court shall be satisfied of the truth of such statement."

This statute must, however, be construed, in connection with the cases already quoted from, and those which are to follow, as

addendum to 111 Tenn., at page 588, 88 S. W. 774. In that case the court held that the juror was incompetent because, said the court, "it will be observed that during the course of his examination the juror stated he conversed with parties who had conversed with witnesses; that he accepted what they said as being the facts in the case; that he does not recall their names, but the names of the witnesses were given him in those conversations; that he has an opinion well grounded and fixed, etc.; that his opinion was unfavorable to the defendant; and that it will require evidence to remove it."

The next and last case in our Reports is *Wilson v. State*, 109 Tenn. 167, 169, 170, 70 S. W. 57, which was decided at the September term, 1902. In that case it appeared that the plaintiff in error had been convicted of murder in the second degree, and had been sentenced to the penitentiary and appealed. It was urged in this court that he had not had a trial before a fair and impartial jury. Said the court upon this subject:

"The specific objection is over the fact that Richard Rider, W. H. Farmer, and four others, whose names are not given, were not competent and impartial, in that they stated, when examined on their voir dire, that they had formed and expressed opinions touching the guilt or innocence of the defendant. They stated that they had heard a great deal about the case, lived in the locality of the killing, had heard persons state how the killing occurred, but did not know whether the persons who made the statements knew of the facts or not; that they had formed their opinions from these statements, but that, if selected as jurors, they could and would wholly disregard these opinions, and try the case alone on the law and evidence, and do equal and exact justice between the state and the defendant; that they would, however, go into the jury box with their opinions; and that it would take evidence to remove them. These parties were objected to as incompetent and disqualified for jury service, and were offered to be challenged for cause; but the court held them competent, and, being acceptable to the state, defendant was forced to peremptorily challenge them, and in this way exhausted his challenges, and was refused any others on that ground. Defendant, having exhausted all his challenges before the jury was made up, was forced to accept as a juror one C. A. Guy, whom he desired to challenge, and who was selected and impaneled as a juror over his protest and challenge.

"This matter has been often before this court, and its latest deliverance upon the questions involved is embodied in the case of *Turner v. State*, 111 Tenn. 593, 89 S. W. 778,

are formed from the personal knowledge of the juror, the statements of witnesses, or of those who have heard the witnesses, and who repeat what they have heard, or from published accounts of the statements of witnesses; and opinions formed from other sources are based upon rumor, and do not disqualify. *Woods v. State*, 99 Tenn. 187, 41 S. W. 811."

It is unnecessary that we should add anything to what is said in the foregoing opinions from which we have quoted. Those opinions, in the excerpts which we have quoted, state fully and clearly the latest views of the court in this state upon the vexed subject of which they treat. It is manifest that, under the principles that are thus laid down, none of the jurors objected to were incompetent. The opinions of all of them must be treated as based on rumor.

It is insisted that the court below erred in failing to instruct the jury upon the subject of assault with intent to commit the specific crime of which the plaintiff in error was convicted. We do not think there was any error in this respect. There was no evidence upon which such a charge could have been based. The plaintiff in error was guilty of the charge of which he was convicted, or of nothing. *Powers v. State*, 117 Tenn. 363, 372, 97 S. W. 815; *Frazier v. State*, 117 Tenn. 430, 441, 100 S. W. 94.

We have thus gone over the various exceptions made, just as if these matters were properly presented to us upon overruling a motion for a new trial in the lower court. However, in the present case, it appears that the motion for a new trial was made in connection with the motion in arrest of judgment in the following form, as shown on the record, at page 7, viz.: "Defendant by attorneys thereupon moved in arrest of judgment, and for a new trial, which was overruled by the court."

In *Freeman v. Railroad*, 107 Tenn. 340, 64 S. W. 1, it is said: "It appears that its motions for a new trial and in arrest of judgment were made at the same time and in the same motion. A motion for a new trial and in arrest of judgment cannot be made together and at the same time, and a motion in arrest of judgment is a waiver of a motion for a new trial." In the later case of *Hall v. State*, 110 Tenn. 365, 75 S. W. 716, it appeared that the motion was precisely the same as here. It is quoted on page 368 of 110 Tenn. and page 717 of 75 S. W.: "Comes the defendant and moves the court in arrest of judgment and for a new trial, which motion being heard is overruled." The court said: "Evidently there was a single motion, embracing two distinct, if not incongruous, matters of procedure, and invoking the judgment of the trial judge upon it. In addition,

record just given, we think the necessary inference is that the motion in arrest was first made, and, being so made, was disposed of first. The legal effect of the waiver of the motion for new trial is that the court is confined to error assigned upon the face of the record."

It is insisted that there was error upon the face of the record, because the indictment was defective; but there was no motion to quash made in the court below. The trial judge may perhaps quash on his own motion, but he is not bound to quash, even on motion of the prisoner. *Jetton v. State*, Meigs, 192; *State v. Willis*, 3 Head, 157.

Objections to the indictment must be made in the lower court. *Glidewell v. State*, 15 Lea, 135; *Rodes v. State*, 10 Lea, 414; *Luttrell v. State*, 85 Tenn. 232, 237, 1 S. W. 886, 4 Am. St. Rep. 760.

Objections to the form of the indictment are generally waived by going to trial without calling the attention of the trial judge to them. *Stevenson v. State*, 5 Baxt. 683; *Forrest v. State*, 13 Lea, 106; *Scruggs v. State*, 7 Baxt. 38.

There was, however, in the lower court, a motion in arrest of judgment. This motion must rest on matter of record. *King v. State*, 91 Tenn. 649, 20 S. W. 169; *State v. Rogers*, 6 Baxt. 563. Such motion is ineffective, unless it states specifically the grounds on which it is based. *State v. Steele*, 3 Heisk. 135; *Hall v. State*, 110 Tenn. 365, 75 S. W. 716. In the first of these cases, it is said: "The record does not disclose for what reason the judgment in this case was arrested. The motion in arrest is general, and specifies nothing. It is certainly the better, if not the only correct, practice, in civil as well as criminal cases, formally to assign reasons in arrest of judgment upon the record in support of the motion in arrest, so that the attention of the court in the first instance may be at once directed to the alleged defect in the proceedings, and that the public, through all time, may, upon examination of the record, be informed as to the ground of its action." * * * The propriety, not to say necessity, of this practice, is more apparent when the cause is to be considered by a revising tribunal, whose attention should be directed at once to the reasons in arrest, assigned of record, instead of being compelled to make a critical, and often fruitless, examination of the record to find out the supposed defects."

In *Hall v. State*, it is said upon this subject: "The motion in arrest should state concisely the defects complained of, or the ruling of the lower court upon such motion, it is held, cannot be reviewed on appeal." * * * A motion in arrest is much in the nature of a demurrer, which goes to defects

it or of our legislation as to demurrers. The general demurrer prevailed for many years in this state; but it was finally condemned as a vicious practice, in that it laid a trap for trial courts and for adversary counsel. So the Code of 1858 abolished it, and provided that the demurrer must specify the defects relied on. We think a general motion in arrest is equally objectionable, and should be discountenanced."

However, even if the objection made in this court to the indictment had been made in the court below, in never so specific a form, it must have been held of no avail.

The indictment reads:

"State of Tennessee, Wilson County. September Term, Circuit Court, 1908.

"The grand jurors for the state and county aforesaid, on their oath, present that Cecil Palmer, on the ——— day of July, 1908, feloniously did have unlawful carnal knowledge of Sophronia J. Yates, a female, forcibly and against her will, and against the peace and dignity of the state.

"Walter S. Faulkner, Attorney General."

The objection now offered is that the indictment does not use the word "ravished"—does not charge that the prisoner "ravished" the female. It is insisted that this word was essential at the common law, and that an indictment without it is fatally defective.

The point is not well taken. Our statute defines rape as follows: "Rape is the unlawful carnal knowledge of a woman forcibly and against her will." Shannon's Code, § 6451. The word "ravish" implies nothing more than that the act was done forcibly and against the will of the woman. *Wilkey v. Commonwealth*, 104 Ky. 325, 47 S. W. 219, 220; *Tway v. State*, 7 Wyo. 75, 78, 79, 50 Pac. 188; *Harmon v. Com.*, 12 Serg. & R. (Pa.) 69; *O'Connell v. State*, 6 Minn. 279, 284, 285 (Gil. 190); *Williams v. State*, 1 Tex. Civ. App. 90, 92, 93, 28 Am. Rep. 399; *Gibson v. State*, 17 Tex. Civ. App. 574; *Fields v. State*, 39 Tex. Cr. R. 488, 46 S. W. 418; *Leoni v. State*, 44 Ala. 110; *Jackson v. State*, 114 Ga. 861; 40 S. E. 989. In *Tway v. State* it is said: "It is contended by plaintiff in error that the information is insufficient because the word 'ravish' is not used in describing the offense. The alleged defect being in the manner in which the offense is charged, the objection should have been made by a motion to quash in the court below. The attention of the district court was not called to it in any way, and the question is not properly before us for consideration. But the information is in the language of the statute, and is sufficient. Bishop says: 'There are commonly employed, in setting out some

reason for it in most cases is that either the offense is now, or it was in its origin, statutory, and the statutory term must be employed to identify it; such being the rule for all indictments on statutes. For example, murder, as distinguished from manslaughter, is a statutory crime, and hence the necessity for the technical words just mentioned. Under modern statutes, under different language from the old common-law and statutory definitions, the use of the same technical words is not always essential.' 1 Bish. Crim. Proc. § 335. And he states (volume 2, § 953): 'Ravish' is indispensable in the common-law indictment, because it is in the statute of Westminster II.' The word does not occur in the definition in our statute, and therefore there is no necessity for its use in describing the offense." 7 Wyo. 78, 79, 50 Pac. 188. Neither does the word occur in the definition in our statute, and there is no necessity for its use in describing the offense. Moreover, our Code provides that, "in all cases where the common law prescribes particular and technical language to describe an offense punished

gree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case" (Shannon's Code, § 7080), and "the statement of facts constituting the offense * * * shall be in ordinary and concise language without prolixity or repetition" (Shannon's Code, § 7077). Our statutory definition of the offense contains every element necessary to constitute the crime of rape. In drawing an indictment under it, it is only necessary to add, as was done in the present case, the circumstances of time and person. The man who is charged with having unlawful carnal knowledge of a particular woman (at a time stated) forcibly and against her will is charged with the crime of rape. The use of the word "ravish," along with the words contained in the statute, would add nothing to the charge. It would be mere surplusage, even with the full meaning accorded to it in the authorities we have cited, and there are other authorities which do not allow so extensive a meaning.

It results there is no error in the judgment of the court below, and it must be affirmed.

MENDOZ v. STATE.

(Court of Criminal Appeals of Texas. April 28, 1909.)

INDICTMENT AND INFORMATION (§ 52*)—AFFIDAVIT TO INFORMATION.

A conviction on an information, not accompanied by an affidavit, cannot be sustained.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 163; Dec. Dig. § 52.*]

Appeal from Hays County Court; Ed. R. Kone, Judge.

Luis Mendoz was convicted of wife abandonment, and he appeals. Reversed, and prosecution ordered dismissed.

B. G. Neighbors, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. This is a conviction of appellant on a charge of abandoning his wife; his punishment being assessed at \$100 fine.

There is no affidavit in this record accompanying the information, without which a successful prosecution cannot be had.

Accordingly the judgment is reversed, and the prosecution ordered dismissed.

MALLORY v. STATE.

(Court of Criminal Appeals of Texas. April 28, 1909.)

CRIMINAL LAW (§ 1090*)—APPEAL—STATEMENT OF FACTS—BILL OF EXCEPTIONS—REVIEW.

Where the record contained no statement of facts or bill of exceptions, and the indictment was sufficient, there was nothing for the court to review, and the judgment must be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1090.*]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

L. Mallory was convicted of murder, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the district court of Kaufman county on a charge of murder, and his punishment assessed at confinement in the penitentiary for a period of 50 years.

The record comes to us without a statement of facts or bill of exception. Some criticism is made of the validity of the indictment; but an inspection of the same demonstrates quite clearly that it is not subject to any substantial objection. In the condition in which the record reaches us there is no question which can be reviewed, and it follows, under the well-settled rule of this court, that the judgment must be, and it is hereby, affirmed.

CARROLL v. STATE.

(Court of Criminal Appeals of Texas. April 28, 1909.)

1. INDICTMENT AND INFORMATION (§ 162*)—AMENDMENT—COMPLAINT—AFFIDAVIT.

The county attorney administered the oath to one making an affidavit charging the violation of the local option law, and the information was filed on the same day; but he did not sign the complaint as swearing officer or make his jurat until the next day, when he did so without the knowledge or consent of accused or the court, neither of whom learned of his action until after conviction. Held that, while the complaint would have been sufficient if the signature and jurat of the county attorney had been authorized by an order of court before trial after due notice to accused, such an amendment could not be made without an order, and the complaint was insufficient to sustain a conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 524; Dec. Dig. § 162.*]

2. INDICTMENT AND INFORMATION (§ 54*)—COMPLAINT—REQUISITES—JURAT.

The jurat of the swearing officer is essential to a complaint.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 173; Dec. Dig. § 54.*]

3. COURTS (§ 116*)—RECORDS—AMENDMENT—MODE.

Papers filed in a criminal case become a part of the record and cannot be changed, except by order of the court after full hearing and as authorized by law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 369; Dec. Dig. § 116.*]

Appeal from Hays County Court; Ed R. Kone, Judge.

J. S. Carroll was convicted of violating the local option law, and he appeals. Reversed and remanded.

Will G. Barber, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the local option law. There was a motion in arrest of judgment made, urged, and overruled. The facts in this connection are embodied in a bill of exceptions, which shows that on the 22d of April, 1906, an affidavit was made by T. J. Jackman charging appellant with violating the local option law, and that on the same day an information was filed; that both pleadings were filed on the 22d of April; that after filing these papers the county clerk called the county attorney's attention to the fact that he had not signed the jurat, the oath having been administered by the county attorney; that he caused the county attorney to sign his name as the swearing officer on the 23d day of April, the day after the complaint and information were filed. It is also stated in the bill of exceptions as a matter of fact that the county attorney did swear Jackman, the affiant, at the time he took the affidavit, but that he did not as

such officer sign the complaint as a swearing officer, or make his jurat to that effect; that his signature officially to the complaint as the swearing officer was made without the knowledge or consent of appellant or the court; and that it was never called to the attention of appellant, nor was he aware of it, nor was the court aware of it, until after the conviction.

We believe, under this state of case, this was error. It has been repeatedly held by this court, and in an unbroken line of decisions, that the jurat of the swearing officer is essential to a complaint, and the decisions have gone sufficiently far to hold that this could not be done after conviction, so as to make a complaint good, or as a basis, rather, of a valid information. This line of decisions is based upon the theory that an information cannot be predicated upon an insufficient complaint, and that a legal complaint is requisite by the statute as a basis or authority for the filing of an information. This complaint would have been sufficient if, prior to the trial of the case, this matter had been brought to the attention of the court and the facts all introduced, and the court thereupon had entered an order authorizing an amendment or the signature of the officer after due notice to appellant. But it ought not to be held that a party to a case, or an attorney in the case, could go among the filed papers of a cause, and add to or detract from, or in any manner change or amend, the pleadings without permission of the court. Such a proceeding as this should not be held valid. Amendments to indictments and practice of this sort have been provided for by statute, and where papers have been filed in a cause they become part of the court records and must remain as such, unless amendments or changes are authorized by the court after a full and fair hearing, and as authorized by law.

This judgment is therefore reversed, and the cause remanded.

Ex parte KING.

(Court of Criminal Appeals of Texas. April 28, 1909.)

HABEAS CORPUS (§ 113*)—REVIEW ON APPEAL—EVIDENCE OF CRIME.

On an application for a writ of habeas corpus by one charged with murder to be admitted to bail, the judgment of the trial court denying his application will not be set aside, where there is proof showing his guilt to be evident.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 113.*]

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

John King, who was charged with murder, applied for a writ of habeas corpus. The

application was denied, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State

RAMSEY, J. Relator was charged by indictment in the district court of Tom Green county with the murder of one Katie Ryan. He applied to Hon. J. W. Timmins, district judge, on January 25, 1909, for a writ of habeas corpus, alleging he was illegally restrained of his liberty, and praying that he be admitted to bail. On hearing before said court his application was denied, and he was remanded to the custody of the sheriff. From this judgment an appeal was duly prosecuted on a statement of facts properly filed and approved by the court below.

The testimony introduced on the part of the state is amply sufficient, if true, to show that relator is guilty of murder in the first degree. His defense consists of proof of alibi, and also involves to some extent an attack and impeachment of the state's witnesses. The case is peculiarly one of fact, and in respect to a matter of this sort, as we view it, from the statement of the evidence contained in the record, the judgment of the trial court should not be set aside, where there is proof showing the defendant's guilt to be evident. We are not prepared to say the action of the court below was without ample warrant, and without comment on the testimony we deem it our duty to affirm the judgment of the court below, which is here done.

MYERS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 3, 1909. Rehearing Denied May 19, 1909.)

1. CRIMINAL LAW (§ 589*)—CONTINUANCE—ABSENT WITNESSES.

Where the facts which accused expected to show by a witness, in order to procure whom he asked a continuance, were not material or probably true, and the evidence tended to show collusion between accused and the absent witness, a continuance was properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1315; Dec. Dig. § 589.*]

2. INTOXICATING LIQUORS (§ 233*)—TRANSACTIONS—ADMISSIBILITY OF EVIDENCE.

In a prosecution for violation of the local option law, accused was properly asked whether he had in his possession whisky of the brand claimed to have been sold by him, and had whisky at all times; the testimony being admissible to show that accused was selling whisky, and not objectionable as an attempt to show a system or prove the offense of having whisky in his possession.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 298-297, 298½; Dec. Dig. § 233.*]

3. CRIMINAL LAW (§ 1137*)—APPEAL—HARMLESS ERROR—INVITED ERROR.

Where accused presented a special charge similar to that prepared by the court, after its charge was framed, but before it was read to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

COUNSEL.—COMMENT ON WITNESSES.
Where, in a prosecution for violating the local option law, accused's counsel referred in argument to a certain state's witness, who was also charged with a crime and who had left the county, and stated that he had left to escape prosecution, and that one who would leave his bondsmen was not worthy of belief, the county attorney could state in reply that it was as reasonable to believe that he was induced to leave by accused as for the reason stated by accused's counsel.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 726.*]

Appeal from Fannin County Court; H. A. Cunningham, Judge.

Joseph Myers was convicted of violating the local option law, and he appeals. Affirmed.

See, also, 52 Tex. Cr. R. 558, 108 S. W. 392.

McGrady & McMahon, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. This conviction was for violating the local option law; the punishment assessed being a fine of \$50 and 30 days in jail.

Appellant's first bill of exceptions complains of the action of the court in overruling his first application for continuance or postponement of the case until the following day for the want of the testimony of Henry Peck, who had been duly subpoenaed, but had gone out of town about eight miles that day, expecting the case to be delayed, as there were a number of cases ahead of it, and thinking he could get back in time for trial. The bill shows that appellant expected to prove by the witness Peck that he purchased a quart of the same kind of whisky claimed to have been bought by Bryant from appellant the night before this alleged sale, and that he went with Bryant to his boarding house and got the whisky; the theory of the appellant being, denying the sale absolutely, that Bryant was engaged in selling whisky, and sold this to Kitchell, and then, to avoid prosecution, claimed that he was merely the agent of Kitchell in purchasing it from appellant. The testimony of three witnesses show that Bryant kept whisky in large quantities at his boarding place; and appellant insists that the testimony, taken as a whole, shows that Bryant was the real seller, instead of appellant, which makes the testimony of Peck (the absent witness) important. We do not believe this testimony is material, or probably true, in the light of this record. Furthermore, the facts suggest collusion on the part of appellant in the absence of the witness.

Bill of exceptions No. 2 shows: While defendant was on the stand testifying in his own behalf, the state propounded to him the following question: "Haven't you had Yel-

there could be no issue of a subterfuge, and no reason to prove system, and did not prove system; that it was an attempt to prove other offenses of having whisky in his possession, showing opportunity to commit them, and was absolutely irrelevant and immaterial to any issue in this case, and introduced for the purpose of prejudicing the jury against the defendant, and calculated so to do. All of which objections being overruled, appellant answered: "I don't know that I have had Yellowstone, but suppose I have." The state's attorney then asked the following question: "Haven't you had whisky at all times?" Appellant objected, for reasons stated above, which objections were overruled, and appellant answered: "I don't think I had any at that time; but most of the time I did have whisky." This testimony was admissible as a circumstance to corroborate the state's case and to show that appellant was selling whisky. See *Southworth v. State*, 52 Tex. Cr. R. 582, 109 S. W. 133, *Myers v. State*, 52 Tex. Cr. R. 558, 108 S. W. 392, and *Wagner v. State*, 53 Tex. Cr. R. 306, 109 S. W. 169.

Bill No. 3 complains of the following charge of the court: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed; and it is not sufficient if it merely shows the commission of the offense. An accomplice, as the term is here used, means any one connected with the crime committed, either as principal offender, as an accomplice, as an accessory, or otherwise. It includes all persons who are connected with the crime by unlawful act or omission on his part, transpiring either before, at the time, or after the commission of the offense, and whether or not he was present and participated in the commission of the crime. Now, if you believe from the evidence that the witness Hamp Bryant was an accomplice, as that term is defined in the foregoing instructions, then you are further instructed that, before you would be authorized to find the defendant guilty, you must not only believe the testimony of the witness Hamp Bryant to be true, but you must further find from the evidence that said Hamp Bryant has been corroborated by other testimony, showing both the commission of the offense charged, as well as connecting the defendant therewith. The corroborating testimony necessary under the law must be material facts connecting the defendant with commission of the offense charged." Appellant objects to this charge, on the ground that it is unwarranted and uncalled for by any evidence adduced on the trial, and was upon an issue not raised by the testi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mony and not charged in the information, and authorized the jury to find the defendant guilty if he and Hamp Bryant, the party to whom the sale is alleged to have been made in this case, acted together in a sale to J. A. Kitchell. This bill is approved, with the following qualification: "That defendant's counsel presented his special charge No. 2 embodying a similar charge, after main charge was prepared, but before main charge was read to jury." Even if error, this is an invited error, under the explanation of the court, of which appellant cannot complain.

Bill No. 4 complains of the argument of the county attorney in his closing speech, wherein, among other things, he said that the reason the witness Bryant left the county was to keep from testifying in this case, and that the defendant caused him to leave. Appellant then and there objected to said argument, and asked the court to instruct the county attorney to stay within the record, and instruct the jury not to consider such argument, and the court refused to stop the county attorney in such argument. After the argument had been closed, and the court had delivered and read his charge in writing to the jury, the defendant filed and asked the court to give the following charge: "I charge you, gentlemen of the jury, not to consider the argument of the prosecuting attorney in the closing argument as to the witness Hamp Bryant leaving Fannin county because he was a witness against defendant." The court refused to give this charge. The bill is approved, with this qualification: "That, at the time of the above complained of argument, county attorney was replying to an argument made by defendant's counsel, to the effect that a man, such as witness Bryant, who would leave his bondsmen, was not worthy of belief, and that Bryant left to waive prosecution; and county attorney argued that all the facts and circumstances in case should be looked to in determining whether or not he had sworn truthfully, and suggested that it was as reasonable to believe that he had been induced to leave by defendant as that he would go on account of case against him." We think the argument was a legitimate retort upon defense's argument.

We find no error in this record, and the judgment is affirmed.

ROSS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 12, 1908. On Rehearing, May 19, 1909.)

1. CRIMINAL LAW (§ 603*)—CONTINUANCE—ABSENCE OF WITNESS—SUFFICIENCY OF APPLICATION.

An application for continuance for the absence of a witness, which did not show whether the witness had permanently left the state, and did not show any probability that the

witness would ever return to the state, was defective.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1353-1360; Dec. Dig. § 603.*]

2. CRIMINAL LAW (§ 598*)—CONTINUANCE—DILIGENCE.

A motion by accused during the trial for a postponement in order to procure testimony of witnesses by whom he could establish an alibi, averring that he had not been advised as to the date when the offense was claimed to have been committed, a date being alleged in the information, was properly refused, where it did not appear that any steps had been taken to procure the testimony; the matter not constituting surprise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.*]

3. JURY (§ 95*)—QUALIFICATIONS OF JURORS—SITTING ON FORMER TRIAL OF ACCUSED.

That jurors in a prosecution for violation of the local option law had sat on a former prosecution of accused for an illegal sale of liquor, and had convicted him, would not disqualify them as having formed an opinion, where the alleged sales in the two cases were made to different persons and the state relied on different witnesses.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 424-430; Dec. Dig. § 95.*]

4. JURY (§ 116*)—CHALLENGE TO ARRAY—STATUTORY PROVISIONS.

Code Cr. Proc. 1895, art. 661, provides that accused may challenge the array for certain causes. Article 662 provides that the preceding article shall not apply where jurors summoned are those selected by jury commissioners, in which case no challenge to the array is allowed. *Held* that, where there is no showing whether the jury was selected by the jury commissioners or not, it will be presumed that it was organized according to law and drawn by the jury commissioners, and no challenge to the array will be allowed.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 116.*]

On Rehearing.

5. CRIMINAL LAW (§ 419*)—EVIDENCE—HEARSAY.

In a prosecution for violation of the local option law, where the state's witness on cross-examination had admitted that, while employed by a railroad company, he had cashed his time check for \$138, when the original check had been issued for \$38, it was error to permit the state to introduce a clearance card, not under oath, alleged to have been delivered by the railroad company to witness, stating that his services had been satisfactory and that he had left the employment of his own accord, since it was hearsay.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 419.*]

6. CRIMINAL LAW (§ 1169*)—APPEAL—REVIEW—REVERSIBLE ERROR—ADMISSION OF EVIDENCE.

The admission of the card was reversible error, since the credibility of the witness, being the principal witness, was the main point in the case.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.*]

Appeal from Montague County Court; Geo. S. March, Judge.

Frank Ross was convicted of violating the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

local option law, and appeals. Reversed and remanded on rehearing.

See, also, 52 Tex. Cr. R. 604, 108 S. W. 375; 53 Tex. Cr. R. 295, 109 S. W. 152, 153.

Jas. A. Graham, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. This is a conviction for violating the local option law; the punishment assessed being a fine of \$25 and 20 days' imprisonment in the county jail.

Appellant presented application for continuance. The same is defective, in that it does not show whether the witness had permanently left the state or not, and does not show to the court any probability that the witness will ever be back in Texas.

During the progress of the trial appellant made a motion to postpone same in order that he might procure the testimony of several witnesses by whom he could establish an alibi for defendant; that he had not been advised as to the time when the offense was alleged to have been committed. The date alleged in the information of the commission of the offense was April 1, 1907. The record does not show any steps to procure the testimony, and this is not a matter of surprise, as has been frequently held by this court. It follows that the court did not err in refusing the postponement.

The record contains a motion to quash the panel of the jury because appellant says they are made up of Prohibitionists and that they had practically formed an opinion against defendant, for six of the jurors had heard the testimony in another case, where the defendant said he did not sell whisky, and, though he testified to that, they convicted him, and thereby had practically prejudged this case. The sale alleged in this case was shown to have been made to one Humphrey, while the sale in the other case in which he had been tried was made to one Bowman, and in no sense were they companion cases. This shows that the facts were different, and different witnesses, and would not disqualify the jury. Article 661, of the Code of Criminal Procedure of 1895 provides that "the defendant may challenge the array for the following causes only: That the officers summoning the jury had acted corruptly and had willfully summoned persons upon the jury known to be prejudiced against the defendant with a view to cause him to be convicted." And article 662 says: "The preceding article does not apply when the jurors summoned are those who have been selected by jury commissioners. In such a case no challenge to the array is allowed." The bill of exceptions here fails to show whether the jury was selected by the jury commissioners or not, and in the absence of such statement in the record it will be presumed the jury was organized according to law and drawn by the jury commissioners, and the only question that can be presented here would be that

the jury had formed an opinion in the case, and this cannot be held so, where it is a different offense and where the state relies upon different witnesses.

The other questions have been passed upon by this court in various local option cases; and, finding no error in the record, the judgment is affirmed.

On Rehearing.

This case was affirmed at a former sitting of this court, and now comes before us on motion for rehearing.

In the original opinion we failed to pass upon bill of exceptions No. 2, which presents the following matter: While the witness A. L. Humphrey was testifying for the state, and after he had testified to purchasing the bottle of whisky from the defendant, and on cross-examination by defendant's counsel had admitted that while working for the Ft. Worth & Denver Railway Company at Childress he had cashed his time check for \$138, and that the original time check had been issued for \$38, and said witness had sought to make his explanation thereof, the state's counsel presented said witness with what was called a clearance card, and the witness identified same, and testified that he had seen the proper officer sign the same at the time it was delivered to him, whereupon the state's counsel proposed to read said clearance card as evidence to the jury, and, before same was read as evidence, defendant's counsel objected, for the reason that the card was hearsay, and the same did not purport to be under oath of the party who executed same, which objections were by the court overruled, and the clearance card, which is as follows, was by the state read in evidence to the jury:

"Form 1012. Fort Worth & Denver City Railway Co. Certificate No. 492. Impression copy to be taken in book kept for that purpose. Childress, Texas, Jan. 29, 1903. This is to certify that A. L. Humphrey has been employed in the capacity of wiper at Childress in the M. P. & C. Department of the Fort Worth & Denver City Railway Co., from August 18th, 1901, to January 28th, 1903. Services satisfactory. Left of his own accord. Yours truly, Milton Player, Master Mechanic."

Stamped: "Master Mechanic, Childress, Tex., F. W. & D. C. Ry. Jan. 29, 1903."

This testimony should not have been admitted. It was clearly hearsay testimony, introducing the opinion of an outside party as to the character of the prosecuting witness, and this was the main point in the case—as to whether the prosecuting witness was a credible one. Being the main witness in the case, it clearly authorized a reversal of this judgment.

Accordingly the motion for rehearing is granted, and the judgment is reversed, and the cause remanded.

In a prosecution for robbery, an allegation of the indictment that accused took one \$10 bill and one \$5 bill, current money of the United States, of the value of \$15, must be proved, and evidence merely that he took "a \$5 bill and a \$10 bill" is insufficient.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 27; Dec. Dig. § 20.*]

2. CRIMINAL LAW (§ 780*)—TRIAL—INSTRUCTIONS—TESTIMONY OF ACCOMPLICE—CORROBORATION.

In a prosecution for robbery, it was error to charge that a certain witness was an accomplice, and that a conviction could not be had on his testimony alone, unless the jury believed that it was true and tended to connect accused with the offense charged, and unless it was corroborated by other testimony tending to connect accused with the offense, and that the corroboration was not sufficient if it merely showed the commission of the offense charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.*]

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

Jack Early was convicted of robbery, and appeals. Reversed and remanded.

Taylor & Gallagher, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of robbery; his punishment being assessed at seven years in the penitentiary.

The evidence is conflicting, and it is not intended here to discuss its sufficiency. The accomplice testified to a state of case which, if sufficiently corroborated, might sustain the conviction. The indictment charges appellant with taking one \$10 bill and one \$5 bill, current money of the United States of America, of the value of \$15. The evidence shows only that he took "a \$10 bill and a \$5 bill." No witness undertakes to testify what character of money, or that it was in fact money, further than the expressions "\$5 bill" and "\$10 bill." There is not a word of evidence that indicates it was United States currency of any sort, greenbacks, national bank bills, or treasury notes; but the evidence leaves it just as stated—"a \$5 bill and a \$10 bill." Why it is thus left is not explained in the record. This allegation of the indictment must be proved. The evidence is too indefinite in this respect. We call attention to this, so that upon another trial such uncertainty may be avoided.

The court charged the jury in regard to accomplice evidence as follows: "I instruct you that the witness Major Nolan is an accomplice. Now, you cannot convict the defendant upon his testimony alone, unless you first believe that his testimony is true and tends to connect the defendant with the of-

fense charged; and the corroboration is not sufficient if it merely shows the commission of the offense charged." Exception was properly reserved to this charge, and correctly. This charge has been condemned in a great number of cases. *Jordan v. State*, 51 Tex. Cr. R. 145, 101 S. W. 247, where will be found quite a number of cases cited; *Oates v. State*, 51 Tex. Cr. R. 449, 103 S. W. 859.

The judgment is reversed, and the cause remanded.

CROWSON v. STATE.

(Court of Criminal Appeals of Texas. March 23, 1909. Rehearing Denied May 19, 1909.)

1. CRIMINAL LAW (§ 1052*)—APPEAL—EXCEPTIONS—DENIAL OF CONTINUANCE.

A ruling denying an application for a continuance in a criminal case is not reviewable, where no exception was reserved to the ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2659; Dec. Dig. § 1052.*]

2. CRIMINAL LAW (§ 1090*)—APPEAL—EXCEPTIONS—RULINGS ON EVIDENCE.

A ruling permitting a witness to be impeached cannot be reviewed, in absence of a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2816; Dec. Dig. § 1090.*]

3. BURGLARY (§ 41*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction in a prosecution for burglary of a railroad car with intent to commit theft.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

Appeal from District Court, Anderson County; B. H. Gardner, Judge.

C. H. Crowson was convicted of burglary with intent to commit theft, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant filed an application for a continuance, which was overruled. This ruling of the court cannot be reviewed, because appellant failed to reserve an exception. There is no bill of exception in the record as to this or any other matter occurring during the trial.

He urges in his motion for new trial that the court erred in permitting the wife of defendant to be contradicted or impeached by showing that she made contradictory statements out of court to those to which she testified on the trial. There were no exceptions reserved to these rulings of the court, and, as we find the statement of facts, we are of opinion that the court did not go beyond the law in ruling as he did; but, in any event,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vic-tion for burglary of a railroad car with intent to commit the crime of theft. The property taken from the car was quite a number of hams, branded "Red Gravy Hams." The facts show that appellant had quite a number of these hams in possession, which were taken from the car. There are other facts going to connect him with this transaction. It is also shown that, after being arrested and giving bond, he fled the country, and was arrested after some length of time in California. The details of the testimony cover several pages of the record, and present a sufficient case to justify the verdict of the jury.

The judgment is ordered to be affirmed.

ROBINSON v. STATE

(Court of Criminal Appeals of Texas. April 28, 1909.)

1. INDICTMENT AND INFORMATION (§ 132*)—JOINDER OF COUNTS—ELECTION.

An indictment for the theft of a horse, which charged in one count that the horse was the property of a designated person, and in another count that the horse was in the possession of such person and alleged that it belonged to some person unknown, charged but one offense, and the court properly refused to require the state to elect.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 425-453; Dec. Dig. § 132.*]

2. INDICTMENT AND INFORMATION (§ 132*)—JOINDER OF COUNTS—ELECTION.

The state will not be required to elect between counts, where the same transaction is embraced in any number of distinct counts, and where the same offense is charged; and each count alleges a different mode of doing the same act, constituting the same offense, or where distinct ways of doing the same thing are not antagonistic to each other.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 425-453; Dec. Dig. § 132.*]

3. CRIMINAL LAW (§ 621*)—TRIAL—ORDER OF TRIAL OF INDICTMENTS.

The court properly refused to require the state to try accused on a prior indictment, on it appearing that the present indictment was intended to cure a defect in the prior indictment, especially where accused was not deprived of any defense.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 621.*]

4. CRIMINAL LAW (§ 590*)—CONTINUANCE—GROUNDS—SUFFICIENCY.

The refusal to postpone the case for 24 hours to enable accused to file a plea of former conviction was not erroneous, where the court offered to grant a reasonable time for filing the plea, and where the time requested was deemed unnecessary, and where the nature of the plea was not even hinted at.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 590.*]

R. J. McCard, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Williamson county on a charge of theft. On trial he was convicted, and his punishment assessed at confinement in the penitentiary for a period of two years.

The indictment contains two counts. The first count charges the horse alleged to have been stolen to have been the property of one A. C. Aderholt, and the second count charges the possession to have been in A. C. Aderholt, but alleges the property belonging to some person to the grand jury unknown.

1. Appellant in the court below filed a motion, after the evidence was in, requiring the state to elect upon which count a conviction would be sought. This was denied by the court, and in this ruling there was no error. The rule is thus stated in the case of Keeler v. State, 15 Tex. Cr. App. 111: "The principle is that the court should always interpose, either by quashing the indictment or by compelling an election, where an attempt is made, as manifested by either the indictment or the evidence, to convict the accused of two or more offenses growing out of distinct and separate transactions, but should never interpose in either mode where the joinder is simply designed and calculated to adapt the pleadings to the different aspects in which the evidence on the trial may present a single transaction." In this case, when the facts are considered, it is obvious that the rule requiring an election cannot in reason be invoked, because this indictment charges but one felony; the different counts only charging different means of accomplishing the one act—the theft of the horse. See Moore v. State, 37 Tex. Cr. R. 522, 40 S. W. 287. It is, well settled in this court that the state will not be required to elect between counts, where the same transaction is embraced in any number of distinct counts, and where the same offense is charged, and each count alleges a different mode or means of doing the same act, constituting the same offense, or where the distinct ways of doing the same thing are not antagonistic to each other. In such case they may be alleged conjunctively in the same count, and the prosecution has the right to proceed upon all the means alleged. Again, where the different counts in an indictment are in substance but different ways of charging the same offense and are pleaded for the purpose of meeting the evidence as it may transpire, the state cannot be required to elect and confine itself to one

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

require the court, before proceeding with the trial of this cause, to put appellant upon trial on an indictment pending therein preferred against him at the July term of said court in 1908. This the court declined to do, and in explanation of his action states that when the motion was submitted to the court the district attorney stated to the court that the indictment in the cause from which this appeal results was intended to cure a defect in the first count of the indictment on which appellant sought first to be tried, and that he did not expect to and would not try defendant upon but one of said indictments, and that he preferred to dispose of this cause before taking any action on the first indictment preferred. The court further states, it not appearing to the court that defendant would be deprived of any right or defense by granting the request of the district attorney, the motion was overruled. The mere statement of the court in his explanation makes it obvious beyond doubt that there was no error in the action of which appellant could complain.

3. Again, appellant, through his counsel, filed another motion, in which he asked for postponement of the case for 24 hours in order to secure time in which to file a plea of former jeopardy. The motion states that counsel desired to file a plea of former jeopardy, and that it would require him at least the greater portion of the time requested to prepare said plea of jeopardy, and as a reasonable excuse for not having said plea prepared the motion states that since the filing of the indictment in this case there has been two cases pending against him in this court, to wit, case No. 6,562 and case No. 6,576, and that, until such time as the court shall pass upon the motion requiring the state to dispose of the first numbered case, neither his counsel nor appellant did and could know what to set up, which necessarily involved the ruling of the court in the other motion as to the facts in his said plea of former jeopardy. In allowing this bill of exceptions the court states that upon the day preceding the day upon which the above motion was filed the case against the defendant was called for trial, and the defendant's counsel stated that he desired to file a plea of former jeopardy, and asked that this case be postponed and another case called in order to give him time to prepare such plea. This request was granted by the court, and the case against the appellant was postponed for such purpose, and appellant filed the motion above referred to; that the court in this connection stated that an additional reasonable time for filing said

contained in the court's explanation is sufficient, we think, to show that appellant is without cause of complaint. It will be observed that the nature of his plea of jeopardy is not even hinted at in his motion, nor, on the motion for a new trial, do the facts constituting such jeopardy appear.

4. Finally, it is insisted that the evidence in the case is insufficient to sustain the verdict. It must be confessed that the evidence is not of that conclusive character which might well be desired; but after a careful inspection of the entire record we are hardly prepared to say that the evidence is so slight as would justify us, in view of the finding of the jury and the action of the court in overruling the motion for a new trial, in setting aside the conviction on this ground.

Finding no error in the record, it is ordered that the judgment of conviction be, and the same is hereby, affirmed.

COLLINS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 10, 1908. On Rehearing, May 19, 1909.)

1. LARCENY (§ 36*)—CONVERSION OF PROPERTY BY BAILEE—INDICTMENT.

An indictment which alleges that defendant was bailee of a sewing machine belonging to the prosecutor, and in violation of the contract of bailment sold the machine and converted the proceeds to his own use, is sufficient to sustain a conviction of theft as a bailee.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 96; Dec. Dig. § 36.*]

2. LARCENY (§ 59*)—CONVERSION OF PROPERTY BY BAILEE—EVIDENCE OF VALUE.

Though no witness testified to the exact value of the property, circumstantial evidence that defendant, as bailee, sold it for \$5 and converted the same to his own use, is sufficient to sustain a conviction of theft by the bailee.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 154, 155; Dec. Dig. § 59.*]

Appeal from Bowie County Court; Sam H. Smelser, Judge.

Bob Collins was convicted of theft as a bailee, and appeals. Affirmed.

Hart, Mahaffey & Thomas, for appellant.
F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of embezzlement, and his punishment assessed at a fine of \$50 and 30 days in jail.

The charging part of the information is as follows: "One Bob Collins having possession of a sewing machine then and there the property of Susan Simpson by virtue of his contract and agreement to turn said machine over to Jim Hughes, city marshal of Texarkana, Texas, or to pay to said Hughes a fine

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and costs to satisfy a criminal judgment against said Susie Simpson, said contract and agreement of said Bob Collins with said Susie Simpson was violated because said Bob Collins did then and there unlawfully and without the consent of said Susie Simpson, the owner of said sewing machine, fraudulently convert said machine to his, the said Bob Collins', own use and benefit, and with the intent to deprive the said Susie Simpson, the said owner of the said sewing machine, of the value thereof; the value of said machine being then and there of the value of twenty dollars—contrary to the statutes in such cases made and provided, and against the peace and dignity of the state."

Appellant filed a motion to quash the information on the ground that same does not charge an offense and is in the alternative. In view of the allegation in the information which says he appropriated said machine to his own use and benefit, we hold that the information is sufficient.

We notice, however, appellant insists that the statement of facts does not show proof of the value of the machine. Furthermore, it is complained of in appellant's motion for a new trial. There is evidence that the machine was sold by appellant for \$5. This is sufficient proof of value, in view of the fact that appellant was convicted of a misdemeanor.

The record showing no error, the judgment is affirmed.

On Rehearing.

This case was affirmed at a recent sitting of this court, and now comes before us on motion for rehearing.

Appellant insists the court erred in holding the indictment in the case was sufficient. After a careful review of the indictment, we hold that same is sufficient, and, while inartificially drawn, it shows that appellant was bailee of the prosecuting witness, Susie Simpson, and as such bailee he violated the terms of the bailment, and sold a sewing machine, and appropriated the money to his own use and benefit. We therefore hold that the information is sufficient.

Appellant is correct in saying the court erred in stating that appellant had been convicted of embezzlement. He was convicted, as appellant insists, of theft as a bailee.

Appellant further contends there is no evidence in this record to show the value of the machine appropriated by appellant. To this we cannot agree. It is circumstantially established that it is worth something like \$5. While it is true no witness swears to the exact value of it, one witness does swear appellant sold it for \$5; and this is a basis for this court, in conjunction with other circumstances in the record, to assume that it had some market value.

The motion for rehearing is hereby overruled.

PICKETT v. STATE.

(Court of Criminal Appeals of Texas. April 28, 1909. Dissenting Opinion May 19, 1909.)

1. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTIONS—NEW TRIAL—MISCONDUCT OF JURY.

Code Cr. Proc. 1895, art. 821, authorizes the state to take issue with accused on the truth of allegations in the motion for new trial, and permits the judge to hear evidence. A motion for a new trial, for misconduct of the jurors in commenting on the failure of accused to testify, supported by the affidavit of a juror, asked that the jurors be summoned and the matter inquired into. The district attorney denied the allegations and demanded strict proof. *Held*, that the court, on appeal from a denial of the motion, must assume, in the absence of a bill of exceptions, or anything to the contrary, that the matter was investigated and that the allegations were found untrue.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1144.*]

2. CRIMINAL LAW (§ 956*)—NEW TRIAL.

Under Code Cr. Proc. 1895, art. 821, authorizing the state to take issue with accused on the truth of the causes set forth in the motion for a new trial, and permitting the judge to hear evidence, counter affidavits and oral proof are receivable on a motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2373-2391; Dec. Dig. § 956.*]

Davidson, P. J., dissenting.

Appeal from District Court, Bell County; John M. Furman, Judge.

John Pickett was convicted of crime, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the district court of Bell county on a charge of rape, and his punishment assessed at five years' confinement in the penitentiary.

The record comes to us without a statement of facts or bill of exception. Appellant seeks a reversal, as he sought a new trial, on the ground, as stated by him, "that he has not had a fair and impartial trial in this cause on account of the misconduct of the jury which rendered the verdict in this case against him, in this: That after retiring to consider their verdict, and in consideration of the case against this defendant, the jury alluded to, mentioned, commented upon, and discussed the fact that this defendant failed to take the stand and testify in his own behalf on the trial of this case, and considered such failure to testify as a circumstance against him, to the injury of this defendant. The defendant says that he does not know and is unable to state the extent of the discussion of the fact that he refused to testify in his own behalf, in the amount of consideration given it by the jury, except as appears from the affidavits of W. N. Kelly and members of said jury." The affidavit of appellant was attached to the

a new trial in this case." The affidavit of the juror Kelly was to the effect "that the defendant did not take the stand and testify in his own behalf on the trial of said cause, and that the fact of his failure to testify on said trial was referred to, mentioned, and discussed by numbers of the jury during their consideration of this case, and before their verdict was reached; that I am unable to recall what member of the jury mentioned the fact of defendant's failure to testify in his own behalf, or to state what jurors spoke of it; but I am positive that the fact of defendant's failure to testify was mentioned and discussed among the jurors in their consideration of the case." This motion was filed on the 28th day of December, 1908. The allegations contained in this motion were denied by the district attorney as follows: "Now comes the district attorney and denies the allegations set up by the defendant, John Pickett, in his motion for a new trial herein, and says the said allegations are not true in whole or in part, and demands strict proof thereof. Wherefore he asks judgment, and that said motion be denied and refused, and he will ever pray. D. R. Pendleton, District Attorney 27th Judicial District of Texas."

It will be noticed that the affidavit attached to the motion is in very general terms, does not state any particular fact that was mentioned by any juror, the name of any juror discussing the failure of appellant to testify, or when or in what connection the matter was mentioned if at all. It may well be doubted whether, in view of the very general statement of this juror, the court would in any event have been required to grant a new trial. We have not infrequently decided that it is not every reference or casual allusion by the jury to the failure of a defendant to testify that would require the court to grant a new trial. See *Smith v. State*, 52 Tex. Cr. R. 344, 106 S. W. 1161, and *Arnwine v. State* (Tex. Cr. App.) 114 S. W. 796, where this subject is fully discussed. In any event, however, it is certain that, as here presented, we would not be authorized to reverse the judgment for the error alleged. In appellant's motion he makes the issue that he was deprived of a fair trial by reason of certain facts therein stated, in support of which motion he attaches the affidavit of the juror Kelly. This motion and the grounds thereof are denied by the district attorney in his official capacity and under the sanction and solemnity of his official oath. It will be noted, further, that appellant's counsel requested that the jurors be summoned and the matter inquired into. Here the matter rests. It is to be presumed that, if urged, this matter would have been inquired

into. Criminal Procedure of 1896, referring to motions for a new trial, is as follows: "The state may take issue with the defendant upon the truth of the causes set forth in the motion for a new trial, and in such case the judge shall hear evidence by affidavit or otherwise, and determine the issue." And it has been held in many cases that counter affidavits are receivable on motion for new trial. *Dignowitty v. State*, 17 Tex. 521, 67 Am. Dec. 670; *Hyde v. State*, 16 Tex. 445, 67 Am. Dec. 630; *Reynolds v. State*, 7 Tex. App. 516. It has also been held in many cases that under the terms of this statute, by affidavit or otherwise, the court is authorized to receive oral proof. *Childs v. State*, 10 Tex. App. 183; *Reynolds v. State*, 7 Tex. App. 516; *Rucker v. State*, 7 Tex. App. 549; *Wilson v. State*, 17 Tex. App. 525; *Richardson v. State*, 28 Tex. App. 216, 12 S. W. 870; *Ulrich v. State*, 30 Tex. App. 61, 16 S. W. 769. While it is doubtless true that, in the absence of any contest, if the affidavit of the juror in its language had been sufficient, that the court should grant a new trial, it does not occur to us that the mere fact that appellant files a motion of this sort, notwithstanding the denial under oath of the district attorney, he is, in the absence of further showing, entitled to a new trial, and certainly it is not true that where, as in this case, he seeks and asks for an investigation, he is on the mere charge entitled to a reversal, in the absence of any showing, by bill of exception or otherwise, of any injustice or injury done him.

In the absence of statement of facts, this is the only question we can review, and, as we have stated, it seems to be without merit. It is therefore ordered that the judgment be, and the same is hereby, in all things affirmed.

DAVIDSON, P. J. (dissenting). I respectfully dissent from the disposition made of this case by my Brethren. There was but one question presented for revision, the record being without a statement of facts and bills of exceptions. Appellant filed his affidavit, which is part of the motion for a new trial, in which he states that the jury alluded to, mentioned, commented upon, and discussed the fact that he failed to take the stand and testify in his own behalf during the trial, and that the jury considered such failure on his part to testify as a circumstance against him. The district attorney files a reply to this in the following language, but to which he did not swear: "Now comes the district attorney and denies the allegations set up by the defendant, John Pickett, in his motion for a new trial herein, and says that said allegations are not true in whole or in part, and demands strict proof thereof, wherefore he

asks judgment, and that said motion be denied and refused, and he will ever pray. D. R. Pendleton, District Attorney." In support of his motion appellant filed the affidavit of W. N. Kelly, one of the jurors who tried and convicted him, in which it is stated: "That the defendant did not take the stand and testify in his own behalf on the trial of said cause, and that the fact of his failure to testify on said trial was referred to, mentioned, and discussed by numbers of the jury during their consideration of this case and before their verdict was reached," etc. My Brethren say this is not sufficient showing to consider the question of the discussion of appellant's failure to testify, and is too general, and they indulge the further presumption that the court inquired into the matter and heard the evidence. There is nothing in the record, as I understand it, to sustain the conclusion that the court heard any evidence further than stated above. The judgment overruling the motion for new trial does not even recite the fact that evidence was heard. It does state that the case came on to be heard on the motion and amended motion of appellant, and "was duly considered by the court, and is in all things overruled." The main opinion treats the general denial on the part of the district attorney as if it were an affidavit denying all the facts, and places it upon the same plane, as a question of evidence, as they do the affidavit of the juror Kelly. The district attorney does not allege or state in his general denial that he knew any fact or was cognizant of anything that occurred in the jury room. He simply denied as district attorney the truthfulness of the facts set up in appellant's affidavit attached to his motion for new trial and calls for the facts. The district attorney, of course, was unaware of what occurred in the jury room, and necessarily could not know or be informed as to what was said and done, except from others.

It certainly is a dangerous precedent to establish, to wit, that a general demurrer or general denial of the district attorney has all the force and effect of being testimony at all, and it would still be more dangerous to hold that it would be testimony of such gravity as to overcome the sworn statement of jurors who participated in the occurrences to which they testify. The statute authorizes the court to hear evidence on motions for new trial "by affidavit or otherwise." The record in this case shows that the only testimony introduced or heard was the affidavit of the juror Kelly, and he stands uncontradicted and unimpeached that the jury "referred to, mentioned, and discussed the failure of the appellant to testify, and this before their verdict was reached." This does not come within the doctrine held by this court that it was a "mere allusion" to the defendant's failure to testify. It has not been laid down heretofore that the simple statement of a district attorney in the form of a general denial was

testimony, or the equivalent to testimony. We find this question mentioned in *McLaughlin v. State*, 48 Tex. Cr. R. 215, 87 S. W. 158, in the following language: "We find in the record a contest filed by the district attorney to the motion for new trial, in which the statement is made that, if the trial judge absented himself from the courtroom during the argument in said cause, it was only momentary, while said judge was at the urinal, a short distance from the courtroom, in sight and hearing of the people in the courtroom, and no injury could have been done defendant, because there was no objection to any proceeding during said momentary absence of the judge. This contest is not sworn to by the district attorney, nor is there any evidence in the record supporting it. Then we are relegated to the undisputed affidavit of appellant's counsel. We do not think the facts set up in the affidavit of appellant's counsel, the substance of which is stated above, authorize this court to say that this case comes within the rule laid down in *Jeff Scott v. State*, 47 Tex. Cr. R. 568, 85 S. W. 1060, 122 Am. St. Rep. 717; but in our opinion the facts come within the rule laid down in *Bateson v. State*, 48 Tex. Cr. R. 34, 80 S. W. 88. We there held that where the judge had lost control of the trial, as the uncontroverted affidavit shows, it would be ground for reversal. There being no controverting affidavit, we have no alternative except to reverse this case, which is accordingly done." This quotation lays down, in my judgment, the correct rule.

Applying the principle enunciated in the *McLaughlin Case* to this, we have the affidavit of the defendant himself as to his information that the jury referred to, mentioned, and discussed his failure to testify before they reached the verdict. We also have an unsworn general denial of the district attorney, calling for proof, and only calling for such proof. This is met by the uncontroverted affidavit of the juror Kelly, who emphatically swears that they referred to, mentioned, and discussed the failure of appellant to testify before the jury had arrived at a verdict. Under the *McLaughlin Case* the showing was sufficient, and, being uncontroverted, the evidence was ample to sustain appellant's ground of his motion for new trial. If the language of the juror Kelly means anything, it shows that appellant's failure to testify was not casually alluded to, nor was it a "mere allusion" to his failure to testify, but that such failure to testify "was referred to, mentioned, and discussed by the jury before arriving at their verdict." Under all the decisions, so far as I am aware, in this state, this judgment should be reversed on account of the ground set up in the motion.

For the reasons above indicated, I most respectfully enter my dissent from the affirmance of the judgment in this case.

GOODRICH v. STATE.

(Court of Criminal Appeals of Texas. April 28, 1909.)

HIGHWAYS (§ 151*)—FAILURE TO WORK ON ROAD AFTER SUMMONS—SUFFICIENCY OF COMPLAINT.

Pen. Code 1895, art. 491, provides that if any person liable to work on the public roads willfully fail or refuse to attend at the time and place designated by the road overseer, after being legally summoned, or shall fail, on or before the day for which he is summoned, to pay to such overseer \$1 per day for each day he may have been notified to work on the road, he shall be fined, etc. In a prosecution thereunder the charging part of the affidavit was: "On or about the 16th day of January, A. D. 1908, G. [defendant] was liable under the law to work upon the public roads, to wit, all the streets and roads in the town of H., in precinct No. 68, in S. County, Texas, in said county was legally summons to attend and work on said road at a time and place designated by the said F., the said road overseer of said road precinct, to wit, 20th, 21, 22, 23, 24th days of January, A. D. 1908, and the said G. did then and there willfully and unlawfully fail to attend the time and place aforesaid, and did willfully fail and refuse on and before the day on which he was summon as aforesaid to attend to the said F., the road overseer of said road, the sum of one dollar per day for each day that he had been notified to work on upon said road." *Held*, that the complaint did not follow the Code, was unintelligible, and fatally insufficient.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 416; Dec. Dig. § 151.*]

Appeal from Sabine County Court; H. C. Maund, Judge.

John D. Goodrich was convicted of failing to work on the public road after he was summoned, and he appeals. Reversed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the county court of Sabine county, Tex., on the 18th day of February, 1908, of the offense of failing to work on the public road after due summons.

The charging part of the affidavit, as same appears in the record, is as follows: " * * * On or about the 16th day of January A. D. 1908, J. D. Goodrich was liable under the law to work upon the public roads, to wit, all the streets and roads in the town of Hemphill, in precinct No. 68, in Sabine county, Texas, in said county was legally summons to attend and work on said road at a time and place designated by the said J. D. Fuller, the said road overseer of said road precinct, to wit, 20th, 21, 22, 23, 24th days of January, A. D. 1908, and the said J. D. Goodrich did then and there willfully and unlawfully fail to attend the time and place aforesaid, and did willfully fail and refuse on and before the day on which he was summon as aforesaid to attend to the said J. D. Fuller, the road overseer of said road, the sum of \$1 per day for each day that he had been notified to work upon said road."

The prosecution seems to have been begun and the case prosecuted under article 491 of the Penal Code of 1895. This article is as follows: Article 491: "If any person liable under the law to work upon the public roads shall willfully fail or refuse to attend, either in person or by substitute, at the time and place designated by the road overseer of his district or precinct, after being legally summoned, or shall fail, on or before the day for which he is summoned to attend, to pay to such overseer the sum of one dollar per day for each day he may have been notified to work on the road, or, having attended, shall fail to perform any duty required of him by law and such overseer, he shall be fined in any sum not exceeding ten dollars."

It will be noted that the complaint does not follow the provision of our Penal Code, and is really unintelligible. Our Assistant Attorney General has secured from the county clerk of Sabine county, Tex., certified copies of both the complaint and information, and the record seems to be, as tested by these instruments, correctly copied in the transcript. It is obvious that the complaint is fatally insufficient, and the allegation that appellant had failed "to attend to the said J. D. Fuller" is wholly meaningless.

There are a number of very interesting questions raised on the appeal, and some of them, not without difficulty, touching the effect of the creation of the road law in Sabine county; but as the case is not briefed, and as this prosecution will have, in any event, to be dismissed, we forbear any consideration or discussion of the other questions.

For the error pointed out, the judgment is reversed, and the prosecution ordered dismissed.

PURYEAR v. STATE.

(Court of Criminal Appeals of Texas. April 28, 1909. On Rehearing, May 19, 1909.)

1. HOMICIDE (§ 308*)—MURDER IN THE SECOND DEGREE—INSTRUCTIONS.

An instruction that if accused killed decedent in a sudden transport of passion, aroused without adequate cause, he was guilty of murder in the second degree, is not reversible error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 642; Dec. Dig. § 308.*]

2. CRIMINAL LAW (§ 822*)—TRIAL—INSTRUCTIONS—SUFFICIENCY.

The court, in testing the sufficiency of a charge, must consider the instructions as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1990; Dec. Dig. § 822.*]

3. HOMICIDE (§ 23*)—SECOND DEGREE MURDER.

One who kills another intentionally, not in self-defense, and under circumstances not amounting to murder in the first degree, nor

It is always unlawful for one to intentionally kill another, unless the act is in self-defense, or is justified in law, such as in case of a legal execution.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 12; Dec. Dig. § 7.*]

5. HOMICIDE (§ 146*)—IMPLIED MALICE.

Implied malice may be presumed, where there is an intentional killing without just cause or excuse.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 265; Dec. Dig. § 146.*]

6. HOMICIDE (§ 308*)—SECOND DEGREE MURDER—INSTRUCTIONS.

Where the court correctly defined murder in the second degree, and charged that to constitute the offense malice must exist, and that implied malice was inferred from the act and fact of an unlawful killing, an instruction that if accused, with a deadly weapon, in a sudden transport of passion, aroused without adequate cause, and not in self-defense, "with intent to kill," shot and killed decedent, he was guilty of murder in the second degree, was not erroneous; for it required the jury to find, to justify a conviction of murder in the second degree, that the killing was unlawful under circumstances in which the law implied malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 642; Dec. Dig. § 308.*]

7. CRIMINAL LAW (§ 780*)—INSTRUCTIONS—TESTIMONY OF ACCOMPLICE.

Where the evidence showed such relation between a witness for accused and accused as to justify a finding that the witness aided in the commission of the offense, and on cross-examination, by way of impeachment, statements were attributed to the witness which, if standing alone, might form the basis for an adverse verdict, an instruction that, if the witness was an accomplice, his testimony, so far as it was adverse to accused, must be corroborated, but that, so far as it was favorable to accused, no corroboration was required, was sufficiently favorable to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1860; Dec. Dig. § 780.*]

8. HOMICIDE (§ 295*)—PROVOKING DIFFICULTY—EVIDENCE—INSTRUCTIONS.

Where accused left the saloon where decedent worked after the latter had called accused a vile name, and then procured a weapon and came back and applied to decedent the same name, the court was authorized to charge on provoking the difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 608; Dec. Dig. § 295.*]

9. HOMICIDE (§ 300*)—SELF-DEFENSE—INSTRUCTIONS.

Decedent called accused a vile name. Accused left the place, armed himself with a weapon, and returned and called decedent the same name. Accused believed that the language was liable to provoke a difficulty. Accused at the time told decedent to get his gun to give him a chance for his life. *Held*, that the court properly refused to charge that accused had a right to go and arm himself, and return to decedent, and seek a retraction of the insult offered by decedent, and that, if he attempted to attack accused, the latter had a perfect right of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622; Dec. Dig. § 300.*]

the nature and character of the impeaching testimony, examine a voluminous statement of facts; but the bill of exceptions should set forth the nature and character of the impeaching testimony, and enable the court to determine therefrom whether in fact it should have been limited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2832; Dec. Dig. § 1091.*]

11. CRIMINAL LAW (§ 824*)—EVIDENCE—INSTRUCTIONS.

Where the state impeached the testimony of a witness by proving without objection that his reputation for truth was bad, and accused offered testimony of an impeaching character, based on conflicting statements of witnesses, and accused made no request for an instruction limiting the use of impeaching testimony, the failure to give a charge limiting the use of the testimony was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1999; Dec. Dig. § 824.*]

12. CRIMINAL LAW (§ 866*)—EVIDENCE—RES GESTÆ.

Statements by decedent, almost immediately after the firing of the fatal shots, to the effect that accused had shot him because he would not give accused a 15-cent drink of whiskey on credit, and that accused shot in cold blood, were admissible as a part of the *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 811; Dec. Dig. § 866.*]

On Rehearing.

13. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

An instruction on self-defense, that every person may defend himself against any unlawful attack, real or apparent, that a reasonable apprehension of death or of serious bodily harm excuses one in using all necessary force to protect his life, that if accused killed decedent while decedent was about to make an attack on him, causing him to fear death or serious bodily harm, accused was entitled to kill decedent in self-defense, and that if accused sought the occasion on which decedent was killed for the purpose of slaying him, and provoked a difficulty with decedent, the killing was murder, etc., sufficiently submits the issue of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. § 300.*]

Appeal from District Court, Williamson County; Chas. A. Wilcox, Judge.

Will Puryear was convicted of murder in the second degree, and he appeals. **Affirmed.**

Geo. S. Walton, O. Dickens, D. S. Chessler, and J. F. Taulbee, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This is the second appeal of this case. The report of the former appeal is found in 50 Tex. Cr. R. 454, 98 S. W. 258, where quite a full statement of the facts of the case will appear. There is no substantial difference between the facts as they appeared on the former appeal and as they appeared on the trial from which this appeal results. It may be stated, however, that on the first

trial appellant testified on his own behalf. On this trial he did not. The state, however, offered extracts from his testimony on the first trial which contained statements believed by the prosecution, and as we believe, to be prejudicial to his defense. On the trial of the case from which this appeal results, which was had in the district court of Williamson county, on August 10, 1908, the appellant was found guilty of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a period of 30 years. There are a number of questions raised in the appellant's motion for new trial and by bills of exceptions, many of which have been treated in the brief filed herein on behalf of appellant, and the most important of which we will undertake to notice and discuss.

1. The first error assigned relates to the charge of the court on murder in the second degree. The court instructed the jury as stated, and submitted the issue of murder in the first degree, murder in the second degree, and manslaughter, together with the law of self-defense, and presented as well the doctrine of provoking the difficulty. The portion of the charge criticised is as follows: "If you believe from the evidence, beyond a reasonable doubt, that the defendant, with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in a sudden transport of passion, aroused without adequate cause, and not in defense of himself against an unlawful attack, real or apparent, reasonably producing a rational fear or expectation of death or serious bodily injury, with the intent to kill, did shoot and thereby kill Minos Long, as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment at confinement in the state penitentiary for any period that you may determine and state in your verdict, provided it be for not less than five years." The correctness of this charge is assailed on many grounds, and particularly because the court failed to instruct the jury that the killing, in order to be murder in the second degree, must have been done upon malice and implied malice; second, because the court failed to instruct the jury that an unlawful killing must be found to have been committed in order to find defendant guilty of murder in the second degree; and, third, because the court instructed the jury that if they believed beyond a reasonable doubt that the defendant killed the deceased in a sudden transport of passion, aroused without adequate cause, they should convict him of murder in the second degree.

The use of the language challenged in the third objection to this charge has not infrequently been condemned by this court, and notably in the cases of *Clark v. State*, 51 Tex. Cr. R. 519, 102 S. W. 1136, *Kannmacher v. State*, 51 Tex. Cr. R. 118, 101 S. W. 238, and

other later cases; but in the later case of *Walters v. State* (Tex. Cr. App.) 114 S. W. 628, this charge was held not to be reversible. In that case the earlier cases cited by appellant were substantially overruled. As to the other criticisms of this portion of the charge, it is not to be denied that the charge is not as full or as accurately expressed as is always desirable; but we believe, tested in the light of the entire charge, or considered in fairness and carefully analyzed within itself, the charge complained of is not so clearly erroneous as to constitute reversible error. We have frequently said, and it cannot be too often repeated, that in testing the sufficiency of a charge of the court, as, indeed, other instruments, the whole instrument and charge must and should be considered together. The entire charge of the court on the subject of murder in the second degree is as follows:

"The next lower grade of culpable homicide to murder in the first degree is murder in the second degree. Malice is also a necessary ingredient of the offense of murder in the second. The distinguishing feature, however, so far as the element of malice is concerned, is that in murder in the first degree malice must be proven to the satisfaction of the jury beyond a reasonable doubt as an existing fact, while in murder in the second degree malice will be implied from the fact of an unlawful killing.

"Implied malice is that which the law infers from or imputes to certain acts, however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree; and the law does not further define murder in the second degree than to say that if the killing is shown to be unlawful, and there is nothing in the evidence on the one hand showing express malice, and on the other hand there is nothing in the evidence that will reduce the killing below the grade of murder, then the law implies malice, and the homicide is murder in the second degree.

"Every person is permitted by law to defend himself against any unlawful attack, real or apparent, reasonably threatening, or reasonably appearing to him to threaten, injury to his person, and is justified in using all the necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary. Homicide is justified by law when committed in defense of one's person against any unlawful and violent attack, real or apparent, made or appearing to him to be made, in such a manner as to produce a reasonable expectation or fear of death or some serious bodily injury. If you believe from the evidence, beyond a reasonable doubt, that the defendant, with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its

use, in a sudden transport of passion, aroused without adequate cause, and not in defense of himself against an unlawful attack, real or apparent, reasonably producing a rational fear or expectation of death or serious bodily injury, with the intent to kill, did shoot and thereby kill Minos Long, as charged in the indictment, you will find him guilty of murder in the second degree and assess his punishment at confinement in the state penitentiary for any period that you may determine and state in your verdict, provided it be for not less than five years."

There is no complaint in the motion that murder in the second degree was not properly defined. The jury were in terms told that, in order to constitute murder in the second degree, malice must exist, and, further, that implied malice was inferred, or such as the law imputes to the act and fact of an unlawful killing. Then follows the language complained of. It is certain, if one kills another intentionally, under circumstances not amounting to murder in the first degree, or such as would reduce the grade of offense to manslaughter, and same is not in self-defense, it is unlawful. It is equally certain that under such circumstances the law would impute malice to appellant, and that the killing would be murder in the second degree. It is always unlawful for one person to intentionally kill another, unless the act is in self-defense or under such circumstances, as in case of legal execution, that the act would be justified in law; and in a case like the one at bar, where murder in the second degree is well and fully defined, so well, indeed, that the definition escapes criticism or complaint, it is not believed that the mere omission in a particular paragraph to require the killing to be unlawful, or upon malice, would vitiate what would be otherwise a proper charge, where the facts required to be found, both as a matter of law and as a matter of fact, would make the killing unlawful and stamp it inevitably as of the grade of murder in the second degree.

It is, as stated, the law, settled time out of mind, that implied malice will be presumed whenever there is an intentional killing without just cause or excuse. As was said by Judge Clark in the case of *Harris v. State*, 8 Tex. App. 90: "A perfectly exact and satisfactory definition of that term, signifying its legal acceptation in a form at once clear and concise, has been often attempted, but with no very satisfactory permanent result. The differing minds of different courts have employed different terms and language in an attempt to convey substantially the same meaning; and, while a general similarity is apparent in all the definitions, the legal mind has not yet crystalized the substance of the term into a terse sentence readily comprehensible by the average juror." Again, in the same case, the same learned judge uses this language: "If malice, in all cases, must be an inference of fact to be deduced by the

jury, and not in any case an implication of law to be expounded by the court, the inquiry at once arises: From what fact must this inference be deduced? Every inference legitimately arising must have a substratum of fact as a basis, and in the absence of such basis the law permits no inference. Clearly, then, the jury must infer malice from the isolated fact of killing, because we are discussing by way of illustration a case in which nothing else is proven." Again, in the case of *Gallagher v. State*, 28 Tex. App. 288, 12 S. W. 1093, the court use this language: "Malice in its legal sense denotes a wrongful act, done intentionally, without just cause or excuse."

We think the charge, while not as clearly expressed as might be desired, is subject only to the construction that would imply and require a finding that the killing was unlawful, and a state of case in which the law of necessity would imply malice, and that the use of the words in said charge, "with intent to kill," relates back and covers any defect in the previous portion of the charge, and that the conclusion logically and necessarily follows that such killing was both intentional and unlawful. See *Brittain v. State*, 36 Tex. Cr. R. 406, 37 S. W. 758; *Neyland v. State*, 18 Tex. App. 547.

2. Complaint is made of the charge of the court on the subject of accomplice. The particular paragraph of the charge assailed is as follows:

"A conviction cannot be had upon the testimony of an accomplice, even if such testimony be inculpatory and be believed by the jury to be true, unless such testimony be corroborated by other evidence tending to connect the defendant with the offense committed (if any), and the corroboration (if any) is not sufficient if it merely shows the commission of the offense.

"An accomplice, as the word is here used, means any one connected with the crime committed (if any), either as principal offender, or an accomplice, or an accessory, or otherwise. It includes all persons who are connected with the crime (if any) by unlawful act or omission on his part, transpiring either before, at the time, or after the commission of the offense (if any).

"If, therefore, you find from the evidence that the witness Harvey Carroll was an accomplice, or if you have a reasonable doubt as to whether he was or not, as that term is defined in the foregoing instructions, and if you further find that the evidence of said witness is true, and that same shows the defendant's guilt of the charge contained in the indictment, you nevertheless, even if you should so believe, cannot find the defendant guilty upon said testimony, unless you are satisfied that same has been corroborated by other evidence tending to connect the defendant with the offense committed (if any), and the corroboration (if any) is not sufficient if

rated as above stated in order to warrant a conviction, has no application to testimony given by an accomplice which is exculpatory. If, therefore, you find that the testimony of said witness Carroll, or that any part of said testimony, shows, or tends in any degree to show, that the defendant was justified in shooting Minos Long (if he did so), or that said testimony, or any part of same, excuses or tends to excuse, or mitigates or tends to mitigate, the offense (if any), you are under no duty to require the corroboration of such exculpatory testimony (if any) before allowing full effect to same, even if you find from the evidence and beyond a reasonable doubt that said witness was an accomplice to the offense (if any) of the killing of Minos Long."

This charge is complained of, first, because there was no testimony adduced showing or tending to show that Carroll was an accomplice; second, because Carroll was a witness for the defendant, and the rule of evidence as to the testimony of accomplices does not apply to witnesses for defendant; third, because it was calculated to confuse the jury, as it was impossible for the jury to distinguish the exculpatory from the inculpatory evidence of said witness, and required of the jury an impossible duty; and, fourth, because said charge was calculated to prejudice said witness before the jury, and cause the jury to believe that said witness was, in the opinion of the court, a particeps criminis to said killing. The evidence showed such relation of the witness Carroll to the facts preceding the killing and leading up to the homicide as might have well justified the jury in believing that he was aiding and encouraging appellant in the assault and attack upon deceased. It is true that Carroll was a witness for the appellant. On his cross-examination, and by way of impeachment, certain statements were attributed to him, which, if standing alone, and in the absence of such an instruction as that given by the court, might have been appropriated by the jury as the basis of an adverse verdict. The purpose, as evidently the effect, of this charge, was to advise and instruct the jury that, if they believed Carroll occupied the relation of accomplice to the homicide, they could not appropriate or use his testimony as a basis of conviction, even though it was true, unless corroborated by the testimony of other witnesses.

The last clause of the court's charge, which in substance instructed the jury that the rule requiring accomplice's testimony to be corroborated has no application to testimony given by an accomplice which is exculpatory, then thus instructs them: "If, therefore, you find that the testimony of said witness Car-

roll, or mitigates or tends to mitigate, the offense (if any), you are under no duty to require the corroboration of such exculpatory testimony (if any) before allowing full effect to same, even if you find from the evidence and beyond a reasonable doubt that said witness was an accomplice to the offense (if any) of the killing of Minos Long." It is not certain but that this instruction was more favorable to appellant than he was entitled to receive. There is nothing in the complaint that the jury would be confused by this instruction, or that it was impossible for them to distinguish between the exculpatory and inculpatory evidence of this witness. The clear intent and effect of it was to advise the jury that if the witness was an accomplice, so far as his testimony was adverse to appellant's interest and affected or might affect the basis of a conviction, it must be corroborated, but in so far as it was favorable to appellant and tended to show justification, excuse, or mitigation of the offense alleged, that no corroboration was required.

3. The next complaint relates to the charge of the court on the subject of provoking a difficulty. This complaint, in substance, is to the effect that this issue was not raised by the facts, for that the appellant, under all the facts of the case, was entitled to a full and fair trial upon the law of self-defense, unembarrassed or uncomplicated with a charge on provoking a difficulty. As stated above, the facts are not essentially different from those on the former trial. In the course of his opinion on the former appeal, Judge Henderson, speaking for the court, says: "We believe that the court was fully authorized to give a charge on provoking the difficulty. According to appellant's own testimony, he left the saloon to procure a weapon, and came back and applied to deceased the same opprobrious epithet which he says deceased had applied to him. This, we think, sufficiently authorized the court to charge on provoking the difficulty. See *McCandless v. State*, 42 Tex. Cr. R. 58, 57 S. W. 672, for character of charge to be given on this subject." The appellant does not complain that the charge of the court in respect to the issue of provoking a difficulty was in itself erroneous, but only, in effect, that the court was not authorized on the facts to charge on this issue at all. We agree with the former opinion rendered in the case that it was clearly the duty of the court to charge on this subject, and we think that the charge is substantially unobjectionable.

4. The next complaint urged by appellant relates to the action of the court in refusing to charge the jury, in substance, that if they believed that deceased had insulted appellant,

attempted to attack defendant, that he (the defendant) had a perfect right of self-defense, and would not lose said right of self-defense by going and arming himself and returning for the purpose aforesaid. On the former appeal, touching appellant's right of self-defense, Judge Henderson uses the following language: "If, when appellant left the saloon, he had not formed the intent to take the life of deceased, but procured a pistol and returned to the saloon, and drew his pistol on deceased, and cursed and abused him, and deceased did not resent it, and he afterwards started to walk away, and deceased again cursed and abused him, and appellant's mind became excited, and he then formed the intent to kill deceased, and did so, then he was only guilty of murder in the second degree. And this is the only contingency, as it appears to us, wherein a charge on self-defense was required; that is, if appellant at this juncture had abandoned the difficulty and withdrawn therefrom, and deceased renewed it, and made a demonstration as if to get a weapon, and appellant believed himself thereby placed in peril of his life or serious bodily injury, he might have the right of self-defense. However, if there was no abandonment, and he came there, as he says himself, to provoke a difficulty, and, if appellant resented it, that he expected to have a mortal combat with deadly weapons, he could not claim self-defense."

This language is directly applicable to the facts of this case. Not only in the statement of facts, but in the very bill of exceptions contained in this record, appellant was shown by the record to have testified that he went back to the saloon to call deceased a son of a bitch; that he thought deceased probably would not take it, and would try to kill him; that he went and got the gun, to call deceased a son of a bitch, and, if he started to kill him, that he aimed to have something to defend himself with; that he knew it was language calculated to provoke a difficulty; that he believed that it was language which was liable to provoke a difficulty; that at the time he told him to get his gun, to give him a chance for his life; that he did not particularly want to fight with guns, when he said that he expected to fight because he had called him a son of a bitch; that he told him, "I have got my gun, and to get his," that he told him this because he had called him a son of a bitch, and naturally expected he would get a gun. There is so much of this testimony that we deem it unnecessary to set it out. Clearly, under these facts, the requested charge would have been wholly inapplicable, and it would have been error for the court to have given it.

5. Again, complaint is made of the error of the court in refusing to limit the testimony

show that certain witnesses had theretofore made different statements from those made by them on the present trial, and impeaching testimony, as will fully appear from the statement of facts in the case, to which reference is made, and which impeaching testimony and contradictions are made a part hereof by reference to prevent repetition; and the court in its charge to the jury failed to limit the use the jury could or ought to make of same, and failed to tell the jury the purpose of permitting same to be introduced; and defendant called the attention of the court, in his motion for a new trial, to its failure to so instruct the jury, and asked for a new trial because of said failure, because the law requires the court to so instruct the jury when such testimony is introduced in evidence, or the jury are at liberty to use same for all purposes, and impair the defendant's rights." It will be noted that by the terms of this exception the nature or character of testimony is not set out. What it is we are at a loss to know, and in order to consider the bill at all, and to judge and determine whether the impeachment and contradictions are of such character as could or might have injured appellant, or whether they were such as should have been limited by the court, would require us to go through the voluminous statement of facts and determine, what the bill leaves open, the nature and character of the impeaching testimony, and whether in fact it should be limited. This, we think, under such a bill, we are not required to do; but in any event, in view of the explanation and qualifications of the court, it is manifest there was no error committed in the respect complained of. In approving this bill the court makes the following statement: "There was no impeaching testimony whatever introduced by the state, except the testimony of the witness Townsend, admitted without objection, that the reputation of the witness Carroll for truth and veracity was bad. All of the testimony as to conflicting statements of witnesses, and all evidence of an impeaching character, except as above stated, was introduced by the defendant, and the defendant made no request, either verbal or written, that such testimony be limited, under such circumstances. The court considered that it would be more favorable to the defendant not to limit said testimony, and same was not limited in the charge."

6. Again, complaint is made of the testimony of several witnesses in respect to statements and declarations of the deceased which were offered as dying declarations and as part of the *res gestæ*. These statements were to the effect that appellant had shot him because he would not sell him a 15-cent drink of whisky on a credit, and that he shot

fired, and we think come within the rule of res gestae, and were admissible on this ground, and probably as well on the ground of their being dying declarations.

7. There are some other matters complained of in appellant's motion for new trial, as well as by bills of exceptions; but they are not matters of serious moment, nor do we believe that there was any error committed by the trial court in respect to any of them. We have carefully examined the quite voluminous record in the light of appellant's brief, as well as aided by his oral argument, and we do not believe that there was any error committed on the trial of the case for which we would be justified in reversing it.

It is, therefore, ordered that the judgment of conviction be, and the same is hereby, affirmed.

On Rehearing.

The motion for rehearing filed herein vigorously assails the correctness of the opinion of the court in affirming the judgment of the court below. We have, on the fullest reflection, no doubt of the correctness of the matters discussed in the original opinion. The motion for rehearing, however, complains that the charge of the court on self-defense was so interwoven with the charge on provoking the difficulty as to constitute a limitation on appellant's right of self-defense, and is error, if self-defense pure and simple be in the case supported by ever so little testimony. This matter received our attention on the original submission; but it occurred to us that the contention had such little foundation in the record as not to require discussion. However, in view of the serious insistence of appellant, and to make the opinion complete, we will discuss the matter.

In paragraph 3 of the court's charge this instruction was given: "Every person is permitted by law to defend himself against any unlawful attack, real or apparent, reasonably threatening, or reasonably appearing to him to threaten, injury to his person, and is justified in using all the necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary. Homicide is justified by law when committed in defense of one's person against any unlawful and violent attack, real or apparent, made, or appearing to him to be made, in such a manner as to produce a reasonable expectation or fear of death or some serious bodily injury." In the sixth paragraph of the court's charge the jury were thus instructed: "A reasonable apprehension of death or of great or serious bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he

no event bound to retreat in order to avoid the necessity of killing his assailant. If from the evidence you believe the defendant killed Minos Long, but further believe that at the time of so doing the deceased had made an attack on him, or that it at said time appeared to defendant that deceased had made, or was making, or was about to make, an attack on him, which from the manner and character of it, or from any or all of the existing circumstances, caused him, when viewing the situation at the time from his standpoint, to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, if any such there were, the defendant killed the deceased, or if you have a reasonable doubt as to whether or not such were the facts, then you should acquit him on the ground of self-defense."

It will be noted, from the quotations above, that the jury were instructed that if they found the facts which under the law constitute self-defense existed, or if they have a reasonable doubt of their existence, they should acquit appellant on the ground of self-defense. Then follows a charge on the doctrine of self-defense as affected by the issue of provoking the difficulty. This portion of the court's charge is as follows: "You are further instructed as a part of the law of this case, and as a part of the law on self-defense, that if you find from the evidence and beyond a reasonable doubt that the defendant, Will Puryear, sought the occasion on which Minos Long was killed (if he was killed) for the purpose of slaying the said Long (if he did so), and that said defendant, having found the said Long, then and there did some act, or used some language, or did both, as the case may be, with intent on his (defendant's) part to produce the occasion for slaying him and bring on the difficulty, and that said conduct on defendant's part (if there were such) was reasonably calculated to provoke a difficulty, and that on such account Minos Long attacked defendant, or reasonably appeared to defendant to attack him, or to be about to attack him, and that defendant then killed Minos Long in pursuance of his original design (if there was such), such killing would be murder of either of the first or second degree, according as the facts and circumstances in evidence may justify the jury in finding. But if the defendant provoked the difficulty that resulted in the death of deceased, and by his own wrongful act produced a necessity for taking the life of the deceased, but in doing so, if he did so, he had no intent to kill deceased, or to inflict upon him serious bodily harm, and suddenly, under the immediate influence of sudden passion arising from an adequate cause, as hereinbefore explained in this charge, he shot and

killed deceased, then you will find the defendant guilty of manslaughter. But if you do not find from the evidence and beyond a reasonable doubt the existence of the facts which would qualify the defendant's perfect right of self-defense under the law as it is given you in this paragraph of the charge, you will decide the issue of self-defense in accordance with the law on that subject contained in paragraph 6 of this charge and without reference to the law on the subject of provoking the difficulty."

The eighth paragraph is as follows: "The full and perfect right of self-defense of a person who provokes a difficulty revives as soon as such person in good faith abandons such difficulty. You are therefore instructed that, even if you find from the evidence and beyond a reasonable doubt that the defendant sought the occasion on which Minos Long was killed (if he was killed) for the purpose of slaying the said Long (if he did so), or for the purpose of provoking a difficulty with no intention of slaying said Long, and that said defendant, having found the said Long, then and there did some act, or used some language, or did both, as the case may be, with intent on his (defendant's) part to produce the occasion and bring on the difficulty, and that said conduct on defendant's part (if there were such) was reasonably calculated to provoke and did in fact provoke a difficulty, such facts would in no wise limit or abridge any right of self-defense that the defendant would otherwise have had on the occasion of the shooting, if you further find that defendant had at the actual time of the shooting abandoned said difficulty (if any) in good faith, or if you have a reasonable doubt as to whether or not he had at said time in good faith abandoned said difficulty (if any)."

We think a careful reading of the court's charge must convince the thoughtful reader that the issue of self-defense was, in the light of the entire record, submitted to the jury as fairly and as fully as it was possible to do.

The other questions of moment are discussed in the original opinion of the court, and we see no occasion to elaborate them.

The motion for rehearing is overruled.

BENSON v. STATE.

(Court of Criminal Appeals of Texas. April 28, 1909.)

1. CRIMINAL LAW (§ 714*)—TRIAL—MISCONDUCT OF DISTRICT ATTORNEY.

Under Code Cr. Proc. 1895, art. 823, providing that on a new trial the former conviction shall not be alluded to in the argument, the action of the district attorney, on a second trial for murder, in referring in the cross-examination to accused's former conviction, and in commenting in his argument on the infliction of the death penalty in the former trial, was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1664; Dec. Dig. § 714.*]

2. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS.

The court, in charging on murder in the second degree and manslaughter, should not alone charge with reference to an actual attack, but should also charge with reference to an attack about to be made by decedent, and thereby give accused the benefit of the reasonable apprehension of danger as it appeared to him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 629; Dec. Dig. § 300.*]

3. CRIMINAL LAW (§ 763*)—INSTRUCTIONS—DIRECTION OF VERDICT.

An instruction, if "you find the defendant guilty of murder in the second degree, or guilty of manslaughter, you will state of which offense found guilty," etc., and that if defendant is guilty of some grade of homicide, but there is reasonable doubt whether it is murder in the second degree, or manslaughter, accused is entitled to the benefit of the doubt, and "if you do not find the decedent is dead, and that defendant unlawfully killed him, a verdict of not guilty will be returned," is not erroneous as directing the jury to find defendant guilty of either murder in the second degree or manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1743, 1752, 1768, 1770; Dec. Dig. § 763; * Homicide, Cent. Dig. §§ 579, 603, 631, 648.]

4. CRIMINAL LAW (§ 763*)—TRIAL—INSTRUCTIONS—WEIGHT OF TESTIMONY.

An instruction that the object of introducing impeaching testimony was to have the jury disbelieve the testimony of the witnesses, that impeaching evidence was used to affect the credibility of the witnesses and to enable the jury to attach such weight to their testimony as they might think proper, and that they might or might not believe the testimony so attacked, and might take all the evidence, and give such weight to it as might seem proper, etc., was objectionable as being on the weight to be given to testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1743, 1752, 1768, 1770; Dec. Dig. § 763; * Homicide, Cent. Dig. §§ 579, 603, 631, 648.]

Appeal from District Court, Bexar County; Edward Dwyer, Judge.

Willie Benson was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Chester H. Terrell, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This is the third appeal of this case. On the first trial appellant was convicted of murder in the first degree, and his punishment assessed at death. 51 Tex. Cr. R. 367, 103 S. W. 911. In this opinion there is a general, but fairly correct, statement of the facts in the case, which was to some extent, however, qualified on the trial of this case. On the second trial appellant was convicted of murder in the second degree, and his punishment assessed at 25 years' confinement in the penitentiary. The opinion on appeal on this conviction is reported in 111 S. W. 403. The conviction on this trial was reversed for the error of the court in charging on the matter of impeaching testimony. Appellant was tried the third time in the district court of Bexar county, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and there are perhaps more numerous objections made to the proceedings of the court below on this appeal than on either of the former appeals.

1. We think the case must be reversed on account of the action of the court in permitting the district attorney to refer to and discuss the former conviction of appellant. This action of the district attorney was duly excepted to at the time, and the point saved by proper bills. Among other things, on cross-examination, the district attorney asked the witness Isaac Walker, "Didn't you know it, and don't you know the papers were full of the Benson trial, and didn't you know the jury assessed the death penalty one month after the killing?" This question and the answer sought to be elicited thereby was objected to by counsel for appellant, for the reason that the district attorney had no right to refer to the death penalty having been given, and because he stated the fact in the presence of the jury that the death penalty had once been assessed against appellant. The court explains, in approving this bill, that the question objected to was permitted on cross-examination of the witnesses, who testified that they had not testified at the first trial, but had kept quiet; that the district attorney then pressed the witnesses, asking how they could remain silent and not tell what they knew, when the death penalty had been found by the jury, and the case had been affirmed by the higher court. This, the court states, was allowed, as going to the credibility of the witnesses and the weight to be given to their testimony by the jury. The court also states, in his explanation, that the death penalty was not in this case, and the court so informed the jury at the time, and it was not referred to, except to affect the witnesses as stated, and to show the jury the improbability of their testimony; they remaining silent under such circumstances. The former conviction, the court says, was a part of the history of the case, and, he adds, the attorney for the defendant and the witness Neunhoffer had mentioned the fact to the jury that the knife was found while the case was on appeal.

By another bill it is shown that in his argument to the jury the district attorney frequently commented on the death penalty having been given, in connection with the testimony of Isaac Walker and Ora Lee Moseley, and stated they should not be believed, because they remained silent, knowing that the death penalty had been given. These statements of the district attorney were objected to by counsel for appellant, and exception reserved, for the reason that commenting on the fact that a death penalty had been

mony was admitted solely for the purpose of going to the credibility and weight of the testimony under the circumstances, and the further statement is made that on the second trial defendant was found guilty of murder in the second degree, and the death penalty could not be considered by the jury in this case, and they were so informed by the court, and no written instructions were asked by defendant's counsel on this subject. It will be noted that, according to the explanation of the court, the only reference made by defendant's counsel to the witness named was an incidental reference to the effect that the knife had been found while the case was on appeal. Whether this appeal would be considered by the jury as referring to his former conviction, or an appeal in an effort to obtain bail, does not appear, and is so casual and incidental as not probably to have been such as would have injured appellant, and was not such a statement as would warrant, as we believe, the district attorney to in terms refer to the fact of a former conviction of appellant, and that that conviction had resulted in the assessment of the penalty of death. Article 823 of the Code of Criminal Procedure of 1895 is as follows: "The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument." It has been uniformly held in this state that it is reversible error for counsel, in argument on a second trial, to allude to a defendant's conviction on a former trial. *Hatch v. State*, 8 Tex. App. 416, 34 Am. Rep. 751; *House v. State*, 9 Tex. App. 567; *Moore v. State*, 21 Tex. App. 693, 2 S. W. 887; *Fuller v. State*, 30 Tex. App. 560, 17 S. W. 1108; *Richardson v. State*, 33 Tex. Cr. R. 518, 27 S. W. 139. It has also been held that evidence with regard to the fact of defendant's previous conviction is inadmissible testimony. *Richardson v. State*, 33 Tex. Cr. R. 518, 27 S. W. 139, 518; *Hargrove v. State*, 33 Tex. Cr. R. 431, 26 S. W. 993.

In the case of *Hamilton v. State*, 40 Tex. Cr. R. 464, 51 S. W. 217, it is said: "If the private prosecutor cannot allude to the former conviction in his argument, by the same reasoning he should not be permitted to allude to it during the progress of the trial. Here he not only alluded to it, but alluded to it in the adducing of testimony in a manner calculated to give weight to that testimony—that is, he was permitted to prove by a juror who tried appellant at a former trial that not only he, but the entire jury, believed the prosecutrix's testimony on that

not have convicted him without this illegal testimony, or they may, without this testimony, have given him a less term of years in the penitentiary. We cannot tell. We only know that the evidence and the remark of the private prosecutor were improper and illegal, and were of a character calculated to prejudice appellant. *Washington v. State*, 23 Tex. App. 336, 5 S. W. 119."

In the later case of *Coleman v. State*, 49 Tex. Cr. R. 82, 90 S. W. 499, in respect to a matter not so serious as this, the court reversed the judgment of conviction. In that case it seems that the district attorney alluded to and discussed the facts of another case, and it seems, according to the statement of the court, the argument was drawn out by some remarks of appellant's counsel. According to the report the matter arose in this way: "That the case referred to was a murder case, somewhat similar to this case, and that case showed the death penalty had been inflicted, and such allusion was calculated to influence the jury and prejudice their minds against defendant. The court signed the bill by stating 'that the district attorney in his closing argument, in answer to some authorities read by counsel for defendant, showed what it took to make murder in the first degree. As soon as objections were made, I told the district attorney it was not proper or right to discuss the fact before the jury in a case not on trial.' In the following bill it is shown: 'Defendant's counsel claimed the fact that the defendant told the officers about the occurrence and surrendered was proof of his innocence. The district attorney then in reply said that he knew of a case of a negro named Spencer, and that counsel for defendant and some of the jury knew of said case, where defendant came across the river to Red River county, surrendered to the officers, and was subsequently convicted and sent to the penitentiary for a term of 99 years.' Appellant objected to this for various reasons, and the court signs the bill with the explanation that the court instructed the jury not to consider the remarks of the district attorney. These remarks were highly improper, and the objection to them should have been sustained at once. It is true that the court withdrew the remarks, or rather instructed the jury to disregard them. Still the remarks were made, and evidently found lodgment in the minds of the jury. If the facts stated by the district attorney in his argument had been introduced and offered before the jury, they would have been clearly inadmissible, and the admission of them before the jury would have required a reversal of the judgment. Why matters of this sort should continually occur in the trial of cases we do not under-

stand, and all matters that intrude upon the jury, whether in evidence or argument. It hardly answers this sort of erroneous proceedings that subsequently the court withdraws the matter from the consideration of the jury. It may or may not. It is owing to the seriousness of the statements. But these matters have become so frequent, and we find them in so many records, that we feel called upon to discountenance them. Trial courts should promptly suppress such remarks and argument, and attorneys refrain from using them, to the end that only fair and legitimate testimony and argument may be considered by the jury in the disposition of cases involving life and liberty."

The importance of this statute and the intent and meaning of it are thus expressed by this court in the case of *Hatch v. State*, 8 Tex. App. 423, 34 Am. Rep. 751: "This statute either means something or it means nothing. If it means anything, then its violation is an injury done to the rights of the defendant, for which the judgment in this case should and must be reversed. It was said by the court in *Tucker v. Henniker*, 41 N. H. 317: 'It is irregular and illegal for counsel to comment upon facts not proven before the jury as true, and not legally competent and admissible as evidence. The counsel represents and is a substitute for his client. Whatever, therefore, the client may do in the management of his case may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects him in it. The right of discussing the merits of the cause, both as to the law and the facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings, to arraign the conduct of parties, impugn, excuse, justify, or condemn motives, so far as they are developed in evidence, assail the credibility of witnesses when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit or wings to his imagination. To his freedom of speech, however, there are some limitations. His manner must be decorous. All courts have power to protect themselves from contempt, and indecency in words or sentiments is contempt. * * * When counsel are permitted to state facts in argument and to com-

v. Swineford, 44 Wis. 282, 28 Am. Rep. 582, the following appropriate language upon this subject is used by the court: "The profession of the law is instituted for the administration of justice. The duties of the bench and bar differ in kind, not in purpose. The duty of both alike is to establish the truth and to apply the law to it. It is essential to the proper administration of justice, frail and uncertain at the best, that all that can be said for each party, in the determination of fact and law, should be heard. Forensic strife is but a method, and a mighty one, to ascertain the truth, and the law governing the truth. It is the duty of the counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and his right, and outside of the principle and object of his profession, when he travels out of his client's case and assumes to supply its deficiencies. Therefore is it that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the alter ego of his client, and indulge in prejudice against his adversary, as far as they rest on the facts in the case. But he has neither the duty nor right to appeal to prejudices, just or unjust, against the adversary, dehors the very case he has to try. The very fullest freedom of speech, within the duty of his profession, should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof." We might cite many other authorities to the same effect, but will content ourselves with making the following extract from the opinion of our Supreme Court in *Thompson v. State*. Moore, J., commenting upon the character of discussion indulged in by the district attorney in his concluding address to the jury, says: "We deem it, however, of sufficiently grave importance, and so highly objectionable, as to require the decided condemnation of the court. Zeal in behalf of their clients, or desire for success, should never induce counsel in civil causes, much less those representing the state in criminal cases, to permit themselves to endeavor to obtain a verdict by arguments based upon any other than the facts in the case, and the conclusions legitimately deducible from the law applicable to them." 43 Tex. 268."

It not only conveyed the information to the jury that in a trial had in the same court, only a month after the homicide, another jury, with the facts fresh on the minds of the witnesses, had found appellant guilty, but the further information that in their judgment the offense was so flagrant as to entitle the state to the assessment of the death penalty. We can well understand how any jury, with this information thus conveyed, would have been reluctant to have acquitted appellant, and how natural it would have been for them, if they should convict him at all, to assess a penalty having some relation, at least, to the severity of the penalty assessed on the first conviction. We cannot sanction a conviction thus obtained, and feel that we have no recourse but to reverse the case, if we are to follow the law and give effect to the statutes in force in this state.

2. There are a number of other questions raised on the appeal, which, perhaps, in view of another trial, it is proper we should discuss. Complaint is made of the charge of the court in many particulars, and exception is urged that in charging, both on murder in the second degree and on manslaughter, the court charged alone with reference to an actual attack, and does not charge the jury with reference to an attack about to be made by the deceased, or give appellant the benefit of the reasonable apprehension of danger as it appeared to him. The charge of the court is, indeed, subject to this criticism, though, when the court comes to charge on self-defense, the instruction is not subject to serious criticism. We suggest that, in framing the charge on another trial, the court should conform to the suggestions pointed out in appellant's motion for a new trial.

3. Complaint is also made of the charge of the court in respect to the issue of manslaughter, and the definition given by the court is seriously complained of. The case was tried, and brief for appellant was filed, before the handing down of the opinion of this court in the *Waters Case*, 114 S. W. 628; and in the light of that decision, and under the rule now established, we do not think the charge subject to the criticisms leveled against it.

4. A reversal is also sought for the reason, as claimed, that under the charge of the court the jury were in effect directed to find appellant guilty of either murder in the second degree or manslaughter, and we are cited on this subject to the case of *Haynes v. State*, 2 Tex. App. 84. We think the case at bar easily distinguishable from the charge contained in that case. Here the court instructed the jury as follows: "Should you find the defendant guilty of murder in the second degree, or guilty of manslaughter, you will state of which offense found guilty;

culpable homicide, but you have a reasonable doubt whether the offense (if any) is murder of the second degree or manslaughter, then you must give the defendant the benefit of the doubt, and in such case, if you find him guilty, it could not be of a higher grade of offense than manslaughter. If you do not find that the said Albert Miller is dead, and that the defendant unlawfully killed him, then you will return a verdict of 'not guilty.' It will thus be seen, reading the charge as a whole, that this instruction went no further than to advise the jury that if they found appellant guilty they were required to state the grade of the offense and name the punishment assessed therefor, but that if they did not find that the killing was unlawful they would acquit him.

5. The charge of the court on impeaching testimony is not correct, and we are not sure but that the case should be reversed for that alone. This charge is as follows: "A witness may be impeached by proving that he or she has sworn differently from what he or she does before you concerning matters material and relevant to the issue. The defense has introduced certain portions of the evidence of the state's witnesses Beulah Miller, Jesse Baird, Arthur Miller, Willie Taylor, Dr. Balderserelli, and Robert Jefferson, taken at former hearings herein, to impeach them, by showing that they had given contradictory testimony to that given by them now before you. The state has also introduced portions of the evidence of witnesses Emmet Polk and Sarah Jones, taken at the inquest trial, and a portion of the testimony of Will Benson, taken at a former hearing, to impeach them, by showing that they had given contradictory testimony on said occasions to that given now. The object of both state and defendant in introducing the impeaching testimony is to have you disbelieve, and not accept as true, and to refuse to give credence to, the testimony of said witnesses, as given before you. Impeaching evidence is used for the purpose of affecting the weight of the evidence and the credibility of the witnesses giving the testimony, and to enable you to attach such weight to it, if any, as you may think proper. You may or may not believe the testimony so attacked, or you may or may not believe the attacking testimony; and you may take all the evidence before you altogether, and give such weight to either or both as you may see proper, should you so see fit, in arriving at a verdict herein."

This language follows pretty closely the opinion of this court on the former appeal, where the effect of the impeaching testimony was discussed; but it is not always permis-

sible for the jury, in substance, to do where the evidence was conflicting it was the duty of the jury to reconcile the conflicting testimony, if in their power to do so, or, they could not do so, it was their province "give faith and credit to such as you think entitled to belief, and to disbelieve such as you see proper to disbelieve." In passing this charge the court said: "Under repeat decisions of this court the objections seem to have been well taken, and the charge gives the jury the right arbitrarily to disbelieve or discredit the testimony, and is an invasion of the province of the jury." A similar rule has been made in many cases. See *Pharr v. State*, 9 Tex. App. 129; *Butler v. State*, 10 Tex. App. 48; *Wilbanks v. State*, 10 Tex. App. 642; *Knight v. State*, 7 Tex. App. 206.

6. There are a number of other questions raised by the assignments and noted in appellant's brief. Some of these are not of character likely to arise on another trial, nor do we believe that in respect to any of them there is such error as would justify a reversal.

For the grounds stated above, the judgment is reversed, and the cause remanded.

Ex parte THOMAS.

(Court of Criminal Appeals of Texas. April 28, 1909.)

1. INFANTS (§ 68*)—CRIMES—JURISDICTION—STATUTES.

Acts 30th Leg. 1907, p. 137, c. 65, defining a delinquent child, providing for the disposition and care of such child through juvenile courts, and declaring in section 4 that no such child shall be incarcerated in any jail in which persons over 16 years of age are being detained refers only to confinement during proceedings brought under the act for the disposition of such child, and does not oust the courts or the executive officers of their power to confine prisoners under 16 years of age in a jail to await trial, where such detention is necessary to secure their safety until trial.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 68.*]

2. INFANTS (§ 68*)—CRIMES—JURISDICTION—STATUTES.

Acts 30th Leg. 1907, p. 137, c. 65, regulating the treatment of delinquent children, and declaring in section 9 that when any person prosecuted for a felony is under 16 the district court "shall have authority to order such prosecution dismissed and to order such child to be committed to the juvenile court," confers discretion on the district court to dismiss such a prosecution and to order commitment to the juvenile court.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 68.*]

3. INFANTS (§ 68*)—CRIMES—JURISDICTION—STATUTES.

The refusal of the district court to entertain a writ of habeas corpus for the release of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

child.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 68.*]

Appeal from District Court, Brazos County; J. C. Scott, Judge.

Application of Will Thomas for a writ of habeas corpus for his release from confinement pending his trial on a felony charge. From a judgment denying the writ, he appeals. Affirmed.

A. G. Board, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. The relator was indicted in the district court of Brazos county on a charge of rape, and also on a charge of assault with intent to commit rape, upon one Mary Jackson. He was allowed bail by the court below in the sum of \$750. On April 5th of this year he made application to the district court of Brazos county for a writ of habeas corpus, seeking his release on the ground that he was not subject to prosecution in the ordinary manner for this crime, but was entitled to be tried and punished, if at all, under the laws of this state in respect to juveniles. He further alleged that at the time of his application he was confined in the jail of Brazos county with all manner of criminals charged with murder and other felonies.

1. The law by virtue of which relator seeks release is, as we understand it, the act entitled "Delinquent Child." Chapter 85, p. 137, Acts 30th Leg. 1907. This act undertakes to define what is a delinquent child, and makes provision for the disposition, care, and nurture of such child through juvenile courts, and contains, among other things, in section 4 of said act, the provision that no child within the provisions of this act shall be incarcerated in any compartment of a jail or lock-up in which persons over 16 years of age are being kept or detained. This section of the statute, and the provision above quoted, have reference, as we believe, only to the confinement of such child during proceedings brought under the terms thereof for the disposition and rearing of such child, and was not intended to oust the courts or the executive officers of the state of their power and authority to confine prisoners under 16 years of age in a jail or other secure places to await trial in due season, when such detention was necessary to secure their safety until trial.

2. Release is also sought under the provisions of section 9 of said act. This section is as follows: "The county or district court when it deems it proper and necessary may order a child coming under the definition of this act, and which is charged with the com-

order being first so entered. And after conviction of such child so prosecuted for a misdemeanor the court shall have full power to stay the execution of such judgment and to release such child on good behavior or other such orders as the court may see fit to make. Whenever it shall appear to the district court of this state that any person being prosecuted in such court for a felony is a child under sixteen years of age, such court shall have authority to order such prosecution dismissed and to order such child to be committed to the juvenile court of the county in which such district court is being held, for such action and disposition as said juvenile court may think proper in the premises. Or the said district court may after conviction on trial of such child, suspend judgment and order the defendant released on good behavior or such other orders as in the judgment of such district court would be for the best interest of said child."

It is doubtless true, under this act, that it lies within the discretion of the district judge to require the dismissal of a prosecution of such child and to order his commitment to the juvenile court of the county in which such district court is being held for such action as said juvenile court may think proper in the premises. But, if this be a proper construction, it is undoubtedly true that where, as in this case, the court entertains a writ of habeas corpus and declines to release the relator, who brings himself under the provisions of this act, it is to be conclusively assumed that the court so trying the case had exercised his discretion not to order a dismissal of such cause. The crime charged against relator is a felony, and, except for his age, a capital felony. We do not believe, as presented, he is entitled to a discharge.

The judgment of the court below is therefore affirmed.

CABRERA v. STATE

(Court of Criminal Appeals of Texas. Feb. 8, 1909. On Rehearing, May 12, 1909.)

1. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

An instruction: "Do the facts * * * show such a general disregard of human life as necessarily includes the formed design against the life of the person slain? If so, the killing, if it amounted to murder, will be upon express malice"—is not misleading, as leading the jury to believe that in the opinion of the court accused was a dangerous and reckless person.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 762.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. HOMICIDE (§ 286*)—EVIDENCE—INSTRUCTIONS.

Where the evidence showed that accused and a codefendant approached at night decedent's room, and fired a shot into the room, killing him, an instruction that, if the acts showed such a general disregard of human life as necessarily included the formed design against the life of decedent, the killing, if amounting to murder, would be on express malice, was not open to the objection that it instructed on a phase of the law not raised by the evidence.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 286.*]

3. CRIMINAL LAW (§ 423*)—CONSPIRATORS—DECLARATIONS—ADMISSIBILITY.

Where two or more persons act together, any acts or declarations, prior to the commission of the crime, illustrating the purpose and animus or probable co-operation of the parties in the commission of the crime, are admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.*]

4. CRIMINAL LAW (§ 423*)—ACTS OF CONSPIRATORS—ADMISSIBILITY OF EVIDENCE.

Where the evidence showed that accused and his codefendant acted together in murdering decedent, and that they went together at night to decedent's room, and fired a shot into the room, killing decedent, any evidence that they were present, or were probably present, at the time of the killing, together with evidence that the codefendant had been seen during the evening of the night of the killing going to the place of the killing, was admissible, though there was no testimony that accused and his codefendant were acquainted prior to the night of the homicide.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 423.*]

5. CRIMINAL LAW (§ 349*)—FLIGHT OF ACCUSED—EVIDENCE—ADMISSIBILITY.

The state may prove, as a circumstance to show flight of accused, that he was incarcerated in the general jail in a distant city, charged with the crime.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 349.*]

6. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The error, if any, in admitting evidence that accused had been incarcerated in the general jail in a distant city, charged with the crime, was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.*]

7. CRIMINAL LAW (§ 1036*)—APPEAL—REVIEW—EXCEPTIONS.

To take advantage of the admission of improper evidence, accused must object to its introduction and preserve his exceptions to the overruling of his objection; and a requested instruction directing the jury not to consider such testimony is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1036.*]

8. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—EVIDENCE.

Where the evidence showed that accused and his codefendant went to decedent's room at night, and fired a shot into the room, killing decedent, and there was nothing to show that they were not acting together, and the court charged fully on the law of principals, and stated that the jury must believe that accused and his codefendant were acting together at the time of the commission of the offense, the refusal to charge that the mere presence of

accused at the time and place of the killing did not justify a verdict of guilty, unless the state showed that accused, knowing the unlawful intent of his codefendant, aided him in the commission of the offense, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 829.*]

9. CRIMINAL LAW (§ 814*)—EVIDENCE—INSTRUCTIONS.

Where, on the trial of a Mexican for murder, there was nothing suggesting the necessity of a charge that the jury must not allow the fact that accused was a Mexican to influence them, the refusal to so charge was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979-1985; Dec. Dig. § 814.*]

10. CRIMINAL LAW (§ 814*)—EVIDENCE—INSTRUCTIONS.

Where, on the trial for the murder of a district judge, there was nothing suggesting the necessity of a charge that the jury must not consider the bare fact that decedent was a district judge, the refusal to so charge was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979-1985; Dec. Dig. § 814.*]

11. HOMICIDE (§ 183*)—EVIDENCE—ADMISSIBILITY.

Where, on a trial for homicide, the state proved that on the morning after its commission, and after the discovery of decedent's body, a large number of men, marching in file and headed by a band, stopped in front of decedent's house, and that the men were accompanied by a number of armed men, and the court admitted testimony that accused was legally carrying arms, the refusal to permit accused to read a decision of the Court of Criminal Appeals, determining that a third person had authority to commission men to carry arms, and to show that the third person had deputized accused to carry arms on the day after the homicide, was not erroneous.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 183.*]

12. HOMICIDE (§ 174*)—EVIDENCE—ADMISSIBILITY.

A witness may testify that he sighted through an aperture where a slat was broken out of the shutter on the window of the room in which the decedent was sleeping at the time he was shot, towards the body and wound of decedent, and that the window of the room was immediately behind the body of decedent and immediately behind the wound in his back, was admissible, though the body had been removed and replaced; that fact going only to the weight of the testimony.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 174.*]

13. CRIMINAL LAW (§ 478*)—EVIDENCE—EXPERT TESTIMONY—COMPETENCY.

An expert on gunshot wounds is competent to testify that the bullet which killed decedent entered in the back near the right shoulder blade, and that the point of exit was the wound in front of the body on the left breast.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 478.*]

14. WITNESSES (§ 48*)—COMPETENCY—CONVICTION OF FELONIES.

The offenses of illicit retail liquor dealing, and of receiving and concealing smuggled property in violation of the federal statutes, though punishable by fine or confinement in the penitentiary for a term greater than a year, are not felonies, within Code Cr. Proc. 1895, art. 768,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

A witness, impeached by proof of statements contradictory to his sworn testimony, may be corroborated by proof that he had made statements similar to his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1260; Dec. Dig. § 395.*]

16. CRIMINAL LAW (§ 721*)—FAILURE OF ACCUSED TO TESTIFY—COMMENT BY PROSECUTING ATTORNEY.

Where a witness for the state, on cross-examination, in reply to a reiterated question, said, "Yes, sir; there he [defendant] is; you can ask him," and no protest was made to the statements by accused, the action of the prosecuting attorney, in inadvertently repeating what the witness stated, was not a comment on the failure of accused to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.*]

17. CRIMINAL LAW (§ 1174*) — APPEAL — HARMLESS ERROR—MISCONDUCT OF JURY.

Where the court found that a juror was not influenced by a communication received from a third person to the effect that the juror's horse had run away while his children were riding, but that the children were not hurt, nor by occurrences in the jury room, the irregularities were harmless.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1174.*]

18. HOMICIDE (§ 253*) — EVIDENCE — SUFFICIENCY.

Evidence held to justify a conviction of murder in the first degree on the theory that accused was a guilty participant in the assassination of decedent.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 253.*]

On Rehearing.

19. CRIMINAL LAW (§ 784*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where witnesses testified that accused and a codefendant went in the nighttime to the room of decedent, that a shot was fired by one of them into the house, killing decedent, and that the following morning the body of decedent was found in the room with a fatal bullet wound, the refusal to charge on circumstantial evidence was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.*]

Ramsey, J., dissenting.

Appeal from District Court, De Witt County; James C. Wilson, Judge.

Alberto Cabrera was convicted of murder in the first degree, and he appeals. Affirmed.

R. B. Creager, A. I. Hudson, Lackey & Le-wright, and J. L. George, for appellant. Davidson & Bailey, F. W. Seabury, J. I. Kleiber, Dist. Atty., and F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at life imprisonment in the penitentiary.

Between 12 and 1 o'clock at night on No-

and the district attorney the other. The homicide occurred on the night preceding an election. Judge Welch was at said city holding court at the time. Appellant and Jose Sandoval approached the window of Judge Welch's room, where he was sleeping, and remained standing there, close together, side by side, for a short period of time. One of the two fired a shot into the house through the window where Judge Welch's body was found. He was shot from that point through the back. The evidence shows only one shot was fired in that neighborhood that night. The evidence shows that the wound that killed Judge Welch was fired from the window as indicated. Judge Welch's body was within four or five feet of the window, inside of the room, in the direction from which the shot was fired. Only one bullet hit the body. Cayetano Pena and his wife, Jesusa Gonzales de Pena, are the two witnesses who testified that they saw appellant and his codefendant fire the shot as above detailed. They furthermore testify they were sitting at their home, some 120 feet away from Judge Welch's room, and early in the night appellant and his codefendant passed by their house and they recognized them. Some time thereafter, while they were still sitting, one in the door, and the other on the bed looking out of the door, in the direction of Judge Welch's window, they saw appellant and his companion approach and fire the fatal shot. They then saw them run away hurriedly from the window. They swore positively that it was appellant and his codefendant. If the testimony of the witnesses is to be believed, as disclosed by this record, the motive for the killing was political, and appellant and his codefendant were the hired assassins of political enemies of Judge Welch, since there is nothing to suggest that appellant and his codefendant had any personal animus against the judge. No one knew that Judge Welch was killed until early the next morning, when the district attorney entered the room and found that he had been shot as suggested. Alarm was given, various parties gathered in, and after continued search appellant was some time subsequently arrested in old Mexico, and brought back to this state on a proper requisition and tried for this homicide. The jury gave him murder in the first degree, with life imprisonment. Pena and his wife testified that, at the time that appellant and his codefendant passed their house, Judge Welch was sitting just inside of the east door of his room, and there was a light burning in the room. Appellant and his codefendant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

passed on, going to the north of the house in which witnesses lived, then turned to the right, and disappeared. Some time after these parties passed, Judge Welch's light went out, and his door was closed. About an hour after they passed the first time, the same two parties, coming from the same direction as before, walked up to the east window of the south room of Judge Welch's house and fired a shot. They did not know which fired the shot. There are other circumstances in the record that we do not deem necessary at this time to rehearse.

Appellant's first ground of his motion for a new trial complains that the court erred in failing to charge on circumstantial evidence. To support his contention he cites us to the following authorities: *Early v. State*, 50 Tex. Cr. R. 344, 97 S. W. 82; *Guerro v. State*, 46 Tex. Cr. R. 445, 80 S. W. 1001; *Trijo v. State*, 45 Tex. Cr. R. 127, 74 S. W. 546; *Poston v. State* (Tex. Cr. R.) 35 S. W. 656; *Leftwich v. State*, 34 Tex. Cr. R. 489, 31 S. W. 385; *Polanke v. State* (Tex. Cr. R.) 28 S. W. 541; *Montgomery v. State* (Tex. Cr. App.) 20 S. W. 926; *Deaton v. State* (Tex. App.) 13 S. W. 1009; *Puryear v. State*, 28 Tex. App. 73, 11 S. W. 929; *Beason v. State*, 43 Tex. Cr. R. 442, 67 S. W. 98, 69 L. R. A. 193. The case of *Puryear v. State*, supra, and other authorities noted by appellant do not sustain his contention. There is a long line of authorities in this state, holding that, where the defendant is in such juxtaposition to the crime committed as the facts in this case show, a charge upon circumstantial evidence is not required. The latest case that our attention has been called to, sustaining this modification, is the case of *Dobbs v. State*, 51 Tex. Cr. R. 630, 103 S. W. 918. In discussing the question as to whether the issue of circumstantial evidence was presented in that case, we used this language: "The state's testimony shows that a witness a couple of hundred yards away heard a gun fired at the spot where deceased was subsequently found, and in a few moments saw appellant and his son (his son having a gun) coming from the direction of where the deceased was subsequently found. The witness walked up the road in company with another witness and discovered deceased lying on the ground shot, and these facts place appellant in such juxtaposition to the crime, of themselves, from the state's standpoint, so as to preclude the issue of circumstantial evidence." So we have in this case the parties thoroughly identified as being the parties who fired the shot that killed the deceased. There was no one else in the room, or that slept in the room. So we hold that the court did not err in failing to charge on the issue of circumstantial evidence. In passing upon this case, on the question of habeas corpus, as reported in 110 S. W. 898, we there stated that "the testimony for the state is positive and unequivocal that re-

lator, in company with another, killed the deceased by shooting him through a window at night," and we meant by that statement evidently that the facts placed appellant in such juxtaposition to the crime as to exclude any other issue than that of positive testimony. The state, in its brief, in addition to the *Dobbs* Case, supra, cites as also pertinently bearing on this question the following authorities: *Keith v. State*, 50 Tex. Cr. R. 63, 94 S. W. 1044; *Kidwell v. State*, 35 Tex. Cr. R. 264, 33 S. W. 342; *Holland v. State*, 45 Tex. Cr. R. 172, 74 S. W. 768; *Beason v. State*, 43 Tex. Cr. R. 442, 67 S. W. 98, 69 L. R. A. 193; *Polk v. State*, 35 Tex. Cr. R. 495, 34 S. W. 633; *Adams v. State*, 34 Tex. Cr. R. 470, 31 S. W. 372; *Baldwin v. State*, 31 Tex. Cr. R. 589, 21 S. W. 679; *Crews v. State*, 34 Tex. Cr. R. 533, 31 S. W. 373; *Bennett v. State*, 32 Tex. Cr. R. 216, 22 S. W. 684; *Hardin v. State*, 8 Tex. App. 653.

The fourth assignment of error complains of the following charge: "Do the facts and circumstances in this case show such a general disregard of human life as necessarily includes the formed design against the life of the person slain? If so, the killing, if it amounted to murder, will be upon express malice." Appellant insists that said charge is erroneous, because it instructed the jury as to a phase of the law and as to an issue not raised by the evidence in this case, and for the further reason that said portion of the court's charge was calculated to lead the jury to believe, and did lead the jury to believe, that in the opinion of the court this defendant was a dangerous and reckless person. This is simply an illustration used by the court to get the jury to understand what murder in the first degree is. Furthermore, the circumstances surrounding this case to our minds do not show that the charge was not altogether pertinent to the facts. There is no error in the charge.

Appellant insists the court erred in refusing the following charge: "That there is no evidence before you showing or tending to show that the defendant ever saw or knew Jose Sandoval prior to and at the time of 11 o'clock p. m. of November 5, 1906. Therefore you are instructed that any act, acts, conduct, or conversation of or with said Sandoval prior to said time of 11 o'clock p. m. of November 5, 1906, cannot be considered by you in this case as in any way tending to criminate the defendant on trial herein." And in this connection appellant further complains that the court erred in failing to give the following charge: "That the testimony of Rufino Clark, Francisco Martinez, and Rafael Moreno was admitted before you upon the statement of the state's counsel that the materiality thereof would be subsequently shown; but, inasmuch as this has not been done, the court now instructs you that you will not consider for any purpose the evi-

or any other person, or to any message sent to him or received by him on said night (if they were sent or received by him). Said evidence must not be considered by you for any purpose whatever; and it is your duty as jurors to wholly disregard the same, exclude it from your minds, and try this case as though you had never heard it." The record shows that the court permitted Rafael Moreno to testify for the state that he was overtaken on the night of November 5, 1908, by Jose Sandoval, while riding on the road from Roma to Rio Grande City, at or about 9 p. m., and that he rode with said Sandoval about a league in the direction of Rio Grande City; that he conversed with Sandoval, and that said Sandoval then left the witness and rode on ahead toward Rio Grande City. It is shown by Rufino Clark that he saw Sandoval at a ranch five miles below Roma, in Starr county, and on the road leading from Roma to Rio Grande City. This testimony was entirely germane and pertinent. The evidence for the state shows that the parties were acting together in the commission of this murder, and any evidence going to show that they were present, or were probably present, one or each of them, or both, was germane and pertinent, and it follows, therefore, that the court did not err in refusing the above-quoted charges. Where two or more parties act together, any acts or declarations, prior to the consummation of a crime, that will illustrate the purpose and animus, or probable co-operation, of the parties in the commission of the crime, are admissible. The sheer fact that there was no testimony showing that the parties were acquainted prior to the night of the homicide does not show that they did not act together. If they met for the first time on the night of the homicide, the testimony that he was going to where he met appellant would be clearly admissible. It would be only a circumstance to be argued to the jury to indicate that they did not.

The trial court permitted the district attorney, John I. Kleiber, to testify for the state that while he was in the City of Mexico, he saw this defendant incarcerated in the general jail in said city. Appellant objected to this testimony, as shown by bill of exception No. 4, on the ground that same was irrelevant, immaterial, and prejudicial to the rights of this defendant, and upon the further ground that it was not competent nor proper for the state to prove that this defendant had been in jail for this or any other offense. It was proper for the court to permit this testimony. It is a circumstance to show flight, or at any rate it could not prejudice the rights of appellant, to prove that he was in jail charged with this crime.

The twelfth error complained of was the

to wit: That the fact (if it is a fact) that the defendant was extradited from the Republic of Mexico, or the fact that he did or did not undertake to defeat said extradition by legal process or otherwise, cannot be considered by you in this case as in any way tending to incriminate this defendant. Every citizen has a right to appear before the proper officials and defend himself in an extradition proceeding, and the fact that he does so is not and cannot be considered by you as a fact or circumstance showing or tending to show his guilt or innocence as to the crime with which he stands charged." It is contended that the court was in error in refusing this, because evidence was introduced to show that appellant, while in the City of Mexico, fought the extradition from the United States and resisted being returned from the asylum country. He asserts in the statement in his brief that exception was reserved to this testimony in his bill of exceptions No. 3, found on pages 31 and 32 of the transcript. An inspection of that bill does not verify this contention. There is nothing in the bill indicating that appellant fought extradition. The exception was reserved to the statement of District Attorney Kleiber that he went to the City of Mexico on business connected with extradition of the defendant, and there the bill ends, so far as this phase of the testimony is concerned. It may be conceded, so far as this charge is concerned, that testimony was introduced that appellant fought the extradition; but, in order to take advantage of this, the defendant must object to the introduction of this testimony, and, if the court overruled the objection, appellant should have properly reserved his bill of exceptions; but this was not done, nor was a motion made to exclude the testimony subsequently. We find no bill of exception was reserved, but appellant seeks to use a special charge to meet his failure to except to the introduction of it. This cannot be done. A charge cannot be used to serve the office of a bill of exception in regard to the admission or rejection of evidence. *Pippin v. State*, 9 Tex. App. 269; *Thomas v. State*, 16 Tex. App. 535; *Capps v. State*, 40 Tex. Cr. R. 104, 48 S. W. 517; *Nalle v. Gates*, 20 Tex. 315; *Lanham v. State*, 7 Tex. App. 126; *Bohanan v. Hans*, 26 Tex. 445. We therefore hold that a requested instruction cannot take the place of a bill of exception in regard to testimony illegally introduced or rejected. The authorities cited by appellant, notably the case from Missouri, are not in point, inasmuch as the question is not properly before the court. There having been no bill of exception reserved to the introduction of this testimony, it cannot be raised by a special charge. Therefore the following authorities relied upon by appellant: *Johnson v. State* (Tex. Cr. App.)

principle of the law of the court to give the following charge: "That the mere presence of the defendant at the time and place of the killing, if he was present, would not justify you in finding him guilty of the offense charged, unless the state has satisfied your minds by competent evidence, and beyond reasonable doubt, that he (the defendant), knowing the unlawful intent of the party committing the act, aided him by acts or encouraged him by words or acts to commit such offense. And it would devolve upon the state to prove such acts by competent evidence, beyond a reasonable doubt, before you can convict defendant upon such evidence." The charge on principals in this case was very full. It covered every possible phase required under the law of this state. It told the jury in clear and succinct language that they must believe beyond a reasonable doubt that the parties were acting together at the time of the commission of the offense, and it was not necessary. Furthermore, there was no testimony that parties were not acting together.

Appellant insists the court should have charged the jury that they must not allow the fact that he is a Mexican to influence them in arriving at a verdict. There is nothing suggested in this record to require such a charge, or a charge to the effect that they must not consider the bare fact that the deceased was a district judge.

The seventeenth and eighteenth assignments of error complain that the court erred in refusing to permit appellant to read a decision of this court in the case of Francisco Gonzales, which shows that Jose Pena had authority to commission men to carry arms, and, further, to show that he had deputized appellant to carry arms on the day after the homicide. It seems that the state proved that on the morning of the 6th, after the homicide, and after the discovery of Judge Welch's dead body, a large number of men, marching in file and headed by a band of music, marched by and stopped in front of the house of the deceased, and that said men were accompanied by a number of armed men carrying rifles or Winchesters and pistols. Appellant insists that this testimony was calculated to impress the jury that the parties were unlawfully armed, and that this defendant was one of the parties. It was pertinent for the state to show that appellant, in company with others, was armed the next day following the homicide. The court admitted testimony to the effect that appellant was legally carrying arms, in order to rebut the presumption created by the state's evidence; but we do not think a decision of this court holding that one Pena was authorized to issue a commission to bear arms was admissible under any view of the case. Nor do we think the testimony of sufficient mo-

significance of error complain that the court erred in permitting John I. Kleiber to testify, for the state, in substance and effect, that during the next day after the commission of the homicide he sighted through the aperture where the slat was broken out of the shutter on the east window of the room in which the deceased was sleeping, and in which the body was found, on the morning of November 6, 1906, towards the body and wound of the deceased, and that the east window of said room was immediately behind the body of Judge Welch, and immediately behind the hole in the back of said body. This testimony was admissible. The testimony of Dawson to the same effect was also admissible. The fact that the body had been removed and replaced would only go to the weight of the testimony.

The twenty-fourth assignment of error complains that the court erred in permitting the witness Dawson to testify, for the state, that the bullet which killed the deceased entered in the back near the right shoulder blade, and that the point of exit was the wound in front of the body, on the left breast. The bill shows the witness was an expert on gunshot wounds, and there was no error in admitting his testimony. The testimony of the witnesses as to the condition of the window blind and all other circumstances surrounding this homicide were admissible.

Bill of exceptions No. 14 complains that the court erred in permitting the district attorney to frighten and intimidate the witness Rafael Moreno. The qualification contradicts this contention.

The thirty-first error complains that the court erred in admitting before the jury the testimony of Cayetano Pena, a state's witness, over the objection of appellant, and upon the defendant's challenge as to the competency of said Cayetona Pena as a witness herein; it being shown by uncontroverted evidence introduced by defendant, at the time said witness was offered by the state, that he had twice been convicted in the United States District Court at Brownsville, Tex., of felonies, to wit, the crime of illicit retail liquor dealing, and the crime of receiving and concealing smuggled property, both in violation of the federal statutes for such cases made and provided, and introduced in evidence. Under the United States statutes defendant might legally be punished by confinement in the penitentiary for a term greater than one year in duration; appellant urging the incompetency of said witness under the terms of section 3 of article 768 of the Code of Criminal Procedure of Texas of 1895. In the case of Reagan v. United States, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709, Bannon v. United States, 156 U. S. 464, 15 Sup. Ct. 467, 39

felony. In the case of Pitner v. State, 23 Tex. App. 366, 5 S. W. 210, in passing upon a similar question, we held that the defense, in order to make the judgment available for the purpose of disqualifying the state's witness, should have proved by the law of Kansas that forgery was a felony. We therefore hold that the witness was not disqualified to testify, since, according to the federal decisions, the offense of which he was convicted was not a felony, and could not come within the terms of the statute invoked by appellant to disqualify him from testifying.

The thirty-third error complains that the court erred in permitting Cayetano Pena to testify for the state that he told his son-in-law, Pancho Trevino, in April, 1907, what he (Pena) claims to have seen and heard on the night of November 5, 1906, pertaining to the murder of Judge Welch, as shown by bill of exceptions No. 21. This testimony was objected to by appellant on the ground that it was irrelevant, immaterial, and hearsay; furthermore, that said Pena had not been impeached by any other witnesses at the time he was allowed thus to testify. But the record and bill does show that he was impeached by proving contradictory statements to the one sworn to in the trial of this case. Therefore it was permissible to prove what he told his son-in-law.

The thirty-fourth and thirty-fifth assignments show the following: While the witness Jose Maria Gonzales, a witness for the state, was testifying, on cross-examination by defendant, in reply to a question, the witness stated, "There he is; ask him," pointing to the defendant at the time he made said remark. From this circumstance Mr. Seabury, counsel for the state, in his argument to the jury, undertook to impress upon the jury the idea that said witness Gonzales was an honest and truthful man, as shown by the remarks made by him and his pointing at the defendant. The defendant said that said argument and conduct of said Seabury constituted and were in fact an indirect, but exceedingly harmful, allusion to the failure of this defendant to testify herein in his own behalf. The bill of exceptions in reference to the matter presents it as follows: While the witness was on cross-examination he was asked: "Q. What were the first words Cabrera spoke to you? A. In what direction was the shot? Q. What did you reply? A. I told him it was that way (indicating). Q. Is that all you said, just 'that way'? A. Yes, sir; towards the courthouse. Q. Did you mention his name? A. No, sir. Q. Are you sure those are exactly the words he used? A. Yes, sir,

A. He said, 'We were drinking coffee when I heard the shot, and I do not know in what direction it was.' Q. He had just told you what direction he thought it was, had he not? A. Yes, sir. Q. Then he turned around and told you that he had been taking coffee and did not know in what direction it was? A. Yes, sir; you can ask him; he is there present (indicating the defendant). Q. Did any other words at all pass between you at that time? A. No, sir. Q. Are you sure the words you have given here under oath are the exact words that passed? A. Yes, sir." During the discussion of the above facts by Mr. Seabury, he referred to this incident in the trial of the case, which had been brought out by examination of appellant's counsel, whereupon an objection was immediately made that appellant had not testified, and the court, passing upon this matter, indorsed upon the bill of exceptions a complete and full statement of the facts, and stated, in his explanation attached to the bill, that Mr. Seabury never referred to any matter that could be construed as intimating to the jury anything about appellant not having testified. In the light of the explanation of the court, we cannot hold it was an allusion to defendant's failure to testify. The bill is quite long, and we have copied same as fully as the length of this opinion will justify. There appears to have been no protest at the time the witness made the statement on the part of the defense's counsel. The witness replied, "Yes, sir; there he is; you can ask him;" but appellant's counsel never protested against it, and the attorney inadvertently repeated what the witness stated. We cannot say that this violates the statute invoked in this case.

There is a long bill of exceptions in this record complaining of the argument of Hon. A. B. Davidson. In the light of the explanation of the court, the argument was legitimate, or at least was a retort upon the argument made by appellant's counsel, and provoked by them.

The thirty-ninth error complains of the misconduct of the jury in this: After the jury had heard part of the argument in this case, but before said argument was finished, and before the jury received the charge of the court herein, one Charles Lenz approached H. C. Huebotter, who was then and there a duly impaneled and sworn juror in this case, at or near the restaurant of said Lenz in the city of Cuero, Tex., and stated to said Huebotter that he (Lenz) had received a telephone message to the effect that said Huebotter's horse had run away with his buggy, in which his (Huebotter's) children were riding, and had torn up the buggy, and

that the horse was badly cut up by barbed wire, but his children were not hurt, and for him not to be uneasy. Attached to the bill presenting this matter is the affidavit of the juror; but the district judge found as a matter of fact that said affidavit was untrue, and the juror trying this case was in no way influenced by what occurred, and the juror Huebotter had stated facts not true, and that the verdict of the jury was in no way affected by what occurred in the jury room, nor what occurred in the presence of Mr. Lenz. To present these matters in detail would be unnecessary, since, after a very careful reading of same, we hold that the irregularities complained of were harmless to defendant, and did not in any way jeopardize his rights, or increase his punishment, pains, or penalties. Other misconduct of the jury complained of by appellant has also been reviewed by us, and we find no ground for reversal of the judgment by reason of such misconduct.

We have discussed with much candor and detail all the assignments of error raised by appellant in this very voluminous record, covering in all nearly 1,000 pages, and feel constrained to say that a verdict in consonance with justice and with law and the procedure of this state has been secured. The record clearly shows that appellant, in conjunction with his codefendant, acting as a cowardly tool of a lot of political assassins killed the district judge of his district. That the evidence is as clear and cogent as it might be cannot be said, but that it is sufficiently convincing to show to any fair mind that the appellant was one of the guilty participants in the assassination, we take it, there can be no cavil about.

So believing, and so finding the record, the judgment is in all things affirmed.

RAMSEY, J. (dissenting). I am not prepared to agree to the judgment of affirmation. It seems to me that the court should have charged the law of circumstantial evidence. Again, I am inclined to think that the special charge No. 10, requested by appellant's counsel, should have been given. Nor am I sure there are not other errors in the record. I may write my views later.

On Rehearing.

BROOKS, J. This case was affirmed at the recent Dallas term, and now comes before us on motion for rehearing.

The first ground of the motion is that this court erred in finding, as a matter of fact, that Cayetano Pena and his wife testified that they "saw appellant and codefendant fire the shot" alleged to have killed the deceased. If appellant's counsel had construed the opinion as a whole, as all opinions must be construed, they would have seen that this criticism was gratuitously incorrect, since it will be shown by a reading of the opinion that

the following statement is therein made, to wit: "Judge Welch was at said city holding court at the time. Appellant and Jose Sandoval approached the window of Judge Welch's room, where he was sleeping, and remained standing there, close together, side by side, for a short period of time. One of the two fired a shot into the house through the window where Judge Welch's body was found. He was shot from that point through the back." Further along in said opinion will be found the following statement: "Only one bullet hit the body. Cayetano Pena and his wife, Jesusa Gonzales de Pena, are the two witnesses who testified that they saw appellant and his codefendant fire the shot as above detailed." Further along in said opinion appears the following: "They saw appellant and his companion approach and fire the fatal shot." The latter statement, when construed in the light of the two previous statements, shows that appellant's criticism is hypercritical, since this court never attempted to say, nor does it now understand the record to be, that appellant himself fired the shot that killed the deceased; but the evidence does conclusively establish the fact out of the mouth of the two above-named witnesses that appellant, in direct co-operation with Sandoval, was present when the shot was fired that killed the deceased through the window about 12 o'clock at night, and they either walked or ran away together after said shot. It is immaterial whether they ran or walked away. They left. They were at the house at an unseemly hour. They had previously approached the house, and, seeing deceased sitting in his door, disappeared, and a short while after deceased's light was blown out or turned out. Then they approached the window, as stated, and fired a shot into the back of the deceased, according to the testimony in this record. The witnesses did not say, nor does the opinion of this court say, that the witnesses stated which one of the two defendants fired the shot. Nor does it matter under the law of principals which one fired the shot.

Appellant further insists that both of the state's witnesses testified that they did not see any weapon whatever in the possession of either appellant or Sandoval, upon either of the occasions testified to by said witnesses. Moreover, said witnesses testified that they did not see the flash of any pistol or rifle shot at the time they claim to have heard the shot fired by either appellant or Sandoval. The testimony of the witness Cayetano Pena, found on page 492 of the statement of facts, in reference to the immediate facts of the shooting, is as follows: After testifying that he saw appellant and Sandoval together a short while before the killing, he then testified as follows: "The second time that I saw these two men come by my house that night, they were going this way (indicating by reference to map). This is the corner of my house, and this is the house of the judge

(indicating). When I saw these two men there the second time that night, they went this way (indicating), to the window of the judge's room. After they got to the window, and the shot was fired, they went this way (indicating by reference to map). I did not see any pistol or gun on either of these two men when they passed my house either time that night. When the shot was fired, I did not remain sitting in the door. I went to the window. I went to the window in that same house of mine. After I had opened the window, my wife stood at my back behind me. My window there had a blind on it. When I went to the window the blinds were shut. When I got to the window I opened it—opened one of the shutters. When they fired the shot, I was at the door. At the time I saw them go to the corner of the priest's yard, the wall, I was at the window. When these two men left the corner of the house in which I lived and went to the window of Judge Welch, they went in a natural walk, side by side. Before they fired the shot, they remained at Judge Welch's window very little, hardly any time, and they just stood there a few moments after they fired the shot." Furthermore, the witness testifies: "The window into which I saw this shot fired was the first window on the part towards the river. After the shot was fired, they went steadily away. They went in an ordinary pace. That is what I saw—that they went in an ordinary pace. I did not know that night that Judge Welch had been killed." Now, as to whether the witness means, by saying "they went steadily away" from the scene of the homicide, that they ran or walked, as stated above, becomes utterly immaterial. They left the building together. They went there together. They went at a time when no possible inference of innocence could be attached to either, at the dead hour of the night, walking together up to the window. One of the two fired a shot into the house; the deceased lying a few feet from the window. The mark of the weapon from which the fatal ball was fired was impressed on the window blind, and on a direct line, as the witnesses testify, with the back of the deceased, and that the hole in his back was made by the bullet; the bullet having passed probably through his heart.

The second ground of the motion complains that the court erred in finding as a conclusion of fact that said Cayetano Pena and his wife saw appellant and Sandoval run away hurriedly from the window of Judge Welch's house. The last statement above made answers this criticism upon the opinion of this court.

The third ground of the motion is that the court erred in its conclusion of fact that "if the testimony of the witnesses is to be believed, as disclosed by this record, the motive for the killing was political, and appellant and his codefendant were the hired assassins of the political enemies of Judge

Welch." Appellant insists that this conclusion of the court is absolutely unsupported by and contrary to the record facts, and urgently requests this court to set out such of the testimony of the witnesses as this court considers to be sufficient to prove that appellant was the hired assassin of political enemies of Judge Welch. Appellant further submits that this court has given a most lame and impotent reason for this finding of fact, viz., because there is nothing in the record to suggest that appellant and his codefendant had any personal animosity against the judge. Appellant further states that upon reflection this court must see the weakness of that position. This record contains something over 1,000 pages. The opinion in this case had to be gleaned from over 500 pages of statement of facts, and in sheer deference to the fact that appellant insists that the court erred in its conclusion of fact that the motive for the killing was political we will now state the substance of the evidence that we think suggests the motive for this killing. To do so in detail would make the opinion unnecessarily prolix and tedious. The evidence shows that appellant belonged to a political organization in the county of the homicide at variance with that of the district judge whom he assassinated. The party with whom Judge Welch and the district attorney affiliated and appellant's faction or party were each holding a political meeting on the night of the homicide. Judge Welch had been appealed to by one of the adverse factions to appoint part of said adverse faction deputy sheriffs to keep the peace on the next day, which was election day. This he positively refused to do. The record shows that, after his death, appellant, armed by some authority, marched by and stopped in front of the judge's office, where he was killed, in company with many of his companions, about 70 of whom, if this record is to be believed, were armed. In fact, one bill of exceptions in this record complains of the action of the court permitting the state to prove this last fact.

We did not mean to say, nor do we now state, as a matter of law, that the reason was political; but no other conclusion can be reached by the candid mind in reading this record other than the fact, as stated in the original opinion, that appellant was the hired assassin of political enemies, since the record discloses that appellant and the deceased were unknown to each other, or at least that they had no sort of bickering, misunderstanding, or personal animosity one to the other. The record is replete with various circumstances showing the most intense animosity existing among the crowd that appellant ran with against the judge and his efforts, as he conceived them, to enforce the law. We are not here called on, nor are we attempting, to pass upon the justness of the insistence; nor are we intimating the illegality here of appellant's insistence from a political standpoint. With those matters we have naught

to do, and care less. Therefore, if appellant had no personal animosity, conceding him rational, and no plea of insanity was interposed for him in this case, and the record being full and replete with suggestions of political animosity, the killing, occurring at the dead hour of night, when the victim was asleep, cannot be designated otherwise than as an assassination. Then the evidence showing to our minds conclusively that appellant committed the assassination, and political animosities being ripe and manifest from a careful inspection of this record, we cannot ascribe the motive to any other reason than as stated, and we reiterate and here state that it is apparent to this court that the basis and motive for this homicide and assassination was political. In addition to the above detailed facts, we make this addition thereto as demonstrating a clear and rational basis for the conclusion, stated in the original opinion, that the motive for this killing was political. Appellant and companion were seen at the meeting or headquarters of the political faction with which they affiliated and opposed by the faction with which the deceased affiliated before killing. The deceased commissioned members of his side and had refused to authorize those of the opposing faction to act as police or go armed the following day—election day. Appellant and his companion were seen and talked to by Gonzales just after the killing. Appellant claimed the shot was fired in the direction of headquarters of his faction, while Gonzales said the shot was fired in the direction of deceased's room; that appellant then had a gun concealed, only the barrel of which could be seen by Gonzales during the conversation; that they separated, appellant and confederate going towards headquarters, where he (appellant) was subsequently seen.

The fourth ground of the motion complains that the court erred in its conclusion of fact that after continued search appellant was some time subsequently arrested in old Mexico. The record shows, as appellant insists, that he remained in the county where the homicide occurred for some time after the homicide, and that he did not leave there for Mexico until after the adjournment of the district court of Starr county for its spring term, 1907. It is furthermore true that the principal witnesses against appellant, viz., Cayetano Pena, his wife, and Jose Maria Gonzales, lived in Rio Grande City, the place of the homicide; but the record does show, and this is the only statement we were attempting to make, that appellant was captured after continued search in Mexico, and extradited, and brought back to Texas—he resisting arrest and doing all he could to escape being brought back to Texas. This is the only thought we meant to suggest, and the only legitimate conclusion that could have been drawn from the statement in the opinion.

The fifth ground of the motion complains that the court erred in finding that the trial judge committed no error in failing to charge on circumstantial evidence and in refusing to charge upon circumstantial evidence, and feels that when this court begins to discuss those cases, and attempts to state just why they are not in point upon appellant's contention here, the court will reach the conclusion that it erred in its original finding upon this question of law. In the first place, as stated in the opinion rendered in this case on habeas corpus (53 Tex. Cr. R. 466, 110 S. W. 898), the court unanimously held that the testimony of the state is positive and unequivocal that relator, in company with another, killed deceased by shooting him through a window at night. We have re-examined all the authorities that appellant cites, together with a great many other authorities, and have no occasion now to change our opinion that this is not a case of circumstantial evidence. This case was tried by the court below under the guidance of the habeas corpus opinion, which stated that the evidence was positive; and while we would not hesitate to reverse, if we thought we were in error, still, after a thorough and careful review of all the authorities, we hold, as stated, that it is a case of positive testimony. In appellant's motion for a new trial he insists that none of the authorities cited support this court in the previous opinion. In the case of Polk and Watts v. State, cited in the original opinion, we have a case, as we think, exactly in point with reference to the facts of this case. The dying declaration of the deceased covers all the salient features of the state's testimony, and from it we quote. After stating he went to a literary society at the church, he then says: "After the exercises broke up, the two Parsons boys got company and started home. The balance of the boys, including myself, followed along behind them, so we could get together after they took the girls home. The reason why we did this was because we feared something would happen. After we left the church, we saw three boys coming behind us, and we stopped to see who they were, and they passed us on the other side of the street, and I saw who they were. They were Austin Polk, Biz Watts, and Mack Hughes, who had one eye. They walked on ahead of us for some piece, and after they had passed us they got on the same side of the street we were on, but kept ahead of us, and we saw them turn out of the road into some bushes, in a run, when they stopped. At this time we were about 50 feet from them, and I heard them snapping what sounded like a pistol. I told Mack not to shoot; that it was me. Mack jumped up and started to run, and, as he did, all three of the boys commenced shooting. I could tell that Mack Hughes was shooting at me, but could not tell which way Austin and Biz were shooting, but think they were shooting

at the Parsons boys. I was looking at Mack Hughes, and had been talking to him before he shot me. Mack Hughes was the one that shot me. I know this. There were several pistol shots fired. I don't remember how many though; but all the boys were shooting. At the time of the shooting it looked as if Austin, Mack, and Biz were shooting at the Parsons boys, who were with the girls, as well as me, and the boys who were with me." Now, the above is practically the state's case against the appellants Polk and Watts, the decision now under consideration. Mack Hughes was tried separately. The record does not show what was done with his case. Now, a casual reading of the above statement, and certainly a full reading of the decision last cited, will show that the deceased did not swear that appellants Polk and Watts shot him at all, but swears positively that they did not. The evidence further shows that it was dark. He had seen these two defendants go into the woods with Mack Hughes, and Judge Hurt found that it was not necessary, in the trial of these two defendants, to charge on circumstantial evidence, using in that connection the following language: "There was no error in omitting to charge upon circumstantial evidence. See, also, *Kidwell v. S.*, 35 Tex. Cr. R. 264, 33 S. W. 342. There was positive evidence of the parties participating in the main act, the killing; and, if not, the facts were in such close juxtaposition as rendered such charge unnecessary."

The facts show that Judge Welch and the district attorney, Kleiber, were sleeping in a small, one-story house; each occupying rooms adjoining. The appellants walked up at the dead hour of night, and one or the other shot into the window, inflicting a wound in the back of the deceased while sleeping. Now, then, if the evidence had shown that this shot waked Kleiber up, and he should have run into the room and discovered appellants walking "steadily away," could it be rationally insisted that the case would have been a case of circumstantial evidence? Certainly not, especially when the evidence of the two Penas is considered. Then the only difference between this condition and the record before us is that Kleiber did not enter the room immediately, but came within five or six hours, or at least when he waked up in the morning and found the judge dead. Pena and his wife saw one of the parties shoot into the room. There was no one else in the room, and Kleiber, when he awoke, went into the room and found the judge dead. Would the fact that he went then, instead of immediately, render the case one of circumstantial evidence? Certainly not. Where the evidence shows that a certain party is sleeping alone in a room, and another party is seen to approach said room at the dead hour of night and fire into said room, the fact that his dead body is not found until

the next morning does not per se make it a case of circumstantial evidence. Suppose Pena and his wife, after hearing the shot fired into the room, and, after appellant and his companion steadily walked away, said Pena and wife approached the house and found deceased lying on his cot dead; would this have made it a case of circumstantial evidence? We apprehend not, and yet they could not swear they saw the bullet kill the deceased; but they could swear, as Kleiber did swear, that there was no one else in the room, and the physical facts show that the bullet which was fired into the window killed the deceased. But, as stated in the original opinion, if these are circumstances only going to show the fact that deceased was killed by appellant, still the facts are in such juxtaposition to each other as not to call for a charge on circumstantial evidence.

Appellant in his zeal insists on an impossibility of this court, in that he suggests that we point out a decision exactly like the one here under consideration. The philosophic principle has been laid down by many courts that, where the facts are in such juxtaposition one to the other as in this case, the court does not have to charge on circumstantial evidence, and we apprehend, with the utmost confidence in the statement, that no court of last resort would hold the facts in this case warrant a charge upon circumstantial evidence.

So believing, the motion for rehearing is in all things overruled.

RAMSEY, J. (dissenting). Dissenting opinions are usually in vain, and for the most part useless. I am always reluctant to dissent from an opinion representing the deliberate convictions of my Associates, and heretofore, in the few instances in which I have found myself unable to agree with them, I have done no more than to briefly note that fact, with as brief a statement of the substance of my own opinion; but the importance of the questions involved in this case and that decent respect for the opinion of the profession which every judge should entertain have constrained me to set out at length the particular reasons upon which my own opinion is based. I am sure, if I write with earnestness, it will be understood that it is without disrespect to the opinion of the majority and is due to the strong opinions which I entertain. In my judgment, and as I read and interpret the law, the opinion of the majority overturns the ancient landmarks of the law, is a departure from the settled rule in this court, and our Supreme Court for more than a half century, is wholly unsupported by any authority, in the face of all the authorities, and wholly without legal reason as a basis. If this opinion I so entertain is correct, I ought to dissent. As to whether I am right or wrong will be judged by the reasons given and authorities cited in this opinion.

What are the facts? Stanley Welch, judge of the Twenty-Eighth judicial district, was assassinated in Rio Grande City, Starr county, Tex., on the night of November 5, 1906. The general election at the time fixed by law was to be held on the next day, and there was and had been considerable political excitement in that section of the state, and particularly in Rio Grande City. The body of the lamented judge was found on the morning of November 6th, between 7 and 8 o'clock. His death undoubtedly resulted from a gunshot wound, and he had apparently been dead for several hours when found. There was a bullet wound in his back, one in his breast, and two wounds on his left arm, evidently made by the same bullet. He was occupying, when killed, the south room of a two-room one-story brick house; the adjoining or north room being occupied by John I. Kleiber, the district attorney. To the east of the office building, in the south room of which Judge Welch's body was found, and at a distance of about 120 feet, was a one-story building, one room of which was occupied by Cayetano Pena and Jesusa Gonzales de Pena, his wife. This last-named house was situated upon a rise about seven feet above the elevation of the Welch house. The view from the two houses was practically unobstructed. There was no fence around the Welch house. To the north lay Third street, 60 feet in width, upon the opposite side of which was what is known as the "Priests' inclosure," occupying about a half block, and surrounded by a brick wall about seven feet in height. To the south of the Welch house were vacant lots, and then a small jacal. The county courthouse is situated at the head of Britton avenue, about 500 feet north of where Judge Welch was killed. The Catholic Church is diagonally across Britton avenue, northwest from the Welch house, and facing south upon the corner of Britton avenue and Third street. Two political meetings were being held in Rio Grande City on the night of the assassination. One meeting was held at what is known as the "Red Corral" or club, where the Democratic adherents were gathered, and the other at the "Blue Corral" or club, where Independent and Republican forces were assembled. The former was held in what is known as the old courthouse, and the latter in what is known as "Juan Hinojosa's inclosure." The Rio Grande river runs approximately east and west at the foot of Britton avenue, south of the courthouse and Welch house. The cot upon which Judge Welch's body was found lying was directly in front of, and at a distance of from four to six feet from, the east window of his room. The south room was separated from the north room by a brick partition, in which was a white pine door, with a transom over same. None of the witnesses knew, or even suspected, that Judge Welch had been killed

until between 7 and 8 o'clock on the morning of the 6th of November.

There is no evidence in the record to show any motive whatever on the part of either appellant or Jose Sandoval to kill Judge Welch, except as same may be implied by the circumstances. We think the inference is fair that his death was due to political animosity, though there is nothing to show any special reason that his death should have been sought by either appellant or Sandoval. There is no evidence to show that either of said parties was personally acquainted with Judge Welch, nor was there any evidence to show that appellant and Sandoval were acquainted with each other, or had ever met, prior to the night on which the judge was killed. Sandoval lived in Mexico and was a citizen of that republic. Appellant had lived in that section many years, and the testimony indicates that he was an adherent of the opposition party to Judge Welch, though he was not specially prominent in it; nor was there a hint in the testimony of any words spoken by him or to him touching Judge Welch. It is simply shown that there was an intense feeling and hostility between the factions, and that he belonged to the Independents, and, later, the fact that Judge Welch was killed. The testimony upon which a conviction was sought, except a few wholly incidental circumstances, rests in the evidence of Jesusa Gonzales de Pena and her husband, Cayetano Pena. There are many contradictions between these witnesses. They contradict themselves repeatedly, their testimony is contradictory as same was delivered on habeas corpus trial, and on this trial they contradict themselves and contradict each other. Cayetano Pena was shown to have been charged and convicted of more than one offense growing out of the customs laws, and his wife, Jesusa Gonzales de Pena, is shown to have been a witness of such dense ignorance and incapacity as to almost stagger belief. She testified that she did not know how old she was, did not know the date of the birth of any of her 11 children, did not know the date of her own marriage, did not know how many windows there were in the front of the house in which she had lived at the time of the murder for a year, did not know what year it was at the time she testified, did not know what month or day of the week it was upon which she was testifying, and did not know the year in which the shot was fired which killed Judge Welch. She also testified that she did not know what north, south, east, or west was; that she did not know how to read or write, or tell the time by the clock or a watch. Her testimony, however, on this trial, was to the effect, in substance, that on the night of the murder she and her husband were in the house above described; that on that night, between 11 and 12 o'clock, her husband was sitting in the door in a chair, and she was

ting inside his room in front of the door; that there was a light burning in his room; that while she and her husband were sitting there, and while Judge Welch was also sitting in his door, appellant and Jose Sandoval passed in front, and within six or seven feet of the door where witness was sitting; that they were coming from the direction of the river, and were going toward the north. Witness knew them both well; that they passed along in front of the house, along the walk, and said nothing; that some time after these two men passed Judge Welch's light was extinguished and his door closed; that about an hour, more or less, after they passed the first time, witness saw appellant and Jose Sandoval coming from the same direction in which they had come before, but before getting in front of her door they turned off towards Judge Welch's office, and, walking upright and in a perfectly natural manner, walked to the window of Judge Welch's room; that when they got to the window they stood close together a few moments, and then witness heard a shot fired; and that in a short time after the shot was fired appellant and Sandoval walked off in the direction of the priest's house. She did not know, nor did she indicate by any hint in the testimony, which of the two men fired the shot, though she testifies that the shot was fired at the east window of Judge Welch's room; that she did not see that either of the parties had a rifle or a pistol or firearm of any kind on either of the two occasions when she saw them; that she heard no other sound, nor did she see the flash of any pistol or gun. She also testified that after the firing of the shot she suspected nothing wrong, and did not know Judge Welch had been killed until she was so told the next morning. She testified, as did her husband, that they agreed that they would tell no one of the circumstance of the night before, because they were afraid to do so; nor did they say anything about the fact to any one until several months thereafter.

Jose Maria Gonzales testified that he was living in Rio Grande City, at a place between Judge Welch's office and the Blue Club; that he had been attending the two political meetings, which were going on on the night in question, and went home about 12 o'clock, and had partly undressed, when he heard a shot in the direction of the Welch office, and got up, dressed, and walked out in the street near his house, and met appellant and another man whom he did not know, coming from the direction where he had heard the shot; that appellant carried what witness took to be a rifle partly concealed under his coat. This witness had some conversation with appellant, in which appellant said in substance

they had so desired; but they came on toward him, walking at a natural gait, walked straight up to where he was in the street, and spoke in a perfectly natural way as they passed him, asking him in which direction was the shot. It was shown that a message had been sent to Mexico on November 5th for Jose Sandoval, and the witness Clark saw him on this side of the river in Texas that evening about five miles from Roma; and he was on horseback, and was at the time on the way to Rio Grande City. It was demonstrated to my mind by quite a number of circumstances that the shot which killed Judge Welch passed through the east window of his office, entering the body in his back, and causing his death. It is a fair inference, I think, from the entire record, that the motive for this killing was political animosity, due to the activity, as believed, of Judge Welch in respect to political differences between the two contending factions, and particularly to his refusal to grant the right to bear arms to the party of which appellant was a member. In this connection it should be stated that in a general way the testimony of Cayetano Pena supported that of his wife as to the movements of appellant and Sandoval as to the firing of the shot and their presence at the window when the shot was fired, and for the purpose of this discussion (whatever might be my own opinion as a matter of fact) it will be assumed that the evidence is sufficient to show that appellant and Sandoval were at the window of Judge Welch's house, and that one or the other of them fired a shot into said window.

If this be true, and so much be conceded, two questions arise: First, whether or not, even if it be conceded that appellant fired the shot, it was a case of circumstantial evidence, and should the court have given in charge to the jury an instruction in respect to that character of testimony? Second, the question whether, while the evidence shows that one of the two parties committed the murder, without showing which one of them, and the other did nothing—that is, committed no overt act and spoke no word, as testified to by any witness—and that his connection and relation with the killing is to be gathered from his presence and other circumstances connected with the killing, was not a charge on circumstantial evidence required? It is well settled in this state, where the case is one depending alone upon circumstantial evidence, the court must charge upon that character of evidence, whether requested to do so or not. *Hunt v. State*, 7 Tex. App. 212-236; *Howard v. State*, 8 Tex. App. 53-59; *Ross v. State*, 9 Tex. App. 275; *Ward v. State*, 10 Tex. App. 293-297; *Barr v. State*, 10 Tex. App. 507-513; *Robertson v. State*, 10 Tex.

State, 13 Tex. App. 309-318; Lee v. State, 14 Tex. App. 266-270; Dovalina v. State, 14 Tex. App. 312-314; Cooper v. State, 16 Tex. App. 341-344; Black v. State, 18 Tex. App. 124-130; Puryear v. State, 28 Tex. App. 73-77, 11 S. W. 929. It is as well settled that, where the case is not dependent alone on circumstantial evidence, the court is not required to charge upon that character of evidence. Tooney v. State, 8 Tex. App. 452-456; Buntain v. State, 15 Tex. App. 515-520; Hunnicutt v. State, 18 Tex. App. 498-522, 51 Am. Rep. 330; House v. State, 19 Tex. App. 227-240; Smith v. State, 21 Tex. App. 277-307, 17 S. W. 471. These general principles are so well settled that the propositions need no discussion, and the rule seems to be recognized in the majority opinion. That this was a case of circumstantial evidence, judged by the decisions of this court heretofore, we shall hereafter undertake to demonstrate. None of the cases cited by the court in the original opinion herein were cases of circumstantial evidence, and none of them are in point in support of the conclusion reached by the majority, except the case of Beason v. State, 43 Tex. Cr. R. 442, 67 S. W. 96, 69 L. R. A. 193, which sustains, as I believe, my position. All the other cases cited in the original opinion of the court were cases of direct testimony, and in not one of them was the testimony circumstantial. To establish this conclusion let us review the cases.

The first case cited, Dobbs v. State, 51 Tex. Cr. R. 629, 103 S. W. 918, was a case in which the wife of the appellant testified in express terms to the fact of the killing. Indeed, it was not denied. The issue in that case was an issue of self-defense. We find in this opinion, written by Judge Brooks, this statement: "Appellant, however, insists the court erred in failing to charge the law of circumstantial evidence. Appellant's wife saw the difficulty, and testifies to the shooting of deceased by her son; appellant being present at the time." We have examined the original record, and note that the statement of facts on this trial was returned, under the direction of this court, to the court below, and we cannot, therefore, do more than quote from the original opinion; but on the second appeal of this case (113 S. W. 923), wherein the opinion was written by myself, this statement appears: "Mrs. Dobbs had testified on direct examination that when the gun fired she was just north of her house putting up some chickens; that she heard deceased say in a loud voice, 'Pap is going to swear lies on me about that land;' that she ran up to where she could see them, and, when she got within 40 or 50 yards from where her husband was, she saw deceased jump out of the buggy and grab her husband's gun; that they scuffled over the gun awhile, and it was finally broken, her

son fired." Thus it will be noted by an inspection of this case that Dobbs was an active participant in the encounter and that the act of the killing was in response to his invitation and by his procurement, and that this fact was testified to by an eyewitness. Of course, it is obvious that in this case no charge on circumstantial evidence was required.

The next case cited is the case of Keith v. State, 50 Tex. Cr. R. 63, 94 S. W. 1044. That was not a case of circumstantial evidence, and is not in point at all. Judge Davidson, who wrote the opinion in that case, gives a brief statement of the facts. I quote enough of it to show what was in his mind in passing on the issues raised therein: "The evidence shows that when appellant reached the residence, and after being introduced to deceased, they sat awhile conversing on the gallery. Appellant mentioned his mission; that he had come there, not for the purpose of talking with him about his family troubles, but to talk with him in a quiet and friendly way about his treatment of his (appellant's) mother. As soon as this statement was made, deceased got up from his position, where he was sitting on a cot, and started in the direction of appellant, with his right hand reaching towards his pocket, where he had a knife, remarking, 'If that is your game, I will kill you,' accompanying the expression with an oath. Appellant told him to stand back; he did not want to hurt him; did not want any trouble with him; not to come on him. Deceased continued to come, until he came to close quarters. Four shots were fired, and deceased was killed." In discussing the question of the necessity of a charge on circumstantial evidence, Judge Davidson disposes of the matter in this summary fashion: "We do not believe that the court erred in failing to charge on circumstantial evidence. Appellant admitted the killing. The circumstances place the two parties on the gallery together, and appellant in such close juxtaposition to the killing that, even without the confession, it would not, in our judgment, be a case calling for a charge on circumstantial evidence. He did all the shooting."

The facts of the case in Kidwell v. State, 35 Tex. Cr. R. 264, 33 S. W. 342, are somewhat obscure; but as we understand the facts, interpreted in the light of the companion case of Moffatt v. State, 35 Tex. Cr. R. 257, 33 S. W. 344, it is no more in point than the case we have just mentioned. In the course of the opinion, Judge Henderson, speaking for the court, says: "The appellant in this case asked a charge on circumstantial evidence, and contends in that connection that, although the accomplice was present and saw the killing, yet, it being dark, and at the very time" of the killing he being some

was an accomplice furnished no reason why a charge should be given on circumstantial evidence, and at the time the fatal stroke was given he was so near and in such juxtaposition, though he may not have seen which one of the two parties inflicted the stabs and blows, several of which were fatal, yet, in the view we take of the case, it would make no difference, as to their guilt, which one may have caused the wounds." As above stated, the facts are not given in the Kidwell Case; but in the companion case of Moffatt v. State it is recited by the witness Lay as follows: "That, after Pratt fell, Moffatt and Kidwell came to where witness was standing, and said that they had killed Pratt. Kidwell had a dirk in his hand, carrying it with the point hanging down." So that it is obvious in this case that this was not a case of circumstantial evidence, and has no sort of relevancy to the case under consideration here.

The case of Holland v. State, 45 Tex. Cr. R. 172, 74 S. W. 763, is still less in point. That was a burglary case. The evidence showed that one Schroeder, whose house was burglarized, had just left the room and closed the door, and that two or three minutes after this he went downstairs, and his wife went upstairs to their room, and he heard her scream; that when his wife reached the room she saw defendant in there. Here the fact that the door was closed is shown by positive testimony. The fact that the appellant entered the room and was in the room is shown by positive testimony. Appellant admitted being in the room, though he says the door was partly open, and gave the explanation that he was looking for a closet. There is no discussion in this case, further than a remark that the court did not believe the evidence was circumstantial as to the breaking, and hence it followed that the court did not err in refusing to charge on circumstantial evidence.

The case of Polk v. State, 35 Tex. Cr. R. 495, 34 S. W. 683, which is discussed at some length in the opinion on motion for rehearing, is perhaps least of all the cases cited in point. There it unqualifiedly appears that the guilt of appellant was shown by positive testimony. Let us examine that case. Judge Hurt, speaking for the court, in the course of his opinion says: "There was positive evidence of the parties participating in the main act, the killing; and, if not, the facts were in such close juxtaposition as rendered such charge unnecessary." In the dying declarations of Rufus Jamison, the deceased, among other things, he says: "Mack Hughes was the one that shot me. I know this. There were several pistol shots fired. I don't remember how many, though; but all the boys were shooting. At the time of the shooting, it looked as if Austin, Mack, and

the parties in same were animatively disclosed by positive testimony, and this fact is expressly recognized by Judge Hurt, who was not likely to be mistaken in his opinion.

Nor is the case of Adams v. State, 34 Tex. Cr. R. 470, 31 S. W. 372, in point. That was a case of horse theft. The facts in the case, as briefly stated in the opinion, are that appellant was "seen by the witness Lowe on the day of the alleged theft, just outside of said pasture, near a road which led along the fence; and the defendant was just ahead of the colt, which seemed to be following him. He told said witness, as he passed him, that the colt had just jumped out of the pasture, and that he was following him, and that he was going to drive him back. At some distance further on, in the same road, which led along the pasture fence, he was met by the witness Counts, and was then driving said colt along the road. Defendant offered to sell the said colt to the witness Counts. He told him that the colt had the distemper, and that he had been riding him, and he was afraid it would not hold out to make the trip he was on." This is positive evidence, first, that when first seen appellant disclaimed any knowledge of the animal, and when seen a very short time thereafter he was driving the colt and set up a claim of ownership to it. No more positive testimony of a taking could well be imagined. It was not necessary, in order to make the evidence of the taking positive, that any one should have actually seen him put his good right hand on the horse's mane and put a rope around him; but the facts are shown by positive testimony that the property did not belong to him, that when first seen he recognized this fact and stated he was going to drive the colt back, and that at some distance further on in the same road he was met by another witness, who saw him driving the animal and heard him in person set up a claim of ownership to the colt. There is no discussion by Judge Hurt in this case, but he disposes of the claim and contention that the court erred in not charging on circumstantial evidence in this language: "If said colt had jumped out of the pasture, as stated by appellant, said witness Lowe saw him at or about the time he was in the act of taking possession of the colt, and the witness Counts met him in a very short time thereafter. But if it be conceded that no witness saw him in the very act of taking possession of said colt, yet the testimony places defendant in juxtaposition to the main fact, which is the act of taking in this case, so that the omission to give the charge on circumstantial evidence was not calculated to injure defendant's rights."

The next case referred to, Baldwin v. State, 31 Tex. Cr. R. 589, 21 S. W. 679, is

at all, is not of sufficient importance to require a reversal. The missing hogs were tracked a short distance from the place at which they were taken, and discovered in the possession of defendant and his brother, who were driving them, and who drove them on home and butchered them. While no witness saw defendant actually take possession of the hogs, yet the criminative circumstances are in such 'juxtaposition to the main fact' that the omission to give the charge was not calculated to injure defendant's rights."

The next case referred to, *Crews v. State*, 34 Tex. Cr. R. 533, 31 S. W. 373, was a case of positive testimony. That was a case of murder, and is well briefed by both counsel for the state and defendant, and seems to have received more than usual attention both by counsel and the court. Judge Henderson in that case says: "While it is true in this case that no witnesses testify that they saw the act of killing, yet the facts and circumstances of this case are of a character to place defendant in such proximity and juxtaposition to the fact of killing as to render such a charge unnecessary, and, besides, the statements of deceased and Mrs. Crews were in the nature of positive evidence." The whole facts, taken together, show beyond the shadow of a doubt that the evidence was positive and true, as the following statement will show: "The little boy in the house heard his mother, just before she received her death wound, cry out to Crews not to shoot, and the father, as soon as they went to him, as a part of the *res gestæ*, when asked who did it, said that it was Crews, and that he robbed him, and rode off on his horse Joe; and he was seen a short time thereafter, near the scene of the homicide, riding the deceased's horse, with his gun." So that here is the spontaneous cry of a little child, testifying to the declaration of his mother, in her extremity and just before she received her death wound, crying out to Crews not to shoot, and the father, who was also killed at the time, spontaneously stating as part of the *res gestæ* that it was Crews who did the killing. There can be no doubt that this was a case of positive testimony.

Nor is the case of *Bennett v. State*, 32 Tex. Cr. R. 216, 22 S. W. 684, in point. That, also, was a case of positive evidence. Let us examine the record. The opinion is quite brief, nor are the facts given at any length; but in paragraph 3 of the opinion, written by Judge Simkins, this statement was made: "The court did not err in failing to tell the jury that this was a case wholly of circumstantial evidence. The evidence was direct and positive as to appellant's guilt, as testified to by an eyewitness, and, if the shooting was not seen, the facts were in such close

wrote the opinion in that case, among other things, states: "The evidence in this case is not wholly circumstantial in a legal sense. The presence of the defendant at the scene of the theft, and his active confederation with the actual thief, were established by evidence of a positive nature. The rule as to circumstantial evidence has not yet been extended to a case of that character."

These are all the cases cited in the majority opinion, except the case of *Beason v. State*, 43 Tex. Cr. R. 442, 67 S. W. 96, 69 L. R. A. 193. With the reasoning of that case, nor as to its conclusion, we have no complaint to make, nor do we differ from it in any respect. The opinion in the case is written by Judge Brooks, and contains intrinsic evidence of the most careful consideration, and is in clear accord, as I believe, with my views, and if the doctrine applied in that case is to obtain here, under my view, this case should be reversed. The following lengthy quotation from the opinion in that case is a better statement of my views than I could myself write: "It has been held that a charge on circumstantial evidence is necessary only when the case rests 'solely' and 'alone' upon circumstantial evidence. * * * The word 'solely' or 'alone' has been repeatedly construed in this state by every court of last resort, and the decisions of this state have been followed with approval by the courts of other jurisdictions. The rule is this: That it is only necessary where the main fact, or, as one case puts it, 'where the gravamen of the offense,' or, as another case has it, 'where the act of the crime,' rests solely upon circumstantial evidence, that then it becomes a case known as a case of circumstantial evidence, requiring a charge upon that. In the *Buntain Case*, 15 Tex. App. 515, Judge White used the following language: 'If a court were required to charge the law of circumstantial evidence in all cases where reliance was had upon circumstances to establish any particular fact, then, indeed, there would be but few, if any, cases in which such a charge would not be required; but such is not the rule. A charge upon circumstantial evidence is only required where the evidence of the main facts essential to guilt is purely and entirely circumstantial.' In the *Hanks Case*, 56 S. W. 922 (opinion rendered by this court), in reference to whether or not positive evidence of uttering a forged instrument, where the indictment was for the forgery, was sufficiently direct to lift the case out of the real or circumstantial evidence, the following language was used: 'We are aware of the rule, and we adhere to the same, that when the main fact constituting the gravamen of the offense is proved by direct testimony, and the intent merely with which the act was

case the discussion of the principles applied to burglary is involved. At the risk of being prolix, but in order that the same may be made clear, we quote copiously from that case: "Mr. Starkie, in his work on Evidence (section 862), says: 'The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstances being, in the abstract, insufficient, unless they exclude every other supposition, it is essential to inquire with the most scrupulous attention what other hypotheses there may be which may agree wholly or partially with the facts in evidence.' The court in Beavers' Case said: 'We can conceive of no hypothesis by which, in the order of natural causes and effects, the facts proved can be explained consistently with the innocence of the prisoner; and this is the true test of circumstantial evidence. It excludes all reasonable doubt of the prisoner's guilt.'" 58 Ind. 531, 537. But this principle applies only to proof of the act, and not to proof of the intent. Accordingly, in a case of burglary, an instruction which contained the following sentence was properly refused: "Where a criminal intent is to be established by circumstantial evidence, the proof ought to be not only consistent with the defendant's guilt, but it must be wholly inconsistent with any other rational conclusion than that of the defendant's guilt." The court said: "This rule is proper when the act which is claimed to be criminal is sought to be established by circumstantial testimony. But when the act is proved by direct testimony, and all that remains to be found is the intent which accompanied the act, and which may be inferred from the circumstances accompanying the act, then this principle does not apply." In the reversal of this case upon its former appeal this court said: 'Now, while it is true a confession to the burglary would take the case out of the rule, yet a confession to theft alone, under the circumstances of this case, would not make the charge of burglary a case of positive evidence. The possession of the corn recently after it is stolen would only be a circumstance pointing to the burglary, for the corn may have been stolen, and yet no burglary have been committed.' See Wooldrige v. State, 13 Tex. App. 443, 44 Am. Rep. 701; State v. Calder, 23 Mont. 504, 59 Pac. 909; Leeper v. State, 29 Tex. App. 154, 15 S. W. 411. Therefore it is clear that, where the act constituting the main essential fact of a crime is testified to by direct evidence, it is not a case of circumstantial evidence. But where the main fact, or the act constituting the crime, is shown by indirection, it is a case of circumstantial evidence, although the intent may rest upon positive proof. What is the main fact, or the act of a crime,

robbery, rape, murder, or any other felony. The main essential fact of burglary is the breaking and entering of the house. The commission of the crime intended when the house was entered need not be executed, and yet the crime is complete. Martin v. State, 1 Tex. App. 525. In this case, both upon this trial and upon the former appeal, no human eye saw, nor did a human lip testify to, the actual breaking of the house alleged to have been burglarized. That it was broken and entered depends solely upon inferences and deductions. It was arrived at by the method of exclusion. True, appellant pleaded guilty to the theft of the corn; but what was the effect of his plea? It was merely an admission of all the facts alleged in the complaint and information charging theft. 'A plea of guilty,' says Mr. Bishop, 'is a recognition of whatever is well alleged in the indictment.' Crow v. State, 6 Tex. 334; Doans v. State, 36 Tex. Cr. R. 468, 87 S. W. 751."

The facts of the case last cited are more fully set out in the opinion on the first appeal, which will be found in Beason v. State (Tex. Cr. App.) 63 S. W. 633. The syllabus in that case briefly states the facts, which, as I believe, are much stronger than the facts of this case. This syllabus is as follows: "Where, in a prosecution for burglary, there was no positive evidence as to the entry by breaking, the fact that the defendant had pleaded guilty to theft committed in the alleged burglary, and stated that he would turn state's evidence against his codefendants, and that he knew enough on them to send them to the penitentiary, did not amount to a confession of the burglary, and it was error to refuse a charge upon circumstantial evidence." It was also shown in that case that the property taken from the burglarized house was soon thereafter found in the possession of Beason, and it is stated, as a reason why the charge on circumstantial evidence should have been given, that the fastenings were of a flimsy character, and evidently such as might be blown open by the wind, or, the house being an outhouse, some person might in the meantime have pushed some of the doors open and so left them, and because the state's evidence showed that after 12 o'clock on the night in question one of the doors was open.

These are the cases, and all the cases, cited in the majority opinion, and we submit that it will appear by reference to the brief résumé of each case, and more clearly by an inspection of the original opinion, that none of them are cases of circumstantial evidence, except the case of Beason v. State, supra, which was twice reversed because the court did not give a charge on circumstantial evidence. The opinion of the court, too, as we

conceive, overlooks this distinction. In the cases where it is said there was such juxtaposition in respect to the offense charged as to relieve the court of the necessity of a charge on circumstantial evidence, the nearness of the defendant was shown both in respect to the place of the homicide as well as the time at which the offense was committed. Here the body of the deceased and his death was not discovered for many hours—six or seven at least—after the firing of the fatal shot as testified to by the witnesses. It is not shown, except as an inference, that the deceased was in the room when the shot was fired. It is shown that he was in his room a short time before the firing of the shot, and it is shown that his dead body was lying on his couch many hours thereafter. It is not shown that the persons who fired the shot in the window knew the exact spot where he slept, or could see his body, or knew they had killed him. While the circumstances may point, as I believe they do, very strongly to the fact that he was shot through the window on the east side of the house, after all, strong as the evidence is, it cannot be denied, I think, that it was circumstantial. It is not the weakness or strength of the testimony which required the court to give a charge on circumstantial evidence. It is the character of the testimony, and not its quantum; and whether in any given case the evidence is weak or strong does not in any sense change the rule. This is abundantly demonstrated and sustained by all of the authorities. It will be unnecessary to quote many of them. We shall make liberal extracts from a few of the cases, so as to illustrate our views and support our position.

Among the earliest cases is that of *Puryear v. State*, 28 Tex. App. 78. In that case our Brother Brooks had the honor to be counsel. The testimony of the state rested largely upon the evidence of Essie Puryear. After stating that the appellant was the father of the child, and that no one was present or lived in the house except Puryear, she then states: "On the morning of the 13th day of March, A. D. 1888, I gave birth to a child. It was near daylight, and no one was present but defendant. I told him, before the birth of the child, that I couldn't stand it by myself; but he said I could stand it without some one, as well as with them. While I was giving birth to the child, the defendant pressed on my knees, and he delivered the child. There were three rooms to my house; one room being upstairs, and two downstairs. The child was born downstairs in the front room. After he delivered the child, he went to the fireplace to get a string to tie the cord. The baby cried, and I called the defendant to come and tie the cord. He then came and took the child upon his left arm, and took it out of the room into the side room, and I heard him pouring water on something, and then he came back into my room, and I asked him where the child was, and he said he had

it 'out there all right.' I asked him where, and he replied, 'Out there in the water.' The defendant then made up a fire, went into the side room, and returned with the child between some wood. I saw it, and asked him what he was going to do with it, and he said he would burn it. He then put the wood and baby into the fire, and I said, 'Oh, John, don't do that.' The child did not make any noise, and had made none since he had carried it out of the room. I had heard him pouring the water out in the side room after he took the child out there. When defendant threw the child and wood in the fire, and I said, 'Oh, John, don't do that,' he did not make any reply, but turned towards me and smiled. I was flooding at the time, was very weak, and said nothing else about the child at the time. After a little I told defendant to get me some water—that I was flooding. He kept a large fire all day, and kept the door shut and the window curtains down. It was a warm morning, and defendant was in his shirt sleeves. His shirt was patched at the elbow. The shirt was originally blue, but had faded until you could not tell its color. He kept this shirt on until Sunday morning, when he pulled it off. He got some blood on the left sleeve of his shirt close to the wrist." Here was juxtaposition, presence, participation, everything, except that the witness was in one room and the child was in the other at the time of the murder, but a moment intervening. It lacked nothing of being positive evidence, except to see the bloody murder with her own eyes, and yet in that case it was held that a charge on circumstantial evidence should have been given. In the course of the opinion Judge Hurt uses this language: "It will be readily perceived that, if killed at all, the child must have been drowned or burned to death; the circumstances tending strongly to show that its death, if it was killed, was caused by drowning. If drowned, we have a case resting purely upon circumstantial evidence. If burned to death, we have a case of positive evidence; assuming that the child was living when placed on the fire. If it was not living when placed on the fire, then the theory that it was burned to death is not in the case, except as the fact that the body was thus disposed of may tend to show express malice, assuming that defendant had murdered the child by drowning it. Back, then, to the question as to the methods by which the child was killed. If drowned, then a case of circumstantial evidence. The facts demonstrate this proposition. Being a case of circumstantial evidence, the rules applicable to such a case should have been given in charge to the jury. This was not done, though such instructions were prepared and requested to be given by counsel for defendant. This was error, unless it is absolutely certain that the child was burned to death. Was this the case? By no means, for the proof tends more strongly to show that it was drowned. Essie

Puryear does not state that the child was living when placed on the fire. If the child was living when placed on the fire, this fact is established by circumstances; and hence we have a case of circumstantial evidence upon either theory relied upon by the state. But let us concede, for the argument, that the circumstances—the facts—were in such juxtaposition that they amount to positive proof that the child was burned to death, still the theory that it was drowned might have been adopted by the jury, and the defendant convicted upon that theory, without proper instructions upon the rule applicable to a case depending upon circumstantial evidence." This case has been frequently referred to with approval, and was in express terms approved in the case of *Leftwich v. State*, 34 Tex. Cr. R. 490, 31 S. W. 385.

Another case illustrating the same view is that of *Trijo v. State*, 45 Tex. Cr. R. 127, 74 S. W. 546. To insure accuracy we quote from the statement contained in the opinion the substance of the criminating testimony. It is as follows: "Celestina Aguillar states that she knew defendant and deceased; that defendant came to her house about 2 o'clock on the morning deceased was killed, and asked her to open the door, which she refused. He then forced his way into the house, grabbed, and tried to slap witness, and for a little while was striking at witness. She caught him, and held him, and heard two or three persons approaching the house. Deceased came to the door, knocked, and said, 'Celestina, Celestina,' and defendant did not want witness to answer, and was angry. She told him that her mouth was her own, and that she would answer. Deceased opened the door, came in, and asked for a drink of mescal. Defendant raised the mosquito bar and stood up. She informed deceased she had no mescal, and defendant told deceased to get out of the room in an angry voice; and deceased kept asking for mescal. Defendant then went to the door, stood, and said to deceased, 'You stay with the whore; she has her customers that visit her at midnight;' and then took his departure. Deceased remained in the room, asking for a drink. Witness begged him to leave, informing him that defendant was a very bad man; that she knew him well, and that he would return and do some injury. Deceased went to the door, and told some one outside to go away, and that he was going to stay; and witness entreated deceased to leave also. Finally deceased concluded to leave, and went out of the door. Witness immediately shut and tied the door with a rope, which defendant had cut. She was very sleepy, having been up two nights without sleep, and had come in on the train from Mexico, and immediately threw herself on the bed and went to sleep. She was aroused by a pistol shot near the window, where her bed was situated. She got up from the bed, and saw defendant at the win-

dow. He remarked to her, 'Hist, Celestina; be careful not to say that I did it.' Smoke was coming in through the shutters of the window. She did not see any arms about defendant. He had changed his coat since he had left her house and before the shooting. Upon his making the remark to her, he went away. Witness aroused her daughter, who began blowing the police whistle. After blowing the police whistle, witness De La Rose and Rodriguez came to the house and asked what had happened, and witness informed them that defendant had fired a shot." Here there was motive, jealousy, anger, a pistol shot, the smoke of a pistol in the presence of the defendant, and a dead man, with but slight suggestion that the murder could have been committed by anybody else, and putting Trijo in close juxtaposition to the murder, both with respect to time and place, with the strongest possible evidence of motive. Yet the witness did not in fact see the shot fired and the man killed. It lacked only this of making the testimony positive, and not circumstantial. On this question our present Presiding Judge uses this language: "It is also seriously contended that the case was one of circumstantial evidence, and exception is reserved because the court did not charge the law applicable to this character of case. Where an issue in a case is left in doubt by the evidence, that doubt should always be solved in favor of the accused. If the presumption of innocence and reasonable doubt mean anything, it is of a peculiar force at this particular point. The facts should never be resolved in favor of guilt or against reasonable doubt by the trial court in submitting a charge upon the law. While it is true that the circumstances may be so close and cogent, throwing the accused in such juxtaposition with the main fact that it may not require a charge upon circumstantial evidence, yet, when the facts are in doubt upon this theory, it is the safer and sounder rule to charge in regard to circumstantial evidence. In order to justify the trial court in not charging upon this phase of the law, it must be taken as certain, first, that the witness Aguillar testified truthfully, and, growing out of that, secondly, that appellant was at the window as testified by her, and, thirdly, that his remark to her was a confession to the killing. While these conclusions of the court may or may not be proper deductions from the testimony, still we do not believe it of sufficient cogency to exempt it from the rules of circumstantial evidence, or bring it within the rules of positive evidence to the exclusion of the law of circumstantial evidence. Upon another trial the court should give this phase of the law." If the doctrine is correct, as is stated, that the facts should never be resolved in favor of guilt or against reasonable doubt by the trial court in submitting a charge upon the law, on what theory or by

what reasoning appellant was denied a charge on circumstantial evidence in this case is not apparent.

Again, take the case of *Guerrero v. State*, 46 Tex. Cr. R. 445, 80 S. W. 1001. The facts in that case and the opinion in respect to them are thus stated by Judge Davidson: "A serious question in the case is the omission of the court to charge the law applicable to circumstantial evidence. Witness Will McCombs, nephew of the alleged owner, testified that while riding in the Irvine pasture he heard four shots, and after a short interval of time another. After hearing the five shots, he hitched his horse, and walked half a mile to near where he heard the shots. He came in sight of defendant hanging up a pig in the fork of a mesquite bush some 2½ or 3 feet high. Witness hid in the brush. After hanging the hog up, defendant went in the direction of witness, and when within about 50 yards worked the lever of his gun several times. He did not stoop down or pick up anything from the ground. He then passed within about 30 steps of witness, and went in the direction of his home. Witness examined the pig and recognized it as his uncle's. The pig weighed about 30 pounds. He informed his uncle of these matters, and they returned to the Irvine pasture, where, the alleged owner testified, he found the hog hanging in the fork of the mesquite bush. It was dead, and was killed by a gunshot. From this point they trailed a track. The sheriff arrested appellant the following day, and en route to jail carried him to the point designated by the witness McCombs, and there fitted the shoe appellant was wearing in the track found upon the ground, which corresponded exactly. How long it was between the cessation of the four shots, as mentioned by witness Will McCombs, and the firing of the fifth shot, or how long after the firing of the fifth shot before he hitched his horse and went in the direction of where he heard the shots, is left to conjecture. The distance is stated to be about one-half mile. Coming in sight of appellant, witness stopped, and recognized him as being the man he saw hanging the hog in the mesquite bush. It is further shown that the hog was shot, and that appellant had a Winchester with him. There is unquestioned evidence, also, that there was a Mexican at appellant's residence, who wore a shoe corresponding exactly with that worn by appellant. This evidence is from the state's witnesses. It is contended by appellant that this case depends purely on circumstantial evidence, and required the court to submit that phase of the law. The state contends that the facts placed appellant in such close proximity and juxtaposition that the court was justified in not charging this phase of the law. There are some authorities in this state which sustain the state's contention. But we are of opinion that the facts of these cases place the relation of the

accused more nearly to the immediate act relied upon by the state than does the testimony in this record. While the fact that appellant was seen hanging the hog in a bush, and that he had a gun, and that the hog was shot, might be cogent circumstances tending to prove his guilt, yet it is a deduction and must be an inference from these facts that would justify the jury in concluding he shot the pig. We are therefore of opinion that the facts were not of sufficient cogency in their nearness and proximity to the immediate transaction to relieve the court of the duty of charging the law of circumstantial evidence."

Especially noticeable is the following language in this opinion: "While the fact that appellant was seen hanging the hog in a bush, and that he had a gun, and that the hog was shot, might be cogent circumstances tending to prove his guilt, yet it is a deduction and must be an inference from these facts that would justify the jury in concluding he shot the pig." On the general proposition that the whole case here, and this without reference to who fired the fatal shot, makes it a case of circumstantial evidence under the authorities, could be demonstrated, as I believe, by the citation of innumerable authorities; but the language and facts of the cases cited above would seem to be sufficient to support the correctness of my opinion. But there is even stronger ground upon which the court was required to submit a charge on circumstantial evidence, and that rests on this theory: In this case there is no pretense, or claim, or hint of any statement that appellant, and not Sandoval, fired the shot which killed Judge Welch, if they did kill him. The statement is that one of them fired a shot through the east window of his residence. Which one? Can the court say? Should not the jury be left free to determine this fact under the evidence? If it be true, as our learned Presiding Judge says, that our whole criminal jurisprudence rests and must be construed with reference to the presumption of innocence and the doctrine of reasonable doubt, should it not rather be assumed that Sandoval fired the shot, in submitting the law of the case? Was appellant not entitled to a submission with reference to the presumption in his favor, and not on an assumption conclusively assuming the worse state of affairs against him? Is it not evident that, in a case where it is absolutely in doubt which of two parties fired the shot, the case is no stronger against appellant than if the positive testimony had showed that Sandoval did the shooting? Or, if this much cannot be conceded, is it not evident in any event that, in submitting the law of the case, appellant was entitled to a charge based on the theory most favorable to him and which would authorize the jury, in the event they found this theory to be true, to apply the undoubt-

charged. Ordinarily, in determining whether a case is one of circumstantial evidence, it has been found that it was only one person charged, and but one of the elements suggested above entered into the question. Ordinarily the only question is: Was the shot the cause of the death, and appellant's connection with the shot shown by positive testimony, and was he the person shown to have been guilty of a criminal act? In this case, both the questions occur. In the first place, in addition to the question that, whoever fired the shot, the facts showing the killing are not positive, but if appellant did not actually fire the shot, his complicity rests alone on circumstantial evidence. Let us assume that the jury might have found that Sandoval fired the shot. Then how is appellant's guilt shown? There is no suggestion in the testimony of these Mexicans that one word was spoken by these parties; that the person who did not fire the shot raised his hand, or his voice, or did one act, or made any possible demonstration. If appellant did not fire the shot, then his guilt rests upon these circumstances: That he belonged to a political party adverse to the deceased; that he was seen in the hostile camp with Sandoval about 11 o'clock; that he was twice seen at the house of Cayetano Pena late that night; that he was traced to the window of the deceased, and was later seen by Gonzales walking along the public street—with such additional force as the jury might lend to the circumstance of his open departure for Mexico six months after the tragedy. It is not to be denied that these circumstances are indeed strong, if the testimony of Cayetano Pena and his wife is to be believed. But that the testimony is circumstantial is to my mind so demonstrably clear as to not admit of doubt.

On this question, fortunately, we are not without the benefit of the learning of many courts, and especially decisions by this court, so clear and so conclusive as that no man ought to be able to err. Among the controlling cases, and the most recent one, is that of *Early v. State*, 50 Tex. Cr. R. 344, 97 S. W. 83, in which the opinion was written by our Brother Brooks. In that case Jack Early and Harmie Horn were indicted for the murder of one Terrell Calloway. I want to contrast, and put, as it were, in parallel columns, the facts of the two cases. In that case Horn and Early were close friends. In this case appellant and Sandoval were strangers. In that case Early and Horn were together, not only on the night of the homicide, but were together from early in the afternoon. In that case threats were shown by Early against Calloway. In this case not a word was spoken hostile to the

on the ground where the fatal difficulty occurred. In this case the same fact was proved. In that case there was an immediate flight. In this case appellant stayed for six months near the scene of the homicide, and when he did leave there was no secret of his going. Not only this, but the witnesses say in the *Early Case* that two men were seen near where Calloway lay. Let us quote the record: "Nelson had retired and gone to sleep, and was aroused by a noise on the outside. The first thing he heard was some one saying: 'That will do. Let him up.' He then looked out of his window, and saw the bulk of men out some distance from the office, one standing up and another in a low position. The man standing up was moving about a little, and he could tell that it was a man. The other object, in the low position, he could not tell whether it was one or two men at that time." The evidence in this case showed, as the record puts it, that Calloway had been literally cut to pieces. The evidence in respect to the weapons was as follows: "Appellant and Horn were each shown to have owned a large springback knife, with blades three or four inches long." Again, we find the following statement fixing Early undoubtedly on the scene: "Appellant was shown to have worn on the night of the difficulty a hat with a yellow leather hatband." The evidence further shows that the struggle extended over a space of ground 20 or 25 feet in length and from 4 to 8 feet wide, and, further, that the leather hatband of appellant was found upon the ground where the evidence of the struggle was shown. This further statement appears in the record: "The feeling of appellant toward deceased was one of malice, bitterness, and hatred." This statement also appears: "On the very night of the difficulty, while appellant and Harmie Horn were at the depot, waiting to take the train for Axtell, they had a conversation with John Stirman, in which conversation appellant used this language: 'We don't like Calloway. He has not treated us right.'" The evidence in that case further shows that at the time of the difficulty Horn was in an advanced state of intoxication, and raises some presumption that his condition was such as to render it unlikely that he had inflicted all the injuries found on Calloway's body. In that case it was urged that the court should have charged on the law of circumstantial evidence, and in passing on this assignment Judge Brooks says: "The evidence for the state shows appellant was at the scene of the homicide. This is made manifest by circumstantial evidence, as well as by appellant's confession. But there is no positive testimony of any guilty participancy by appellant in the homi-

cide. Appellant expressly disclaims any participancy, and the fact that he assisted in the commission of the crime, if established, is by circumstantial evidence alone. This being true, it was the duty of the court to charge the law of circumstantial evidence. *Jones v. State*, 34 Tex. Cr. R. 491, 30 S. W. 1059, 31 S. W. 664; *Puryear v. State*, 28 Tex. App. 73, 11 S. W. 929; *Riley v. State*, 20 Tex. App. 105; *Trijo v. State*, 45 Tex. Cr. R. 127, 74 S. W. 546; *Beason v. State*, 43 Tex. Cr. App. 442, 67 S. W. 98, 69 L. R. A. 193; *Crowell v. State*, 24 Tex. App. 404, 6 S. W. 318."

It will be noticed that the opinion contains the expression that "appellant expressly disclaims any participancy" in the difficulty; but it is manifest that this disclaimer could have no effect on the issue in question as to whether the law of circumstantial evidence should have been given in charge. Where the state's evidence is circumstantial, unless the killing is admitted by a defendant, the court must charge the law in respect to circumstantial evidence. How can it be contended that the disclaimer of appellant or the character of his testimony can change the law, unless, indeed, he admits the killing, when he may not and is not required to testify at all? The test must be with reference to the incriminating circumstance, and if the evidence of the state is circumstantial, and the appellant produces no testimony, the law of circumstantial evidence must be given in charge. His plea of not guilty is a denial of everything, and is in itself a disclaimer as complete and perfect, as testing the character of charge to which he is entitled, as if he had gone on the witness stand and in terms denied the killing. A careful review of the *Early Case*, supra, has convinced me that it is a more direct case of positive testimony than the case at bar; and how it can be held that the *Early Case* must be reversed on account of the failure of the court to charge on circumstantial evidence, and yet in the *Cabrera Case* held that a charge on circumstantial evidence is not required to be given and is a case to be affirmed, is something that I confess with, I hope, becoming humility, and certainly in all candor, that I do not understand. If in the realm of mind and morals a theodolite could be constructed with needle as fine as the spider's most attenuated thread, no finite mind can draw a possible distinction between the two cases to the disadvantage of the appellant here. The holding of the court in the *Early Case* was not new. Judge Brooks was but following the decisions of this court and our Supreme Court from the time when both he and I were infants in arms, and as authority for his action refers to and reaffirms the *Puryear case*, supra. It is the universal rule that where, on a trial for homicide, the evidence of the accused's presence at the scene of the crime was, aside from such

presence, circumstantial, and his participation in the crime was established by circumstantial evidence alone, the refusal to charge on circumstantial evidence is erroneous.

Among the early cases on this question is that of *Burrell v. State*, 18 Tex. 713. That opinion, concurred in by the surviving members of our old court, John Hemphill and Royall T. Wheeler, who with Judge Lipscomb, were the *Dii Majores* of our judiciary, judges worthy to rank with Mansfield, Hardwicke, and Holt of England, and with Marshall, Cooley, and Sharkey of our own country, a court that has added luster to our civilization, and whose decisions have been the inspiration, as they have been the foundation, of most that is good in the annals that have followed them. If we might imagine the time when Macaulay's traveler from New Zealand should stand on London Bridge and view the ruins of St. Paul, the virtues, as the performances, of these men will stand in vigor, unabated and in glory unobscured. The opinion in this case by Judge Wheeler is the same doctrine and the same rule contended for by Judge Brooks in the *Puryear Case*, and later laid down by him in the *Early Case*. What are the facts? James Burrell and James R. Burns were jointly indicted. The evidence shows, in brief, that these parties came to the house of Elizabeth Ewell, in San Felipe, on the day of the homicide, and were served with dinner; that while at this house Bird, the deceased, came in, and some conversation ensued in which Burns asked Bird if he was about to travel, to which he replied that he was, and then asked him which way he was going, and Bird replied, "Up the county towards La Grange," and Burns said, "We are going that route," and invited Bird to go with them, and suggested that they travel together, which seemed to be agreeable. It seems about 3 o'clock the next morning Bird was brought back to her house wounded, and made to Mrs. Ewell a dying declaration, from which we quote the following: "On the Saturday following, she asked Bird who shot him. He said James Burrell shot him, and then said, 'Come close to me, and I will tell you all about it.' He said: 'We had no quarrel. He (Bird) was riding behind. They said, 'Ride up, Bird; don't be afraid.' He rode up. One said, 'Are you armed?' 'No; I never pack arms.' One said, 'Defend yourself,' and as he turned his head Burrell shot him (about seven miles above San Felipe, near the cross timber in Austin county)." Bird died about the 15th of August, 1854. On the Thursday that Bird was so happy, he asked them if they would not believe what a dying man would say. Bird said he told the men he was traveling with his name, and they told him their names. The names they gave were James Burrell and James Burns. Bird said, when he was shot, he wheeled his horse, and ran towards San Felipe, and fell off his horse. He said

just arrived. I know Bird said James Burrell shot him." It appears by the testimony of other witnesses that Bird made use of the following language: "I shall die, and two men riding with me shot me." Again, the following appears from the testimony of Woodson F. Washam: "Bird was sensible; knew me; said he thought he should die; said Burrell and Burns shot him." The last two expressions, to the effect that Bird had declared that the two men had shot him, in the light of the opinion of the court, must have been construed as to be a mere opinion or conclusion of the witness, and that his statement to Elizabeth Ewell that James Burrell shot him was the correct statement of the actual transaction. Burrell and Burns traveled together, and were found together after the homicide. Now, here we have the fact of Burrell and Burns being together, when Bird appears. Deceased (Bird) travels with them at Burns' request. Burns is present when the shot is fired and the man is killed. Burns continues with Burrell after the homicide, and is found with him more than once thereafter. His presence at the time of the homicide is shown. That Bird was with them when he was killed, at Burns' invitation, is abundantly established by positive testimony. Both Burrell and Burns were tried together. They were both convicted. As to Burns an instruction on the law of circumstantial evidence was requested and refused. The judgment of conviction as to Burrell was affirmed, and that as to Burns was reversed, for the reason that the court did not give, as it should have given, a charge on the law of circumstantial evidence. The opinion of Judge Wheeler in that case is so clear and convincing on this question that we insert it entire:

"But it is not so clear that there is not error both in the refusal of instructions and in the charge of the court in reference to the case of the defendant Burns. If he be guilty, it is as a principal in the second degree, being present, aiding and abetting the commission of the homicide. To constitute the crime of which the evidence tends to convict him, there must have been a participation on his part in the act. If he was cognizant of the intention of his codefendant, and, being present, was consenting, and it was but the carrying out of a common design, he is guilty equally with him who committed the deed; and upon this subject the general principle is correctly stated in the charge of the court. But, in order to implicate him in the crime, he must have been aware of the intention of his companion to commit it. His bare presence is not sufficient. For, although a man be present whilst a felony is committed, if he take no part in it, and do

Roscoe, Cr. Ev. 213; Whart. Am. Cr. L. 6364; Whart. L. Homicide, 157. Whether he was aware of the intention of his companion and participated in it was the fact to be proved, in order to implicate him in the criminality of the act. That as to him, was the *factum probandum*, upon the proof of which his conviction must rest; and as to that the evidence was wholly circumstantial. There was no positive proof that he was aware of the intention of his companion, or that he committed any overt act at the time, manifesting a criminal intention on his part. His presence was not, of itself, sufficient to inculcate him. It was not, *per se*, evidence of guilt, or of any force as proof, only as considered with other circumstances conducing to prove his guilt. It was not the main fact to be proved; for, of itself, it did not imply any criminality. But his presence and companionship, and his conduct at and before and after the commission of the act, were circumstances from which the main fact of his participation in the criminal intention and design of his companion was to be inferred. It is plain, therefore, that as to his guilt the evidence was wholly circumstantial. Although joined with the other defendant upon the trial, he was entitled to a distinct consideration of the evidence in his case, and to have the law applicable to it given in charge to the jury. All the instructions asked respecting the legal tests of the sufficiency of circumstantial evidence to warrant a conviction were refused; and the charge of the court did not affirm in any distinct proposition, or embrace in substance, the instructions refused, or inform the jury what is the proper test of the sufficiency of such evidence. The fifth and twelfth instructions were rightly refused; the former, because not correct in the abstract, and the latter, because of the assumption which it contains that there was no evidence in the case tending to show that Burns was privy to the intention of Burrell. The first and second, though not liable to the same objections, and though expressed in the language of a learned and philosophical elementary treatise, were not well adapted to the comprehension of a jury; and we do not hold that it was error to refuse them, in the form in which they were propounded. Mr. Starkie and other elementary writers have undertaken to define, and doubtless have defined, with all the precision and accuracy the subject is susceptible of, the tests of the legal sufficiency of circumstantial evidence. But it is finally admitted that the circumstances which will amount to sufficient proof of a disputed fact can never be previously defined. In their nature they can never be matter of general definition. The only legal test of which they are susceptible is their

plaintiff appeals. Reversed. Motion for rehearing overruled.

Charles Crenshaw and Wilkins & Vinson, for appellant. Cecil Smith-Farrar & Pier-son, Freeman & Batsell, and Silas Hare, for appellees.

RAINEY, C. J. Arthur Little brought this action against W. W. Forbes, sheriff of Ellis county, and two of his deputies, Moore and Maggart, and H. S. Rich, sheriff of Grayson county, and his deputy, Biggerstaff, and the chief of police of the city of Sherman, W. H. DeSpain, for false arrest and imprisonment and malicious prosecution. Plaintiff alleges, in substance: That on November 24, 1906, a complaint for burglary was sworn to by J. M. Maggart in Ellis county and filed with a justice of the peace upon which said justice issued a warrant of arrest addressed to any sheriff or constable of Ellis county, and on same day plaintiff was arrested by Biggerstaff, deputy, and DeSpain, chief of police aforesaid, without having said warrant in their possession, or the same having been transferred to either of them, and he was incarcerated in the Grayson county jail and from there conveyed to Ellis county by W. H. Forbes and his deputy, Lee Moore, and there lodged in jail, but, having been advised that he was not the man wanted, he was soon discharged and said complaint formally dismissed. That on March 12, 1907, plaintiff was indicted by the grand jury of Ellis county for said crime of burglary at the instigation or by the procurement of W. H. Forbes, in which he was aided and abetted by some or all of the other defendants. On this indictment a capias was issued which came to the hands of W. H. Forbes, and under his direction plaintiff was again arrested and imprisoned in Grayson county jail by said H. S. Rich, and was by him delivered to said Forbes or one of his deputies, who took him to Ellis county and then imprisoned him in the jail of that county, where he remained until discharged under a writ of habeas corpus in March, 1907. Said charge was finally dismissed. That the defendants conspired together to do the things above recited, and said indictment was procured for an unlawful purpose and to further their private ends, etc. Defendants pleaded general and special exceptions, general denial, and justification under a warrant. A trial was had and the court instructed a verdict for defendants, which was accordingly returned, and a judgment rendered thereon.

The first assignment complains of the court for excluding the introduction of a letter offered as evidence by plaintiff. Said letter is as follows: "The State of Texas, County of Ellis. W. H. Forbes, Sheriff. Tom McKee, Jailer. J. M. Maggart, J. V. Forbes, Tom Morgan, Ennis, Deputies. Waxahachie, Texas, Mar. 13, 1907. H. S. Rich, Sheriff, Sherman,

Texas—Dear Sir: I herewith enclose capias for my friend, Arthur Little. Please do him the kindness to lock him up and wire me. He may rest assured that we are going to entertain him here on his little burglary charge, and when you get ready to go to trial let me know. Yours to command, W. H. Forbes, Sheriff." This letter was not written by Forbes, but by Sweatt, his office deputy. Forbes testified that Sweatt did most of his correspondence, and had authority to sign his name to letters and checks; did not ask Sweatt to write it; did not know his object in writing it; and did not know what was in it, but the capias had been sent to Grayson county under his direction. Sweatt was not a party to the suit, nor was it alleged in the petition that he was one of the conspirators or the agent of Forbes. There being no allegation of Sweatt being the agent of Forbes, or that he was one of the conspirators, or had anything to do with the arrest or prosecution, said letter was not admissible. *Lewis v. Hatton*, 86 Tex. 538, 26 S. W. 50. The principal is not responsible for the personal malice, and expressions made by the agent indicating malice in the absence of the principal are not admissible to show the motive of the principal. *Railway Co. v. Willie*, 53 Tex. 318, 37 Am. Rep. 756.

There was no controversy about the capias having been sent under Forbes' direction. This was the only point upon which the letter could have been admissible, and, there being no controversy about that, it was not reversible error for the court to exclude it.

The second assignment of error complains of the court's refusal to admit as evidence a memorandum made by witness Bolin, as shown by bill of exception as follows: "On the trial of this case W. C. Bolin, a witness for plaintiff, having testified that on the 8th day of November, 1906, he was town marshal of Stonewall, then Indian Territory, he was instructed by the town recorder of Stonewall, W. T. Heard, to issue a license to Hares & Brown to show in said town from November 8 to November 11, 1906, said recorder being sick and unable himself to issue said license; that witness issued said license at the time and made the following memoranda of the issuance: 'No. 55. \$2.50. Occupation License. To Hares & Brown for the occupation of show from 11-8 to 11-11, 1906. Amount of tax \$5.00. Issued the 8th day of November, 1906. N. T. Heard, Recorder. W. C. Bolin'—that on the night of said November 8, 1906, witness attended said show, and on the next morning, November 9, 1906, he met the plaintiff in this case, Arthur Little, with whom he was acquainted, on the street, and told him about the show, stating that it was a good show and invited plaintiff to go with him on the night of the 9th, 1906, to said show; that the plaintiff accepted the invitation and did go with him to

the show, and they sat together during the show, and when it was over left the house in which the show took place together and afterwards parted for the night, and the next morning, the 10th, 1906, he again met plaintiff on the street and they had some talk together, and among other things about the show. Said witness also testified that he made said memoranda himself, and that it is in his own handwriting, and that said memoranda is accurate, and that independent of said memoranda he could not accurately fix the date of the issuance of the license and the date that he and plaintiff attended the show together. Plaintiff then offered said memoranda in evidence, to which the defendants objected on the ground that it was immaterial, irrelevant, and hearsay, and did not tend to prove any issue in the case. The court sustained this objection and refused to allow said memoranda to be read to the jury." The statement of facts shows that Bolin testified that plaintiff was in Stonewall on the 8th, 9th, and 10th of November, 1906, and refreshed his memory from said memorandum, and there were several other witnesses who testified that plaintiff was in Stonewall at that time, showing that it was impossible for him to have committed the burglary at Midlothian, Ellis county, at the time it was alleged to have been committed. Mr. Wharton, in volume 1, § 316, Ev., states the rule to be thus: "In case the witness swears to the accuracy of the memoranda or other refreshing documents, they may go to the jury as evidence, if not per se inadmissible. It is otherwise if such accuracy is not proved. But, even if inadmissible, they may be used to refresh his memory, if he knows they were accurate when made, and were made at the time of the events noted." The memorandum contained matter that had no bearing to the issues in this case and within itself was inadmissible. The witness refreshed his memory from it, and his veracity was not attacked. *Railway v. Tuck* (rendered by this court February 6, 1906) 116 S. W. 620. Under the circumstances there was no error in not admitting the memorandum.

Complaint is made of the court's action in giving the jury a peremptory charge to find for the defendants. The evidence shows that the first arrest and imprisonment of plaintiff by the officers of Grayson county was without authority of law. The warrant issued by the justice in Ellis county was directed to the sheriff or any constable of Ellis county, which conveyed the authority to the officers in that county to make the arrest within the limits of said county. Article 259, White's Ann. Code Cr. Proc., provides that: "When a warrant of arrest is issued by a magistrate other than a judge of the Supreme Court, Court of Appeals, district or county court, it cannot be executed in another county than the one in which it issues, unless in-

dorsed by some one of said judges, in which case it can be executed anywhere in the state; or if it be indorsed by some magistrate of the county in which the accused is found it may be executed in such county." The balance of said article prescribes the form of such indorsement, etc. As none of the requisites of said article were complied with to give vitality to said warrant in Grayson county, the officers making the arrest and those who instigated it cannot defend their action by virtue of said warrant. *Sneed v. McFatrige*, 43 Tex. Civ. App. 592, 97 S. W. 113. On this phase of the case we are clearly of the opinion that the court erred in instructing a verdict for all the defendants.

We are not so clear on the proposition as to the arrest and imprisonment under the indictment. Whether or not any of the defendants participated in securing the indictment, about which the testimony is not satisfactory, being actuated by malice, and having no reasonable grounds for believing that plaintiff was guilty of the offense charged, was an issue under all the facts and circumstances that could have been appropriately submitted to the jury. The question of probable cause is fully discussed in *Landa v. Obert*, 45 Tex. 539, *McManus v. Wallis*, 52 Tex. 534, *Ramsey v. Arrott*, 64 Tex. 320, and other Texas cases, and a further discussion by us is unnecessary.

The evidence was such that the trial court should have charged the jury on the issues raised thereby, and, having failed to do so, the judgment is reversed, and the cause remanded for a new trial.

On Rehearing.

The motion for rehearing calls our attention to Acts 29th Leg. 1905, p. 385, c. 162, amending articles 258, 259, White's Ann. Code Cr. Proc., which we overlooked, and contends that under said amendment the first arrest of appellant was not unlawful. As amended, article 258 reads: "That a warrant of arrest issued by any county or district clerk or by any magistrate (except county commissioners or commissioners' courts, mayors or recorders of an incorporated city or town) shall extend to any part of the state, and any peace officer to whom said warrant is directed or into whose hands the same has been transferred, shall be authorized to execute the same in any county in this state." The balance of said amendment has reference to the serving of warrants issued by county commissioners or commissioners' courts, mayors, or recorders of incorporated cities or towns.

We do not see that the amendment in any way should cause us to change our former holding. The warrant upon which appellees base their defense for the arrest of appellant was directed to the officers of Ellis county. There was no warrant issued to Grayson county. There was none transferred to ap-

pellees, nor did they have any in their hands at the time. Their acts in making the arrest without having a warrant for the arrest of appellant in their possession is not sanctioned by the laws of this state.

The motion for rehearing is overruled.

THIGPEN et al. v. RUSSELL et ux.†

(Court of Civil Appeals of Texas. April 14, 1909. Rehearing Denied April 29, 1909.)

1. HOMESTEAD (§ 181*)—ABANDONMENT—EVIDENCE—ADMISSIBILITY.

The testimony of claimants of a homestead, from which they had removed, as to their intention to return thereto, is admissible.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 851; Dec. Dig. § 181.*]

2. HOMESTEAD (§ 162*)—ABANDONMENT—INTENTION.

The abandonment of a homestead by removal therefrom depends on whether the removal was with the fixed intention of not returning to the place as a home.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 815-819; Dec. Dig. § 162.*]

3. HOMESTEAD (§ 181*)—DECLARATIONS—ADMISSIBILITY.

Declarations of claimants of homestead as to their intention to return thereto are admissible on the question of abandonment, though they may be self-serving.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 181.*]

4. HOMESTEAD (§ 181*)—ABANDONMENT—EVIDENCE—WEIGHT AND SUFFICIENCY.

On an issue as to the abandonment of a homestead, evidence held to show that a deed of other property upon which the claimants lived was intended to give them a life interest therein.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 181.*]

5. HOMESTEAD (§ 162*)—ABANDONMENT—INTENTION.

That the claimants of a homestead received a deed of other property on which they lived does not affect the question of their abandonment of homestead, if they at all times intended not to make their home on the property when deeded to them, but to return to the former homestead.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 162.*]

6. HOMESTEAD (§ 162*)—ABANDONMENT—INTENTION.

An offer to sell a homestead was not necessarily inconsistent with the claimants' intention to return thereto and reoccupy it as a home, if they did not sell.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 162.*]

7. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS BY COURT.

An appellate court will not substitute different conclusions of fact for those of the trial court, where it cannot say that the findings have not sufficient evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Appeal from District Court, Goliad County; James C. Wilson, Judge.

Action by P. F. Thigpen and others against

A. S. Russell and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

Fowler & Fowler, for appellants. G. E. Pope and J. Gus Patton, for appellees.

REESE, J. In this case appellants, heirs at law of John Thigpen, deceased, seek to have partitioned between themselves a tract of 200 acres of land, the homestead of said John Thigpen during his lifetime and at the time of his death. The defendants are Mrs. S. A. Russell, the widow of said Thigpen, and A. S. Russell, her husband. After the death of Thigpen, as the result of partition proceedings between his heirs and his widow, the 200 acres in controversy, which was the separate property of John Thigpen, was set apart to his widow as her homestead so long as she should elect to use the same as such, to revert to the heirs of John Thigpen upon the termination of the homestead right. It was specially adjudged that she should have no life estate in the property. It was alleged by plaintiffs that the defendant, now Mrs. Russell, had ceased to use or occupy the property as her homestead, and had abandoned the same, and that thereby the property became subject to partition. The fact of abandonment was denied, and is the only issue in the case. The case was tried by the court, without a jury, and judgment rendered for defendants Russell and wife, from which plaintiffs appeal.

The trial court prepared and filed conclusions of fact, which were excepted to by plaintiffs and are as follows: "(1) I find that the defendant Susan A. Russell was married to John Thigpen in 1876, and a short time afterwards she and said John Thigpen moved on the 200 acres of land in controversy and occupied it as their homestead until John Thigpen's death, which occurred about 10 or 11 years ago, having occupied it for a period of about 22 years. (2) That the estate of John Thigpen was by decrees of the district court of Goliad county partitioned between Susan A. Russell and the heirs of John Thigpen, being the plaintiffs in this case or their ancestors, on the — day of October, —, and the — day of November, A. D. 1897, except the 200 acres in controversy, which was expressly reserved from partition and declared to be the separate property of John Thigpen, deceased, and in said decrees the said 200 acres was set apart to said Susan A. Russell as the surviving widow of John Thigpen, as a homestead so long as she might elect to use or occupy the same as such. (3) That a short time after said decree of partition said Susan A. Russell went upon said land and made some improvements and lived upon it for about one year when she left to reside elsewhere, because she could not get any suitable person to live on the place with her, she having no children, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court May 26, 1909.

rented the place, and continuously since said date to this present time she has rented said land, and the same is now in possession of her tenant. (4) I find that from time to time since said land was set aside to her she has caused the premises to be kept in repair and has added some improvements. (5) I find that said land was the separate property of John Thigpen. (6) That in 1902 defendant Susan A. Russell married her codefendant, A. S. Russell, who at the time of her marriage to him resided in Milam county, Tex., and since her said marriage she has resided with her husband in Milam county, Tex., making occasional visits to Goliad county to look after this piece of property. (7) That at the time of his marriage defendant A. S. Russell owned and lived on some hotel property in Milam county, which he shortly afterwards lost on account of not being able to pay off an indebtedness that existed on said property, and that after the loss of the hotel property defendants rented various places to live on until in November, 1906, Mrs. Russell borrowed \$500, with \$350 of which she purchased a house and some lots in Milano, Milam county, Tex., and since said time she and her husband have resided on said property. (8) That at the time of the purchase of said lots in Milano it was the intention of defendants to draw the papers in such way that the property would belong to Bran V. Burk, a boy 10 years old who lives with defendants; but on account of the way papers were gotten up this purpose was not accomplished, and the title to said property is in defendant Susan A. Russell. (9) I find that the defendant A. S. Russell is a surveyor by profession and has an income of probably \$200 per annum. (10) I find that defendant Susan A. Russell owns property consisting of several town lots in the town of Fannin, Goliad county, Tex., and the property in Milano, and she has no income other than that received from the land in controversy, which she has each year received and used for her support and maintenance, and I find that defendant A. S. Russell owns an interest in several tracts of land in Milam county, Tex. (11) I find that the house on the 200 acres of land in controversy is out of repair and has been since the last marriage of Susan A. Russell, and since then has not been fit for occupancy. (12) I find from the continued declarations in the matter that it has been the intention of Susan A. Russell to return to and occupy the land in controversy as her home as soon as her husband could arrange his business affairs in Milam county so as to leave them and could get money with which to repair the improvements on said land so as to render them fit for occupancy, and that it was not their intention to occupy the lots in Milano as their homestead. (13) I find that both Mrs. S. A. Russell and her husband have offered to sell their homestead right to the land in controversy."

The foregoing findings of fact are approved by us without qualification, with the exception of that embraced in the eighth paragraph, which will be later referred to in disposing of the third assignment of error. From these conclusions of fact the court found, as a conclusion of law, that Mrs. Russell had not abandoned the homestead on the 200 acres of land.

The trial court permitted certain witnesses to testify, over the objections of appellants, to declarations made by appellees as to their intention to move back to and reoccupy Mrs. Russell's home on the land in controversy. To the admission of this testimony appellants excepted, and the ruling of the court is made the basis of the first assignment of error. In so far as the testimony of appellees themselves is embraced in this assignment, it stands on altogether different ground from that occupied by the testimony of the other witnesses, and was in no sense their declaration of their intention, but their testimony under oath, as to such intention. This testimony is not subject to any of the objections to the admissibility of their mere declarations to third persons during their absence from the home, as set out in the various propositions, under the assignment. The testimony of Bego, Burns, and Patton was, in substance, that at various times, while appellees were living at Milano, they declared that they expected and intended, as soon as they could arrange to do so, to come back to Goliad county and occupy this homestead. It has been held that the question of abandonment of a homestead once used and occupied as such by removal therefrom, is dependent upon the intention of the parties and whether such removal was with the fixed intention of not returning to the place as a home (*Shepherd v. Cassidy*, 20 Tex. 29, 70 Am. Dec. 372; *Gouhenant v. Cockrell*, 20 Tex. 98), and in this connection it has been generally held, we believe, that the declarations of the parties are admissible upon this question, notwithstanding they may seem to be self-serving (*Gunn v. Wynne* [Tex. Civ. App.] 43 S. W. 293; *Gaar, Scott & Co. v. Burge* [Tex. Civ. App.] 110 S. W. 185). The authorities cited by appellants in support of their contention are as to the weight and effect of such declarations when contradicted by the actions of the parties, and none of them go so far as to hold that such declarations are not admissible. *Woolfork v. Ricketts*, 48 Tex. 37; *Reese v. Renfro*, 68 Tex. 195, 4 S. W. 545. In *Johnston v. Martin*, 81 Tex. 21, 16 S. W. 550, the parties owned a homestead in town which they occupied as such, and had never occupied or lived upon the property in the country attempted to be claimed as a homestead. In *Portwood v. Newberry*, 79 Tex. 337, 15 S. W. 270, the question was not presented nor decided. In fact, we have not been able to find any case in which it was held that evidence of the declaration of the

parties was not admissible on the question of abandonment of a homestead once used and occupied as such. Evidence had been admitted as to the acts of Mrs. Russell in moving with her husband to Milam county and in renting out the property in question for several years. In the language of the court, in *Gunn v. Wynne* (Tex. Civ. App.) 43 S. W. 294: "These acts did not unmistakably manifest their true intent, and declarations accompanying such acts and explanatory thereof are also admissible." The acts of removal and renting were not necessarily inconsistent with the intention of the homestead right here claimed. The intention, after all, was the material thing. The court did not err in admitting the evidence. Its weight was for the court, sitting as a jury.

The second assignment of error rests necessarily upon the same grounds as the first, and is overruled.

The third assignment of error assails the finding of fact set out in the eighth paragraph of such findings, heretofore referred to, which is as follows: "That, at the time of the purchase of the said lots in Milano, it was the intention of the defendants to draw the papers in such way that the property would belong to Bran V. Burk, a boy 10 years old who lived with defendants; but on account of the way the papers were gotten up the purpose was not accomplished, and the title to said property is in Susan A. Russell." Appellees contend that this finding is opposed to the uncontradicted evidence on this point. The testimony of the witnesses, appellees, and Mrs. Jones, on this point is not at all clear: but it is uncontradicted, and shows substantially, that Mrs. Jones, the grandmother of the boy, Bran V. Burk, a boy 10 years old, who was godson to Mrs. Russell and lived with her and her husband, lent appellees \$500 with which to buy an improved place in Milano, with the understanding that appellees should have only a life interest in the property, and that at their death the property should go to the boy. It was intended that the deed should be so drawn, but by mistake it was so drawn as to vest the fee-simple title in Mrs. Russell. The date of this deed is not given in the record so far as we can find; but on November 23, 1906, Mrs. Russell, joined by her husband, executed a deed, the purport of which was to convey the property to A. S. Russell, the husband, during his natural life, and at his death to revert to Bran V. Burk. This deed was intended to carry out the intentions of the parties in the purchase of the property. Both deeds were drawn by appellee A. S. Russell, who disclosed a considerable degree of ignorance as to such matters by his testimony. This latter deed was not acknowledged for record until January 21, 1908, and there are several circumstances concerning it which affect the transaction as suspicious and not bona fide; but the trial judge, sitting as a jury, was satisfied with the explanation given of them

by appellees, and his ruling thereon will not be revised. This evidence, however, conclusively shows that it was not the intention of the parties to draw the deed so that the property would belong to Bran V. Burk, if by this is meant that appellees should have no interest therein. Substituting for this finding, however, such finding as the above evidence authorized, does not, in our opinion, affect the judgment, as, notwithstanding such finding as alone was authorized by the evidence, as aforesaid, if the parties at all times retained the intention not to make their home on this property, even if it were in the name of Mrs. Russell, but to return to Goliad and resume their occupancy of the home there. It would not constitute an abandonment of the Goliad home. *Baum v. Williams*, 16 Tex. Civ. App. 407, 41 S. W. 840.

The fourth and fifth assignments of error attack the findings of fact embraced in paragraphs 11 and 12 as not authorized by the evidence. We cannot say that there is not sufficient evidence to support the findings, and the assignments, with the several propositions thereunder, are overruled. The offer to sell the property was not necessarily inconsistent with their intention to return to it and reoccupy it as a home if they did not sell. *Gaar, Scott & Co. v. Burge*, supra. They had in fact no interest which they could dispose of by sale.

The sixth, seventh, and eighth assignments of error assail the judgment of the court and the overruling of the motion for a new trial on the ground that it is contrary to the law and the facts, in that the evidence conclusively shows abandonment of the Goliad county homestead. Our conclusions of fact are as found by the trial court, who, sitting as a jury, has passed upon the evidence, and in deference to such finding we do not feel authorized to substitute for them different conclusions of fact, so long as we cannot say that such findings have not sufficient evidence to support them. The evidence tends strongly to support the conclusion that appellees did not intend to return to Goliad county to live, and would have authorized such conclusion; but that is not sufficient to authorize us to overturn the contrary conclusion of the trial court. The facts thus found by the trial court, in our opinion, justify his legal conclusion that Mrs. Russell had not lost her homestead right in the property. The facts are strikingly similar to those in the case of *Foreman v. Meroney*, 62 Tex. 723, in which it was held that the homestead right had not been forfeited. That decision has never been overruled, or in any way qualified, so far as we can find, and it is largely upon its authority that our conclusion rests that the judgment should be affirmed. In that case, as in this, the widow, in whom was the homestead right, married again, and her husband, a year after the marriage, bought a home and lot elsewhere, to which they moved, and in which they lived until they sold it, when

live on the land in controversy unless compelled by poverty or unavoidable circumstances. The land in controversy was rented to tenants by the year. The facts were even stronger against the retention of the homestead right than in the present case, in so far as the same could rest upon the intention of the parties. The Supreme Court, however, held that the homestead right had not been abandoned. The reasoning in the opinion in that case applies with great force to the facts of this case, and we do not feel at liberty to disregard the authority of the decision, as applied to the present case.

We have examined all of the assignments of error and the various propositions thereunder, which are presented in an able and exhaustive brief for appellants. We do not think they present sufficient ground for reversal of the judgment, and it is therefore affirmed.

Affirmed.

CARNEY v. MENEFEE.

(Court of Civil Appeals of Texas. Jan. 30, 1909. Affirmed on Certificate, April 10, 1909.)

1. 'APPEAL AND ERROR (§ 622*)—PROCEEDINGS FOR TRANSFER OF CAUSE—TIME FOR FILING TRANSCRIPT—WRIT OF ERROR.

The transcript on writ of error need not be filed in the Court of Civil Appeals until after the service of the writ.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 622.*]

2. APPEAL AND ERROR (§ 401*)—PROCEEDINGS FOR TRANSFER OF CAUSE—WRIT OF ERROR.

The Court of Civil Appeals does not acquire jurisdiction of a writ of error until service of the writ.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 401.*]

3. APPEAL AND ERROR (§ 387*)—PROCEEDINGS FOR TRANSFER OF CAUSE—BOND—TIME FOR FILING.

An appeal is perfected under Rev. St. 1895, art. 1387, where a bond is filed within 20 days after the expiration of the term, except that, where the term may by law continue more than 8 weeks, the bond shall be filed within 20 days after notice of appeal is given if appellant resides in the county, otherwise within 30 days; and hence a transcript accompanying a motion to affirm a judgment on certificate which recited that the term of court began July 6th, that judgment was rendered July 7th and bond filed September 9th, four days after court adjourned, but did not show that the term could not by law continue more than eight weeks, so that the bond should have been filed within 30 days at the latest, after notice of appeal which might have been of the date of judgment, did not show that the Court of Civil Appeals acquired jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2066; Dec. Dig. § 387.*]

brings error. Motion to affirm the judgment on certificate. On motion for a rehearing after refusal to dismiss, the transcript was amended to show petition for writ of error and citation in error with a sheriff's return thereon. Judgment affirmed.

A. R. Hopkins, for plaintiff in error. Wray & Mayer, for defendant in error.

SPEER, J. In this case a motion is filed by defendant in error to affirm the judgment on certificate. The term of the county court at which the judgment was rendered was begun on July 6, A. D. 1908, and adjourned on September 5, 1908, as shown by the caption to the transcript. The judgment sought to be affirmed was rendered on July 7th, and was in defendant in error's favor against plaintiff in error for the sum of \$546.15. On September 9, 1908, a supersedeas bond was filed, in which it is declared that "the said T. G. Carney has sued out a writ of error to the Court of Civil Appeals for the Second Supreme Judicial District," etc. The caption, judgment, and supersedeas bond referred to make up the entire transcript before us. No transcript whatever has been filed in this court by the plaintiff in error, but such transcript is not required to be filed here until service of the writ of error has been had (*Scarborough v. Groesbeck* [Tex. Civ. App.] 25 S. W. 687); nor, indeed, has this court jurisdiction until such service (*Crunk v. Crunk*, 23 Tex. 605; *Vineyard v. McCombs*, 100 Tex. 318, 99 S. W. 544). We cannot, therefore, entertain jurisdiction as upon writ of error proceedings.

Neither does the plaintiff in error appear to be in any better position if we treat the supersedeas bond as an ordinary appeal bond. An appeal is perfected where a bond is filed upon filing that bond "within twenty days after the expiration of the term. If the term of the court may by law continue more than eight weeks the bond * * * shall be filed within twenty days after notice of appeal is given if the party taking the appeal resides in the county, and within thirty days if he resides out of the county." Rev. St. 1895, art. 1387. Now, we cannot affirm this case on certificate unless the appeal bond was filed within the time above designated. The bond does appear to be filed within 20 days after the expiration of the term, but we cannot know that the term of the county court of Tarrant county could not by law have continued more than 8 weeks, and that, therefore, the appeal bond should have been filed within 20 days, or at most within 30 days, after the notice of appeal was given, which, if it corresponded

ed, and the motion is therefore dismissed. See *Dixon v. Southern Building & Loan Association* (Tex. Civ. App.) 28 S. W. 58. Motion dismissed.

PER CURIAM. Rehearing granted, and judgment affirmed on certificate.

NAIL v. FIRST NAT. BANK OF CHICKASHA.

(Court of Civil Appeals of Texas. April 28, 1909.)

APPEAL AND ERROR (§ 640*)—RECORD—AMENDMENT.

Where the clerk fails to fasten the transcript of the record at the top as directed by the rules, and does not incorporate therein appellant's assignment of errors, appellant will be allowed to file a new transcript, properly prepared and certified.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 640.*]

Appeal from District Court, Lipscomb County; H. G. Hendricks, Judge.

Action between A. L. Nail against the First National Bank of Chickasha. From a judgment for the bank, A. L. Nail appeals. Motion by appellee to strike from the record the statement of facts copied therein, and by appellant to permit him to file the original statement of facts. Motions granted.

E. C. Gray, Capp, Cantey, Hanger & Short, and R. M. Rowland, for appellant. Hoover & Taylor, for appellee.

FISHER, C. J. We grant appellee's motion to strike from the record the statement of facts therein copied, and we grant appellant's motion to permit him to file the original statement of facts. Appellant's motion also contains an application for certiorari to bring up a more perfect record. From the statement contained in this motion it seems that the clerk failed to fasten the transcript at the top, as the rule prescribes, and failed to incorporate in it appellant's assignments of errors. Appellant has accompanied the motion with an entirely new transcript or record, which is properly certified to, and which is properly prepared in accordance with the rules, and which contains his assignments of errors, and asks that this transcript be filed in lieu of the original one, which is defective and not complete, as pointed out. We see no impropriety in granting this request, and the new transcript is ordered filed, to take effect from the date of the filing of the one first returned to this court and here filed August 10, 1908.

The costs of both motions are taxed against the appellant.

1. TRESPASS (§ 46*)—TIMBER TRESPASS—SUFFICIENCY OF EVIDENCE.

Evidence held to support a finding that defendants committed a timber trespass intentionally, and not through mistake in the land lines.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 46.*]

2. TRESPASS (§ 12*)—WHAT CONSTITUTES.

Every unauthorized entry on the land of another is trespass, and it is willful trespass if intended and deliberately done.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 8-12; Dec. Dig. § 12.*]

3. TRESPASS (§ 52*)—TIMBER TRESPASS—DAMAGES.

Where timber is cut on the land of another, either through culpable negligence or willful disregard of the rights of the owner, the trespasser is liable for the full value of the property at the time and place of demand or of suit brought.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 137, 138; Dec. Dig. § 52.*]

4. TRESPASS (§ 44*)—TIMBER TRESPASS—DAMAGES—BURDEN OF PROOF.

Where, in an action for timber trespass, plaintiff elected to treat the manufacture of the timber into lumber as the period of conversion, the burden was on her, before she could recover the manufactured value, of proving that the timber was so manufactured.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 44.*]

5. TROVER AND CONVERSION (§ 13*)—RIGHT OF ACTION.

Where the taking of timber is intentional and wrongful, the owner, as against the original trespasser, may elect, though not compelled, to fix the time of conversion, and proceed, according to the circumstances, to recover.

[Ed. Note.—For other cases, see *Trover and Conversion*, Dec. Dig. § 13.*]

6. TROVER AND CONVERSION (§ 13*)—EFFECT ON TITLE.

A wrongful taking of property does not change the title thereto, and it may be recovered so long as its identity is perceptible to the senses, though its form has been changed, and its value greatly enhanced, by the labor of the party taking it.

[Ed. Note.—For other cases, see *Trover and Conversion*, Dec. Dig. § 13.*]

7. TROVER AND CONVERSION (§ 40*) — EVIDENCE.

A tortious taking of property is sufficient proof of a conversion.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 236; Dec. Dig. § 40.*]

Error from District Court, Bowie County; P. A. Turner, Judge.

Action by Mrs. Etta Less and another against J. W. Ripy and others. There was a judgment, and defendants bring error. Reversed and remanded.

The defendant in error Mrs. Etta Less, joined by her husband, claiming that J. W. Ripy & Son, a firm, and A. M. McDaniel, without consent or authority, intentionally and wrongfully trespassed upon her land, and

ages for injuries done to the fence inclosing the land from which the timber was cut. The defendants in the suit below answered by general denial. The case was tried before the court without a jury, and judgment was entered in favor of defendant in error against the firm of J. W. Ripy & Son and in favor of A. M. McDaniel against defendant in error.

Hart, Mahaffey & Thomas, for plaintiffs in error. Smelser & Vaughan, for defendants in error.

LEVY, J. (after stating the facts as above). By their first assignment the plaintiffs in error contend that the court erred in holding that in cutting and removing the timber from the land they were guilty of a trespass of such a nature as would authorize a recovery against them for any greater sum than the value of the timber in its manufactured state at the time and place it was cut and removed. As is conceded in the written argument of counsel, it appears from the record that on the trial of the case no issue was made that certain pine timber had been cut and removed by plaintiffs in error from the land belonging to Mrs. Less, the defendant in error. There was an issue as to the amount of timber cut, but the trial court's judgment as to the amount of timber cut is supported by testimony. There is involved in the judgment of the court, which was excepted to and the exception noted in the judgment, the finding of fact, as alleged by defendant in error, that the plaintiffs in error, without authority or consent, intentionally and wrongfully cut and removed the timber from the land, and converted same to their own use and benefit. It was the claim of plaintiffs in error that they cut and removed the timber from the land under the honest belief that it belonged to them. We will not undertake to set out the entire evidence bearing on the question presented, in view of the result of the appeal. We, however, refer to certain features of it only for the purpose of indicating why we think this court would not be warranted in setting aside the finding of the trial court.

Plaintiffs in error had purchased all the timber on the Wardell survey. Defendant in error owned the survey adjoining. Some 12 or 14 years previous to the time in question the then owner of the survey of defendant in error inclosed the same with a wire fence, and by consent of the then owner of the Wardell survey embraced between 60 and 100 acres of said survey under the wire fence inclosure. The Wardell land inclosed lay in the northwest corner of the fence. Plaintiffs in error sought to purchase the timber belonging to the defendant in error, and the right to construct a tram across her land,

was specifically directed by Lufton, who once owned the Wardell timber, that the Wardell land in the wire fence inclosure was located in the northwest corner of the inclosure. The employé went to the southwest corner of the inclosure, and cut defendant in error's timber. We do not understand the record to reasonably account for this change of direction. It was further shown that there was no pine timber on the Wardell under inclosure. Later a simple survey disclosed the fact that there was no timber on the Wardell under the inclosure. It does not appear that the boundary lines between the two surveys were in dispute or in confusion, or were unascertainable by proper care. Under the circumstances stated, and especially when the specific direction of Lufton to the employé of plaintiffs in error is considered as to the location of the Wardell land in the northwest corner of the inclosure and his cutting the timber off the southwest corner, we do not think it could be held in the case that the testimony does not support the finding of the trial court that the plaintiffs in error did commit the trespass intentionally, and not through mistake in the land lines. Every unauthorized entry on the land of another is trespass, and it is willful trespass if intended and deliberately done. It might not be a malicious act, because not intended to injure the owner. Every person who cuts timber upon his own land, or who intends to do so, owes a duty to an adjoining landowner to ascertain the boundary line of the adjoining land, if he can, with diligence and care, so as to avoid trespassing upon such adjoining land; and, if he neglects such duty, and negligently and carelessly or recklessly cuts beyond his own premises, he cannot be said to have done so by mistake. The neglect of such duty is in itself evidence of a want of good faith. We do not understand that, where timber is cut upon the land of another through either culpable negligence or the willful disregard of the rights of another, the trespasser can avoid the larger damages allowed by law to be recovered. The rule announced in the case of *E. E. Bolles Woodenware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, has been followed. *Ry. Co. v. Starr*, 22 Tex. Civ. App. 353, 55 S. W. 393; *Ry. Co. v. Jones*, 34 Tex. Civ. App. 94, 77 S. W. 955; *Petit v. Frothingham* (Tex. Civ. App.) 106 S. W. 907; *Young v. Pine Ridge Lumber Co.* (Tex. Civ. App.) 100 S. W. 784. There it was announced that the full value of the property at the time and place of demand, or of suit brought, could be recovered against a willful trespasser. See *Tignor v. Toney*, 13 Tex. Civ. App. 518, 35 S. W. 881; 4 *Sutherland on Damages*, § 1020; *Wright v. Skinner*, 34 Fla

cut and removed, because there is no testimony that the timber cut and removed from the land was ever manufactured into lumber. We think this contention must be sustained. Defendant in error by her petition has treated the time of the manufacture of the timber into lumber as the period of conversion, and has so alleged, and seeks to recover the value accordingly. Assuming an intentional and wrongful taking, then we think that she has the legal right to treat the manufacture, if so, of the timber into lumber as the period of the conversion; and, having so elected, as she has, there devolved upon her the burden of proof, before she could recover the enhanced or manufactured value, that the timber so taken was manufactured by plaintiffs in error into lumber. This proof is not in the record before us. Where the taking of timber is intentional and wrongful, the principle of law is clear, we think, that the owner of the timber taken, as against the original trespasser, may elect, though not compelled, to fix the time of conversion, and proceed, according to the circumstances of the given case, to recover. The time of conversion is not always fixed by the same circumstances, and depends upon the circumstances of the given case. A wrongful taking does not change the title to the property. It still remains in the owner, and may, by suit in sequestration, be recovered so long as its identity is perceptible to the senses. It may be recovered, though its form has been changed and its value greatly enhanced by the labor of the party taking, as in the case of logs into lumber, leather into boots, and the like. It may in the new form be recovered, or compensation for its loss be claimed and recovered, because it is in that form still the property of the owner, and the wrongdoer is not entitled to compensation for the labor bestowed upon it. It is a principle of natural justice that a wrongdoer ought not to be allowed to make a profit by his own willful tort. Thus a tortious taking is sufficient proof of a conversion, but yet the owner may elect to consider the property as still his own, and treat a removal or sale of it, or a manufacture of it into other forms, or a refusal to deliver on demand by the wrongdoer, as the period of conversion. The owner of the land from which the timber is taken might treat the removal from the land as the conversion, and follow the logs to the mill and reclaim them at the mill, and, upon refusal to deliver, sequester them by suit, or sue to recover the value of the logs at the mill at the time of the suit; or, if the taker has changed the character into lumber, the owner of the timber may, if capable of identifica-

is fixed at the time enhanced value is placed upon the property, and is so pleaded, then it must be proved that the timber has been put into the state of-enhanced value before a recovery for same is allowable. Unless the defendant be proved guilty of such particular kind of conversion, he could not be held liable for such.

By the third assignment it is contended that the judgment is excessive. The judgment being for the manufactured value of the timber into lumber, and there being no proof in the record that the timber was manufactured into lumber, it follows that this assignment must be sustained.

For the error indicated, the case was ordered reversed and remanded.

SCOTTISH UNION & NATIONAL INS. CO. v. WEEKS DRUG CO.

(Court of Civil Appeals of Texas. April 14, 1909. Rehearing Denied May 12, 1909.)

1. INSURANCE (§ 335*)—FORFEITURE—FAILURE TO KEEP ACCOUNTS.

The inventory of goods on hand taken two or three days before the fire cannot take the place of the accounts of cash sales required by the policy to be kept by insured.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 335.*]

2. INSURANCE (§ 335*)—FORFEITURE—FAILURE TO KEEP ACCOUNTS.

The provision in a policy of insurance that insured will keep accounts showing sales of goods in some place not exposed to fire is material to the risk, though insured made an inventory of his goods on hand two or three days before the fire. Hence Sayles' Ann. Civ. St. Supp. 1897-1904, art. 3096aa, providing that misrepresentations will not avoid a policy unless they are material, does not apply.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 335.*]

3. INSURANCE (§ 668*) — FORFEITURE — INCREASE OF HAZARD — QUESTION FOR JURY.

Whether a single effort by an unknown person to burn the property should cause insured to consider it likely to be repeated, making it the duty of insured to report same to the company, within a provision that the policy shall be void if the hazard be increased by any means within the knowledge of insured, is a question for the jury.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 668.*]

4. INSURANCE (§ 335*)—FORFEITURE—QUESTION OF LAW OR FACT.

The failure of insured to keep an account of his cash sales of goods, as required by this policy, is a forfeiture of the insurance as a matter of law.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 335.*]

5. INSURANCE (§ 388*)—CONDITIONS OF POLICY—WAIVER OF FORFEITURE.

Under the provisions of a policy that insured should submit to examination by any per-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not waived by requiring insured to submit to several examinations.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 388.*]

Appeal from District Court, Nacogdoches County; James I. Perkins, Judge.

Action by the Weeks Drug Company against the Scottish Union & National Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

June C. Harris and Crane, Gilbert & Crane, for appellant. S. W. Blount and King & Strong, for appellee.

JAMES, C. J. The action is one upon a fire insurance policy on goods in appellee's drug store. The court directed the jury to find for the appellee.

The contract contained the following provisions:

"Iron-Safe Clause. The following covenant and warranty is hereby made a part of this policy:

"(1) The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of assured the unearned premium from such date shall be returned.

"(2) The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and for credit, from date of inventory, as provided for in first section of this clause, and also from date of last preceding inventory, if such has been taken, and during the continuance of this policy.

"(3) The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire proof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or falling in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building, and unless such books and inventories are produced and delivered to this company for examination, this policy shall be null and void, and no suit or action shall be maintained hereon; it is further agreed that the receipt of such books and inventories and the examination of the same shall not be an admission of any liability under the policy, nor a waiver of any defense of the same."

see failed to show any entry in the books of the cash sales from November 23, 1907, to the date of the fire, which occurred on the night of January 8, 1908. The sales for the month of December were usually from 50 to 75 per cent. more than any other month in the year. This is the undisputed testimony.

It is contended by appellee: That an inventory of the goods on hand, which was taken and completed on January 1, 1908, two or three days before the fire, and testified to as complete and true, rendered such cash account unnecessary and immaterial in arriving at the amount of the loss; also, that the provisions of the act of 1903 (article 3096aa, Savles' Ann. Civ. St. Supp. 1897-1904) made the keeping of such items of the cash account not material to the risk, in view of said subsequent inventory.

The first of these positions cannot be sustained. The inventory was not, in any sense, a substitute for what was stipulated should be evidenced by the books. The second is also untenable. The peculiar wording of the statute makes it apply only to the truth or falsity of answers or statements in the application or contract, and not what was agreed in the contract to be performed. The case of Insurance Co. v. Whitaker, 112 Tenn. 151, 79 S. W. 121, 64 L. R. A. 451, 105 Am. St. Rep. 916, did not involve a statute worded as this one. The contract was clearly violated by the failure to record the cash sales in the books for the period named, and the consequence of this breach is written in the contract itself, as shown in clause 3, which plaintiff must abide by, having agreed to it, unless appellant has waived, or is estopped from insisting upon, the requirement, which is a matter that will be discussed further on.

At this place we may mention another breach of the policy claimed by appellant; it being in reference to this provision: "The entire policy * * * shall be void * * * If the hazard be increased by any means within the control or knowledge of the insured." The testimony of Mr. Weeks, the president of the drug company, showed that he became informed a few nights before the fire in question during such night that an attempt had been made upon the premises, in an upstairs plunder room, to burn the house. This consisted of finding two candles in a box of trash and excelsior, that one of the candles was burning and the other had burned out, and that, if he had been five minutes later in discovering this situation, the house would have burned up, and he believed somebody was trying thereby to burn the building, and he did not notify the ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whether or not a single effort to burn the house would cause one to consider it likely to be repeated until successful would involve a presumption of fact, which should always be left to the jury.

But we are of opinion that the failure to make entry of the said cash items upon the books was, as a matter of law, a breach of the contract which avoided it according to its own plain provisions, unless appellant waived or has estopped itself from setting it up. The evidence was: That three days after the fire the adjuster of appellant and the adjusters of other companies who had issued policies on this stock came to Nacogdoches and called upon Mr. Weeks, president of appellee, to meet them and bring his books, policies, inventories, etc., for examination. He did so, and testified that he had there his ledger, and all the policies and the inventories, but did not have his cashbook there. That a few days later Mr. Thompson, adjuster and attorney for appellant, came to Nacogdoches and notified appellee, fixing time and place, to submit to an examination under oath in reference to the loss and to have and produce at such examination all policies carried by appellee, and all books of accounts, inventories, invoices, and records, stating in said notice: "You are notified that, in making this demand and in holding said examination, it is not the purpose or intention of either of said companies to thereby admit a liability for said loss, nor to waive any condition or provision of said policies or either of them, or any forfeiture thereof, if any such exists." Mr. Thompson fully examined Mr. Weeks until midnight, with his books, and if the facts now claimed as forfeitures, viz., the absence of said cash entries in the books, and the attempted burning a few days before this fire, were not made known to appellee in the first examination before mentioned, they became known in this examination by Mr. Thompson. Mr. Thompson left, stating he would return later and complete the examination, and he returned on January 24th and subjected Weeks and his books to another or further examination under oath with stenographer, and left without any intimation of what the insurance company would do or claim, and that to protect its rights under the policy "appellee was by said conduct of the company, in failing to say whether it would pay the policy or claim forfeiture of same, compelled to go to considerable expense and labor in employing and making out proof of loss of property under the terms of the policy, which proof consisted of 10 pages of typewritten matter. That a copy of this proof was handed to the agent of appellant

waiver by reason of such acts." The above in quotation marks is copied from the brief of appellee.

Appellee claims that the acts of appellant, in treating the policy as valid, were repeated three times with knowledge, after the first time, of the breaches now complained of, and there being no pretense that appellee consented to waive his right to claim the legal consequence of such conduct, and these facts being undisputed, it follows that the forfeiture was waived, and cites the case of *Insurance Co. v. Evans*, 25 Tex. Civ. App. 300, 61 S. W. 536, as in point. In that case it does not appear that the contract of insurance contained any such provision as we find in this one, and set forth above in the iron-safe clause. Nor the following, which is also in the contract: "The insured, as often as required, shall exhibit to any person designated by this company * * * and submit to examinations under oath by any person named by this company and subscribe the same and as often as required shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made." And further: "This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for."

Nothing could be plainer than that appellant had the right to conduct the examinations it did, without thereby subjecting itself to any claim of waiver or estoppel, as is contended for by appellee. As stated in *American Cent. Ins. Co. v. Nunn*, 98 Tex. 195, 82 S. W. 499: "There was nothing in the facts that transpired at the examinations which was calculated to mislead appellee in any respect." Nothing by word or act was done in the examinations that signified that appellant would waive any right. The case just cited, by the Supreme Court of this state, is in point, and deals with the very provisions involved in this case.

The undisputed evidence showing such breach of the contract by appellee as entitled appellant to claim nonliability, and there having been no waiver or estoppel with reference to such breach, the instruction should have been of a verdict for appellant; and we conclude that the judgment should be reversed, and judgment here rendered for appellant.

Reversed and rendered.

ENGLEMAN et al. v. MISSOURI, K. & T. RY. CO.

(Court of Civil Appeals of Texas. May 1, 1909.)

1. APPEAL AND ERROR (§ 753*)—ASSIGNMENTS OF ERROR—EFFECT OF FAILURE TO ASSIGN.

Where no assignments of error were copied into the transcript, error alleged in the brief cannot be considered on appeal unless it is shown by the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3066-3069; Dec. Dig. § 753.*]

2. INJUNCTION (§ 28*)—SUBJECTS OF RELIEF—PROSECUTION OF SUCCESSIVE SUITS.

The petition alleged that defendant had recovered judgment against petitioner in a former action for loss of certain articles in shipment and afterward brought suit in a justice's court for the value of some of the same articles of the value of \$20, which were included in that judgment, and that the second suit was brought to harass petitioner and caused it expense, etc. Held that, as no appeal would lie from a justice's judgment for the amount stated, to prevent injustice, defendant would be enjoined from maintaining the second action.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 26.*]

Appeal from Rains County Court; R. L. Porter, Judge.

Action by the Missouri, Kansas & Texas Railway Company against J. H. Engleman and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. W. Berzette, for appellants. Coke, Miller & Coke and B. M. McMahan, for appellee.

RAINEY, C. J. This is an injunction suit brought by appellee against appellants to enjoin them from prosecuting a suit in the justice court, instituted by appellant Engleman against the appellee to recover for the value of one magnetic and three oil cups lost in shipment from Dallas, Tex., to Elmore, Tex., which were alleged to be of the value of \$20. The petition for injunction alleged, in effect: That theretofore appellant Engleman had brought suit and recovered a judgment for damages that accrued to him in the shipment of one well drill, in which was included said magnetic and oil cups, and said matter has been finally adjudicated in appellant Engleman's favor; that the said Engleman and his attorney, W. W. Berzette, will prosecute said suit "to judgment if they are not restrained, and thereby vex and harass, and this applicant will be compelled to pay same and to employ counsel to represent it in the trial of said cause, and thereby pay out a large amount in the way of attorney's fees and costs, and expense of procuring testimony in the trial of said cause to their damage in the sum of \$550, if the said parties are not restrained from prosecuting said suit." Upon a hearing of the cause a judgment was rendered for appellee, from which this appeal is prosecuted.

We find no assignments of error copied in the transcript, which prevents our consider-

ing the errors presented in the brief, unless some are shown by the record. The record shows that appellants' general demurrer to the petition was overruled, to which exception was duly reserved. The contention is that the petition "does not set up such facts as would make it the basis of an injunction." The petition, in effect, shows: That the suit sought to be enjoined is in part for articles which were included in a former action, upon which a recovery was had by appellants; that the articles were of the value of \$20, and the action was brought in the justice court; that said suit would thereby vex and harass the applicant and compel it to employ counsel and be at large expense in attorney's fees and costs in procuring testimony; and that "judgment will be rendered therein" against petitioner, unless said parties are restrained.

No appeal lies from a justice's judgment where the amount in controversy is not over \$20. It would be wrong to allow the appellant to prosecute a second suit in the justice's court for a part of a demand upon which a recovery had theretofore been had and recover judgment. Where it appears that an injustice may be done, a remedy by injunction, which works no hardship to the appellant, who can set up his demands in said proceeding and have it determined, is proper. "Our system of procedure is essentially equitable in its nature, and was designed to prevent more than one suit growing out of the same subject-matter of litigation, and our decisions from the first have steadily fostered this policy." *Railway v. Dowe*, 70 Tex. 5, 7 S. W. 368.

We conclude that the petition alleged a good cause of action, and there was no error in overruling the general demurrer.

No other assignment of error appearing that we can consider, the judgment is affirmed.

WESTERN UNION TELEGRAPH CO. v. BARRETT.

(Court of Civil Appeals of Texas. April 17, 1909. Rehearing Denied May 15, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 38*)—DELAY OF TELEGRAM—ACTIONABLE NEGLIGENCE.

Where a telegram sent plaintiff by his son, announcing the serious illness of plaintiff's daughter, and asking plaintiff to come at once, could have been delivered in time for plaintiff to have taken a train six hours earlier than he did, in which time plaintiff suffered mental anguish, actionable negligence on the part of the telegraph company is shown.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 33; Dec. Dig. § 38.*]

2. TELEGRAPHS AND TELEPHONES (§ 68*)—MENTAL ANGUISH.

Where plaintiff, by reason of a delay in a telegram announcing the illness of his daughter, was unable to take a train until six hours aft-

was no better.
[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by J. R. Barrett against the Western Union Telegraph Company for the negligent transmission of a telegram. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Geo. H. Fearons, N. L. Lindsley, and R. R. Neyland, for appellant. B. Q. Evans, for appellee.

RAINEY, C. J. The statement of the nature and result of the suit made by the appellant is admitted by appellee to be correct, and we adopt the same, in part: Appellee sued for damages for injuries sustained by himself on account of an alleged delay in the delivery of the following telegram: "Commerce, Texas, April 6, 07. To J. R. Barrett, care of Baptist Church, Corinth, Miss. Expecting Luna to die any time. Come at once. Answer [Signed] W. C. Barrett." The ground of damage claimed is this: That on April 6, 1907, the plaintiff resided in Hunt county, at Commerce, Tex., and the defendant was a corporation having an office and local agent at Greenville in said county. That defendant also had offices between Commerce, Tex., and Corinth, Miss., and transmitted messages for hire between said points at said time. That on said date he resided with his family at Commerce, Tex. That his family consisted of his wife, two daughters, and two sons. That he had one daughter whose name was Luna, and who had been married but a short time prior to said date. That on said date he was at Corinth, Miss., and had been there, or in that vicinity, for about two weeks. That on said date plaintiff's daughter Luna Potts was very sick at Commerce, Tex., and W. C. Barrett, plaintiff's son, acting for and on behalf of the plaintiff, delivered to the agent of the defendant at Commerce, Tex., the above-described message. That the said W. C. Barrett paid the defendant's agent the price demanded for sending the message, and at the same time informed the said agent of the importance of a delivery and of the relation of the parties, whose names were mentioned in the telegram. Plaintiff further alleged: That said telegram was received at Corinth, Miss., at 6 o'clock p. m. on the same date, but was not delivered to him until after 9 o'clock that night, a delay of more than three hours; that if said telegram had been delivered to him at any time before

said delay he did not reach his home until Tuesday morning, about 3 a. m. Plaintiff further alleged: That, when he received said message, the next train leaving Corinth, by which he could have made connection and reached his home at Commerce, Tex., was scheduled to leave at 3 o'clock a. m. That, after receiving said message, he sent the following reply: "Corinth, Miss., April 6, 1907. To W. C. Barrett, Commerce, Texas. How is Luna. I cannot leave until three a. m. [Signed] J. R. Barrett." That at the time he delivered said message to the defendant at Corinth, Miss., he paid for the same the sum of 60 cents, and requested the agent to ask for a reply. That said telegram was delivered to the plaintiff's wife at Commerce, Tex., about 11 o'clock on the night of April 6th, and plaintiff's daughter Bertie wrote out and delivered to the defendant's agent at Commerce, Tex., the following message: "Luna no better. Come at once." That she directed said agent to go to W. C. Barrett, in Commerce, and he would pay the charges for transmitting the same, which said agent agreed to do and left.

Plaintiff alleges: That he waited until midnight, and until the agent at Corinth closed his office, expecting a reply. That he left on the first train that left Corinth thereafter, which was about 6 o'clock a. m., Sunday morning; said train being late about three hours. That he did not arrive at home until Monday night, April 8th, or Tuesday morning about 3 a. m. That when he reached home he found his daughter was better, and that she finally recovered. That when he found the telegram had been delayed about three hours, and that if the same had been delivered he could have left on the 7 o'clock train, and when he realized that he would be deprived of being with his daughter for at least 24 hours, he was greatly distressed in mind, was disappointed, perplexed, and grieved because of not being able to be with his daughter during said time. That when he could not get a reply from his son concerning her condition, and when he was unable to learn whether she was still living or dead, and not knowing whether his telegram had reached home or not, and not knowing whether his daughter knew he intended to start home, or was on the way, and when he realized he would have to begin his journey and reach his home many hours thereafter, without being able to hear from them, he was still further disappointed, distressed, and worried. That by reason of the negligence of the defendant in failing to promptly deliver to him the telegram at Corinth, and of its negligence in failing to deliver the tele-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gram at Commerce, as above set forth, plaintiff was caused to suffer mental pain and anguish of mind to his damage in the sum of \$1,995, for which amount he asked judgment. Defendant answered by general demurrer, various special demurrers, and general denial. A trial resulted in a verdict and judgment in favor of plaintiff for the sum of \$500, from which this appeal is prosecuted.

It will be seen that appellee sought a recovery on two grounds: The first for the negligent failure to deliver a telegram informing him of his daughter's illness, and the second for the negligent failure to deliver an answer to a telegram sent by him inquiring about his daughter's condition. Special exceptions were urged against the allegations of the petition as failing to state a cause of action, as to both grounds, which exceptions were overruled. As to the allegations charging negligence for the failure to deliver the first message, we think a good cause of action was stated, and the court did not err in overruling defendant's demurrers thereto. *Tel. Co. v. Belew*, 32 Tex. Civ. App. 338, 74 S. W. 799.

As to the allegations of the petition relating to the failure to receive a message in reply to the one he sent inquiring of his daughter's condition, appellant presents the following assignment of error, viz.: "The court erred in overruling and in not sustaining the defendant's sixth special exception, which complains of allegations in the plaintiff's petition growing out of the failure to receive a reply to the message which plaintiff sent from Corinth, Miss., asking: 'How is Luna. I cannot leave until three a. m.' For that no damage could have resulted to plaintiff growing out of the company's delay or failure to deliver said message, because the telegram and answer to said message read: 'Luna no better. Come at once.' And inasmuch as if the plaintiff had received said answer it would have left him with the same advice which he at first received, relating to his daughter's illness, the said allegations are, therefore, too remote to be made the basis of any action." Under this assignment the following proposition is submitted: "The damages for failure to receive a reply message, in response to a telegram of inquiry as to the condition of a party, sent by a person who had been previously advised by telegraph that the party inquired about is expected to die, are not recoverable for a breach of a contract, when it further appears that, if such reply message had been received, it would have said that the person expected to die was no better." The court erred in overruling said exception. "The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message." *Rowell v. Tel. Co.*, 75 Tex. 26, 12 S. W. 534. Had

the plaintiff received the message sent in reply to his, we do not understand how it would have alleviated his suffering. The message did not convey any information other than what he already knew, and, had he received it, it would not have tended to relieve or lessen the existing anxiety.

For the error in failing to sustain the said sixth exception, the judgment is reversed, and cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. BRATCHER et al.

(Court of Civil Appeals of Texas, Feb. 13, 1909. Rehearing Denied May 1, 1909.)

1. TRIAL (§ 139*)—QUESTIONS OF FACT.

It is only when a cause is susceptible of but one just opinion that the trial judge may take it from the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 332; Dec. Dig. § 139.*]

2. MUNICIPAL CORPORATIONS (§ 35*)—BOUNDARIES—ALTERATION—EVIDENCE.

In an action for death at a railroad crossing, evidence of proceedings of the city council tending to show the passage of an ordinance for incorporating territory including the place of the accident within the city limits, and that the city actually exercised its municipal functions in such territory, so as to render a speed ordinance of the city applicable, was admissible, though the former ordinance itself was not produced.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 35.*]

3. MUNICIPAL CORPORATIONS (§ 35*)—BOUNDARIES—EVIDENCE.

In an action for death at a railroad crossing, evidence held to show that a city, in the exercise of jurisdiction over territory including the place of the accident, was acting as a municipal corporation and under color of law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 35.*]

4. MUNICIPAL CORPORATIONS (§ 35*)—BOUNDARIES—COLLATERAL ATTACK.

Where a municipal corporation exercises its functions of government under a color of law over territory in a certain addition, its right to do so, at least so far as the enforcement of an ordinance is concerned, cannot be collaterally attacked.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 35.*]

5. RAILROADS (§ 314*)—ACCIDENTS AT CROSSINGS—OBSTRUCTION OF VIEW.

The maintenance of a cut and dump by a railroad 600 feet from a crossing was not negligence rendering it liable for death at the crossing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 965; Dec. Dig. § 314.*]

6. RAILROADS (§ 314*)—ACCIDENTS AT CROSSINGS—OBSTRUCTION OF VIEW.

The maintenance by a railroad company of a tower house of an interlocking plant near a crossing was not negligence constituting an independent ground of recovery for death at the crossing, but was material only on the question of care of the company in managing its trains.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 965; Dec. Dig. § 314.*]

7. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—QUESTIONS FOR JURY.

In an action for death at a railroad crossing, it was proper to submit to the jury the question of negligence in failing to keep a flagman at the crossing.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 350.*]

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Action by Lula Bratcher and others against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Coke, Miller & Coke and Grace & Eskridge, for appellant. Y. D. Kemble and Farar & Pierson, for appellees.

TALBOT, J. This is a suit by Lula Bratcher, the widow of G. S. Bratcher, deceased, in behalf of herself and minor children, to recover of the Missouri, Kansas & Texas Railway Company damages resulting to them from the death of said G. S. Bratcher, who was killed by one of the railway company's trains at an intersection of its railroad and a street car line in the city of Waxahachie, in a collision between such train and a street car of which the said G. S. Bratcher was the driver. The grounds of negligence alleged and submitted to the jury were: (1) That the train causing the death of G. S. Bratcher was being run within the limits of the city of Waxahachie at a greater rate of speed than allowed by the city ordinance; (2) that appellant maintained on its right of way, near the scene of the killing, cuts and dumps and the tower house of an interlocking plant, which obstructed the view and prevented the said G. S. Bratcher from seeing said train as it approached the street crossing; (3) that appellant failed to keep a flagman or watchman at the highway crossing where the killing occurred. The defendant pleaded the general issue and contributory negligence on the part of the deceased.

The first assignment of error is that the trial court erred in not directing the jury, at appellant's request, to return a verdict in its favor, because the evidence showed beyond controversy that the death of G. S. Bratcher was caused, or contributed to, by a want of ordinary care on his part, and hence the verdict of the jury must have been the result of prejudice. This assignment will be overruled. We do not regard the testimony as conclusively establishing contributory negligence on the part of the said G. S. Bratcher. It is only when the case is susceptible of but one just opinion that the trial judge is authorized to take it from the jury. *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059. After a careful consideration of all the testimony bearing upon the question, we think it was sufficient to require the submission of the issue to the

jury, and, as the case will be reversed and remanded for another trial, we shall refrain from further comment upon the testimony.

Appellant's second assignment of error is as follows: "No ordinance by the city council of the city of Waxahachie receiving as a part of said city territory which included the place where said G. S. Bratcher was killed having been shown, or introduced, the court erred in permitting plaintiff's counsel to prove, over objections duly and seasonably made, facts tending, and intended, to show that such an ordinance had, in fact, been passed by the city council, and showing, and intended to show, that the city at the time said Bratcher was killed actually exercised its municipal functions in territory which included the place where he was killed; and further erred in admitting in evidence, over objections, the 'speed ordinance' of the city of Waxahachie—all as more fully shown by bill of exceptions reserved." The testimony offered and objected to was, in substance, as follows: J. W. Martin testified that he made a survey of territory, which included the place where Bratcher was killed, for a contemplated addition to the city of Waxahachie. The city secretary testified that, after search of the records of his office, all that he was able to find having reference to what is known as "Trinity addition" to Waxahachie, which included the street known as "Grand avenue" (along which G. S. Bratcher was traveling when killed), was what appeared on pages 262 and 263 of minute book F of the city council of the city of Waxahachie, which he produced and identified. These pages purported to show proceedings of a regular meeting of the city council of the city of Waxahachie, held on August 5, 1902, which stated that "the following petition and ordinance was read and unanimously adopted," that on that day came on to be heard the petition of H. P. Mizell and others asking that certain defined territory, and the inhabitants thereof, be included in, and made a part of, the city of Waxahachie, which petition, signatures, and affidavits thereto are, in substance, as follows. Then followed copy of petition by Mizell and 18 others for the addition of territory included in Martin's survey to the city, with affidavits of Mizell and two other signers that the persons signing the petition constituted a majority of the qualified voters in the described territory, and a certificate by the mayor of the city that the affidavit had been filed before him, and that he certified the same to the city council. J. T. Sullivan testified that he was an alderman of the city of Waxahachie, and lived in the territory known as "University addition" (same as Trinity addition), and that such territory included the street known as "Grand avenue." J. M. Lancaster testified: That he was an alderman

of Waxahachie from 1900 to 1906; that he helped Martin make his survey, and knew that an ordinance for the admission of the territory into the city was prepared, and he thought it was adopted by the council; that was his recollection, but was not certain; that for three years subsequent to 1902 he as alderman, was chairman of the street committee, and as such did a great deal of work on the streets in Trinity addition; that from the date of the council meeting of August 5, 1902, the city government of Waxahachie had exercised its functions over the territory known as "Trinity addition" as a part of the city. O. H. Chapman testified that as city attorney of Waxahachie he prepared several ordinances receiving territory into the city, and his recollection was that he prepared one receiving Trinity addition, and that it was passed by the city council, but he knew nothing about whether such ordinance was ever signed by the mayor, or filed in the archives of the city government, except that such things when acted upon by the council were turned over to the city secretary, and he was supposed to do the rest. The objections urged to this testimony were: (1) That there had been no proof of the original territorial limits of the city, and recitals in extension proceedings were insufficient to locate previous limits, or to show that territory proposed to be added adjoined such limits; (2) that the record offered did not show an ordinance of the city council receiving the described territory as a part of the city; (3) that it was incompetent to thus prove the territorial limits of a city, that the law prescribed how additions to a city should be made and required record evidence thereof, that only by the production of such record evidence, and proof of compliance with statutory requirements in all material respects, could such extension be shown, that no question of de facto government was involved in the case, and that the passage of a city ordinance, in so far as relevant to the issues in the case, could not be thus proved by parol.

There was no error in admitting this testimony, nor did the court err in instructing the jury that the undisputed evidence showed that the accident which resulted in the death of G. S. Bratcher occurred within the corporate limits of the city of Waxahachie. In the case of *City of El Paso v. Ruckman*, 92 Tex. 86, 46 S. W. 25, Chief Justice Gaines, speaking for the court, says: "The rule is well established that when the creation of a public corporation, municipal or quasi municipal, is authorized by statute, and a corporation has been organized under the color of such authority, its corporate existence cannot be inquired into by the courts in a collateral proceeding. The validity of the incorporation can only be determined in a suit brought for that purpose in the name of the state, or by some individual under the au-

thority of the state, who has a special interest which is affected by the existence of the corporation." It was shown: That from the date of the council meeting held on August 5, 1902, the minutes of which stated that the petition of Mizell and others to add the territory surveyed by J. W. Martin to the city of Waxahachie was read and adopted, it had been continuously claimed by said city and its officers that said territory so surveyed and known as "Trinity addition," was a part of the city; that the city and its officials had exercised jurisdiction over said territory, levying and collecting taxes on the property therein, including so much of appellant's railroad as was situated in said territory; that aldermen living in that territory had been elected regularly to serve in the city council; and that bonds based on property values including property within said territory had been issued by said city and all the functions of a city government exercised by it in such territory. If therefore it should be conceded that the testimony was insufficient to show the passage of an ordinance by the city council of Waxahachie, taking in the territory in question in compliance with the statute on that subject, still it abundantly, and without dispute, showed that said city, in the exercise of jurisdiction over said territory, was acting as a municipal corporation and under the color of law. In such case its corporate existence as to said territory or right to exercise its functions of government over it, at least in so far as the enforcement of its ordinances in said territory is concerned, cannot be collaterally attacked. It is subject to attack only through a direct proceeding instituted by the state. Mr. Dillon, in his work on *Municipal Corporations*, says: "In proceedings to enforce ordinances the illegality of the corporate organization cannot be shown to defeat a recovery. In such a collateral proceeding, evidence that the corporation is acting as such is all that is required." In the case of *Graham v. City of Greenville*, 67 Tex. 62, 2 S. W. 742, a case in which the validity of the steps taken to annex certain territory to that city was called in question, the above statement of the law by Mr. Dillon was quoted with approval, and the further announcement made: "That if a municipality has been illegally constituted, the state alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter." It follows that the court properly admitted in evidence the ordinance prohibiting the running of locomotives, engines, and cars within the city limits of Waxahachie at a greater rate of speed than six miles per hour, and also correctly ruled on all other matters complained of in this assignment of error.

The fourth and fifth assignments of error assert that the court erred in submitting to the jury, as distinct ground of negligence up-

on which plaintiffs might recover, the maintenance by appellant on its right of way of the cut and dump north of where the killing of G. S. Bratcher occurred, and the building and maintaining of the tower house on its right of way. We think these assignments must be sustained. The evidence, in our opinion, was not sufficient to authorize a finding by the jury that the cut and dump, referred to in the charge, so obstructed Bratcher's view of the approaching train as to have proximately caused his death. Therefore such an issue should not, we think, have been submitted to the jury. According to the practically uncontroverted evidence, said cut and dump were 600 feet north of the crossing where the accident occurred, and a train emerging from the cut going south toward the crossing could be seen by one approaching it as Bratcher was, for that distance, unless it was partially obscured as it passed the tower house of the interlocking plant. It is very clear, we think, from the evidence, that the cut and dump in no wise contributed to the accident resulting in Bratcher's death. Nor could the existence of the tower house properly be considered as constituting a distinct or independent ground of recovery. It could only be considered by the jury, with other circumstances, upon the question of the degree of care which the railway company was bound to exercise in running and managing its trains and giving warning of its approach. Situated and maintained as the evidence shows it was in this case, it cannot be an independent ground of recovery. *M., K. & T. Ry. Co. v. Rogers*, 91 Tex. 52, 40 S. W. 956; *I. & G. N. Ry. Co. v. Knight*, 91 Tex. 660, 45 S. W. 556; *Cordell v. Railway Co.*, 70 N. Y. 119, 26 Am. Rep. 550. In the case of *Railway Co. v. Knight*, supra, Chief Justice Gaines says: "In the case of the Missouri, Kansas & Texas Railway v. Rogers, 91 Tex. 52, 40 S. W. 956, we held that it is not negligence for a railroad to put on its right of way obstructions to the view of one approaching a crossing, whether the obstruction be placed there by the railroad for its own use, or by another, by the railroad's permission to be used in connection with the business of the road; but it is merely a matter to be considered on the question whether there was negligence in the operation of a train at the crossing." Again, he says: "A prudent man operating trains along the track of the defendant company may have exercised more care by reason of the obstructions than he would have exercised had they not existed. Otherwise the existence of the structure did not affect the case." The tower house in question was the usual and ordinary structure necessary to the operation of the interlocking plant, a device to prevent trains from colliding or running into each other at the intersection of

two roads; the intersection in this case being that of the Houston & Texas Central Railroad and that of appellant, so that the erection and maintenance of this structure, under the rule announced in the cases cited, cannot on account of its obstructing the view of the railroad track, if it did obstruct it, "be deemed negligence either in law or in fact."

The sixth and last assignment of error complains of the court's action in submitting to the jury whether or not appellant was guilty of negligence in failing to keep a flagman at the crossing where Bratcher was killed to warn persons about to pass over the street crossing of the approach of trains. We are of the opinion there was no error in this action of the court. It is true that railway companies are not required to keep a flagman or watchman at every crossing to give warning to travelers about to use the crossing of the danger of approaching trains; but, if the location of a crossing and the circumstances surrounding it renders it unusually dangerous, the failure to have a flagman there becomes a proper subject of inquiry and question of culpable negligence in determining the liability of the company for damages for injuries inflicted upon one attempting to pass over such crossing. *Railway v. Gibson* (Tex. Civ. App.) 83 S. W. 862.

We are not prepared to say that the evidence was insufficient to justify the submission of the question in this case.

For the error in the charge, as indicated, the judgment of the court below is reversed, and the cause remanded.

WAGGONER v. PORTERFIELD.†

(Court of Civil Appeals of Texas. April 8, 1909. On Rehearing, April 29, 1909.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a servant by having his arm clipped off as the result of a set screw projecting from a revolving shaft, whether defendant was negligent in permitting such projection *held* for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1028; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—DANGEROUS MACHINERY—ASSUMPTION OF RISK.

Plaintiff, after being employed three days in defendant's seedhouse, was injured by his arm being caught in a set screw projecting from the collar of a revolving shaft as he was endeavoring to adjust a belt. The screw was near the end of the shaft, 15 feet from the floor, and, at the time when plaintiff had occasion to be near it, it was difficult for him to observe it, because the shaft and screw were revolving at high speed. He did not know of the screw, which projected from one to two inches above the collar of the shaft, and which was both unusual and dangerous. *Held*, that plaintiff, being entitled to assume that the machinery was reasonably safe, did not assume

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court June 2, 1909.

TO SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a servant by being caught by a projecting set screw on a revolving shaft, evidence as to plaintiff's contributory negligence held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1080-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ACTION—EVIDENCE.

In an action for injuries to a servant by a set screw projecting from a revolving shaft, the exclusion of evidence, offered only to show whether the set screw could be produced in court, and not to show that the screw had been removed after the injury, was not error.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 918; Dec. Dig. § 270.*]

5. MASTER AND SERVANT (§ 274*)—INJURIES TO SERVANT—EVIDENCE.

Where a servant was injured by a set screw projecting from a revolving shaft, evidence as to his knowledge, or means of knowledge, of the existence and presence of the screw was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 989; Dec. Dig. § 274.*]

6. JURY (§ 142*)—OBJECTION TO JUROR—DISQUALIFICATION—TIME.

An objection that a juror had served more than six days in the district court within the six months preceding the trial comes too late after verdict.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 500; Dec. Dig. § 142.*]

7. DAMAGES (§ 132*)—EXCESSIVENESS.

In an action for injuries to a servant by having his left arm clipped off as the result of his being caught by a set screw negligently permitted to project from the collar of a revolving shaft, a verdict for plaintiff for \$10,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 383; Dec. Dig. § 132.*]

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Action by G. M. Porterfield, by his next friend, against W. T. Waggoner. Judgment for plaintiff for \$10,000, and defendant appeals. Affirmed.

Appellee, a minor suing by next friend, suffered the loss of an arm while in the service of appellant in the Vernon Cotton Oil Mill, and in his petition claims that his injury was the result of the negligence of the appellant in failing to provide him a reasonably safe place in which to work, and in permitting a set screw resting in the collar that surrounded the line shaft, and near the coupling, to project outwardly and beyond the surface or face of said collar and line shaft. The appellant answered by general denial, contributory negligence, and assumed risk. The case was tried to a jury, and in accordance with their verdict a judgment was rendered in favor of appellee. The seedhouse of the Vernon Cotton Oil Mill was a building about 50x300 feet in size. The

in the seedhouse was conveyed from the engine to the seedhouse by a line shaft and belting about 300 feet long. This line shaft did not extend through the full length of the seedhouse, but to about 25 to 30 feet from the east end of the same. It hung on bearings to upright posts, which were about 30 feet high, and placed on the floor on a good foundation, and extended up to within about 5 or 6 feet of the top of the seedhouse. The bearings on which the line shaft ran were on the north side of the posts, which were about 10 feet apart, and there were three pulleys between the said posts and the line shaft. The line shaft had a collar on its west end 27/16 inches in diameter, whose office it was to keep out the end play of the shaft—that is, from working east and west—and this collar was attached to the line shaft by means of a set screw running through the center of the collar. It is conclusively shown that this set screw which so fastened the collar near the west end of the shaft and against the bearing was longer than was necessary, and projected out of the collar 1 3/4 inches. The line shaft was from about 14 to 16 feet from the floor of the seedroom. Some 3 1/2 feet below the line shaft, and on the south side of the upright posts to the north side of which the line shaft was fastened by bearings, was a board 2 inches thick and 10 inches wide for the employes to stand on while putting belts on the pulleys of the line shaft and oiling the bearings of said line shaft, and that board was supported by two horizontal pieces which were fastened to the upright posts and braced. On the same side of the upright posts there was a 2x6 board extending between the two posts and fastened to them, and on the south side of them, and some two or three feet above the line shaft, for the employes to hold to while engaged in putting belts upon the pulleys of the line shaft. Appellee was 20 years of age, and had been at work in the seedhouse about three days before the injury, and before entering the service of appellant had had about 10 days' experience in working in the seedhouse of a cotton oil mill at the same kind of work. The injury is shown to have occurred in substantially the following manner: Appellee and Robert Coon had picked the lint cotton off of the reel in the seedhouse, and then appellee, as was his duty, went back on the platform that ran along by the line shaft to put on the reel belt, while Coon stayed down on the floor to hold on the shaker belt, which, without his holding it on, would come off every time the reel was started. The belt was on the left side of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the pulley, and appellee turned himself towards the pulley, with his left side towards the shaft, supporting himself on the platform, and his right hand holding the support above him provided for the purpose, and with his left hand laid the belt upon the pulley, and then, laying the palm of his left hand against the belt, attempted to give the belt a tilt, and as he did so the set screw, which was somewhere between 2 and 4 feet from the pulley, caught his clothing about his hip on the left side and carried him around the shafting, tearing off his clothing, and his left arm was caught in the pulley, and was clipped off, and he fell to the floor, a distance of about 17 feet. The evidence as to whether appellee had his suspender down at the time of his injury is in conflict. Appellee says he did not have his suspender down, but properly adjusted over his shoulder. Appellee testified, in effect, that he did not know, nor had his attention ever been directed to the fact, that there was a projecting set screw in the collar around the shafting, and that he had had very little opportunity to see it because of the short time of three days he had been at work, and the fact that the end of the shaft was 15 feet above the floor of the seedroom, and at times when he had occasion to be up near the place where the set screw was the machinery was running, and the shaft, collar, and set screw were at the time revolving at a speed of 240 revolutions to the minute. The verdict of the jury involves a finding in favor of the appellee on all the issues in the case, and in deference to the verdict of the jury, which we think is sustained by the evidence, we conclude that the appellant was guilty of negligence as claimed in the petition, and that the appellee was not guilty of contributory negligence, and that he did not know, nor in the circumstances could he have reasonably seen, that the set screw projected over the rim of the collar of the line shaft, and that the amount of damages awarded by the verdict is sustained by the evidence.

R. W. Hall, Marshall & Spoons, and Stephens & Miller, for appellant. Berry & Lucky and McLean & Carlock, for appellee.

LEVY, J. (after stating the facts as above). By the first assignment of error it is contended that the court erred in refusing to give a peremptory instruction to the jury to find for appellant. We do not think there was error. It was properly a question, we think, for the decision of the jury, in all the circumstances of the case, as to whether appellant was guilty of negligence in permitting the set screw which caused appellee's injury to project above the collar in which it was inserted. *Bonn v. Ry. Co.* (Tex. Civ. App.) 82 S. W. 809; *Mountain Copper Co. v. Pierce*, 136 Fed. 150, 69 C. C. A. 148; *Columbia Box*

& Lumber Co. v. Drown, 156 Fed. 459, 84 C. C. A. 269; *Pruke v. Furniture Co.*, 68 Minn. 305, 71 N. W. 276; *Ingraham v. Moore*, 90 Cal. 410, 27 Pac. 306. See 4 Thompson, Commentaries on Neg. §§ 4020, 4022. We do not think that it could be held in the case that appellee was precluded from a recovery because he assumed the risk of danger from the set screw. The undisputed evidence shows that he had no knowledge of the projecting set screw, and had had very little opportunity to see it. He had been at work in the seedhouse only three days prior to the injury. The set screw was near the end of the shaft, and 15 feet above the floor of the seedroom, and at the times when appellee had occasion to be up near the place where the set screw was the machinery was running, and the shaft, collar, and set screw were revolving at a speed of 240 revolutions to the minute, which rendered it difficult for him to have become aware of the fact that the set screw projected out above the surface of the collar. Several witnesses testified that, while the line shaft was revolving at its usual speed, a person looking at it could not distinguish that it was a set screw. It was uncontroverted that no warning or instruction was given the appellee about the set screw. It was shown, by several competent witnesses, that it was unusual for the set screw to project from 1 to 2 inches above the collar. The servant has the right to rely upon the assumption that the machinery with which he is called upon to work is reasonably safe. He does not assume the risks arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risks, or in the ordinary discharge of his own duty must necessarily have acquired the knowledge. *Ry. Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Peck v. Peck*, 99 Tex. 10, 87 S. W. 248; *Ry. Co. v. Bingle*, 91 Tex. 287, 42 S. W. 971; *Oil Co. v. Thompson*, 76 Tex. 237, 13 S. W. 60. As to whether or not the manner in which appellee undertook to put the belt on the pulley was more dangerous than another way that the same work might have been done is a controverted question between the witnesses who testified in the case. We do not think it could be held, as a matter of law, that appellee was guilty of contributory negligence under all the facts and circumstances of the case. *Ry. Co. v. Keefe*, 37 Tex. Civ. App. 588, 84 S. W. 676; *Ry. Co. v. Vestal*, 38 Tex. Civ. App. 554, 86 S. W. 790; *Oil Co. v. Harkey*, 20 Tex. Civ. App. 225, 48 S. W. 1005; *Lumber Co. v. Bivins* (Tex. Civ. App.) 105 S. W. 831; *Smith v. Oil Co.*, 41 Tex. Civ. App. 267, 91 S. W. 383.

The only purpose of the evidence complained of in the second assignment being to ascertain whether or not the set screw could be produced in court, and not offered or insisted upon to show that the set screw had

been removed after the injury, there was no error, and the assignment is overruled.

It was permissible for appellee to show his knowledge, or means of knowledge, of the existence and presence of the set screw, and the third assignment is overruled.

Assignments 4, 5, 5a, 5b, and 5c are overruled. The evidence which counsel commented on was properly admitted in the case in the first instance. The court failing to submit to the jury any issue of negligence as to the running board which was pleaded, the objections urged were entirely removed.

The petition alleged that appellee was a minor, and inexperienced in the work about an oil mill, and that appellant was so informed prior to the injury, and failed to instruct him how to do the work. His evidence tended to show these allegations. His evidence was to the effect that previous to the injury he did not see the set screw, and had occasion to be near it only once or twice during the time that he had been working, which was three days, and then the machinery was in continual rapid revolution. The sixth and seventh assignments are therefore overruled.

We do not think there was reversible error shown in assignments 8, 9, 10, 12, 13, and 14. We think the court fully and correctly instructed the jury as to what would constitute negligence in the case, and the eleventh assignment is overruled. Assignments 15, 16, 17, 18, 19, 20, 21, and 22 relate to objections made to the argument of counsel in the case. We are not prepared to hold that the remarks of counsel complained of were of that character and kind as to require or warrant a reversal of the case. The court especially instructed the jury in his main charge not to consider, or be influenced by, certain statements made by counsel.

The twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth assignments relate to the refusal of the court to give special charges. We have considered all these assignments, and think they should be overruled. The main charge of the court correctly, fully, and affirmatively applied the law applicable to the facts of the case.

The thirtieth and thirty-first assignments relate to the disqualification of a juror. The objection that the juror had served more than six days in the district court within the six months preceding the trial comes too late after verdict. *Schuster v. La Londe*, 57 Tex. 28; *Newman v. Dodson*, 61 Tex. 96; *Rice v. Dewberry* (Tex. Civ. App.) 93 S. W. 715.

The thirty-second assignment claims that the verdict is excessive. Considering the age and the injury and suffering of appellee in the case, we do not feel warranted in holding that the verdict is excessive. See *Ry. Co. v. Bohan* (Tex. Civ. App.) 47 S. W. 1050.

The case was ordered affirmed.

On Rehearing.

The statement in the original opinion, on page 1096, "And appellee turned himself towards the pulley, with his left side towards the shaft, supporting himself on the platform, and his right hand holding the support above him provided for the purpose, and with his left hand laid the belt upon the pulley," is not accurate, and is withdrawn and corrected so as to read: "And appellee turned himself towards the pulley, with his left side towards the shaft. His right foot was in front of him on the running board provided for the purpose, and his left foot resting back of him on a scantling towards the nearest post west of him, which post was about 2½ or 3 feet distant, and was holding with his right hand to a scantling above his head, and then, inclining his body towards the belt, with his left hand laid the belt upon the pulley."

The motion for rehearing was ordered overruled.

TEXAS & P. RY. CO. v. TAYLOR.

(Court of Civil Appeals of Texas. March 13, 1909. Rehearing Denied April 10, 1909.)

1. CONSTITUTIONAL LAW (§ 803*)—DUE PROCESS OF LAW—PENALTY FOR FAILURE TO FURNISH CARS.

The statutes authorizing penalties for failure to furnish cars (Rev. St. 1895, arts. 4497-4502) are not contrary to Const. U. S. Amend. 14, on the ground that they make no provision for exempting the carrier from liability for failure under circumstances beyond its control, and so amount to a taking of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 863; Dec. Dig. § 303.*]

2. STATUTES (§ 241*)—PENAL STATUTES—RULE OF STRICT CONSTRUCTION.

The rule of strict construction of penal statutes does not consist in giving the words the narrowest meaning of which they are susceptible, nor in adopting that strained construction obviously contrary to, or destructive of, the intention of the lawmakers, manifest from one section alone, or in connection with other parts of the same act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 322; Dec. Dig. § 241.*]

3. STATUTES (§ 241*)—CONSTRUCTION—LEGISLATIVE INTENTION AS CONTROLLING.

The intention of the Legislature, even in penal statutes, when it can fairly be discovered must in all cases control.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 322; Dec. Dig. § 241.*]

4. STATUTES (§ 241*)—PENAL STATUTES—RULE OF STRICT CONSTRUCTION.

The rule of strict construction as applied to penal statutes is more, properly speaking, a requirement that the plaintiff's case must be brought strictly within the spirit and letter of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 322; Dec. Dig. § 241.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. STATUTES (§ 241*)—CONSTRUCTION—PENAL STATUTES.

Courts, cannot, and ought not to, deal with an act as a crime, unless it is plainly within the language used by the Legislature; but, when determining whether or not the act is within such language, a common-sense method of interpretation to ascertain its real meaning should always be employed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 322; Dec. Dig. § 241.*]

6. STATUTES (§ 188*)—CONSTRUCTION RENDERING LAW ABSURD OR MEANINGLESS.

A construction should not be employed that would render the law absurd or even meaningless, when a rational, expressive, and wholesome meaning may be ascertained from the language used.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 266; Dec. Dig. § 188.*]

7. CARRIERS (§ 20*)—FAILURE TO FURNISH CARS—STATUTE AUTHORIZING PENALTY—CONSTRUCTION—INVALIDITY AS BEING UNCERTAIN.

The requirement of Rev. St. 1895, art. 4502, that a shipper suing for a penalty for failure to furnish cars shall have "on hand at the time any demand for cars was made" necessary freight for loading them, when read in the light of the privilege conferred on him of 48 hours for loading after the cars are delivered, means he must be the owner or manager of the freight, and have such possession or control over it that he can, and will, be ready and able to load the cars ordered within the time given by the statute; and whether he has such goods on hand within the meaning of that act does not depend upon feet or miles, but rather on his ability actually to deliver the freight and load within the time specified, and the statute, thus construed, is not void for uncertainty in the use of the expression "had on hand."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 36; Dec. Dig. § 20.*]

8. CARRIERS (§ 20*)—FAILURE TO FURNISH CARS—CONSTRUCTION OF STATUTE—MEANING OF "ON HAND."

The phrase "on hand" as used in the statute does not require that the shipper shall have the property at the immediate point of shipment at the time of demand, but, as the statute gives the railroad company six days from demand within which to furnish cars, and the shipper 48 hours thereafter to load, the words mean that he has or owns the property so circumstanced as may be shipped within the time named.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 36; Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 6, p. 4972.]

9. CARRIERS (§ 20*)—PENALTY FOR FAILURE TO FURNISH CARS.

Under Rev. St. 1895, art. 4499, fixing the penalty for failing to furnish cars at "the sum of \$25 per day for each car failed to be furnished," but not naming the time for which it is to be inflicted, the penalty is to be charged at the rate of \$25 per day for each car, and be continued for the whole time of the carrier's delinquency, and a penalty is not forbidden if cars were eventually furnished.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 36; Dec. Dig. § 20.*]

10. CARRIERS (§ 20*)—FAILURE TO FURNISH CARS—OWNERSHIP OF PROPERTY BY SHIPPER AS FIXING CARRIER'S LIABILITY.

In an action for penalties for failure to furnish cars, it is sufficient if the evidence shows plaintiff was one of the owners, and had the actual custody and control of the property to be

shipped, and he need not be shown to be the sole owner.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 44; Dec. Dig. § 20.*]

11. TRIAL (§ 143*)—CONFLICTING EVIDENCE—QUESTION FOR JURY.

A summary instruction should not be given the jury as to an issue on which the evidence conflicts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

12. EVIDENCE (§ 594*)—WEIGHT AND SUFFICIENCY—UNDISPUTED TESTIMONY—INTERESTED WITNESSES.

The undisputed testimony of an employé of one of the parties, consisting largely of opinions and conclusions, would not necessarily be binding on the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

13. CARRIERS (§ 20*)—FAILURE TO FURNISH CARS—CONTRACT OF SHIPMENT AS BEING LOCAL AND INTERNATIONAL.

The statutes authorizing a penalty for failure to furnish cars (Rev. St. 1895, §§ 4497-4502) apply to a contract of shipment for local transportation, though the shipper intended, when it was completed, to deliver the shipment to a connecting carrier for further transportation into Mexico; the shipment under the contract not being for that reason international.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 36; Dec. Dig. § 20.*]

14. CARRIERS (§ 20*)—FAILURE TO FURNISH CARS—ACTION FOR PENALTY—EVIDENCE TO SUPPORT FINDING.

Evidence, in an action for penalties for failure to furnish cars, held to authorize a finding that the carrier's failure to furnish cars within the time demanded was without sufficient legal excuse.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 48; Dec. Dig. § 20.*]

15. TIME (§ 9*)—COMPUTATION AS TO PENALTY—EXCLUDING FIRST AND LAST DAY.

Where an order, filed on November 28th, for cars to be furnished on December 2d, was complied with by furnishing cars on December 13th, December 2d, and 13th should be excluded from the computation in determining the number of days for which penalty for delay should be allowed; and hence there remain only 10 days for which it should be inflicted.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 14½; Dec. Dig. § 9.*]

Appeal from District Court, Mitchell County; James L. Shepherd, Judge.

Suit by E. G. Taylor against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Ed. W. Smith and Wagstaff & Davidson, for appellant. Royall G. Smith, for appellee.

SPEER, J. Appellee recovered judgment against appellant for a penalty of \$1,975 for its failure to furnish cars upon his written order, under articles 4497-4502, Rev. St. 1895.

The first assignment of error, under which practically all the questions in the case may properly be discussed, complains of the court's refusal to direct a verdict for the defendant. So much of the statutes as are

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

necessary to be set out in this case are as follows:

"Art. 4497. When the owner, manager or shipper of any freight of any kind shall make application in writing to any superintendent, agent or other person in charge of transportation, to any railway company, receiver or trustee operating a line of railway at the point the cars are desired upon which to ship any freight, it shall be the duty of such railway company, receiver, trustee or other person in charge thereof, to supply the number of cars so required, at the point indicated in the application within a reasonable time thereafter, not to exceed six days from the receipt of such application, and shall supply such cars to the persons so applying therefor, in the order in which such applications are made, without giving preference to any person: Provided, if the application be for ten cars or less, the same shall be furnished in three days; and provided further, that if the application be for fifty cars or more, the railway company may have ten full days in which to supply the cars.

"Art. 4498. Said application for cars shall state the number of cars desired, the place at which they are desired and the time they are desired: Provided, that the place designated shall be at some station or switch on the railroad.

"Art. 4499. When cars are applied for under the provisions of this chapter, if they are not furnished the railway company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of twenty-five dollars per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages that such applicant may sustain.

"Art. 4500. Such applicant shall at the time of applying for such car or cars, deposit with the agent of such company one-fourth of the amount of the freight charge for the use of such cars, unless the said road shall agree to deliver said cars without such deposit. And such applicant shall, within forty-eight hours after such car or cars have been delivered and placed as hereinbefore provided, fully load the same and upon failure to do so, he shall forfeit and pay to the company the sum of twenty-five dollars for each car not used: Provided, that where applications are made on several days, all of which are filed upon the same day, the applicant shall have forty-eight hours to load the car or cars furnished on the first application, and the next forty-eight hours to load the car or cars furnished on the next application, and so on; and the penalty prescribed shall not accrue as to any car or lot of cars applied for on any one day, until the period within which they may be loaded has expired. And if the said applicant shall not use such cars so ordered by him, and shall so notify the said company or its

agent, he shall forfeit and pay to the said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the applicant to use said cars."

"Art. 4502. It shall be necessary for the party or parties bringing suit against any railroad company under the provisions of this law, to show by evidence that he or they had on hand at the time any demand for cars was made the amount of lumber, cotton, wool, hides, or other freight necessary to load the cars so ordered: Provided, that the provisions of this law shall not apply in cases of strikes or other public calamity."

Some of the reasons urged in support of the requested peremptory instruction go to the very validity of the statutes above quoted, and will therefore be considered first. The contention that the statutes authorizing the recovery of penalties against railroad companies for failure to furnish cars are contrary to the fourteenth amendment of the Constitution of the United States, because they make no provision for exempting the carrier from damages for failure under circumstances beyond its control, and hence amount to a taking of its property without due process of law, may be dismissed summarily by a reference to the decision in the case of *Allen v. Tex. & Pac. Ry. Co.*, 100 Tex. 525, 101 S. W. 792, wherein our Supreme Court expressly repudiated such a construction, and gave to the statute a broader and more liberal interpretation, so that it does not, and cannot, fall within the condemnation of the amendment invoked.

Next it is insisted, inferentially at least, that the statute itself is void for uncertainty by reason of the language employed in article 4502, to the effect that, before a shipper may recover under the provisions of the act, he must show by evidence that he "had on hand at the time any demand for cars was made" the necessary freight with which to load them. The argument is that the expression "had on hand" is so indefinite and uncertain as to defeat the statute. While these statutes have repeatedly been held to be highly penal in their nature, and while the rule of strict construction has at all times been applied to them, we nevertheless do not feel that the application of this rule should destroy the statute upon the grounds urged. The rule of strict construction, as applied to statutes, does not consist in giving words the narrowest meaning of which they are susceptible, nor does it consist in adopting that strained construction which would obviously be contrary to, or destructive of, the intention of the law-makers, when such intention itself is manifest from the section alone or in connection with other parts of the same act. The intention of the Legislature, even in penal statutes, when that intention can fairly be

in the spirit and letter of the statute the intention of the Legislature, when once that intention is discovered. To be sure, courts cannot, and ought not to, deal with an act as a crime, unless it is plainly within the language used by the Legislature; but, when determining whether or not the act is within such language, a common-sense method of interpreting the language so as to ascertain its real meaning should at all times be employed. A construction should not be employed that would render the law absurd or even meaningless, for this itself is a species of absurdity, when a rational, expressive, and wholesome meaning may be ascertained from the language used. The requirement of the statute that the shipper shall have "on hand at the time any demand for cars was made" the necessary freight for loading them, when read in the light of the privilege conferred upon him of 48 hours, after such car or cars have been delivered, of loading them, must be held to mean, we think, that such person must be the owner or manager of such freight, and have such possession of it, or control over it, as that he can and will be ready and able to load the cars so ordered within the time given him by the statute. Whether or not the shipper has such goods on hand within the meaning of the act is not made to depend upon feet or miles, but rather upon his ability actually to deliver the freight and load the cars within the time specified. The very provision allowing 48 hours within which to load the cars, and even longer under some circumstances, tends to negative the idea that the freight was to be actually tendered to the possession of the carrier at the time of making demand for cars; but, if mistaken in this and the proper construction of the statute should be, as contended by appellant, that the freight in such case should be actually delivered to the possession of the carrier, yet the statute would not be void for uncertainty for this very construction makes it certain.

In *Tex. & Pac. Ry. Co. v. Smith* (No. 4, 557) 118 S. W. 1118, this court construed the phrase "on hand" as follows: "It could hardly have been intended by this to require that the intending shipper shall have the property at the immediate point of shipment at the time of demand, inasmuch as the statute gives the railway company as much as six days from the time of the demand within which to furnish the cars, and the shipper 48 hours within which thereafter to load them. The provision must mean that he has or owns the property so circumstanced as that it may be shipped within the time named." We think that decision announces the correct rule, and gives to the statute a construction which correctly discovers the real intention of the

Legislature. The vice in the Kentucky statute stricken down by that decision was that the act of a railroad corporation in charging and receiving more than "a just and reasonable rate of toll or compensation for the transportation of passengers or freight" was made penal, without in any manner establishing a standard of just and reasonable rates of toll, thereby leaving to the determination of individual juries whether or not given rates were just and reasonable. It may be true that such language in a penal statute renders it too indefinite and uncertain to enable those to be affected by it to know definitely beforehand whether or not a given act will be in violation of it, and that was the argument largely upon which the act was condemned, but, even applying that test to the present statute, the carrier in all cases must know, for it has the means of knowing, whether or not the shipper is within the letter of the act; that is, in a position to load the cars within the time allowed by law. The expression "on hand" is as definite and certain, and perhaps more so, than if the statute had required the shipper to be in actual possession of the property to be shipped. It is as definite, we think, as the phrase "party aggrieved," used in the act regulating the sale of intoxicating liquors, authorizing certain persons to sue, and which words have been held sufficiently intelligible to render the act not uncertain. *Peavey v. Goss*, 90 Tex. 90, 37 S. W. 317.

Another difficulty which a very strict construction of the statute would discover has occurred to us in our consultation, and that is that by the terms of article 4499 the penalty against an offending railway company is fixed at "the sum of twenty-five dollars per day for each car failed to be furnished," but the time for which such penalty is to be inflicted is not named; i. e., whether the penalty shall be visited upon the company for one day only, or for each day during the time for which such failure may continue. But we think the language employed is fairly capable of the interpretation that the penalty is to be inflicted at the rate of \$25 per day for each car, and to be continued for the whole time of the carrier's delinquency. Again, a very strict construction would forbid the visitation of a penalty upon the carrier for any failure, however long, if the cars were eventually furnished, for the letter of the act is "for each car failed to be furnished"; but this construction, though literal, would lead to a manifest absurdity and violation of the evident intention of the Legislature and is therefore to be rejected.

We will next notice those contentions which would defeat a recovery in the present

case, though they do not affect the statute itself. It is insisted that the court should have directed a verdict because the evidence shows that appellee was not the sole owner of the horses and cattle, but the evidence shows he was at least one of the owners, and had the actual custody and control of the property, making the shipment in his own name, and this we take to be sufficient.

It is also insisted that the undisputed evidence showed that appellant's failure to furnish the cars upon appellee's demand was due to circumstances beyond its control, but upon this the evidence conflicted, and a summary instruction could therefore not have been given; for if appellant's witness Everman's testimony was undisputed, it would not necessarily be binding upon the jury, since he was an employé of the company, and therefore an interested witness, and his testimony at best consisted largely of opinions and conclusions. *McCormick v. Kampmann* (Tex.) 115 S. W. 24; *Lake v. Earnest* (by this court, not yet officially reported) 116 S. W. 865.

It is next insisted that a verdict for appellant should have been directed because appellee's cattle were shipped from Colorado, Tex., to a point in the republic of Mexico by a continuous shipment and journey, and that therefore, the shipment being international, the statutes of Texas authorizing a penalty do not apply in this case. The evidence shows, however, that while appellee did contemplate and did actually finally ship his cattle to a point in the republic of Mexico, yet the only contract of shipment entered into with appellant was one for transportation from Colorado City to El Paso, Tex. The cattle were not billed through to the republic of Mexico, and appellant in no manner undertook to deliver the cattle to a connecting carrier at El Paso for further transportation into the republic of Mexico, or to do otherwise than to deliver them to the order of appellee at El Paso, Tex. The contract was therefore a complete contract, looking to the transportation of the property only from one point in Texas to another point in this state, and as such fairly within the rule announced by this court in *G., O. & S. F. Ry. Co. v. Texas*, 32 Tex. Civ. App. 1, 73 S. W. 429, and approved by our Supreme Court (97 Tex. 274, 78 S. W. 495), and by the United States Supreme Court (204 U. S. 404, 27 Sup. Ct. 360, 51 L. Ed. 541). A single quotation from an illustration made by the United States Supreme Court in its decision of the case cited will illustrate the correctness of our holding: "To state the question in other words—if the only contract of shipment was for local transportation, would the state law in respect to the mode of transportation be set one side by a federal law in respect to interstate transportation, on the ground that the shipper intended, after the one contract of shipment had been completed, to forward the goods to

some place outside the state?" Appellee's written requisition for cars was delivered to appellant November 28, 1906, demanding seven cars to be delivered at Colorado on December 2, 1906, was accompanied by the necessary deposit of one-fourth the freight charges, and in all respects complied with the provisions of the statute hereinabove quoted. Appellee and his father were the owners of the cattle and horses contained in the shipment in controversy, and had them within easy shipping distance of appellant's pens at Colorado, Tex., on the above dates, and until December 13th, on which day the cars were actually furnished. The cattle were being kept in a pasture about $3\frac{1}{2}$ miles from the pens, while the horses were at a farm only about $1\frac{1}{2}$ miles away. They were so near by to appellant's pens that they could easily have been loaded within 4 or 5 hours upon the delivery of the cars, and were so loaded within that time when the cars were finally furnished. Under these circumstances we think the appellee was such owner of the property as was entitled to recover; that he had shown that the property was "on hand" at the time of his requisition for cars, and the jury were authorized to find from the evidence that appellant's failure to furnish cars within the time demanded was without sufficient legal excuse. Neither do we find any error in the court's rulings in giving or refusing charges.

The judgment is excessive, however, in that the penalty was allowed for 11 days, when it should have been for 10 only. As already stated, the order was filed on November 28th, and the cars were to be furnished on December 2d, and were actually furnished on December 13th. Excluding from the computation December 2d, for appellant had all of that day on which to make the delivery, and excluding also December 13th, for there was not a default on that day, there remain only 10 days for which the penalty should be inflicted, and the judgment is therefore excessive in the sum of \$175. The appellee has offered to remit this sum if we hold it to be erroneous, and the judgment is therefore reformed so as to be for the sum of \$1,750, and as thus reformed is affirmed.

TEXAS & P. RY. CO. v. ANDREWS, REYNOLDS & CO.

(Court of Civil Appeals of Texas. March 13, 1909. On Rehearing, April 17, 1909.)

1. CONSTITUTIONAL LAW (§ 808*)—DUE PROCESS OF LAW—PENALTIES FOR FAILURE TO FURNISH CARS.

The statute authorizing penalties for failure to furnish cars (Rev. St. 1895, arts. 4497-4502) allows a railway company the right to excuse a failure to furnish cars within the statutory time, when such failure is caused by extraordinary conditions suddenly arising, and beyond the power of the company to control, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

hence does not violate Const. U. S. Amend. 14, by depriving it of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 863; Dec. Dig. § 303.*]

2. CARRIERS (§ 2*)—FAILURE TO FURNISH CARS—CONSTITUTIONALITY OF STATUTE—EXCESSIVE FINES AND PUNISHMENT.

The statute authorizing penalties for failure to furnish cars (Rev. St. 1895, arts. 4497–4502), and which provides by article 4499 a penalty of \$25 per day for each car failed to be furnished in addition to actual damages, is not a violation of the Constitution in that it authorizes imposition of excessive fines and punishment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 3; Dec. Dig. § 2.*]

3. CARRIERS (§ 20*)—FAILURE TO FURNISH CARS—LIABILITY FOR PENALTIES—SUFFICIENCY OF APPLICATION.

Rev. St. 1895, art. 4497, makes it the duty of a railway company to supply the number of cars required by a shipper at the point indicated in the application, within a reasonable time thereafter, not to exceed a specified number of days, varying with the number of cars applied for. Article 4498 requires that the shipper shall state in his application the number of cars required, the place where they are desired, "and the time they are desired." Article 4499 provides that when cars are applied for, if the railroad company shall fail to furnish them, it shall forfeit a certain sum per day for each car, in addition to actual damages. *Held*, that the respective periods allowed by the statute within which to deliver cars on written order were minimum periods, which must in all cases be allowed by the shipper, but subject to which the shipper had the right, and it was made his duty, to designate the time when cars were desired, and hence an application for cars designating a day for delivery more remote than the minimum statutory time from the receipt of the application was sufficient to authorize recovery of the penalty for its disobedience.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 36; Dec. Dig. § 20.*]

On Rehearing.

4. CARRIERS (§ 20*)—FAILURE TO FURNISH CARS—ACTION FOR PENALTIES—CONSTRUCTION OF FINDING.

In an action against a railroad company for penalties for failure to furnish cars, while plaintiffs sought to recover, and the court adjudged penalties only for the days including December 18, to December 27, 1906, they alleged that defendant incurred, and they were entitled to recover, the statutory penalty for the full period of delay after December 8th, the day on which the application required delivery, and the court found that "the evidence fails to show a sufficient excuse for the failure of defendant to furnish the cars in question on or before December 18, 1906, and defendant could by the use of reasonable diligence, notwithstanding the conditions prevailing at the time, have furnished said cars at M. prior to December 18th." *Held*, that this finding, aided by the judgment in plaintiffs' favor, required the conclusion, if necessary to support the judgment, that defendant was without excuse for its delay at any time after December 8th.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

5. APPEAL AND ERROR (§ 1033*)—JUDGMENT LESS THAN AUTHORIZED—RIGHT TO COMPLAIN THEREOF.

A party cannot complain on appeal merely because the judgment awards against it a less

penalty than the pleadings and facts would have authorized, save for the limitation of the prayer for recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4061; Dec. Dig. § 1033.*]

Conner, C. J., dissenting in part.

Appeal from District Court, Midland County; W. K. Homan, Special Judge.

Action by Andrews, Reynolds & Co. against the Texas & Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Ed. W. Smith, for appellant. S. J. Isaacs and G. B. Smedley, for appellees.

CONNER, C. J. On November 26, 1906, appellees filed with appellant's local agent at Midland, Tex., an application for eight stock cars in which to ship cattle from Midland to Ft. Worth, Tex., on December 8, 1906, at the same time depositing with such agent an amount equal to one-fourth of the freight charges on such shipment. The cars were not delivered at Midland until December 26, 1906, and appellees instituted this suit to recover actual damages and statutory penalties for delay. After alleging the facts stated, it was charged that the delay was negligent, violative of the statute, that the resultant actual damage was \$365.75, and that "by reason of the defendant's failure and refusal to furnish cars on December 8, 1906, and on each day thereafter until December 26, 1906, after having been given the statutory notice and demand to do so, and after having tendered the amount of money required by law, plaintiffs are entitled to recover of and from defendant the statutory penalty of \$25 for each car demanded for each day said cars were not furnished after December 8, 1906, and plaintiffs now sue for penalty in the sum of \$1,600. Plaintiff says that the days for which he is suing for penalty are December 18 to December 26, 1906, both inclusive. The defendant answered by general demurrer, special exceptions, general denial, and a special answer, in which it was alleged that the failure on the part of the defendant to furnish the cars demanded at the time demanded, or sooner than they were in fact furnished, was due to the fact that prior to the time the cars were demanded to be furnished an unprecedented volume of traffic of all sorts arose on its line of railway, and continued during the time in which the matters herein arose, and that such extraordinary conditions caused a congestion of traffic and a blockade of defendant's tracks, side tracks, sidings, and switches, and that such increase in the volume of business could not reasonably be foreseen or avoided, although the defendant had ample facilities to handle such traffic as arose on its line, or was offered it by its connecting carriers, under ordinary or normal conditions, and did in fact handle

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such business under such conditions with reasonable promptness." The court overruled all of appellant's exceptions, and gave appellees a judgment for \$60 expended by them in holding their cattle during the delay in the receipt of cars, and a further sum of \$1,600 penalty. The trial was before the court without a jury and the cause is now presented to us for review on appellant's appeal, upon the evidence, the trial court's conclusions of fact and law, and the numerous assignments of error that are urged.

The action involves a consideration of the following articles of our statute (Rev. St. 1895):

"Art. 4497. (As amended 1890, p. 67.) Railroad to Furnish Cars When Demanded.—When the owner, manager or shipper of any freight of any kind shall make application in writing to any superintendent, agent or other person in charge of transportation, to any railway company, receiver, or trustee, operating a line of railway at the point the cars are desired upon which to ship any freight, it shall be the duty of such railway company, receiver, trustee or other person in charge thereof, to supply the number of cars so required, at the point indicated in the application within a reasonable time thereafter, not to exceed six days from the receipt of such application, and shall supply such cars to the persons so applying therefor, in the order in which such applications are made without giving preference to any person: Provided, if the application be for ten cars or less, the same shall be furnished in three days; and provided, further, that if the application be for fifty cars or more, the railway company may have ten full days in which to supply the cars.

"Art. 4498. Application shall State, What.—Said application for cars shall state the number of cars desired, the place at which they are desired and the time they are desired: Provided that the place designated shall be at some station or switch on the railroad.

"Art. 4499. Penalty for Failure to Furnish.—When cars are applied for under the provisions of this chapter, if they are not furnished, the railway company so failing to furnish then shall forfeit to the party or parties so applying for them the sum of twenty-five dollars per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages that such applicant may sustain.

"Art. 4500. (As amended 1899, p. 67.) Applicant shall Make Deposit.—Such applicant shall, at the time of applying for such car or cars, deposit with the agent of such company one-fourth of the amount of the freight charge for the use of such cars, unless the said road shall agree to deliver said cars without such deposit. And such applicant shall, within forty-eight hours after such car or cars have been delivered and placed as hereinbefore provided, fully load the same,

and upon failure to do so he shall forfeit and pay to the company the sum of \$25 for each car not used: Provided, that where applications are made on several days, all of which are filed upon the same day, the applicant shall have forty-eight hours to load the car or cars furnished on the first application, and the next forty-eight hours to load the car or cars furnished on the next application, and so on; and the penalty prescribed shall not accrue as to any car or lot of cars applied for on any one day, until the period within which they may be loaded has expired. And if the said applicant shall not use such cars so ordered by him, and shall so notify the said company or its agent, he shall forfeit and pay to the said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the applicant to use said cars."

Article 4501 relates to transportation of loaded cars, and is not applicable in this case.

"Art. 4502. Necessary for Applicant to Show, What.—It shall be necessary for the party or parties bringing suit against any railroad company under the provisions of this law, to show by evidence that he or they had on hand at the time any demand for cars was made, the amount of lumber, cotton, wool, hides, or other freight, necessary to load the cars so ordered: Provided, that the provisions of this law shall not apply in cases of strikes or other public calamity."

It is insisted that the statute authorizing a penalty is void, in that it violates the fourteenth amendment to the Constitution of the United States to the effect that no state shall deprive any person of his property without due process of law. The contention, in substance, is that the statute denies to the railway company the right to excuse a failure to furnish cars within the time required by the terms of the law, when such failure is caused by extraordinary conditions suddenly and unexpectedly arising beyond the power of the company to control. But since the construction of the statute given by our Supreme Court in the case of *Texas & Pacific Ry. Co. v. Allen*, 100 Tex. 525, 101 S. W. 792, allowing such defense, the constitutional objection now urged is not maintainable. Moreover, the trial court in this case permitted appellant to plead and offer evidence of a sudden and unexpected congestion of traffic and scarcity of cars in defense of the failure charged. It is also urged that the statute is violative of the Constitution in that it authorizes the imposition of excessive fines and punishment, but we are not inclined to give ear to this complaint, and think, besides, that the *Allen* Case, *supra*, and others that might be cited are, at least by implication, against the contention. We, therefore, overrule all objections herein urged on constitutional grounds. We also overrule several other contentions

herein made or involved for the reasons given in the case of *Tex. & Pac. Ry. v. Taylor* (No. 5878, this day decided by us) 118 S. W. 1097, which therefore need not be repeated here.

All other assignments of error are, we think, directly or indirectly involved in appellant's contention that the application for cars made by appellees is insufficient to support the court's finding and judgment for penalties. We, therefore, address ourselves to this question without further delay. The application is as follows: "Midland, Texas, November 26, 1906. The Agent of the Texas & Pacific Railway Company, Midland, Texas—Dear Sir: On Saturday, Dec. 8, 1906, we desire to ship from Midland, Texas, to Fort Worth, Texas, over your line of railroad, eight cars of cattle; and on that date, to wit: December 8, 1906, you will please furnish us at Midland, Texas, eight stock cars in which to ship said cattle. We herewith hand you \$96.00, and amount equal to one-fourth of the freight charges on said cars from Midland, Texas, to Fort Worth, Texas. Yours truly, Andrews, Reynolds & Company." While the writer inclines to a contrary view, the majority are of opinion that the application is a sufficient compliance with the statute to authorize the recovery of the penalty for its disobedience. They say, in the language of Mr. Associate Justice SPEER that: "By article 4498 of the Revised Statutes already quoted, it is required that the shipper shall state in his application the number of cars desired, the place at which they are desired, 'and the time they are desired.' When the statutes are read as a whole, it is manifest that the Legislature intended to authorize the shipper to name the day on which he would have cars delivered, subject only to the qualification that the company should have at least the number of days designated by the statute. In *Tex. & Pac. Ry. Co. v. Hughes*, 99 Tex. 533, 91 S. W. 567, the Supreme Court held that an application for cars 'as soon as possible,' was not a compliance with the article last above cited, in that the application did not state any time whatever within which the cars were to be furnished. It is insisted, however, since the statutes provide that it shall be the duty of the railway company to supply cars at the point indicated in the application within a reasonable time thereafter, 'not to exceed six days from the receipt of such application,' and that where the application is for 'ten cars or less the same shall be furnished in three days,' and that, since by article 4499, 'if they are not furnished the railway company so failing to furnish them shall forfeit,' etc., that the order in the present case, naming December 8th, a day more than three days 'from the receipt of such application,' is not a compliance with the statute, since it demands a delivery of cars at a time other than that which the law requires the railway company to de-

liver them. In other words, according to article 4497 the reasonable time within which the carrier is given to furnish cars dating 'from the receipt of such application,' and that, time itself being fixed by the statute, it is not within the power of the shipper to name another date, and to recover a penalty for the company's failure to observe it. But we think the better view is that the respective periods allowed by the statute to the carrier within which to deliver cars on writ ten order are minimum periods which must in all cases be allowed by the shipper, but subject to which the shipper has the right, and it is made his duty, to designate the time when such cars are desired. If the contention of appellant were sustained, the result would be entirely to destroy that portion of article 4498 which authorizes the shipper to state the time when the delivery of cars is desired, inasmuch as under that construction the law would in all cases name the day on which such cars should be delivered. The statutes evidently never contemplated that the carrier should deliver cars within the time designated in the body of the act, where the shipper himself had designated in the order a day more remote."

As indicative of the writer's thought he wishes to briefly add that, while of course sufficient as a basis for the recovery of actual damages in event of negligence, he thinks it may well be doubted whether the application under consideration affords that degree of certainty that the law requires in cases of penalty. As exemplified by many authorities, before a person should be punished as for a crime, or in the way of a penalty, the law and the facts should leave no room for doubt as to what was the duty of the accused. And as directly applicable here, it was said by our Supreme Court, in the case of *Ry. Co. v. Hughes*, 99 Tex. 533, 91 S. W. 567: "The statute under which appellee seeks to recover is highly penal, and the rule applies that he who seeks to recover a penalty under such statute must bring himself strictly within the provisions of the law." See, also, *Ry. Co. v. Barrow*, 33 Tex. Civ. App. 611, 77 S. W. 643; *Ry. Co. v. State*, 100 Tex. 420, 100 S. W. 766; *State v. Ry. Co.* (Tex. Civ. App.) 103 S. W. 654; *Louisville & N. Ry. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 130; *Mathews v. Murphy* (Ky.) 63 S. W. 765, 54 L. R. A. 415. It seems clear that at least the letter of the law required appellant to deliver at Midland the eight cars applied for by appellees in three days "from the receipt of such application." Vide article 4497, supra. If not so delivered, article 4499 denounced a penalty, amounting in this case to \$200, for each day of failure. The application was received by appellant's agent on November 26th, and if the statutory requirement was to be followed, the cars, to avoid the penalty, must be furnished at Midland not later than November 30th, yet the appli-

cants demanded them for December 8th, some 9 days thereafter, and until then appellant could hardly expect the operation and benefit of the reciprocal penalty denounced by article 4500 in event appellees failed to accept and load the cars within 48 hours after delivery. In such case was appellant subject to the penalty if the cars were not delivered within the time required by the statute, and compelled to hold the cars at Sweetwater during the interim without compensation or liability on the part of the appellees until 48 hours after December 8th?

But if the difficulties here suggested, if they are such, may be avoided by the reading of the statute adopted by the majority, and that construction is certainly a reasonable one if liberality of construction is allowable, then what were the duties of appellant in the matter of priorities so plainly enjoined by the statute? Article 4497 specifically requires that cars applied for under the statute shall be supplied "in the order in which such applications are made, without giving preference to any person." Let it be supposed, as may reasonably be done if we consider the length of appellant's line of railway through our extensive grazing territory, that upon November 27th appellant had received an application for eight cars or less, to be furnished December 1st, and so on up to December 8th, each case allowing the statutory period, and no more; and let it be further supposed that, by reason of prior applications and other excusing conditions recognized by law, appellant was unable to furnish all cars so applied for, including those for appellees. Then who of the applicants must await a further time? In other words, how can priority in application be observed if the statute is to be construed as allowing the shipper to make his application for cars 9, 30, 90, or any other number of days, far in advance of the time he needs them? To do so would seem to foster confusion, uncertainty, and perhaps enable a shipper to obtain advantage over others equally entitled to consideration. It may be well doubted whether the statute, in requiring an applicant for cars to state "the time they are desired," contemplates an unbridled liberty in this respect. As a whole the statutes seem inconsistent with any such purpose. It is evident that promptness and diligence, not only on the part of the railway company, but also on the part of the shipper, is intended. Not only is a penalty provided as against the shipper, but it is especially required that an applicant suing must "show by evidence" that he or they had "on hand," at the very time any demand for cars was made, the amount of freight necessary to load the cars applied for. Article 4502. If when he applies he is ready—i. e., has his property on hand—the writer sees no difficulty or deprivation of privilege in requiring an applicant, in stating the time when the cars are de-

sired, to name that day which will give to the railway company the full number of days allowed by the law for the particular number of cars applied for, and which will also enable the company to enforce, by penalty, acceptance, and loading, within 48 hours after they are furnished. The fact that the law omitted to prescribe the particular day that should be stated in the application is not conclusive that the Legislature intended to grant an intending shipper the right to name any day he chose, however remote from the time of making his application, in view of the variation in the number of days allowed for furnishing cars, dependent upon the number of cars demanded. So that, while it may not be entirely clear, it seems to the writer that less of uncertainty and confusion will arise to construe the statute allowing the shipper to name the day he desires the cars as meaning that he shall state the first day that he is entitled to receive the cars, viz., the day immediately following the full period allowed the railway company for furnishing the particular number of cars applied for. If the shipper has his freight on hand when he makes his application, the 48 hours allowed by the statute before he is required to use the cars, a period amounting to two full days, gives all the latitude in the statement of time he needs.

However, the opinion of the majority must prevail, and we accordingly adopt the trial court's conclusions, and affirm the judgment for the penalty as well as the actual damages.

On Rehearing.

It is very earnestly insisted that we erred in ignoring and overruling appellant's first assignment of error. The insistence, in substance, is that the court in effect found that appellant was excused from its failure to furnish cars for a number of days after the time the statute required their delivery at Midland, and that hence the court erred in assessing a penalty for a time not fixed by the statute. While appellees sought to recover, and the court adjudged, penalties only for the days including December 18, to December 27, 1906, they alleged that appellant incurred, and appellees were entitled to recover, the statutory penalty for the full period of delay after December 8th, the day upon which the application required delivery, and the court's finding on the subject, which we approved, is as follows: "The evidence fails to show a sufficient excuse for the failure of defendant to furnish the cars in question on or before December 18, 1906, and defendant could, by the use of reasonable diligence, notwithstanding the conditions prevailing at the time, have furnished said cars at Midland prior to December 18th." This finding, aided by the judgment in appellees' favor, we think would require the conclusion, if necessary to support the

in his findings circumstances showing a congested condition of traffic, as alleged, and awarded penalties for the period only from December 18th to December 26th, inclusive, is not deemed controlling, in view of the appellees' prayer and the final conclusion of fact on the part of the trial court. We fail to see how appellant can complain merely because the judgment awards less penalty than the pleadings and facts would have authorized save for the limitation of appellees' prayer for recovery.

Upon the question of the sufficiency of the application both the majority and the writer see no reason to change their views as expressed in our original opinion, and the motion for rehearing must therefore be overruled.

AMERICAN FREEHOLD LAND MORTGAGE CO. OF LONDON, Limited, v. BROWN et al.

(Court of Civil Appeals of Texas. March 17, 1909. Rehearing Denied May 5, 1909.)

1. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In an action for injuries to plaintiffs' business by fraudulent statements and representations made to plaintiffs' customers, an instruction that if defendant committed the acts charged in furtherance of a design to break up plaintiffs' business, and they were financially injured thereby, the jury should find for them, was not erroneous as authorizing a recovery as to facts alleged as to which there was no testimony, and as to other facts on which the plaintiffs were not entitled to recover, where the court also charged that all allegations in support of which there was no evidence were withdrawn, and withdrew certain issues on which no recovery could be based.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

2. TORTS (§ 28*)—ACTION—TRIAL—INSTRUCTIONS.

In an action for injuries to plaintiffs' business, caused by false statements of defendant to plaintiffs' customers, the refusal of instructions that, if a certain loss resulted from bad business, or from general rumors that plaintiffs were careless and incompetent loan agents, or from any other cause than the false statements of defendant, there could be no recovery was not error; it being presumed that the jury would not give a verdict for loss not resulting from defendant's acts.

[Ed. Note.—For other cases, see Torts, Dec. Dig. § 28.*]

3. APPEAL AND ERROR (§ 230*)—PRESENTATION OF QUESTIONS—ARGUMENTS OF COUNSEL.

Improper remarks of counsel not objected to at the time will not be reviewed on appeal; an objection, after a discussion of the same matter outside of the record alternately by counsel for both parties, and presentation of

AND SUFFICIENCY.

In an action for injuries to plaintiffs' business, caused by false statements by defendant to plaintiffs' customers, evidence held to justify a verdict of \$40,000 actual damage and \$10,000 exemplary damages to plaintiffs.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 184.*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by R. L. Brown and another against the American Freehold Land Mortgage Company of London, Limited. From a judgment for plaintiffs, defendant appeals. Affirmed.

The nature of this suit is sufficiently indicated by the charge of the trial judge, which, omitting formal parts, reads as follows:

"Gentlemen of the Jury: In this case the plaintiffs allege that R. L. Brown and J. Gordon Brown, under the name of Brown Bros., had established at Austin, and in the city of Waco, a business of loan agents, which transacted business throughout the state, and had from 1888 to 1898 conducted the business of lending money on behalf of foreign corporations, receiving for their services a per cent. of the annual interest as it accrued upon the loans made; that the plaintiffs had established a good reputation as business men for honesty, promptness, and reliability, and as men who could command money for lending to those who might apply to them to borrow, and in the transaction of the business of loan agents had established business relations with many people in Texas who were borrowers of money, who had confidence in the plaintiffs, and who would have continued to do business with them, except for the interference of the defendant; that they were appointed agents of the American Freehold Land Mortgage Company of London, Limited, hereinafter called the defendant company, in the year 1888, and continued to transact business as such agents for that company until the year 1898, during which time a profitable business was done for said defendant company, for which the plaintiffs received annually \$8,000; that in the year 1898 the defendant company determined to change the manner of doing business in Texas, so as to pay salaries instead of commissions, as it had done with the plaintiffs; that by reason of the transactions which plaintiffs had carried on as agents lending money for the said defendant company, as well as others, they had established a valuable business, having loaned money to many persons, which loans were about to mature, and said persons would require to renew the loans, or to borrow money to pay them; that plaintiffs

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index

would have been able to control that business as agents of other companies after the agency for said defendant company had been taken from them, and to prevent this, and secure the plaintiffs' business for themselves, the said defendant company and R. B. King and T. Mallinson who are alleged to be agents of the defendant company, fraudulently and maliciously combined, confederated together for the purpose of weakening and destroying plaintiffs' business influence, financial credit and standing, and to break them up and run them out of business, and that by means of the fraudulent combination and their acts done and performed, alleged specially in the petition, the defendant succeeded in preventing the plaintiffs from continuing their business with a large number of their clients who needed to borrow money, and whose loans in other companies were maturing, and by the fraudulent and false representations alleged in the petition defendant prevented said persons from making application to the plaintiffs for such loans, and thereby weakened, and in a large measure destroyed, the business of the plaintiffs. It is further alleged that the defendant, for the wicked, malicious, and fraudulent purpose before charged, circulated and published reports and statements to the effect that the plaintiffs were insolvent and unable to accommodate their customers who might apply for loans, and by the various methods alleged, interfered, and prevented persons from applying to the plaintiffs for loans, and also by such means and false and fraudulent representations prevented plaintiffs from acquiring agencies from other companies, which otherwise they would have done, so as to enable plaintiffs to furnish money to those persons who applied to them for loans.

"(2) Plaintiffs have dismissed their case as to T. Mallinson and R. B. King, and they are no longer parties to this case. The defendant company denies the allegations in the plaintiffs' petition, and specially allege that on the 20th day of July, 1899, plaintiffs and defendant company made and entered into an agreement, wherein they had a full and complete settlement of all matters in controversy then existing between said company and said plaintiffs, growing out of their relations as principal and agents, and on account of the termination thereof, and it alleges that no acts or statements complained of by the plaintiffs herein, as committed or made by its representatives (if any were actually committed or made), were committed or made under its authority, or with its knowledge or consent; nor was any such act or statement ever ratified by it; that neither it nor its representatives ever at any time caused the plaintiffs to lose any company which they had, nor caused them at any time to lose any customer which they had; that neither the defendant nor its representatives at any time prevented the plaintiffs from securing any new company, nor did it or its representa-

tives at any time prevent the plaintiffs from securing any new customers; that neither it nor its representatives at any time prevented or caused any company or persons to desist from loaning plaintiffs any money, nor did it or its representatives ever at any time cause the plaintiffs, or either of them, to suffer any damage, save such as necessarily resulted to them by the withdrawal of defendant's business from them, which it had a full legal right to do, and for any results of which it is in no way responsible.

"(3) All allegations of fact in the pleadings in support of which no evidence has been introduced are withdrawn from your consideration, and you will not consider such allegations for any purpose in arriving at your verdict.

"(4) Under the contract of employment of plaintiffs by the defendant company said company retained the right to discharge the plaintiffs at any time for or without cause, at its discretion, and hence the plaintiffs cannot recover of the defendant any damages for withdrawing or terminating its agency contract with the plaintiffs, or for any losses which the plaintiffs may have sustained by reason thereof, regardless of the motives said company may have had in withdrawing the same. When the plaintiffs were discharged by said company, a settlement of all matters existing between them, growing out of said contract, and damages to the plaintiffs on account of the sending out of what is known as the 'Francis Smith & Co. Letters,' was made and entered into on July 20, 1899, under and by virtue of which both parties released the other from all liability for or on account of anything arising out of, or connected with, the former agency of the plaintiffs, and also the Francis Smith & Co. letters, and hence plaintiffs cannot recover of the defendant any damages for or on account of the Francis Smith & Co. letters, and are limited in the amount of their recovery in this suit, if any, to damages growing out of the alleged wrongs committed by defendant, through its officers and agents, which did not arise out of, and were not connected with, the agency referred to, nor growing out of the Francis Smith & Co. letters, namely, alleged fraudulent and malicious acts and false declarations, uttered and done by the defendant for the purpose of breaking up plaintiffs' business as loan agents, and running them out of such business; and all of the evidence which has been admitted touching the kind of business done by the plaintiffs for the defendant company and the English & Scottish Company was admitted upon the issue above stated, and can only be considered by you in determining whether or not the defendant committed the acts alleged, for the purpose alleged, as above stated; and the Francis Smith & Co. letters can only be considered by you in arriving at or determining the purpose, if any, of the

out of such business, and in no event can they be considered by you in estimating the amount of damages, if any, which plaintiffs may have sustained.

"(5) Some evidence has been introduced regarding letters written, and statements made, by J. H. Harrison and F. W. Norris, employés of Francis Smith & Co., and in this connection you are instructed that you cannot consider these letters and statements for any other purpose whatever, unless you believe from the evidence that Francis Smith & Co. authorized or caused said acts and declarations to be made or done, and, unless you believe from the evidence that they were so authorized, you will disregard such evidence, and not consider the same in arriving at your verdict; but if you believe from the evidence that they were so authorized, then you will consider the statements made and letters written by them, or either of them, if any, in connection with, and as part of, the Francis Smith & Co. letters.

"(6) The plaintiffs in this case cannot recover on this suit any damages on account of the alleged statements of E. B. Hoare, 'If Mr. Brown had retained the agency, liquidation would have been unavoidable,' sued upon in the English court, because the judgment in that court adjudicated any cause of action, if any, that arose from the use of that expression, if same was used by the said Hoare, and you are instructed not to consider any evidence as to such statements for any purpose whatever.

"(7) Any unlawful act, done willfully and purposely to the injury of another, is, as against that person, malicious.

"(8) Now, if you believe from the evidence that the defendant company, acting through one or more of its controlling officers and one or more of its agents and employés, working in concert and with a common purpose, committed the acts, or some of them, or made the statements, or some of them, alleged in the petition, and did such acts maliciously, or made such statements falsely, and committed such acts or made such statements in furtherance of a design and intention to break up Brown Bros. in business, and drive them out of business, and that Brown Bros. were financially injured in their business as loan agents thereby, then you will find for the plaintiffs, and the burden of proof rests upon the plaintiffs to establish such facts by the preponderance of the evidence; and, if you do not find for the plaintiffs under this paragraph, you will return a verdict for the defendant.

"(9) By the expression 'controlling officers,' as used in the foregoing paragraph, is meant some chief officer, or vice principal of the company, who must be shown to possess, un-

"(10) If you find for plaintiffs under paragraph 8 of this charge, you will assess the damages at such sum as will compensate them for the actual financial loss or injury to their business as loan agents sustained by them, and state such amount in your verdict as actual damages; and, in arriving at such sum, if any, you will not take into consideration any damages, if any, which may have been sustained by Brown Bros. from any other source or cause than from the acts and statements of the defendant, through its officers and agents, if any, as submitted to you in paragraph 8 hereof.

"(11) If under the instructions hereinbefore given you find for the plaintiffs actual damages, then you may also, in addition to actual damages, if in your judgment the facts and circumstances in evidence warrant, find for the plaintiffs such other and further amount as exemplary or punitive damages as in your judgment, under all the facts and circumstances in evidence, may seem to you right and proper as a punishment to the defendant company for such conduct.

"(12) You cannot, in any event, find any exemplary damages unless you find for the plaintiffs actual damages, and if you do not find that the plaintiffs have suffered actual damages under the instructions herein given you, you will return your verdict for the defendant.

"(13) If you find for the plaintiffs, you will so say, and assess their actual damages, under the instructions hereinbefore given you, and state in your verdict how much you find as actual damages; and, if you find exemplary damages, you will state in your verdict how much, if any, you so find as exemplary damages.

"(14) You are the exclusive judges of the credibility of the witnesses, and the weight to be given to the testimony, and as you find so say in your verdict."

The jury returned a verdict for the plaintiffs for \$40,000 actual, and \$10,000 exemplary, damages. Judgment was rendered in accordance with the verdict, and the defendant, Land Mortgage Company, has appealed.

Gano, Gano & Gano, Sleeper & Kendall, and J. E. Yantis, for appellant. Clarence H. Miller, George Clark, O. L. Stribling, and Fiset & McClendon, for appellees.

KEY, J. (after stating the facts as above). This is the third time that this case has come before this court. 97 Tex. 599, 80 S. W. 986, 67 L. R. A. 195; (Tex. Civ. App.) 81 S. W. 824; (Tex. Civ. App.) 101 S. W. 856. On the first appeal, which was prosecuted by the

plaintiffs on certified question submitted to the Supreme Court, that court held that the plaintiffs' petition, alleging that the defendants conspired together to ruin plaintiffs in their business as real estate agents, and for that purpose circulated false statements that plaintiffs were bankrupt, etc., and that in consequence of such representations plaintiffs' business had been destroyed, stated a cause of action. The case was reversed by this court on account of certain errors committed during the trial. The second trial resulted in favor of the plaintiffs, and the defendant appealed and secured a reversal of the case because of an error in the court's charge to the jury. That error was cured at the last trial. The present appeal is presented in this court upon 70 assignments of error, and a printed brief on behalf of appellant comprising over 200 pages. Very many of the questions presented were urged, considered, and decided against appellant on the former appeals. However, the case has been given extended and careful consideration, and no reason has been found for changing any of the rulings heretofore made. There are some additional questions, some of which we deem it proper to consider in this opinion.

Error is addressed to the eighth paragraph of the court's charge, the contention being that it authorized the jury to consider all of the issues presented in the plaintiffs' petition, although as to some of them there was no testimony before the jury, and as to some others, even if the facts were as alleged, the plaintiffs were not entitled to recover upon such state of facts alone; and error is also assigned upon the refusal of certain requested instructions withdrawing from the jury certain allegations in the plaintiffs' petition, because no evidence was submitted tending to support them. Considering the entire charge together, and especially the third paragraph, we are of opinion that no error was committed in the matters referred to. *Railway Co. v. Farmer* (Tex.) 115 S. W. 260.

Complaint is made because the court refused to give the following requested instruction: "If you believe from the evidence that the English & Scottish American Mortgage & Investment Company, Limited, withdrew its business from plaintiffs on account of the bad business done for it by plaintiffs, or in its discretion for any other reason, and not because of any false and malicious statements derogatory to plaintiffs, made by the defendant company, its agents, or representatives, you will not consider the loss of said company by plaintiffs in arriving at your verdict." Considering the nature of the plaintiffs' case as asserted in their petition, and as submitted to the jury by the charge of the court, we are of opinion that the refusal of the instruction referred to does not constitute reversible error. The very gist of the plaintiffs' case was damages caused

by the wrongful conduct of the defendant, and damages resulting from any other cause were not sued for. Indulging the presumption that the jury was composed of men of average intelligence, it might well be supposed that, in a case of this magnitude, which the record shows was on trial for more than a month, they would understand, without being specifically so instructed, that the plaintiffs were not entitled to recover for any loss or injury which had not been caused by the defendant. However, in the tenth paragraph of the charge the court specifically instructed the jury, if they found for the plaintiffs, not to take into consideration any damages which may have been sustained by them from any other source or cause than from the acts and statements of the defendant. In view of this instruction we see no reason to suppose that the jury did not fully understand the scope of their authority, and what was their duty in that regard. We do not mean to say that the refused instruction does not embody a correct proposition of law, nor that error would have been committed if it had been given, but we do not believe that its refusal constitutes reversible error in this case. *Railway Co. v. Milam* (Tex. Civ. App.) 60 S. W. 591.

An instruction was requested, and error is assigned upon its refusal, to the effect that, if there were general rumors that the plaintiffs were careless and incompetent loan agents, which rumors were caused by plaintiffs making loans on bad titles and insufficient security, and extravagance in the management of their business, and suffered damage on account of such rumors, the defendant would not be responsible for such damage. What has just been said in reference to the other refused instruction has application to this. Both instructions involve the same general proposition of law, to the effect that the defendant was not liable to the plaintiffs for damage that was not caused by the defendant.

Three assignments of error complain because of certain statements made and language used by the plaintiffs' counsel in arguing the case to the jury. Under these assignments but one proposition is submitted, which is to the effect that when counsel make statements outside of the record, which are calculated to excite the passions and prejudices of the jury, and the court fails to interfere, then the verdict should be set aside, although such statements were not objected to at the time. While that proposition is supported by *Willis & Bro. v. McNeill*, 57 Tex. 475, later cases by the Supreme Court, asserting a different rule, and holding that such misconduct, to constitute reversible error should be objected to at the time, have been followed by this court. *Moore v. Moore*, 73 Tex. 394, 11 S. W. 396; *Moore v. Rogers*, 84 Tex. 2, 19 S. W. 283; *Hogan v. Railway*, 88 Tex. 685, 32 S. W. 1035; *Jones v. Smith*, 21 Tex. Civ. App.

case some of the language used by Mr. Miller in the opening address for the plaintiffs, and objected to by the defendant, was legitimate and proper; some of it may have extended beyond proper bounds. But, instead of objecting to it at the time, the defendant's counsel, who followed Mr. Miller, replied to him, and discussed before the jury the matter now complained of. He was followed by Mr. Stribling for the plaintiffs, who also went outside of the record, and discussed the matter which had previously been discussed by Mr. Miller for the plaintiffs and Mr. Sleeper for the defendant. Then Mr. Stribling was followed by Mr. Yantis on behalf of the defendant, and the latter discussed the same question at considerable length. In closing the case for the plaintiffs Judge Clark, as had all the other attorneys, went out of the record in the same respect, and then, for the first time, the defendant objected to that character of argument. Thereupon Judge Clark stated that he withdrew the remark objected to, and requested the jury not to consider it, but stated that the defendant's counsel had alluded to it and brought it into the case first. The court stated to the jury that, if there was any question about Judge Clark's remarks being withdrawn, he would instruct them not to be influenced in any way whatever by the remarks referred to. Some further statements were then made by the other attorneys in the case as to who first mentioned the subject of trusts, and Judge Clark then used certain language which may have been inelegant and unparliamentary, but was not calculated to improperly influence the jury against the defendant. Such being the state of the record, we hold that reversible error is not shown in that regard, although a new trial was asked on account of improper argument.

There are several assignments of error which assail the verdict of the jury, the contention being that there was no evidence warranting any verdict against the defendant, and especially no evidence to justify as large a verdict as the jury returned. Appellant has cited authorities in other jurisdictions indicating rules which, if followed in this state, would require a reversal of the judgment. But, accepting the law of this case as established by the Supreme Court on the first appeal, and reasoning by analogies furnished in other classes of cases, we have reached the conclusion that the verdict finds support in the testimony, and should not be set aside by this court. The plaintiffs submitted much testimony tending to show a great amount of diminution in the volume of business transacted and profits made by them

we cannot say that the jury were not warranted in concluding that, to a large extent, they probably were. The law is, to some extent, a growing science, and in the course of its development old rules are sometimes relaxed, and even new ones established. It is now the settled rule in this state that in actions for damages on account of the death of a husband, father, or son the plaintiff, if recovery be had, is entitled to such sum of money as will be equivalent to the pecuniary aid which such plaintiff would have received from the deceased relative if the defendant had not caused his death. In such a case the jury may take into consideration the life expectancy of the deceased, his existing and prospective earning capacity, and all other pertinent circumstances, and therefrom estimate the amount of damages sustained by the plaintiff, although, if the death of the deceased had not been caused by the defendant, it might have resulted on the following day from some other cause. Thus it will be seen that in a case of that kind, as well as the case at bar, the damages recoverable are, in a sense, uncertain and speculative; still, if it is permissible to recover them in the one case, we see no reason why they should not be recoverable in the other.

The verdict involves findings to the effect that the defendant, acting by its controlling officers and agents, wrongfully and maliciously committed some of the acts charged in the plaintiffs' petition and submitted to the jury and that as a proximate result the plaintiffs' business was injured to the extent of \$40,000; and, in view of the testimony, we adopt and approve such findings of fact.

All the questions presented in appellant's brief have been considered, and our conclusion is that no reversible error is made to appear, and that the judgment should be affirmed, and it is so ordered.

Affirmed.

VICKERS et al. v. PEDDY.

(Court of Civil Appeals of Texas, April 14, 1900. Rehearing Denied May 12, 1900.)

1. HOMESTEAD (§ 128*)—TRANSFER—TITLE OF GRANTEE OF HUSBAND.

A warranty deed of a homestead executed by the husband only is void as to the wife and conveys no title to the land except by force of the covenant of warranty, which would operate against the heirs of the husband and upon his interest, which, being community property, was an undivided half, and as long as the wife lived upon the property no possessory rights could be asserted under the deed against her.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 230; Dec. Dig. § 128.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. HOMESTEAD (§ 145*)—RIGHTS OF SURVIVING WIFE—ABANDONMENT.

Where a surviving wife executes a deed of the homestead under an agreement allowing her to return and use the property as her home, such agreement is not a substitute for the homestead user after it becomes evident that she will not return.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 285; Dec. Dig. § 145.*]

Appeal from District Court, Sabine County; W. B. Powell, Judge.

Action by Mrs. A. I. Peddy against V. H. Vickers and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Goodrich & Synnott, for appellants. Geo. A. Holland and E. P. Padgett, for appellee.

JAMES, C. J. The action was by appellee, in trespass to try title to 100 acres of land, against V. H. Vickers and W. F. Goodrich. Defendants, besides the general issue, pleaded limitations and alleged: That they purchased the land from Nellie Brown, a widow, and her children; that about 1880 Cary Brown, the husband of said Nellie, deeded the land to A. J. Peddy; the husband of plaintiff, at which time it was homestead, Cary Brown having theretofore abandoned his family; that Nellie did not join in said deed; that she and her children continued to reside upon and to claim the land as their homestead, and adverse to all others, up to the date of the transfers to defendants; that said deed was in fraud of the wife and was void. Plaintiff, by supplemental petition, alleged: That Cary and Nellie Brown were never married; that when Peddy bought from Cary Brown he called upon Nellie Brown and informed her of his intention, and she then informed plaintiff that she was not Cary's wife, and in reliance upon this statement the land was bought; that plaintiff then rented the land to Nellie, who continued to occupy it as plaintiff's tenant and never asserted any ownership, and because of this defendants are estopped to claim that Cary and Nellie were married and from claiming she had homestead rights; and, that if she ever resided upon the land as her home, then long prior to the time she conveyed same to defendants she had abandoned it as her home and thereby confirmed the sale of her husband, and she and defendants are estopped from claiming it now. The cause was tried by the judge, who gave plaintiff a judgment for an undivided half of the land upon the ground that the land was community property of Cary and wife, and Cary having died, and his deed, being a general warranty deed, operated, after the termination of the homestead use, to vest in plaintiff the husband's one half interest, by estoppel. The other half was given, 31½ acres to Vickers and 18½ acres to Goodrich. From this judgment Vickers and Goodrich have appealed.

The first and second assignments of error seek to question the judge's following conclusions of fact: "(6) I find that his wife, Nellie Brown, lived upon and used the land in controversy as her homestead until the latter part of the year 1900, or first of the year 1901, at which time she left the place to live with her kindred, being old and feeble and unable to take care of herself; that no one lived on the place after she left it, or cultivated any part of it. (7) I find that Nellie Brown and Laura Brown conveyed by deed to V. H. Vickers, for the sum of \$75, all of the 100 acres that had not been previously conveyed to W. F. Goodrich by deed dated May 5, 1902, which was after she had left the place." The proposition made under these assignments is as follows: "Nellie Brown had not removed her household effects from the land in controversy until after she had sold out to V. H. Vickers in May, 1902. The land, less the 18½ acres which she had previously sold to Goodrich, was her homestead at the time she transferred the land to V. H. Vickers, May 30, 1902, and when she visited her daughter she was at the time only temporarily absent from her home."

The property being homestead, the deed from her husband to Peddy was void as to the wife, and upon no theory did it convey any title to the land except by force of the covenant of warranty it contained, and the estoppel in this respect would operate against his heirs and upon his interest, which was an undivided half. As against his wife's homestead right, the deed was of no effect whatever. He died about 1881, but so long as she continued to live upon the property, and until she had in fact abandoned it as a home, no possessory rights could be asserted under the Peddy deed against her, although Peddy may have had a good title to an undivided half by estoppel against Cary's heirs. Doubtless it is with reference to this theory that appellants question the correctness of said findings of fact, and insist that the evidence showed that Nellie had not in fact abandoned, but was remaining away only temporarily from, this place as her home. It is evident that the court concluded from the evidence that she had finally abandoned all intention of returning to the place, and the evidence, notably that of Nellie herself, fully sustains such conclusion; but stress seems to be laid on certain testimony that, when she made the sale to Vickers, she had an oral understanding with him that she could still use the place for a home as long as she chose to do so. There is authority that such an agreement is valid and enforceable, though not embodied in the deed. 2 Devlin on Deeds, § 766. Assuming that she continued, after executing the deed to Vickers, and after leaving the place, to have the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

right under this agreement to return and use the property as her home, we do not think the existence of the agreement constituted of itself an absolute substitute for the homestead user. It might so long as she entertained an expectation to return, but certainly not after it became evident from the facts and circumstances that she would not return. We therefore overrule said assignments.

Under the third assignment are three propositions, which we do not sustain. They assert that the deed from the husband to Peddy was an absolute nullity and conveyed nothing, either in present or in futuro, and could have no effect in any way as an estoppel or against his heirs. The deed contained a covenant of general warranty. The following cases appear to settle the question against the contentions of appellants: *Colonial & U. S. Mortgage Co., Ltd., v. Thetford*, 27 Tex. Civ. App. 152, 66 S. W. 103; *Ley v. Hahn*, 36 Tex. Civ. App. 208, 81 S. W. 354.

The fourth assignment is predicated upon the theory that nothing was capable of passing by the deed from Cary Brown to Peddy, and is therefore overruled.

We likewise overrule the fifth. The deeds from Nellie Brown to Goodrich and Vickers could convey only what she owned. The interest which her husband and his children, as his heirs, owned, was vested in Peddy by estoppel, and the children's deed conveyed nothing. Goodrich obtained 18½ acres of the undivided 50 acres which belonged to Nellie Brown, and Vickers the remainder, or 31½ acres, as found by the court.

In pursuance of what has been said, we overrule the proposition stated under the sixth, seventh, eighth, and ninth assignments of error.

We overrule the tenth assignment, for the reason that plaintiff's right of possession, under the deed from Cary Brown, was subject to the right of Nellie Brown to use the property. Her possession was referable to this right and was not inconsistent with plaintiff's right under said deed.

Affirmed.

WEAD v. HELPERT et al.

(Court of Civil Appeals of Texas. April 28, 1909.)

1. VENDOR AND PURCHASER (§ 87*)—ABANDONMENT OF CONTRACT—EFFECT AS TO RIGHT TO DEPOSIT TO SECURE PERFORMANCE.

Defendant agreed to convey land to plaintiff, and to insure performance plaintiff deposited \$300 in a bank, and defendant deposited a note for the same amount, the note and money to be held by the bank as liquidated damages to be paid to the one who was in default, and the contract was subsequently extended 20 days. *Held*, that either party would have until the extended date in which to perform or tender performance; and, where neither performs or tenders performance on that date, no cause of

action exists in favor of either party for the amount deposited by the other, unless one of the parties before the time expired had abandoned the contract, and expressed to the other his determination not to perform, and in the event of one party's giving such notice, the other party need not tender performance.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 147; Dec. Dig. § 87.*]

2. VENDOR AND PURCHASER (§ 352*)—REMEDIES OF PURCHASER—ACTIONS FOR BREACH OF CONTRACT—EVIDENCE.

Evidence, in an action by a purchaser to recover a deposit made by the vendor to secure performance of a contract to convey land, held sufficient to make defendant's breach a question for the jury.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 1059; Dec. Dig. § 352.*]

Appeal from Millam County Court; John Watson, Judge.

Action by August Wead against Raymond Helpert and another. A verdict was directed for defendants, on which judgment was rendered, and plaintiff appeals. Reversed and remanded.

M. G. Cox and W. T. Hefley, for appellant. J. K. Freeman, for appellees.

FISHER, C. J. This is a suit by the appellant against appellee Helpert and the Burlington State Bank to recover \$300 deposited in the bank by plaintiff, and a \$300 note there deposited by the appellee Helpert. These deposits were made by the appellant and appellee, respectively, and so held by the bank as liquidated damages to be recovered and paid to the one who may not be in default in the performance of a certain contract concerning the sale of land, wherein Helpert agreed to convey to the appellant certain lands owned by him upon the payment by appellant of the amount agreed upon. This contract was to be executed January 1, 1908. Appellant contends that by agreement between him and Helpert the time for the execution of the contract was extended to the 20th of January, 1908. This is denied by Helpert. It is also contended by appellant that after the agreement of extension Helpert refused to recognize the agreement and to execute the contract. Helpert answered, and by cross-action asserted a claim to the amount deposited by the appellant. The trial court peremptorily instructed a verdict in favor of Helpert, and to the effect that the appellant recover nothing in his action against the appellee. Verdict was returned accordingly, upon which judgment was rendered.

We are not going to take up and discuss each of the assignments of errors. They are all overruled, except those discussed in the opinion. Upon the question of extension there was a conflict of evidence. Appellant and his witness Vassling testified that on the 30th of December, 1907, appellant and appellee entered into an agreement to extend the time of performance of the contract to Janu-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ary 20, 1908. This is denied by Helpert, who testified that there was no such agreement. The other facts relating to these questions will be stated in the opinion.

If there was an extension to January 20th, either party would have to that day to perform or tender performance, and as the evidence shows that neither performed, or offered to perform, on that day, no cause of action exists in favor of either party for the amount deposited by the other, unless one of the parties, before the time expired, had abandoned the contract, and expressed to the other his determination not to perform. There is evidence of plaintiff to the effect that on January 3d the defendant Helpert informed him that he would not perform the agreement as extended. Upon this subject Wead testified that on the 3d of January, 1908, Helpert came to him, and said that he would call off the trade and release the forfeit. Helpert denied this, but said that after January 20, 1908, he told Wead that he released the forfeit, as Wead was a poor man. Wead testified that Helpert refused, on January 3, 1908, to stand by the extension agreement, and he wrote to the parties at McGregor that he would not need the money, because Helpert had called off the trade. At another place Wead testified that he expected to obtain the money from parties living at McGregor. If there was an extension, but before the time expired Helpert had to the plaintiff expressed his determination to abandon the agreement, and not to perform it, the plaintiff could treat it as at an end, and would not be required thereafter to do the useless thing of making a formal tender to Helpert, who had just, in effect, informed him that he would not receive it. Upon these facts, if true, a cause of action arose in plaintiff's favor against the defendant and the bank to recover the amount deposited by the defendant, and also the sum deposited by himself, and this phase of the case should have been submitted to the jury. On the other hand, if there was an extension of time for 20 days, and there was no refusal on January 3d by the defendant to perform, neither party could recover from the other, because, as before said, there is no evidence showing a performance, or offer to perform, by either on January 20th, and for the failure in this respect no legal excuse is shown, except the fact referred to, if it be a fact. In such a case each party would be entitled to withdraw his deposit with the bank. If there was no contract of extension, Helpert is entitled to recover, because the undisputed evidence of both the plaintiff and defendant shows that, before January 1st, the time fixed for execution of the contract by both parties, plaintiff had informed Helpert that he would not be prepared at that time to pay the sum agreed. If Helpert did not agree to extend the time,

and if plaintiff failed to comply as agreed, the previous statement of the plaintiff should be treated as a refusal to comply, upon which Helpert's cause of action arose for the amounts deposited under the agreement.

For the reasons stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

FT. WORTH & D. C. RY. CO. v. ANDERSON.

(Court of Civil Appeals of Texas. April 15, 1909. Rehearing Denied May 13, 1909.)

1. MASTER AND SERVANT (§ 113*)—LIABILITY FOR INJURIES TO SERVANT—RAILROAD TRACKS.

It is the duty of a railroad company to use reasonable care to have its roadbed free of obstructions calculated to cause injury to its employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 224; Dec. Dig. § 113.*]

2. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—PRESUMPTIONS.

That a switchman is injured by having his foot caught in a baling wire on the track is not sufficient evidence of negligence on the part of the railroad company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 955; Dec. Dig. § 235.*]

3. MASTER AND SERVANT (§ 229*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

It is the duty of a switchman to exercise ordinary care to avoid injury to himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 674; Dec. Dig. § 229.*]

4. MASTER AND SERVANT (§ 240*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

It is negligence for an experienced switchman to attempt to ride on the brake beam of an approaching car, according to a custom of the railroad company's employes, instead of using the steps on the side, which are reasonably safe and intended for such use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 753; Dec. Dig. § 240.*]

Appeal from District Court, Childress County; S. P. Huff, Judge.

Action by W. P. Anderson against the Ft. Worth & Denver City Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

August 6, 1907, appellee was in the employ of appellant as a switchman in its yards at Amarillo. He was then about 28 years old, and had had several years' experience in such work. At about 9:30 p. m. of the day mentioned, while attempting to get on a moving freight car, appellee had his right foot crushed as the result of one of the car's wheels running over it. After an engine pulling eight or nine cars had moved with them off a switch or side track to and southeast on the main line track, appellee in the discharge of his duty had set the switch so the train might be backed on the main line northeast to another switch about 250 feet distant which it was to take. He then signaled the engineer

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to back the train, and, standing astraddle of one of the rails of the track, awaited the approach of the train as it backed northeast. When it got within his reach, he grasped a handhold on the end of the first of the cars approaching him, placed his left foot on the brake beam thereof situated in front of the wheels, and attempted to place his right foot on the beam. Because, he testified, his said foot was caught by a piece of baling wire about nine feet long, with its ends tied together, as he attempted to place it on the beam, his foot was, instead, thrown under the wheel of the car. In his petition appellee alleged negligence on the part of appellant in permitting the wire to be on its track or roadbed. Appellant answered by a general denial and a general plea of negligence and assumed risk on the part of appellee. In his charge the court instructed the jury to find for appellee if they believed "that his foot was entangled in a wire, which was then on the defendant's track or roadbed, and thereby jerked the foot of the plaintiff under the wheel of the car," and further believed "that defendant or its employees in charge of its yard at Amarillo were negligent in allowing said wire to get and remain on said track," etc. The appeal is from a judgment in appellee's favor for the sum of \$3,000.

Spoons, Thompson & Barwise, Fires & Diggs, and J. M. Chambers, for appellant. W. B. Howard and William H. Allen, for appellee.

WILLSON, C. J. (after stating the facts as above). After careful consideration of the record we are of the opinion that appellant's first assignment of error should be sustained on both the grounds urged, to wit, that the evidence failed to show appellant and did show appellee, to have been guilty of negligence. It was appellant's duty to use ordinary or reasonable care to have its track and roadbed so free of obstructions calculated to cause injury to its employees as to render same reasonably safe for appellee's use in the discharge of his duties. It may be conceded that the wire referred to by appellee, if on the track, was an obstruction it was appellant's duty to use ordinary or reasonable care to discover and remove. But we think there is not in the record evidence sufficient to support a finding that it had not exercised such care. Testimony showing the wire to have been on the track and appellee to have been injured because it was there alone we think was not sufficient to support such a finding. 4 Thompson on Neg. p. 76. It does not appear from the record when the wire got on the track. Without fault on appellant's part, it may have fallen to the track from one of the cars which the evidence shows only an instant before had passed the point where appellee was when injured, or it might only a moment before he was injured have been thrown on the track by a

person for whose conduct appellant was not responsible. In either of such events, reasonably it could not be said that in the exercise of proper care appellant should have discovered and removed the wire before the train as it was backed towards the switch reached and injured appellee. And logically, therefore, it could not be said in such a state of the evidence that it was sufficient to support a finding of negligence on the part of appellant on the ground that it had permitted the wire to be on its track. 3 Elliott on Railroads, p. 721.

Furthermore, it does not appear from the record whether the wire was wholly on top of the ground, where by a proper and timely inspection it should have been discovered, or, instead, was so embedded in and covered by the ground as to have rendered a failure by appellant to discover and remove it excusable. And this omission in the evidence seems to be due entirely to the failure of appellee when he was injured promptly to assert the claim he afterwards made, that the cause of his injury was the wire on the track. The wire, it seems, was seen by appellee alone. Directly after he was hurt, he accounted for the accident by saying his foot had slipped from the brake beam. Not until the next day thereafterwards did he say anything about a wire having had anything to do with the accident. A search was then made by appellant's agents at the place where appellee testified he had thrown the wire, but they failed to find it. An inspection of the wire or of the portion of the track it was on or under or of both the wire and the track might have furnished evidence tending to show whether at the time it caught appellee's foot the wire was wholly, or only partially, and if the latter to what extent, on top of the ground, and how long it had been in the position it was in. From such evidence an inference of negligence on appellant's part might or might not properly have been drawn. Without reference to how or where it got there, such an inference could not, we think, be drawn from evidence merely showing the wire to have been on the track in such a position as to catch appellee's foot, and thereby cause him to be injured. The case does not, we think, belong to the class of cases in which negligence may be presumed from proof merely of an accident and a resulting injury to the party complaining. The only case among the number cited by appellee as supporting his contention which seems to do so is that of *Texarkana & Ft. S. Ry. Co. v. Toliver*, 37 Tex. Civ. App. 437, 84 S. W. 375. There the plaintiff, a switchman, as he was coming from between two cars which he had uncoupled, stumbled over a rock lying by the side of the track, and in an effort to keep from falling stepped into an open frog which held him while a car ran over his leg. The defendant's switching yard had been inspected at 7:30 a. m., and

accident occurred and after the yard was inspected that morning." The evidence was held to be sufficient to support the finding of the jury that the defendant was guilty of negligence in failing to discover and remove the rock, and to support the further finding that it was guilty of negligence in permitting the frog to be open. The latter finding we think furnished ample support for the judgment, but on the meager facts stated in the report of the case we cannot agree that the finding of negligence in not discovering and removing the rock was supported by the evidence.

While engaged in discharging his duties as appellant's switchman, it was appellee's duty to exercise ordinary care to avoid injury to himself. If he failed to exercise such care, and if his failure contributed as a direct cause thereof to the injury he suffered, he was not entitled to recover. If it should be said that he did not exercise proper care in taking the position he did take on the track, or in attempting as he did attempt to ride on the box car, it would follow that it should be said that the judgment in his favor is erroneous, because contrary to law and the evidence; for it cannot be disputed that his taking such position and attempting to so ride on the car contributed as a proximate cause thereof to the injury he sustained. Testifying as a witness in his own behalf, appellee stated that, after closing the switch, he stood astraddle of one of the rails of the track as the train approached him and until the car in question as it approached him got within his reach, when he grasped the handhold on the end thereof, and attempted to place his foot on the brake beam. There was evidence tending to show a custom among switchmen and brakemen to make the use appellee was attempting to make of the handhold and brake beam, and there was evidence to the contrary. But the evidence was uncontroverted that neither the handhold nor the brake beam had been constructed for any such use; on the contrary, it appeared that the handhold was intended for use in aiding employes in coupling and uncoupling cars, and that the brake beam, as a part of instrumentalities for that purpose, was intended only for use in controlling the movement of the car. It would seem that no other evidence was needed to show that appellee was occupying a dangerous position than his bare statement of the fact that he stood astraddle of one of the rails of the track, awaiting the approach of the train, or that he engaged in a dangerous undertaking when from that position, as he testified, he attempted to get upon the brake beam of the car when the train reached him; but nevertheless it was shown by

ous was the undertaking, as testified to by one of the witnesses, that "nine times out of ten you are caught." The evidence was uncontroverted that the car appellee attempted to so ride upon was equipped on the right-hand side thereof as it approached appellee and near the end thereof farthest from him, and on the left-hand side thereof as it approached him and near the end thereof closest to him, with ladders or steps constructed and intended for use by employes in riding upon it in the discharge of such duties as appellee at the time he was injured was engaged in discharging, and that the same were reasonably safe for such use. We have, then, a case where the master has discharged his duty to the servant by furnishing him a reasonably safe place in which to ride on the car, where the servant has refused to use the place so furnished to him, and, instead, has attempted to use another and dangerous place not provided nor intended to be used for the purpose. In the absence of a sufficient excuse for it, such conduct on the part of the employe clearly would be negligence as matter of law. Does such an excuse appear from the evidence in the record? We think not. The fact that it may have been customary for employes to so use the handhold and brake beam did not furnish such an excuse. Having provided for appellee's use a reasonably safe place on which to ride the car in the discharge of his duties, appellant should not be held liable for consequences resulting to appellee from his choice of another and dangerous place on which to ride the car, when the place chosen was not constructed or provided, nor authorized or intended, by appellant to be used for such a purpose. The excuse urged by appellee for attempting to use the dangerous position chosen by him was that he could not signal the engineer from the ladder on the left-hand side of the car, and could not see ahead of the moving train from the ladder on the right-hand side thereof. The witness Sanders, who was assisting appellee, was at the switch 250 feet northeast from appellee, and evidently for that distance at least there was no necessity that he should keep a lookout in the direction towards which the train was moving. We do not think the excuse given is a sufficient one. In *Montgomery v. Railway Co.*, 109 Mo. App. 88, 83 S. W. 66, a case in practically all its facts like this one so far as the question now being considered is concerned, the court denominated the excuse a "makeshift," and held the plaintiff to be guilty of contributory negligence. In discussing the facts of that case the court said: "We think plaintiff made out a case against himself. In other words, he proved that his own negligence directly contributed

to his injury. He took a position upon the car by placing one foot on the brake beam and with one hand grasping the handhold on the end of the car, from which he was thrown while the car was passing over a frog of the track; the fall resulting in his injury. He placed himself in the most dangerous position on the car that he could have selected as the train was moving backwards, and where he would almost certainly be injured should he happen to fall from his place, as the result demonstrated; and also where he was liable to be injured should the train back upon other cars that were on the track. The physical fact was shown by the photograph, and by plaintiff's testimony, that at the other end of the car, but on its side, there was not only a handhold, but also a stirrup for the foot, which was a safe position, and which, had he occupied, would have prevented the injury. It was further shown that plaintiff could have signaled the engineer as well from the north end of the car as from the south end. But plaintiff stated that he was at his proper place, from which he could guard the train from backing upon other cars on the track. This appears to have been a makeshift excuse for his being there, and it must have been so considered by the trial court. Such a pretense ought not to excuse his negligence," etc. And see *Burns v. Chronister Lumber Co.* (Tex. Civ. App.) 87 S. W. 163. We have examined the authorities cited by appellee in his brief as supporting his contention that the evidence was sufficient to authorize the finding of the jury that he was not guilty of contributory negligence. As we understand them, they do not support the contention made, and are of little value when the particular facts of this case are kept in mind.

It does not appear probable from the record that other evidence justifying a judgment in appellee's favor could be produced on another trial of the case. In reversing the judgment of the court below, a judgment therefor will be here rendered in favor of appellant.

INTERNATIONAL & G. N. R. CO. et al. v. FLORY.

(Court of Civil Appeals of Texas. March 24, 1909. On Rehearing, April 28, 1909.)

1. COURTS (§ 121*)—JURISDICTION—AMOUNT—INTEREST.

In an action for damages, the interest demanded on the damages sought to be recovered forms a part of the damages; and therefore, if the amount of the damages and interest exceed the jurisdiction of the county court, such court has no jurisdiction of the action.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 419; Dec. Dig. § 121.*]

2. APPEAL AND ERROR (§ 1106*)—DISPOSITION OF CAUSE—REMAND.

Where the amended petition, in an action for damages begun in the county court, alleges a cause of action for an amount beyond the jurisdiction of the county court, and the original petition is not in the record, the case will not be dismissed on appeal, but will be remanded for trial on the original petition, if it states a case within the court's jurisdiction, or on some proper amendment thereof.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4386, 4387, 4392; Dec. Dig. § 1106.*]

Appeal from Bexar County Court; P. H. Shook, Judge.

Action by Joe Flory against the International & Great Northern Railroad Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded on rehearing.

King & Morris, Hicks & Hicks, Terry, Calvin & Mills, and Houston Bros., for appellants. Cobbs & Cobbs, Jno. H. Cunningham, and Will A. Morris, for appellee.

JAMES, C. J. By these motions our attention is called for the first time to the question whether or not the pleadings disclose a case cognizable by the county court. Appellants now ask that the judgment be reversed and the cause dismissed for want of jurisdiction of the trial court. The amended petition alleged that plaintiff, by reason of the negligence of the defendant, was damaged in reference to one car of onions shipped from San Antonio, Tex., to New York in the sum of \$580, and in reference to the other car in the sum of \$419, and prayed for judgment against defendants for the aforesaid sum of \$999, together with interest at the rate of 6 per cent. per annum from July 27, 1903. In the original opinion delivered in this case we affirmed the judgment of the county court for \$400. The question now presented is a fundamental one, and, if appellants are right in their contention that the demand or matter in controversy exceeded \$1,000, the trial court, and this court on appeal, are without jurisdiction of the cause. We think there is no use of an extended discussion of the question, as it is concluded by the following decisions: *Baker v. Smelser*, 88 Tex. 26, 29 S. W. 377, 83 L. R. A. 163; *Schultz v. Tessman*, 92 Tex. 491, 49 S. W. 1081; *W. U. Tel. Co. v. Noland* (Tex. Civ. App.) 77 S. W. 1031; *Railway v. Sheppard*, 76 S. W. 800. The result of these and other decisions is that the interest demanded formed a part of the damages sought to be recovered. Therefore the amount sued for exceeded the jurisdiction of the county court.

The question then arises as to the proper disposition to make of the case here. There could be no purpose in remanding the cause for another trial, save to give plaintiff an opportunity to amend by reducing his de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bring a new action without waiting for the mandate in this cause.

The opinion heretofore delivered will be withdrawn, the judgment of affirmance set aside, the judgment of the county court reversed, and the cause dismissed.

On Rehearing.

There is one matter suggested in this motion which we regard as substantial. The original petition in the case is not in the record; and, though the amended petition stated a case beyond the court's jurisdiction, the original petition may not have done so. We have no way of knowing of this officially. In view of the possibility of such fact the just and proper disposition to make of this case is to remand the cause, instead of dismissing it. If the original petition states a case within the court's jurisdiction, the cause may yet be tried there on that petition, or on proper amendments thereof.

Cause remanded.

TEXAS & P. RY. CO. v. JOHNSON.

(Court of Civil Appeals of Texas. April 29, 1909.)

1. TRIAL (§ 203*)—INSTRUCTIONS—EVIDENCE.

Where, in an action for injuries to a servant, the evidence tends to show facts from which the jury might infer contributory negligence, it is error to refuse a special charge grouping those facts on that issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

2. MASTER AND SERVANT (§ 180*)—FELLOW SERVANTS—STATUTES—"OPERATING CARS."

Where a "fire knocker," for the purpose of moving blocked cars of wood, to unload which was a part of his duty, was attempting to remove the block so as to move the cars a short distance, and another "fire knocker" was on top of the cars signaling the engineer for the same purpose, they were engaged in operating cars under Rev. St. 1895, art. 4560f, exempting persons engaged in "operating the cars" from the fellow-servant rule.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-368; Dec. Dig. § 180.*]

Appeal from District Court, Gregg County; W. C. Buford, Judge.

Action by Leroy Johnson against the Texas & Pacific Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed, and cause remanded.

Young & Stinchcomb, for appellant. J. N. Campbell and Edwin Lacy, for appellee.

HODGES, J. The appellee brought this suit and recovered a judgment against the appellant for injuries sustained in having

is known as a fire knocker; his business being to knock fire from the fire boxes of engines after they were brought in from their run. In his employment as a fire knocker, it was also his duty to unload wood from cars on a track near by, and frequently such cars had to be moved along the track a short distance by an engine to get them in proper place for unloading. The track on which the car loads of wood were placed was curved, and it appears also to have been upon a little incline. On the 26th day of February, 1908, the appellee and one Curtis Smith, who was also a fire knocker, were ordered by their superior to unload three cars of wood then standing on the track near the roundhouse. In order to hold these cars in position, the wheels or trucks had been scotched by having sticks of wood placed in front so as to prevent any forward movement. The train of which these cars formed a part consisted, in addition to the cars loaded with wood, of a dead engine and one or two other box cars. Before beginning their work of unloading, it was necessary for appellee and Smith to have these cars moved forward some 20 or 30 feet in order to be in proper position. An engine was accordingly brought out of the roundhouse and attached to the front end for that purpose. The testimony shows that the appellee and Curtis Smith, after the engine had been coupled on, walked on back toward the rear end of the train of cars, removing the scotches or blocks of wood from in front of the trucks. When they reached the car next to the last, Smith mounted that car for the purpose of loosening the breaks and of giving the signal to the engineer to start. After he had gone upon the car, the appellee undertook to remove a block from in front of the rear truck of the last car, and while doing so the train moved, his hand was caught, and some of his fingers mashed off. Upon a trial before a jury he was awarded a recovery of \$725 as damages.

The first group of assignments complain of the insufficiency of the testimony to sustain the verdict of the jury. In view of the fact that we have concluded to reverse the case upon other grounds, it will be unnecessary to notice those assignments.

The sixth assignment complains of the refusal of the court to give the following special charge: "If you find from the testimony that the stick of wood or block was fast under the wheel of the car, and that the plaintiff took hold of said stick of wood or block for the purpose of removing it when the wheel should move sufficiently to release it, and that he expected the wheel to move and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the provision in article 4502 must mean that he has or owns the property so circumstanced that it may be shipped within the time named by the statute after delivery of the cars at the point demanded.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

Appeal from Mitchell County Court.

Action by Oz Smith against the Texas & Pacific Railway Company for a penalty for failure to furnish cars. From a judgment for plaintiff, defendant appeals. Affirmed.

Earnest & Smith, for appellant. Ed. J. Hamner, for appellee.

CONNER, C. J. Since the decision of the case of *Houston & Texas Central Railroad Company v. J. A. Mayes*, 36 Tex. Civ. App. 606, 83 S. W. 53, by the Court of Civil Appeals for the Third District, in which writ of error was subsequently refused, a discussion of this case seems superfluous. In the case cited the two principal contentions of appellant herein were expressly decided adversely to appellant. It was held, not only that the penalty statute (Rev. St. 1895, art. 4497) applied in cases of interstate shipments, but also that an application in writing to the local agent of the company at the station from which it was desired to make the shipment was in substantial conformity with the statute on that subject.

The further contention, that the judgment and the court's findings are unauthorized by both the pleadings and evidence, we think, must be overruled. The statute (Rev. St. 1895, art. 4502) provides that he (the shipper) must show by evidence that he had the property he desired to ship "on hand at the time any demand for cars was made." It could hardly have been intended by this to require that the intending shipper should have the property at the immediate point of shipment at the time of demand, inasmuch as the statute gives the railway company as much as 6 days from the time of the demand within which to furnish the cars, and the shipper 48 hours within which to thereafter load them. Rev. St. 1895, arts. 4497 and 4500. So that the provision in article 4502, to the effect that the shipper must have the freight on hand, must mean that he has or owns the property so circumstanced as that it may be shipped within the time named by the statute after the delivery of the cars at the point demanded. If this be the proper construction, we think, in the absence of special exception, the petition sufficiently alleged that appellee had the cattle he intended to ship "on hand," and that the proof on that subject tends to support the court's finding to that effect.

INTERNATIONAL & G. N. R. CO. v. HOOD.

(Court of Civil Appeals of Texas. Nov. 28, 1908. On Rehearing, May 15, 1909.)

1. APPEAL AND ERROR (§ 544*)—PROCEEDINGS NOT IN RECORD—STATEMENT OF FACTS—EFFECT OF ABSENCE.

If the record contains no statement of facts, alleged errors in instructions, the admission of testimony, and the insufficiency of the evidence to support the verdict cannot be considered on appeal, unless there is error so apparent, when considered in connection with the pleading and verdict, as to show that the verdict was rendered by improper instructions, or upon an issue not made by the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2420, 2478, 2479; Dec. Dig. § 544.*]

On Rehearing by Appellant.

2. APPEAL AND ERROR (§ 644*)—PROCEEDINGS NOT IN RECORD—WAIVER OF OBJECTIONS—TIME OF OBJECTING.

Copying the statement of facts into the record on appeal to the Court of Civil Appeals, instead of sending up the original statement, as required by Gen. Laws 1907, p. 509, c. 24, is an irregularity which is waived unless proper objection is made; and, under Court of Civil Appeals rule 8 (67 S. W. xiv), providing that, unless all motions relating to informalities in the manner of bringing the case into court be filed at least 48 hours before 10 o'clock a. m. on the day on which the case is set for hearing, they shall be deemed waived, an objection to appellant's failure to bring up the original statement of facts, made the day before the case was set for hearing, was too late, even if appellee did not waive the objection by preparing and filing a brief contesting appellant's right to a reversal without objection to considering the statement copied into the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2795-2798; Dec. Dig. § 644.*]

On Rehearing by Appellee.

3. TRIAL (§ 200*)—INSTRUCTIONS—REQUESTS.

In an action for damages for not putting plaintiff's wife and daughter off the train near the station at their request, when they discovered that they had no tickets, and putting them off in an improper place, at a distance from the station, a requested instruction that, if they requested to be let off at the place where they got off, and the conductor used ordinary care in putting them off there, plaintiff cannot recover was sufficiently covered by a charge that, if the conductor stopped the train on their request as soon as he might with the use of ordinary diligence, plaintiff could not recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

4. CARRIERS (§ 384*)—EJECTION OF PASSENGER—INSTRUCTIONS.

In an action for damages for putting plaintiff's wife and daughter off defendant's train at a distance from the station, and at an improper place, after they had requested the conductor to put them off near the station upon discovering that they did not have tickets, where the conductor's testimony differed from plaintiff's as to whether the train was stopped

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

when they first requested to be put off, an instruction that, if plaintiff's wife informed the conductor when they were near the depot that they had forgotten their tickets, and requested that they be put off, but the conductor disregarded their request, and negligently carried them on a considerable distance further than they would have gone had he used reasonable diligence to stop the train, and put them off at an improper place, etc., defendant would be liable did not make defendant's liability depend on whether the train was stopped pursuant to the request of plaintiff's wife, but went to the issue of negligence in putting them off where the train was stopped, and hence did not conflict with another instruction that the conductor was not bound to permit plaintiff's wife to ride without tickets, and could put her off.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 384.*]

5. CARRIERS (§ 363*)—PASSENGERS—EJECTION—PLACE.

Women who had bought tickets, but innocently left them at the station, were not strictly trespassers, and the conductor should not have ejected them at a distance from the station in a deep ditch, where they could not alight without exposing their persons, if he could have put them off at a more suitable place.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1445, 1446; Dec. Dig. § 363.*]

6. CARRIERS (§ 380*)—EJECTION OF PASSENGER—PLEADING—ALLEGATIONS—"MENTAL DISTRESS."

Allegations that plaintiff was humiliated, mortified, and shamed by being put off a train at a place where she was compelled to expose her person in alighting showed "mental distress," though that was not alleged in terms.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 380.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5343-5344.]

7. DAMAGES (§ 216*)—INSTRUCTIONS—MENTAL DISTRESS—DOUBLE DAMAGES.

An instruction permitting recovery for "any pain of body, any mental distress, any humiliation or shame," etc., suffered by plaintiff did not permit the jury to award double damages for mental distress; the terms "humiliation," etc., showing mental distress.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

8. CARRIERS (§ 382*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for damages for ejecting plaintiff's wife and daughter from defendant's passenger train at an improper place, because they had left their tickets at the station, as a result of which they were humiliated and forced to walk back a mile and a half to the station on a cold, raw day, the walk and the shock making the wife sick, a verdict for \$1,000, though large was not so excessive as to require reversal.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1490; Dec. Dig. § 382.*]

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Action by T. J. Hood against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John M. King and Baker & Thomas, for appellant. Richard Mays, for appellee.

RAINEY, C. J. This is an action by appellee, Hood, against the railroad company

to recover damages for the wrongful ejection from its passenger train of his wife, at a place which was not a regular stopping place designed for passengers. It was alleged that the conductor's manner was rude and insulting, and that she had to walk some distance, was exposed to disagreeable weather, and was made sick by reason of said treatment, etc. The defendant answered by general exception, general denial, and contributory negligence in that she was on board the train without a ticket entitling her to transportation, etc. A trial resulted in a judgment in favor of plaintiff for \$1,000, and the railroad company appeals.

There is copied into the record what purports to be a statement of facts. The appellee objects to this court considering said statement, as the law requires the original statement of facts to be sent up with the record, and precludes a copy thereof from being included in the transcript. Gen. Laws 1907, p. 509, c. 24. The objection being interposed to our consideration of said statement of facts, it cannot be considered by us. This leaves the case without any statement of facts.

The assignments of error attack the charge of the court, the admission of testimony, and the lack of evidence to support the verdict. These assignments cannot be considered, as there is no error "so glaringly apparent, when taken in connection with the pleading and verdict, as to leave no doubt but that the finding of the jury was controlled by the improper instruction." Nor is it evident that the verdict was rendered upon an issue not made by the pleading. *Railway Company v. Waggoner* (Tex. Civ. App.) 109 S. W. 971.

The judgment is affirmed.

On Rehearing by Appellant.

Upon a reconsideration of this case we have reached the conclusion that we erred in our former disposition of the case in holding that the statement of facts could not be considered as it was copied in the transcript, and was not the original. When the statement of facts is copied in the record, instead of having the original sent up, unless objection is made, the irregularity will be considered waived, and the said statement will be considered in deciding the case. *Ins. Co. v. Ry. Co.* (Tex.) 116 S. W. 46. There was a waiver in this case by the appellee. He prepared a brief contesting appellant's right to a reversal of the judgment, had it printed and filed in the case, and raised no objection to the consideration of the statement of facts copied in the record until the day before the cause was submitted, when he filed a supplemental brief objecting to the consideration of said statement of facts. If it could be said that the briefing of the case by appellee was not a waiver, the failure to file an objection until the day before submission was too late.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Rule 8 (67 S. W. xiv) for the Courts of Civil Appeals reads: "All motions relating to informalities in the manner of bringing a case into court, shall be filed and entered by the clerk on the motion docket at least forty-eight hours before 10 o'clock a. m. of the day on which 'the cause is set for a hearing,' under section 23 of the act entitled 'An act to organize the Courts of Civil Appeals, to define their jurisdiction and powers, and to prescribe the mode of procedure therein,' approved April 13, 1892; otherwise the objection shall be considered as waived if it can be waived by the party; such filing and docketing will be sufficient notice of the motion." Appellee's supplemental brief was but a motion to strike out the statement of facts for being a copy, and, not the original, a mere informality that could be waived. The appellee, not having filed his motion 48 hours before 10 o'clock a. m. of the day on which the cause was submitted, comes too late, and the motion for rehearing is granted, and the cause will be considered on its merits.

Appellee's cause of action, as alleged, in substance, is that his wife and daughter boarded the appellant's train at Mertens, Hill county, holding tickets entitling them to transportation to Leroy, McLennan county, and return. After visiting the country near Leroy for a few days, they left the country for Leroy to return home. Upon reaching Leroy in their haste they boarded the train, leaving their pocketbook containing the tickets in the wagon in which they had gone to Leroy. After the train pulled out the conductor came around collecting tickets, and when he reached them they told him of having accidentally forgotten their tickets and of having left them on the seat of the wagon, and, having no money to pay their fare, they requested the conductor to stop the train, which had only run a short distance, and was moving slowly, that they might get off and get their tickets, which he declined to do in a gruff, crabbed, and insulting manner, informing them that he was going to put them off the train, and then left them. After some little time had elapsed, and the train had gotten under headway, he returned and stopped the train, and put them off in a deep cut, where there was a deep ditch, the distance from the lowest step to the bottom of the ditch being about five feet. That the negro porter placed a foot stool for them which turned over, and was not straightened. In getting off, by reason of the distance they had to step, they were caused to expose their lower limbs, which was very humiliating. This point was about $1\frac{1}{2}$ miles from the station, which they had to walk in returning. Mrs. Hood was in bad health. It was a raw, disagreeable day, etc. That the shock and walk made her sick, and she suffered humiliation in consequence of the acts of the conductor. There was evidence introduced by plaintiff in support of his allegations. The appellant introduced contradictory testimony.

The conductor testified: "I remember the occasion of Mrs. Hood and daughter getting on my train at Leroy in March, 1907. I helped them on the train myself. After getting on the train I gave the signal to the engineer to go ahead, and I walked from the front car into the second car, and as I came to them and asked for tickets, the older one of the ladies commenced searching for her ticket. I stood right by her side in the aisle, and after she had searched a while she said, 'I left my purse and ticket on the seat of the wagon.' I said, 'Madam, what do you want to do about it?' She says, 'Can't you stop and let me get off?' I said, 'Yes, madam,' and I turned round and pulled the signal whistle, and the train stopped. The porter came in and got the stool and put it down on the ground, and put his foot on it to hold it, and we helped them off." There was also testimony tending to contradict the plaintiffs as to the distance the train stopped from Leroy, and as to the assistance they received in alighting from the train.

The court refused to give a special charge requested by appellant, which is assigned as error, as follows: "If you believe from the evidence in this case that, at or about the place where plaintiff's wife and daughter disembarked from said train, plaintiff's wife requested the conductor to let them off at said place, and that in putting them off of said train the conductor used ordinary care (that is, such care as an ordinarily prudent person would exercise under such circumstances), then you are instructed that the plaintiff cannot recover in this case." The refusal of this charge was error. It presented a theory of appellant's defense, which was raised by the evidence, and which was not embraced in the court's charge.

All the assignments have been considered, but none show cause for reversal other than the one above mentioned.

The judgment is reversed, and cause remanded.

On Rehearing by Appellee.

On a former day of this term we reversed and remanded this case, on the ground that the court refused to give a special charge requested by appellant. In the motion for rehearing our attention is called to the fact that said charge was sufficiently covered by the main charge of the court. This being so, our decision was error. The paragraph of the court's charge relating to this issue reads: "If the conductor stopped the train on Mrs. Hood's request as soon as he might with the use of ordinary diligence, plaintiff is not entitled to recover." This paragraph of the charge we think fully and concisely covers the requested instruction, and appellant has no excuse for complaint on this score.

The following paragraph of the charge is complained of, viz.: "Yet if you believe from the preponderance of the evidence that she

tioned, but all have been considered, and we are of the opinion that they are not well taken.

The motion of appellee for rehearing is granted, and the judgment of the court below is affirmed.

HUCHINGSON v. TEXAS CENT. R. CO.

(Court of Civil Appeals of Texas. April 14, 1909.)

1. CARRIERS (§ 304*)—PASSENGERS—LICENSEES—PERSONS ASSISTING PASSENGERS ON TRAINS.

In accordance with the established custom of assisting lady passengers to board trains, plaintiff assisted his aged and infirm sister upon a passenger train, which started while he was seating his sister, and he was injured in getting off while it was moving after it had run about 44 feet. If the train had stopped the usual length of time, plaintiff could have gotten off before it started. *Held*, that plaintiff was on the train as an implied licensee, and not a trespasser, and the company was bound to exercise ordinary care to protect him from injury, and would be liable for injuries caused by its failure to do so.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1104–1124; Dec. Dig. § 304.*]

2. CARRIERS (§ 320*)—PASSENGERS—LICENSEES—ACTIONS—JURY QUESTION—NEGLIGENCE.

In an action for injuries sustained while plaintiff was getting off a moving passenger train, after having entered it to assist his sister on board, by stumbling against a footstool claimed to have been negligently left upon the platform or car step, whether the company was negligent *held* a jury question.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

3. CARRIERS (§ 347*)—PASSENGERS—INJURY TO LICENSEES—ACTIONS—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an action for injuries sustained while plaintiff was getting off a moving passenger train, after having entered it to assist his sister on board, by stumbling against a footstool left upon the platform or car step, whether plaintiff was negligent *held* a jury question.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 347.*]

Appeal from District Court, Hamilton County; N. R. Lindsey, Judge.

Action by J. C. Huchingson against the Texas Central Railroad Company. From a judgment for defendant on a directed verdict, plaintiff appeals. Reversed and remanded.

Langford & Chesley, for appellant. J. A. Kibler and A. R. Eldson, for appellee.

RICE, J. About 4 o'clock on the morning of March 24, 1907, plaintiff, who lived in the town of Hico, accompanied his sick and aged sister, who had been his guest, to the depot in said town for the purpose of assisting her aboard the cars of appellee. Upon the arrival of the train, having previously purchased his sister's ticket, he immediately took her aboard, passing the conductor at the steps, and having found a seat about halfway

of the car, he deposited her grip, which he was carrying, and bidding her a hurried adieu, undertook to disembark; but, just as he was proceeding to do so, the conductor halloed, "All aboard," whereupon the train began to move, and as he was endeavoring to step from the moving car his foot struck a footstool, which had been left on the car platform, or on the first step, causing him to lose his balance, stumble, and fall to the ground, thereby breaking the thigh bone of his leg and otherwise seriously bruising and injuring him, from the effects of which he suffered intensely for several months, and on account of which he brought this action to recover damages, alleging negligence on the part of the company: First, in that it did not stop its train for the length of time necessary to transact its business, nor for the usual and customary length of time at said station; second, in negligently leaving a footstool or other obstruction in the path of exit from said coach; third, in the negligent act of its conductor in giving the warning cry, "All aboard," and immediately thereafter starting the train, without giving time for persons intending to disembark therefrom to do so. And in this connection he also averred that it was a custom, long known to and acquiesced in by the company at said station, for gentlemen to assist their lady friends and relatives aboard its trains. Defendant replied by general demurrer, special exceptions, general denial, and specially answered that appellant did not notify it or its servants of his intention to disembark from said train after assisting his sister thereon, nor had they any knowledge of said intention on his part, also by plea of contributory negligence in jumping from said train while the same was in motion, and also jumping therefrom in contravention of an ordinance of said town prohibiting persons from so doing. After hearing the evidence the trial court instructed a verdict for the defendant, on the ground that the evidence failed to show any negligence on the part of the company, from which judgment this appeal is prosecuted.

The evidence sustained the allegations of the petition, and, in addition thereto, showed: That the usual time for stopping trains at said station was from three to five minutes, whereas, on this occasion said train only stopped from 1 to 1½ minutes; that it was the custom, and had been for many years, at said place, for friends and relatives of lady passengers to enter trains at that point, to assist them on and off the cars; that after the announcement of "All aboard," the cars started at once, without giving time for one to alight; that appellant was leaving the cars and near the door at the time of said announcement of "All aboard"; that at the time he started to step from the train the same was moving very slowly, the evidence showing that the point on the ground

where the appellant fell was only 44 feet from the place he entered the cars, and less than a car length therefrom. The evidence further discloses that he could have safely disembarked but for the fact that he stumbled against the stool which had been left upon the platform or first step of the car, and that, while he was 69 years of age, he was vigorous and active and had been much accustomed to getting off and on moving trains. It was also shown: That his sister, who had been his guest, was departing for Galveston in quest of medical aid; that she was then and had been sick, and her eyesight was bad; that she was 53 years of age and was suffering intensely at the time from an attack of neuralgia, and was unable, without assistance, to have boarded said train, whereby it was necessary for some one to assist her in doing so.

In 2 Hutchinson on Carriers (3d Ed.) § 991, it is said: "A person who comes to a railroad station to assist passengers in entering or leaving the train, though not a passenger, is not a trespasser, as he comes with at least the tacit invitation of the carrier. While so engaged, he does not stand in the relation to the carrier of a bare licensee, but is deemed to have been invited to be there by virtue of the relation existing between the carrier and the intending or arriving passenger. The carrier therefore owes to him the duty of exercising at least ordinary care to see he is not injured by reason of defective station facilities or approaches thereto. So one who goes upon a train to render necessary assistance to a passenger, in conformity with a practice approved or acquiesced in by the carrier, has a right to render the needed assistance and leave the train; and the carrier, in permitting him to enter with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. If he is injured by reason of the sudden starting of the train, or the omission to give the customary signals, the carrier will be liable; but the duty of the carrier in this respect is dependent upon the knowledge of such person's purpose by those in charge of the train, for without such knowledge they may reasonably conclude that he entered to become a passenger, and cause the train to be moved after giving him a reasonable time to get aboard. He should, accordingly, notify some one in the management of the train of his presence, business, or purpose, so as to create some relation to the carrier, and thus make it its duty to care for him. And where the carrier's servants have no knowledge, or there are no circumstances tending to put them on notice, that a person who has boarded a train to assist another intends to alight before the train starts, they are not bound to hold the train until he has had time to disembark, nor to notify him before the train is started."

In 3 Thompson's Commentaries on the Law

of Negligence, § 2658, it is said: "A person going upon a railway train to assist another person on or off is clearly not a passenger, and is therefore not entitled to the high and exact degree of care for his safety which the law imposes upon a common carrier in respect of his passenger. He is either a licensee or a trespasser, depending upon the known rules of the company or the circumstances of the particular case. If, for instance, he is there in conformity with a practice approved or acquiesced in by the carrier, he is to be deemed lawfully there; his position is that of a licensee; and, under a principle hereafter considered, the carrier, if he have notice of his presence on his vehicle, owes him the duty of ordinary or reasonable care. In such a case he is entitled to a reasonable time for rendering the necessary assistance to the passenger to leave the vehicle of the carrier, provided the servants of the carrier have notice of his purpose to leave, and, if he is injured without negligence on his own part, in consequence of not being allowed such reasonable time to alight, he may recover damages from the carrier. It is a part of this doctrine that the company must be notified, through its servants, of an intention of the person so entering its vehicle to assist a passenger to get off the train, if the usual time for stopping is not sufficient to enable him to render such assistance and get off in safety. It must be kept in mind that the conductor and trainmen will not, ordinarily, know who, among those who get upon the train, are passengers, and who are there merely to assist passengers. Hence it is a sound and just conclusion that, in the absence of notice of his intention to leave the train after assisting a passenger into the car, the company will not be chargeable with negligence because of not stopping the train for more than the usual and reasonable time, to enable passengers exercising ordinary care to get on and off in safety; but, where such person gives notice to a trainman of his purpose to get off, those in charge of the train are bound to so regulate its movements as to afford him a reasonable time to alight in safety. * * * But if the carrier's servants have no notice of his purpose to get off, he cannot, in case he is hurt in getting off, in consequence of the starting of the carrier's vehicle, recover damages from the carrier, unless there are some other circumstances of negligence on the part of the carrier's servants."

The above seems to be the general doctrine on the subject, and most of the cases in which the question has arisen have turned upon the fact that no notice was given by the accompanying party at the time of entering the train of his purpose to assist the passenger and then retire from the train. There are cases, however, to the effect that if the circumstances, within themselves, are sufficient to give notice to the trainmen that the accompanying party is intending to disembark,

them at or near the station platform while he accompanied the other upon the cars to assist her in finding a seat, this of itself was sufficient notice to the company that he intended to disembark from the train, as it could not be presumed that he intended to leave the remaining lady alone at the station at such an hour. *International & G. N. Ry. Co. v. Satterwhite*, 19 Tex. Civ. App. 170, 47 S. W. 41. Numerous cases sustain the doctrine that parties who go upon the premises of railway companies "to welcome the coming or speed the parting guest" are not trespassers, but are licensees, and that the company owes them at least the duty of ordinary care to see that they are not injured while there for such purpose.

In *M. & T. Ry. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905, a case in which a man had gone upon the train to assist his wife aboard, and who was injured while disembarking therefrom, the court said: "To such persons it owes the duty of providing reasonably safe platforms and approaches to its trains. *Hamilton v. Railway Co.*, 64 Tex. 251, 53 Am. Rep. 756; *Railway Co. v. Best*, 66 Tex. 116, 18 S. W. 224. The relations sustained between the railway company and appellee do not arise out of contract, and the obligations are not such as are imposed by contract. Appellee did not go into the train as a passenger, and hence the duties imposed by law upon carriers to passengers did not rest upon the company and govern its conduct towards him. He went upon the train under an implied permission or license, and the company owed him the duty of ordinary care. *Lucas v. Railway Co.*, 72 Mass. 64, 66 Am. Dec. 406. The company was under obligations to passengers to stop the train a sufficient length of time for those desiring to get off and those desiring to take passage to do so with safety. It was the duty of appellee to take notice of the usual length of time given for this purpose, and if it was not sufficient, and it was necessary for him to go into the train in order to place upon the company the duty of holding the train specially for him to disembark, he must have given notice of his intention." This case to us seems to imply that, if the usual time for stopping trains would have been sufficient for the accompanying party to have assisted his wife thereon and then safely alighted from the train, it would not have been necessary for him to have notified the company or its agents of his purpose in entering, but that this would only be necessary where the stop was not sufficient for the purpose indicated. The same doctrine is stated in *Texas & Pacific Ry. Co. v. McGilvary* (Tex. Civ. App.) 29 S. W. 67.

In the case of *M. & T. Ry. Co. v. Mil-*

order to entail on the defendant the duty to so handle the train as to allow reasonable facility for the plaintiff to get off without harm to himself, that the conductor be first seen and his permission obtained for plaintiff to go upon the train to see his wife seated. The company unquestionably had power, as a reasonable regulation of its business, to keep the husband from the train, or to prevent him from entering, he not being a passenger; but if, in the absence of any measures to that end, it allows persons who are not passengers to approach and board its train for the purpose of assisting its passengers to a seat, its consent thereto is as much obtained as if it was expressly given."

In the case of *Little Rock & Ft. Smith Ry. v. Lawton*, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434 et seq., 29 Am. St. Rep. 48, being a case where the plaintiff had entered defendant's car for the purpose of assisting a lady and child to a seat, Justice Hemmingway, after discussing the contention of the railway company that as the plaintiff did not enter the car to take passage upon it, but only as an escort to a passenger, the defendant owed him no duty, except not to injure him willfully and wantonly, and the other contention by the plaintiff to the effect that as he went upon the car with the knowledge of the trainmen, and for the purpose of rendering necessary assistance to a female passenger and child, the defendant owed him the same duty as a passenger, said: "We have concluded that neither view is correct, but that reason commends as proper a rule between the two. In the case of *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443, the Supreme Court of Indiana held that a railroad company owed the same duty to those assisting a passenger upon a train as to the passenger himself; but it cites no precedent for the ruling, and it is opposed to all cases adjudged upon the subject to which our attention has been called. The law exacts of railroads for the protection of passengers the highest degree of care and imposes a liability for all injuries which sound judgment, skill, and the most vigilant oversight could have prevented; but this responsibility grows out of the relation of contract of carrier and passenger, on account of the great perils of the undertaking. As this is the cause and the origin of the rule, it would seem that the rule should be restricted in its application to persons who come within that relation, and such is the effect of the authorities"—citing many cases.

Proceeding, the court says: "But a denial that the extreme responsibility contended for exists is not an affirmation of the rule that responsibility is restricted to wrongs that are willful or wanton. Such conclusion would

rest upon the premise that one attending a passenger enters the car from curiosity or upon his own business, under a mere license from the company, and not upon business connected with the company upon an implied invitation. If this premise be false and the converse correct, then, according to the decision of this and other courts, the carrier would be bound to the exercise of ordinary care. *St. Louis, I. M. & S. Ry. v. Fairbairn*, 48 Ark. 491, 4 S. W. 50; *Holmes v. N. E. R. R. Co.*, L. R. 4 Exch. 254. And that it is so bound in cases like this is held in the cases first cited, as well as in others upon the subject. *Gillis v. Pennsylvania R. Co.*, 59 Pa. 129, 98 Am. Dec. 317; *Griswold v. Chicago N. W. R. Co.*, 64 Wis. 652, 26 N. W. 101. In our opinion the rule is correct upon principle, for it is a matter of common knowledge that in the usual conduct of the passenger business it often becomes necessary for those not passengers to go upon the cars to assist incoming as well as outgoing passengers, and that a practice has grown up in response to this necessity. While it perhaps arose out of a consideration for the security and convenience of the traveler, it has proven beneficial to carriers, and now prevails in this state and extensively elsewhere, and is treated as an incident to the business in the conduct of the public and the acquiescence of carriers. It cannot be doubted that it has increased travel and the earnings of carriers, while it has promoted the convenience and security of passengers, and, if it should be abrogated, many persons would be compelled to forego journeys to the detriment of the carrier and their own inconvenience. We conclude that such attendant performs a service in the common interest of carrier and passenger, and that his entry upon a car is upon an implied invitation, which entitles him to demand ordinary care of the carrier. But although we think the attendant is entitled to demand ordinary care for his protection, and would be entitled to recover for an injury caused by its omission, still he could not recover unless he established that his injury was caused by some negligent act or omission on the part of the carrier. The word 'negligence' implies a duty as well as its breach, and the fact can never be found in the absence of a duty. Assuming, then, that the plaintiff went upon the train to render necessary assistance to a lady passenger and child, and that those in charge of the train knew that he was upon it, was it the duty of the defendant to hold the train the full length of time that was usually required for passengers to get off and on the cars at that place? The court charged the jury that it was, and this presents the controlling question upon this appeal." And the case was reversed because of the giving of the charge in the form requested.

And it will be noted in this connection that, while there were other acts of negligence charged in the case than the failure to stop the train for the full length of time at the

station, still, the court held that the facts did not justify their submission to the jury; but, in the instant case, there are other acts of negligence charged than failure to stop at the station the usual length of time or for a reasonable time, which do find support in the evidence, and of which we will now speak.

While it appears from the evidence that there was no direct notice given by plaintiff to the conductor or any one else, of his purpose in boarding the train, still there is nothing to indicate that the train in the morning in question was late, and would not likely remain its usual time, and in view of the fact that it appears that the plaintiff knew its usual stay at such station, could he not, under the circumstances, assume that he would have time to aid his sister in boarding the train and get off in safety, provided it should stop as long as usual, and therefore concluded it was not necessary to give any direct notice of his intention to get off? And, in the absence of circumstances tending to show that it would not stop its usual time on this occasion, would it not be presumed, if any presumption is to be indulged at all, that it would remain the ordinary time rather than otherwise? So that since the circumstances tend to show that, if it had remained the usual length of time at said station, plaintiff would likely have been enabled to perform this service for his sister, and alighted in safety, then no direct notice, under the circumstances, would seem to be necessary. Would not the practice of persons at said station of aiding their female relatives in getting on and off trains, so long acquiesced in by the company that it had ripened into a custom, dispense with actual notice, under the circumstances, and be regarded as tantamount to a notice or as a waiver of actual notice that plaintiff intended not to become a passenger, but to get off? If it could be so held, then it seems that actual notice, under the circumstances, would not be required; but if we were to concede in this case that the facts and circumstances were not sufficient to apprise the company of the plaintiff's purpose to get off, and did not amount to a waiver thereof, still, since he was acting at the time in aiding his sister within the established custom, and since it appears that the train did not stop its usual time, and had it so stopped he could have alighted in safety, we are inclined to hold that he was not a trespasser, but was there at the implied invitation of the company, to render a service alike of interest to it and its passengers, and hence the company owed him the duty of exercising ordinary care, at least to protect him from injury in the discharge thereof; and he would be entitled to recover, if he suffered injury at its hands on account of the negligence of its servants or employees.

In the case of *Doss v. M., K. & T. Ry. Co.*, 50 Mo. 27, 21 Am. Rep. 371, it was held, as stated in the syllabus thereof, that railroad companies are liable for injuries caused by

the want of ordinary care, where the person injured was at the train to meet with or part from a passenger, although not himself a passenger or employé. And, in a case where plaintiff had in charge a lady and her infant child, it was held that he was entitled to sufficient time to escort her to a seat and then to leave the train. If the time of stopping was too short, or if the agent of the railroad company failed to give the usual notice of the starting of the train, there was not an exercise of such ordinary care as the company was bound to employ in order to escape liability; the court saying, among other things, in its opinion: "We should be very reluctant to hold that an aged or infirm mother or sister or wife, or, indeed, any other woman, especially if incumbered with an infant child, should not be allowed the assistance of a male friend or relative in getting a seat upon a railroad car, and if such friend or relative was to be treated as a mere stranger to the company, having no claim upon the company for an injury under any circumstances. Not being a passenger, it is conceded that no extraordinary care was required; but whether the neglect of customary signals would not amount to ordinary negligence is a matter upon which the Massachusetts decision is not satisfactory [referring to the case of *Lucas v. Railway Co.*, 72 Mass. 64, 66 Am. Dec. 406]. And if a person who visits a railroad train 'to welcome a coming guest or speed a parting one' is held to have claims on the railroad company for ordinary care, surely one who attends a female passenger, incumbered with an infant and a satchel, is entitled to hold the company to equal responsibility."

So in this case, it being directly charged, among other things, that the injury was the proximate result of the carrier's negligence in leaving the footstool on the platform or steps of the car, and but for which it is shown he could have safely alighted, and it further appearing that he was not a trespasser while on the train, we think it was sufficient to justify the submission of the issues involved in the case at least to the jury for their consideration.

The question of contributory negligence on the part of appellant, as charged by the company, was a question of fact, and not one of law, and should also have been submitted to the jury under appropriate instructions. *Gist v. I. & G. N. R. R. Co.* (Tex. Civ. App.) 102 S. W. 457; *T. & P. Ry. Co. v. Funderburk*, 30 Tex. Civ. App. 22, 68 S. W. 1006; *I. & G. N. R. R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401.

As to whether the evidence is sufficient to support and sustain any of the allegations of negligence charged in the pleadings, we refrain from the expression of any opinion; but do hold that, taken together, it is ample to require their submission to the jury under appropriate instructions from the court, and

that a failure so to do on the part of the court was error, for which its judgment must be reversed, and the cause remanded, and it is so ordered.

Reversed and remanded.

ATCHISON, T. & S. F. RY. CO. v. WILEY et al.

(Court of Civil Appeals of Texas. April 21, 1909. On Rehearing, May 19, 1909.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT—VERDICTS.

A verdict based on contradictory, unreasonable, and highly improbable testimony of an unreliable witness will not be allowed to stand, though three juries have found the same way.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3930; Dec. Dig. § 1001.*]

On Rehearing.

2. NEGLIGENCE (§ 58*)—PROXIMATE CAUSE.

An injury is not actionable unless it is the natural, ordinary, and reasonable result of defendant's conduct.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 71; Dec. Dig. § 58.*]

3. MASTER AND SERVANT (§ 129*)—INJURY TO SERVANT—PROXIMATE CAUSE OF INJURY.

Where a brakeman, after his fall from the top of a moving box car, jumped up and ran along the track in front of the car about 15 feet, when he stepped into a hole made by a rotten tie and was run over, the railroad company's failure to replace the tie was not actionable negligence, as the defect in the track was not the proximate cause of the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 263; Dec. Dig. § 129.*]

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by Mrs. Leo Wiley and others against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and rendered.

J. W. Terry and A. H. Culwell, for appellant. Patterson & Wallace, for appellees.

FLY, J. This is a suit for damages arising from the death of Jesse Wiley, instituted by his wife, Leo Wiley, his child, Jessie L. Wiley, and his parents, Damon and Samantha Wiley, against appellant. The parents were parties pro forma and were dismissed on their admission that they were not entitled to recover because they received no aid or support from their son. There were several grounds of negligence set up in the petition, but the only one relied on and submitted to the jury was negligence in leaving a hole in the track so that the foot of deceased was caught in it while he was running in front of a moving car and was held until the car ran over and killed him. The jury returned a verdict for \$7,500 in favor of appellees, and judgment was rendered accordingly.

The evidence disclosed that Jesse Wiley was a brakeman in the employment of ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pellant, and that while on top of a moving refrigerator car putting on the brakes, from some unknown cause, he fell from the end of the car to the track and was run over and killed. All of the witnesses agree on the facts stated, and the case against appellant must be sustained, if at all, by what occurred after the deceased struck the track on his back, and those occurrences are based on the evidence of Sam Claborn, who is described by counsel for appellee, in whose behalf he testified, as "a small, black, bullet-headed negro, densely ignorant." His evidence on his examination in chief was as follows: "My name is Sam Claborn. I am 17 years old. I live down to Mr. Henderson's by the Santa Fé track. I don't know, sir, how long I lived down in that country, a long time. I remember about two years and a half ago of witnessing an accident to a man in the yards down there. I was going to the store at the time. I was going to the store, and I saw a man fall off—try to stop the car, trying to turn the brake. He fell down. He was trying to keep the car from—stop the car, so he fell off in the middle of the track and ran down towards the switch and caught under the switch, and the coupler hit him in the back. Then the first wheel ran over him and knocked him right across the track. The first two wheels ran over him, and the last knocked him off the track, off the rails. The car was going down towards the old depot. It was a brake on the end of a car. When I first saw him he had hold of this brake trying to turn it. He fell on his back in the middle of the track. Then he got up and ran down towards the switch, and his foot caught in the switch, and the coupler hit him in the back and threw him across the track, and the wheels ran over him. The right foot was caught. It was kind of a hole, ditch like, under the rod. His foot caught under the rod across the track. I was about 40 feet from him at the time I saw him fall. When he got up he ran about 25 feet before his foot went into the hole. He fell over the rail towards town. There was nobody present there at that time but myself, and after he was run over the switchman came."

The only other witness in a position to testify as to the facts surrounding the death was G. H. Vasquez, a witness for appellees, and his evidence is in direct conflict with that of Sam Claborn. He testified as follows: "My name is George Henry Vasquez. I am a switchman. My present place of residence is 2304 Congress avenue, Houston, Tex. Yes, I was employed by the defendants, the Atchison, Topeka & Santa Fé Railway Company, and the Rio Grande & El Paso Railway Company in April and May, 1906. My last place of employment was at El Paso, Tex. I was acquainted with the deceased, Jesse Wiley. He met with an accident and was killed on or about the 14th

day of May, 1906, in the yards of the defendant company at El Paso. I was present and witnessed said accident. We were making a running or flying switch of an express car in the yards. We made a run of the car, and Jesse Wiley got on the west end of the car to set the brake. I stepped off of the footboard and crossed over to the main line to notice if the brake would take any hold, as the car would come over on the main line track, and, as he passed me, he (Jesse Wiley) was in the act of setting the brake. When about 94 feet from where I was standing, I saw Jesse Wiley's body fall across the rail, and the four wheels passed over him, and the car rolled about 94 feet before it stopped. The car was a Wells-Fargo refrigerator car. I did not make any special inspection, as the track was in a fairly good shape; but at the switch where Mr. Wiley met his death there was a space of at least 5 inches between the points of the rail and the surface. The track was in fairly good shape, with the exception that there was about 8 or 10 inches between the end of the switch and the side of the last tie, leaving that much projecting over the tie, which left a space of about 5 inches between the end of the switch and the ground. The accident occurred exactly at the switch, where I have stated the tie had been left out, and where the end of the switch projected over the side of the last tie."

The only reasonable construction that can be placed upon his testimony is that the man never arose after he hit the rail, but was immediately run over and crushed to death. Not only is the evidence of Sam Claborn contradicted by that of Vasquez, but there appears in the record a statement made by Claborn at a former trial in which he said that Jesse Wiley did not get up and run along the track, but was killed where he struck the rails when he fell from the top of the car. On that former trial he swore that Wiley fell off at the switch and did not get to his feet, but was immediately killed. It is true that on the following day he was again placed on the stand and swore substantially as he did on the present trial, but that, instead of strengthening his testimony, should have rendered it utterly unworthy of belief. If there had been no evidence directly contradicting the testimony of Sam Claborn, and if he had been consistent in his different statements, his evidence seems to be so unreasonable and improbable that we would hesitate to sustain a judgment based upon it. It is highly improbable that a man who had fallen from the top of a refrigerator car with his back across an iron rail would be able at once to spring to his feet, and, if this point is passed, it is unreasonable to suppose that he would run along the track, for a distance of 15 feet, when at one step he could have placed himself in a position of absolute safety.

fresh tracks in the hole, was corroboration of Sam Claborn's statement. We do not think that this necessarily follows, for the tracks may have been made by Jesse Wiley's feet at the time or after he fell and lay on his back across the rail. The footprints, which were described as "kind of scratched," are more consistent with the theory that they were made by Jesse Wiley in his struggles to rise than that they were made at the end of a run of 15 feet. There was no evidence of any footprints on the roadbed from where the fall was stated, by Sam Claborn, to have taken place to the place of the tragedy. The fact of the presence of Sam Claborn and footprints in the hole, made by the absence of a tie, was not sufficient to corroborate the contradictory and improbable statements made by an irresponsible and unreliable witness. A verdict based upon such testimony is a travesty upon justice, and the number of times that such verdict has been repeated can add no sanctity to it. It may be a matter of astonishment and grief that such a verdict could have been rendered by three different juries, yet a vicious action repeated a hundred times does not thereby become meritorious and right, and the same duty rests upon the courts to cancel and destroy a judgment based upon it. The jury system handed down by our English forefathers can never be too highly commended, nor too sacredly guarded and protected by the courts of the country; but there can be no more insidious and deadly attack upon it than to sustain and uphold flagrant and outrageous assaults upon the rights of person or property made in its name or under its cover and protection. The courts are the ultimate resort to which the citizen should with confidence appeal in every lawful emergency.

The learned trial judge was profoundly impressed with the utter lack of evidence to support the verdict, but felt that under the law he had no power to grant another new trial, as appears from the following order overruling the motion for new trial: "Notwithstanding that this court believes that the verdict of the jury is against the preponderance of the evidence and not supported by the same, yet, two new trials having already been granted by it, the court is of the opinion that the power of the district court to grant a new trial has been exhausted, and, except for the opinion that the limit of new trials has been reached, the court would grant the motion of the defendant." Whether the power of the court, in the premises, had been exhausted or not, the language used shows that the judicial conscience of the trial judge was shocked at the verdict, and that only a belief that his authority had

The judgment will be reversed, and judgment here rendered that appellees take nothing by their suit, and that appellant recover of them all costs in this behalf expended.

On Rehearing.

If it should be admitted that the evidence of the witness Claborn was worthy of belief, and that the deceased did run along the track and did get his foot fastened in the switch, there was no evidence of negligence on the part of appellant. How could appellant have anticipated that a switchman would fall from the top of a moving car, and then jump up and run along the track, step into a hole made by a rotten tie, and be run over and killed? The proximate cause of the death of Wiley was not the hole in the track, but acts for which appellant was not responsible. If deceased had not fallen from the car and had not run along the track, he would not have been killed. That is patent, and it cannot be said from the evidence in the case that he would not have been killed if he had not stepped in the hole.

The rule in regard to damages arising from a tort is that, in order for a defendant to be liable, the injuries must be the natural, ordinary, and reasonable consequences of his conduct. It is not claimed that the deceased was placed in his position of danger on the track, after his fall from the top of the car, by the negligence of appellant, and neither can it be claimed that appellant is responsible for the act of the deceased in running along the track. Its negligence is predicated alone on its failure to replace a rotten tie which made a hole in the track, and over which deceased, while running along the track in front of a moving car, stumbled and fell. He was not engaged at that time in the service of appellant, and he was not in his perilous position by reason of any negligence of appellant. It owed him the duty to furnish him a safe place in which to perform the service of his master, but no duty rested upon it to furnish a safe track on which he could run in front of a moving car, where his duties as switchman did not place him. It is not pretended that the car furnished by appellant on which deceased was working was not a safe place for labor; but the negligence is claimed to rest on the defective condition of the track, where deceased had not been placed by appellant, nor was in any manner responsible for his being there. It owed him no duty whatever in so far as its track was concerned under the facts of this case. He was not at that time engaged in its service and was not running along the track in pursuance of his duties. The case of deceased must be viewed therefore just as

track, and neither would the condition of the track be the proximate cause of the injury. The motion for rehearing is overruled.

WESTERN UNION TELEGRAPH CO. v. HUGHEY.

(Court of Civil Appeals of Texas. April 22, 1909. Rehearing Denied May 13, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS FOR DAMAGES—EVIDENCE.

Evidence in an action against a telegraph company for failure to deliver a telegram held to show that such failure was due to the negligence of defendant's agents, and that but for such negligence plaintiff could have reached the bedside of his dying wife about 15 hours sooner than he did.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.*]

2. TELEGRAPHS AND TELEPHONES (§ 65*)—ACTIONS FOR DAMAGES—PLEADING.

A petition in an action for failure to deliver a telegram, alleging that, when plaintiff left home, his wife was in good health, but on the next day she became suddenly sick and telegraphed him to come home, that, had the telegrams been delivered within a reasonable time after their reception at their destination, plaintiff could and would have reached home more than 15 hours before he did, and, by reason of the negligence charged, he was deprived of conversing with her during her last illness, is sufficient as against a general demurrer.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 54-60; Dec. Dig. § 65.*]

3. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS FOR DAMAGES—BURDEN OF PROOF.

In an action for failure to deliver a telegram under a complaint alleging that, when plaintiff left home, his wife was in good health, but on the next day she became suddenly sick, and sent telegrams calling him home, and, had they been delivered within a reasonable time after their reception at their destination, plaintiff could and would have reached home more than 15 hours before he did, and that, by reason of defendant's negligence, he was deprived of conversing with her during her last illness, no burden rests on plaintiff to show that his wife was conscious and capable of conversing with him had he arrived 15 hours sooner, as consciousness is the normal state of the mind, and will be presumed unless shown to be otherwise.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.*]

4. EVIDENCE (§ 67*)—PRESUMPTION—CONTINUANCE OF CONDITION.

Normal conditions will be presumed to exist in every instance until the contrary is shown, and presumptions arising from proof of a given status operate prospectively, and not retrospectively.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 87, 88, 103; Dec. Dig. § 67.*]

Appeal from District Court, Dallam County; J. N. Browning, Judge.

Action by H. J. Hughey against the West-

ern Union Telegraph Company, for appellee.

HODGES, J. The appellee sued the appellant telegraph company for damages for failure to deliver a telegram informing him of the serious illness of his wife. A judgment was recovered for the sum of \$1,400, from which the appellant prosecutes this appeal.

The evidence shows: That Hughey, the appellee, was a drummer, and lived at Dalhart, Tex. That on the evening of April 15th, about 9 o'clock, he left home on one of his customary trips. That at that time his wife was in good health. On the following day, the 16th, a short time after noon, the following telegrams were delivered to and accepted for transmission by the appellant's agent at Dalhart: "Dalhart, Tex., April 16, 1907. To Mr. Hughey, Texhoma, Oklahoma: Come home on No. 29; very sick. [Signed] Mrs. Hughey." Second message: "Dalhart, Tex., April 16, 1907. To Mr. Hughey, Guymon, Oklahoma: Come home on 29. Very sick. [Signed] Mrs. Hughey." Those telegrams were actually written and delivered to the agent by T. L. Swearingen, who testified that he did so in response to a request over the telephone from some lady. Swearingen lived in Dalhart, was in business there, and knew both the appellee and his wife. The appellee testifies that, after leaving home Monday evening, he went to Stratford, where he spent the night. He left there the next day at 12:25, passed through Texhoma, but did not stop, and arrived at Guymon about 1 or 1:30 p. m. The telegram addressed to him at Guymon was received at that place by the agent in time for its delivery, so that the appellee might have left for home over train No. 29 referred to in the message, and, had he done this, he could have reached his home at 5:30 the same evening. The telegrams were never delivered, and appellee knew nothing of his wife's illness till he arrived at Dalhart the next morning about 9 o'clock. His wife was then in a dying condition, was unconscious, and lived only about 30 minutes after his arrival. The testimony was sufficient to authorize the jury to find that the failure to deliver the telegram at Guymon was due to negligence on the part of the appellant's agents at that place, and is also sufficient to show that but for such negligence appellee could and would have reached the bedside of his wife about 15 hours sooner than he did.

Practically the only question involved in this appeal is: Were the pleadings and evidence sufficient to warrant the court in giving the following charge to the jury: "If

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

you find for the plaintiff, you will assess the damages at such sum of money as you believe and find will reasonably compensate him for any actual damage he may have sustained on account of the grief or mental anguish of being deprived of seeing and conversing with his wife before she became unconscious, and before her death. And, in such event, the form of your verdict will be as follows: 'We, the jury, find for plaintiff, and assess his damages at ——— dollars,' etc." It is contended that there was neither allegation nor proof that, if the appellee had reached the bedside of his wife earlier than he did, he would have found her in a conscious condition. The allegations are substantially that, when appellee left home on the night of the 15th, his wife was in good health; that on the next day she became suddenly sick, and caused the telegrams to be sent; that, had they been delivered within a reasonable time after their reception at points of destination, appellee could and would have arrived at the bedside of his wife more than 15 hours before he did; that, by reason of the negligence charged, he was deprived of conversing with her during her last illness. There were also other elements of damage alleged not necessary here to mention. The only exception to the petition was a general demurrer, and which, we think, was properly overruled by the court. The only testimony upon the point in issue is that of Swearingen and of the appellee. Swearingen stated that at about 1 or 2 o'clock on the 16th he was called over the telephone by some lady, and requested by her to send the telegrams above set out. He asked her where Hughey could be found, and she told him at either one or the other of the places named in the messages. He could not say that he recognized the voice of the lady doing the talking as that of Mrs. Hughey. The appellee testified that, when he arrived at the depot in Dalhart on his return at 9 o'clock on the morning of the 17th, he then for the first time learned that his wife was very sick. He found her unconscious and in a dying condition, and she lived only about a half hour after he reached her.

No burden rested on the appellee to allege or prove that his wife was conscious and capable of conversing with him had he arrived 15 hours sooner. Consciousness is the natural and normal state of the human mind, and it will be presumed to be the mental status of all living persons until shown to be otherwise. The fact that Mrs. Hughey was sick, or even very sick, without stating the character of her illness, does not of itself furnish evidence of the abnormal condition called unconsciousness. It is true that consciousness is often lost in severe cases of illness, but the occurrence is not so common that proof of illness alone will

afford a basis for the presumption of unconsciousness. Normal conditions will be presumed to exist in every instance till the contrary is shown. The court had the right to assume, as he did, that, had the appellee arrived at the bedside of his wife at the time he would have done so had the message been punctually delivered, he would have found her conscious and capable of conversing with him in some form or to some extent at least. The fact that she was unconscious and in a dying condition when he did arrive is no evidence that 15 hours before that time she was in the same condition. Presumptions which arise from proof of a given status or situation operate prospectively and not retrospectively. *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Bradner on Evidence*, p. 627. Furthermore, in this case we think the inference is strongly suggested that her unconscious condition was due to the fact that she was in articulo mortis when her husband arrived.

The same questions here raised are presented in different forms under other assignments, but we deem it unnecessary to further discuss them.

We have found no error in the judgment, and it is therefore affirmed.

MECCA FIRE INS. CO. OF WACO v. WILDERSPIN.

(Court of Civil Appeals of Texas. April 22, 1909. Rehearing Denied May 13, 1909.)

1. INSURANCE (§ 830*)—FINDINGS OF POLICY—MORTGAGE ON PART OF PROPERTY—"SUBJECT OF INSURANCE."

An insurance policy on household goods, which provided that it should be void if the subject of insurance, being personal property, should be or become incumbered by a chattel mortgage, is not rendered void by a mortgage on a part of the property at the time the policy was executed, where the value of the unincumbered portion exceeds the amount of the insurance on all the goods, as "subject of insurance" means all property covered by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 829-841; Dec. Dig. § 830.*]

2. STIPULATIONS (§ 16*)—CONCLUSIVENESS AND EFFECT—SUBMISSION OF ISSUES.

Where the parties agree in open court to submit certain issues agreed upon to the jury, neither party can be heard to complain of the action of the court in submitting any of the issues.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. § 16.*]

3. STIPULATIONS (§ 18*)—CONSTRUCTION AND OPERATION—SUBMISSION OF ISSUES.

In an action on an insurance policy for \$500, where certain issues of fact, not including the value of the property, were submitted to the jury by agreement of the parties made in open court as the only issues of fact to be determined, defendant cannot complain that the evidence was not sufficient to support a finding that the property destroyed was not worth the sum alleged in the petition, as the agreement that the issues submitted were the only ones

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was an admission that the property destroyed was worth the sum alleged in the petition.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. § 18.*]

4. INSURANCE (§ 598*)—INTEREST ON AMOUNT OF LOSS.

Under a policy of insurance, giving the insurance company 90 days after proof of loss in which to pay the loss, interest on the amount due will not begin to run until the expiration of the 90 days.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1494; Dec. Dig. § 598.*]

Appeal from Tarrant County Court; John L. Terrell, Judge.

Action by A. K. Wilderspin against the Mecca Fire Insurance Company of Waco. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

The suit was on a fire insurance policy for \$500 written and dated March 1, 1907, covering certain household goods destroyed by fire March 18, 1907. By its terms the policy was to continue in force during the three years next following its date. The premium on it amounted to \$10, \$6 of which was paid by appellee to appellant's agent, Lovejoy, on the day the policy was written, and the remainder of which he agreed to pay about April 1st following. After the policy was written, possession thereof was retained by the agent, to hold, he testified, for the insurance company until the remainder of the premium should be paid, or, appellee testified, for safe-keeping and for his accommodation. After the goods had been destroyed, but on the day they were destroyed, appellee tendered to the agent the balance then remaining unpaid of the premium, and demanded that possession of the policy be delivered to him. First refusing to do so, the agent finally received and receipted appellee for the \$4 tendered, and at the same time turned the policy over to him. Before turning over the policy to appellee, the agent testified, but after it was turned over to him, appellee testified, the agent indorsed on same as follows: "This policy was delivered March 18, 1907." At the time the policy was written, and at the time the goods were destroyed, a portion of them was incumbered by mortgages; but the value of the unincumbered portion thereof exceeded the amount of the insurance on all the goods. By its terms the policy was to be void if the "subject of insurance should be or become incumbered by a chattel mortgage." The cause was submitted to a jury on special issues, with reference to which the judgment recites as follows: " * * * And it being agreed in open court by counsel that there are only two issues of fact to be determined by the jury and one of law by the court, said two agreed special issues were submitted to the jury," etc. The special issues submitted were: (1) "Did Lovejoy hold the policy in question at the time of the fire as the agent of Wilderspin or as the agent

of the insurance company?" The jury answered: "He held it as the agent of Wilderspin." (2) "Did Wilderspin represent to Lovejoy that he was the sole owner of the property described in the policy?" The jury answered: "No." This appeal is prosecuted from a judgment in favor of appellee against appellant for the sum of \$500 and interest thereon at the rate of 6 per cent. per annum from June 20, 1907.

W. L. Eason, for appellant. Cook & Orr, for appellee.

WILLSON, C. J. (after stating the facts as above). We do not agree with appellant that, because it appears that a portion of the property covered by the policy was incumbered by mortgages, it should be held to be void. The proviso in the policy referred to by appellant as demanding such a holding is as follows: "This policy * * * shall be entirely void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage." Construing strictly the language of the clause in the contract quoted, the phrase "subject of insurance" should not be held to mean less than all the property covered by the policy. Giving it such a meaning, the policy was not void, for the greater portion of the property insured was not in any way incumbered. That to avoid a forfeiture of rights acquired under such a contract the phrase referred to should be construed to carry the meaning indicated seems to be fairly well settled by the decisions of the courts of this state. *Bills v. Hibernia Ins. Co.*, 87 Tex. 547, 29 S. W. 1063, 29 L. R. A. 706, 47 Am. St. Rep. 121; *Hartford Fire Ins. Co. v. Walker* (Tex. Civ. App.) 60 S. W. 825; *Id.*, 94 Tex. 473, 61 S. W. 711; *North British & Mer. Ins. Co. v. Freeman* (Tex. Civ. App.) 33 S. W. 1091; *Georgia Home Ins. Co. v. Brady* (Tex. Civ. App.) 41 S. W. 516.

It is insisted that the court should not have submitted to the jury as an issue to be determined by them a question as to whether, while holding the policy, Lovejoy was acting as appellee's or appellant's agent, but instead should have submitted to them a question as to whether the policy had been delivered to appellee prior to the fire or not. From the recital in the judgment it appears that the issue so submitted in open court was agreed to by the parties as one of the only two issues of fact in the case. This being true, neither of the parties should be heard to complain of the action of the court in submitting it. Rule 47 for district courts (67 S. W. xxiv). For a like reason, the complaint made that the evidence was not sufficient to support a finding that the property destroyed was worth as much as \$500 will not be considered. The agreement that the issues of fact submitted were the only ones

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in the case should be treated as an admission that the property destroyed was worth the sum it was alleged in the petition to be worth.

The judgment in appellee's favor was for interest on the sum recovered from June 20, 1907. By a term in the policy appellant was not bound to pay on account of a loss covered by it until 90 days after it had been furnished with proof of such loss. It was not furnished with such proof until May 7, 1907. Therefore the judgment should have been for interest from August 6, instead of from June 20, 1907. *Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578; 4 Cooley's Briefs on Ins. p. 3838.

It will be so reformed as to adjudge interest on the amount of the recovery from August 6, 1907, and as so reformed will be affirmed. The costs of this appeal will be adjudged against appellee.

ATCHISON, T. & S. F. RY. CO. v. PICKENS.†

(Court of Civil Appeals of Texas. April 21, 1909. On Rehearing, May 12, 1909.)

1. STATUTES (§ 281*) — PLEADING FOREIGN STATUTES—NECESSITY.

In an action for injuries to an employé in another state, in the absence of pleading and proof as to the law of such other state, the law of the forum will be applied.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 380; Dec. Dig. § 281.*]

2. APPEAL AND ERROR (§ 882*)—ERROR INVITED BY APPELLANT.

The error of submitting a cause on an erroneous theory cannot be said to have been invited by appellant by requests for instructions, where such requests were offered in explanation and amplification of the general instructions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8602; Dec. Dig. § 882.*]

On Motion for Rehearing.

3. TERRITORIES (§ 11*)—LEGISLATIVE POWER OF CONGRESS—CONSTITUTIONALITY OF EMPLOYER'S LIABILITY ACT.

The federal employer's liability act (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]) is constitutional in its application to injuries to an employé in territories, notwithstanding its unconstitutionality in its application to interstate commerce; the provisions defining the liabilities of employers engaged in commerce in any territory being within the power of Congress to govern territories and independent of the provisions relating to carriers engaged in interstate commerce based on the constitutional power of Congress to regulate interstate commerce.

[Ed. Note.—For other cases, see *Territories*, Cent. Dig. § 8; Dec. Dig. § 11.*]

4. COURTS (§ 91*) — DECISION OF SUPREME COURT—EFFECT ON COURT OF CITY APPEALS.

The decisions of the Supreme Court on the validity of the federal employer's liability act (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]) in

its application to causes arising in territories will be followed by the Court of Civil Appeals.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 325; Dec. Dig. § 91.*]

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action for personal injuries by M. E. Pickens against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed on rehearing.

Terry, Cavin & Mills and A. H. Culwell, for appellant. P. H. Clarke and T. A. Falvey, for appellee.

JAMES, C. J. The action is for damages, the petition alleging injury received by appellee, a brakeman in appellant's service, while working as such between Raton and Las Vegas, N. M.; that plaintiff was caused to fall from the top of a caboose through the negligence of the engineer of a pusher engine in suddenly withdrawing said engine, by reason of which the caboose was suddenly jerked and jarred. The answer was general demurrer and denial, assumed risk, and contributory negligence. Plaintiff was awarded \$7,500.

By the assignments of error appellant complains of the charge submitting the case on the theory of comparative negligence; this being based upon the act of Congress known as the "Employer's Liability Act (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891])", which has since the trial been declared unconstitutional by the Supreme Court of the United States. There are assignments also which complain of the charge in applying the rule as to the acts of fellow servants as the same obtains in this state, instead of applying, as appellant says, the law which prevails in New Mexico on the subject, which appellant states is different from ours. We have held that, if the law of New Mexico is different, it is a fact necessary to be alleged and shown, and, where this has not been done, the rule that governs here will be applied. *Railway v. Mills* (Tex. Civ. App.) 108 S. W. 490; *Tempe v. Dodge*, 89 Tex. 71, 82 S. W. 514, 88 S. W. 222.

In reference to the submission of the case upon the rule of comparative negligence, appellee argues that the error was invited. We overrule this. It appears that the requested charges upon which this argument is founded were asked in explanation and amplification of the charge of the court, and they refer in terms to it, and therefore it appears they were asked after the court's charge was prepared and known. Under these circumstances the charge cannot be held to have been induced by the requests. Moreover, it is probable, and we may say manifest, that the act of Congress, since pronounced unconsti-

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† Writ of error denied by Supreme Court May 26, 1909.

sued in the disposition of the cause upon a false theory, and to this, and not to the requests of defendant, the charges complained of were really due. We are of opinion that the charges as given were not invited error; and that appellant, owing to the circumstances, should not be held estopped by said requests or by proceeding with the trial of the case upon that theory.

In order for appellant to be relieved of the consequences of the judgment, it was not necessary for it to show to this court that the facts were not sufficient to warrant the recovery had, nor that the verdict was excessive.

Reversed and remanded.

On Rehearing.

The motion has been held for some time awaiting further decisions touching the validity of Act Cong. July 11, 1906, c. 8073, 34 Stat. 232 (U. S. Comp. St. Supp. 1907, p. 891), known as the "Employer's Liability Act," in its application to territories, in view of the decision of the Court of Appeals for the District of Columbia in the case of *Hyde v. Railway Co.*, 31 App. D. C. 466, affirming the validity of the act in its reference to territories. The Supreme Court of this state has recently in the case of *Gutierrez v. Railway Co.*, 117 S. W. 426, adopted this view.

Our opinion has been that it is evident that Congress had no intention to enact any but a general statute, and would not have enacted this statute, independent of its having general application to all cases arising under its provisions, and that the effect of the decision of the Supreme Court of the United States in *Howard v. Ill. Cent. R. R. Co.*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, was to nullify the act entirely. In the above circumstances our views should be subordinated to those of the highest court of this state, and we therefore grant the motion for rehearing, and, no error otherwise appearing in the record, the judgment of the district court is affirmed.

WRIGHT v. RILEY.

(Court of Civil Appeals of Texas. April 15, 1909. Rehearing Denied May 13, 1909.)

1. VENDOR AND PURCHASER (§ 27*)—BOND FOR TITLE—ESTATE CONVEYED.

Where the purchase price has been paid, a bond for title to land operates to convey to the grantee an equitable title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 32; Dec. Dig. § 27.*]

2. TRESPASS TO TRY TITLE (§ 10*)—TITLE TO SUPPORT.

A bond for title to land after the payment of the purchase price is an equitable title, which

SUE AND LIMITATIONS.

Rev. St. 1895, art. 3360, limiting the time for suing for specific performance of a contract to convey land, does not apply to an action of trespass to try title for the recovery of the land pursuant to a bond for the conveyance after payment of the price.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 30, 31; Dec. Dig. § 25.*]

4. CONTRACTS (§ 108*)—VALIDITY—PUBLIC POLICY.

A contract by a railroad section foreman to procure a switch track to be constructed at a specified place by the company, in consideration for a conveyance of land to him, is not void as against public policy; the track being beneficial to the company and to the public.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 108.*]

5. TRESPASS TO TRY TITLE (§ 33*)—PLEADING—EFFECT OF PLEA.

In trespass to try title, pleas of general denial, not guilty, statute of limitations, and want of consideration for the contract on which plaintiff's title is based, have the legal effect of admitting possession in plaintiff.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 42-46; Dec. Dig. § 33.*]

Appeal from District Court, Hall County; S. P. Huff, Judge.

Action by T. J. Riley against D. M. Wright. From a judgment for plaintiff, defendant appeals. Affirmed.

The suit was brought by appellee against appellant in the ordinary form of trespass to try title to certain lots in the town of Esteline in Hall county, Tex. Appellant answered by general denial, not guilty, statute of limitation of 10 years under article 3360, Rev. St. 1895, and a plea of want of consideration for the execution of a certain bond for title. A trial without a jury resulted in the court's rendering judgment for appellee for the land sued for.

Appellee offered in evidence a patent from the state of Texas to appellant to 160 acres of land, being the northwest one-fourth of section No. 796, Block H, Waco & Northwestern Railroad Company, in Hall county, Tex., dated May 31, 1897, recorded June 30, 1897. He next offered the following written instrument, duly acknowledged and recorded January 22, 1895: "Know all men by these presents that I, D. M. Wright (an unmarried man), of the county of Hall, and state of Texas, held and firmly bound to T. J. Riley of the county of Hall and state of Texas, in the sum of \$300.00 to be paid to said T. J. Riley, executors, administrators, or assigns, to the payment whereof I bind myself, my heirs, executors, and administrators, firmly by these presents, dated this 6th day of October, 1892. The condition of the above obligation is that, whereas, the above-bound D. M.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lots in certain blocks in the town of Estelline, Hall county, Tex., as shown by the plat of said town recorded in the deed records of Hall county, Tex.]. The consideration paid and agreed to be paid for said land is as follows: \$150 to me in hand paid by T. J. Riley. Now if the said D. M. Wright shall upon receiving a patent from the state of Texas make or cause to be made to the said T. J. Riley, his heirs, assigns, and legal representatives, a good and sufficient title to said premises, then this obligation shall be null and void; otherwise it shall remain in full force and effect. D. M. Wright." The effect of appellee's testimony, elicited on his examination as a witness, and the only oral evidence in the record, was that the appellant agreed with appellee, who was a section foreman of the railway company, to sell and convey to him the lots sued for if he would procure the railway company to put in a side track to its main line at Estelline. Appellee carried out the agreement and procured and had the railway company to put in the side track. Appellant then sold appellee the lots sued for and executed the instrument above set out in payment for the said services of appellee. Appellee's petition was filed October 7, 1907.

Fires & Diggs, for appellant. T. J. Montgomery and H. E. Deaver, for appellee.

LEVY, J. (after stating the facts as above). By his first assignment of error appellant claims that this suit is an action for specific performance of a contract for the conveyance of land, and was therefore barred by limitation of 10 years under article 3360, Rev. St. 1895, at the time suit was brought. We do not think the contention can be sustained. It was clearly a suit by the appellee to recover the land, and not a distinct action for a decree for the enforcement or the performance of the contract to convey the same. The bond for title offered in evidence was relied on, as it could be, as a species of title to the land. A bond for title, when the purchase price has been paid, which was done in this case, operates to convey to the grantee an equitable title; and an action of trespass to try title against the grantor, as is this suit, may be maintained on such equitable title. *Miller v. Alexander*, 8 Tex. 36; *Wright v. Thompson*, 14 Tex. 558; *Elliott v. Mitchell*, 47 Tex. at page 450; *Downs v. Porter*, 54 Tex. 59; *Thompkins v. Brooks* (Tex. Civ. App.) 43 S. W. 70. It follows, we think, that the statute of limitation of article 3360, Rev. St. 1895, is not applicable to the case.

By the second assignment it is contended

man of the railway company to procure a switch to be located on the main line of the railway company at Estelline, was void as against public policy. We think it should be held in the case under the evidence that the services rendered by appellee under his agreement with appellant were a valuable consideration paid for the land, and the court did not err. It does not appear that the services rendered by appellee were in violation of law, or were or had a tendency at the time or now to be injurious to the public or against the public good. Unless the agreement or services could be held—and we do not think they could be—to fall within the classes or either of them stated, they would not be void. 9 Cyc. 483. The agreement and services did not go further than to merely procure the railway company to construct a side track to its main line at the town of Estelline. This but enabled the railway company to perform its full duty to the public, and was beneficial to it and the public and the appellant.

The ruling on the first assignment disposes of the third assignment.

By the fourth assignment it is contended that the court erred in rendering judgment for appellee, because the evidence fails to show that the lots sued for are covered by the land described in the patent. We do not think that the objection that the evidence does not sustain appellee's right to recover the particular lots sued for is tenable. The bond for title clearly describes the land sold and contracted to be conveyed by appellant as certain lots in certain blocks in the town of Estelline in Hall county, Tex., "as shown by the plat of said town which is recorded in volume 5 of Records of deeds of Hall County, Tex." The pleas of appellant have the legal effect to admit possession in appellee. Appellee being in possession of the particular lots under title superior to appellant's, and there being no doubt as to the identity of the land sued for and claimed by appellee, he was, as against appellant, entitled to recover the same.

The case was ordered affirmed.

McKEE v. WEST.

(Court of Civil Appeals of Texas. April 28, 1909. Rehearing Denied May 19, 1909.)

1. PUBLIC LANDS (§ 178*)—LAND OFFICE—RIGHT TO FILE TRANSFERS OF LEASE.

A transfer of a lease of school lands is authorized to be filed in the land office without being acknowledged by the grantor, or recorded in the county where the land is.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 579, 582; Dec. Dig. § 178.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. EVIDENCE (§ 342*) — DOCUMENTARY EVIDENCE — CERTIFIED COPIES — RECORDS IN LAND OFFICE.

A transfer of a lease of school lands, being a record of the land office in which it is filed, certified copies thereof were admissible as prima facie evidence in an action to try title to the land in question, under Sayles' Ann. Civ. St. 1897, art. 2306, making translated copies of records in the land office, certified to under the hand of the translator and the commissioner of the General Land Office, attested with the seal of the office, prima facie evidence in all cases where the original records would be evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1306; Dec. Dig. § 342.*]

3. EVIDENCE (§ 342*) — DOCUMENTARY EVIDENCE — CERTIFIED COPIES — LETTERS OF LAND COMMISSIONER.

Copies of letters of the land commissioner, preserved in the ordinary way, are copies of records of the land office.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1306; Dec. Dig. § 342.*]

4. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR — ADMISSION OF EVIDENCE.

Admission of a letter from the land commissioner to show an award of land to defendant, in an action to try title to the land, if error, was harmless, where the award to defendant was otherwise shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.*]

5. TRESPASS TO TRY TITLE (§ 38*)—AWARD AND SALE BY LAND COMMISSIONER—PRESUMPTION AS TO VALIDITY.

In trespass to try title to public school land, held by defendant under an award and sale of the land commissioner as additional to his home section, under the presumption in favor of the validity of the commissioner's act, it will be presumed that defendant was owner of his home section when he applied for the additional land, until the contrary is affirmatively shown.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 53; Dec. Dig. § 38.*]

6. JUDGMENT (§ 251*) — CONFORMITY TO PLEADING—PLEA OF NOT GUILTY IN TRESPASS TO TRY TITLE.

In trespass to try title, where defendant simply pleads not guilty, the appropriate judgment for defendant is that plaintiff take nothing by his suit; but a further adjudication of title and right of possession would add nothing thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

7. JUDGMENT (§ 251*) — CONFORMITY TO PLEADING—PLEA OF NOT GUILTY—WRIT OF POSSESSION.

In trespass to try title, where defendant simply pleaded not guilty, an award to defendant of a writ of possession upon rendering judgment in his favor was improper, as going beyond what was involved in the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

8. COSTS (§ 238*)—COSTS ON APPEAL—FAILURE TO CALL COURT'S ATTENTION TO ERROR.

In trespass to try title, where the court on rendering judgment for defendant awarded him a writ of possession which was not justified by the pleadings, and plaintiff did not call the error to the attention of the court, the reformation of the judgment in that respect on appeal

will not relieve plaintiff from the costs of appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 912; Dec. Dig. § 238.*]

Appeal from District Court, Schleicher County; J. W. Timmins, Judge.

Trespass to try title by J. F. McKee against C. C. West. Judgment for defendant, and plaintiff appeals. Reformed and affirmed.

L. H. Brightman, for appellant. Sillimann & Campbell, for appellee.

JAMES, C. J. Action by McKee of trespass to try title to school section 106 in block A granted the Houston, East & West Texas Railway Company in Schleicher county. The court rendered judgment for the defendant West.

Appellant's only proposition under his first assignment of error is: "The Commissioner of the General Land Office cannot give a certificate of fact which would be admissible in evidence based on an instrument, which said instrument itself would not be admissible if offered." The only question which this proposition raises is that the documents from which the fact certified to was taken would not themselves have been admissible. The certificate of the commissioner was as follows: "I, J. T. Robison, chief clerk and acting commissioner of the General Land Office of the state of Texas, do hereby certify that the records, papers and documents of said office show that on the 9th day of February, 1898, W. S. Davis conveyed to H. A. Thompson, all of his right, title and interest in and to school sections 16, 106, 108 and 166, Block A, H., E. & W. T. Ry. Co., in Schleicher county, which were leased to the said W. S. Davis, in lease 20,492. That on March 27, 1906, H. A. Thompson conveyed all his title and leasehold interest in and to all of lease No. 20,492 to C. C. West, which latter transfer was filed in this office April 4, 1906, and said section 106, was canceled out said lease 20,492, and sold to C. C. West April 12, 1906." When the above was offered, plaintiff interposed objections thereto, and "for the purposes of the bill of exception only," in connection with the objections, offered and introduced certified copies from the commissioner of the transfer of said lease from Davis to H. A. Thompson, and of the transfer of same from Thompson to West. These certified copies showed that neither of the transfers was acknowledged by the grantor, nor recorded in the county where the land was situated. It was proved that the tract in question was included in a lease to W. S. Davis that ran for 10 years from September 29, 1897. There can be no doubt that the transfers of the lease were authorized to be filed in the land office, and became records of that office without being acknowledged or recorded in the county where the land is. There is no stat-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ute requiring such papers to be acknowledged in order to be filed and acted upon in that office, and being records of the office, article 2306, Sayles' Ann. Civ. St. 1897, made certified copies of them prima facie evidence. The proposition under the first assignment does not raise the question of whether or not the facts stated in the commissioner's certificate were such as it is contemplated by said article he may certify to.

The second assignment complains of the admission of a certified copy from the land office as follows: "April 5, 1906. Mr. O. O. West, Eldorado, Texas—Dear Sir: This department is in receipt of yours of the 27th ult. in which you state that you desire to purchase sec. 106 block A, certificate 55, H. E. & W. T. Ry. Co., in Schleicher county embraced in lease No. 20,492, under your preference right as assignee of the said lease. You are advised that this section will be subject to sale to you as a whole as dry agricultural at \$6.00 per acre as provided by the act of April 15, 1905. Respectfully, John J. Terrell, Commissioner." The commissioner's certificate to this paper shows that was a "copy of the imprint of a letter as appears on page 501 of Letter Book vol. 1. No. 820 which said volume is kept as an archive in this office." We are of opinion that the copies of letters of the land commissioner, preserved in the ordinary way, are copies of records of that office. However, the admission of this in evidence was harmless as the award of the land to West was otherwise shown.

The fourth assignment is that the court erred in rendering judgment for the defendant, and in holding that defendant was entitled to recover the land in controversy as additional land to section No. 78 block certificate 41 granted to the Houston, East & West Texas Railway Company. Appellant's proposition is: "A person buying school land as additional to some other land must have title to the home or mother tract before they are entitled to buy." Defendant holding under an award and sale by the land commissioner, the presumption was in favor of the validity of that officer's act until plaintiff affirmatively showed its invalidity. No evidence was offered to show that defendant was not in fact owner of his home section at the time he applied. The fact was sustained by the presumption.

The third assignment is that the court erred in giving judgment in favor of defendant because the evidence shows that the land was under lease at the time the defendant filed on the same, and at the time it was awarded to him, and the evidence fails to show that the defendant was the assignee of lease No. 20,492 issued to W. S. Davis. The evidence did show that West was the assignee of the lease at the time. Appellant assigns as fundamental error the rendition of a judg-

ment in favor of appellee for the title and possession of the land, there being no affirmative pleading by the defendant. It has been held that, when defendant's pleading is simply not guilty, the appropriate judgment is that plaintiff take nothing by his suit. Still the further adjudication of title in the defendant adds nothing to it, citing *French v. Olive*, 67 Tex. 408, 3 S. W. 568. We think an adjudication of the title and the right of possession, would comprehend no more than is involved in an adjudication that plaintiff take nothing by his suit. But the judgment here goes still further, and awards defendant a writ of possession. This appears to go beyond what was involved in the pleadings, and ought not to be in the judgment. However, this matter was not called to the attention of the trial court, where doubtless it would have been remedied, and therefore the reformation of the judgment in this respect will not relieve appellant from being taxed with the costs of this appeal.

The above disposes of all the assignments of error, and the judgment will be reformed and affirmed.

INTERNATIONAL & G. N. R. CO. v. FORD.

(Court of Civil Appeals of Texas. April 17, 1909. Rehearing Denied May 15, 1909.)

1. NEGLIGENCE (§ 4*)—INJURIES TO PASSENGERS—INSTRUCTIONS—"ORDINARY CARE."

An instruction defining "ordinary care" as that degree of care which a person of ordinary prudence would usually exercise under the same circumstances, and the failure to use such care is negligence, is not erroneous because of a qualification of the word "exercise" by the word "usually."

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 6; Dec. Dig. § 4.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTION.

Error in an instruction as to negligence of a carrier in not furnishing a stool to enable a passenger to alight, as not being based on the evidence, is cured by the giving of a special charge at the request of the carrier withdrawing that issue from the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 717, 718; Dec. Dig. § 296;* *Carriers*, Cent. Dig. § 1406.]

3. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—INSTRUCTIONS.

In an action for injuries to a passenger, in which the acts of negligence charged were a failure to stop the train at a safe place, failure to light the place, and a failure to assist plaintiff to alight, an instruction to find for defendant, if defendant was guilty of the acts charged, enumerating them, and using the conjunctive instead of the disjunctive, is not erroneous by the use of the conjunctive, in view of another instruction authorizing the jury to find for plaintiff, if defendant was guilty of either of the acts of negligence charged.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1326, 1332; Dec. Dig. § 321.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. TRIAL (§ 263*)—REQUESTS FOR INSTRUCTIONS—GIVING ONE OF SEVERAL.

Where, in an action for injuries to a passenger, defendant requests several instructions on the issue of contributory negligence, it cannot complain that the court gave only one of them, or that the court should have chosen another one.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 263.*]

5. TRIAL (§ 260*)—REQUESTS FOR INSTRUCTIONS.

The refusal of a requested special charge fully covered by the main charge is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by G. W. Ford against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker & Thomas, for appellant. J. B. Haynes, for appellee.

TALBOT, J. Ford, the appellee, sued the appellant, railway company, to recover damages on account of personal injuries sustained by him in alighting from one of appellant's passenger trains at Bradley station. The petition alleged, in substance: That plaintiff was a passenger on defendant's said train going from Everman station to said Bradley station; that when the train reached his destination it was night and very dark; that the train was stopped, the station announced, and plaintiff invited or directed by the conductor in charge thereof to alight; that the place where the train was stopped and plaintiff requested to alight was unsafe and dangerous for him to do so, in that the railroad track was upon an embankment and the distance to the ground from the steps of the car about four feet; that defendant's servants negligently failed to furnish a light at or near said place, and so failed to assist him to alight, and failed to provide a box or stool for plaintiff to step upon; that plaintiff did not know of the distance from the steps of the car to the ground; and that, though exercising due care and caution in stepping from the car, because of the great distance to the ground he was thrown or fell with great violence to the ground and seriously injured in his left shoulder, hand, and fingers—the shoulder dislocated and fractured, and the bones of his hand and fingers crushed and broken. The defendant answered by general and special exceptions, a general denial, and plea of contributory negligence. A jury trial resulted in a verdict and judgment in favor of plaintiff, and the defendant appealed.

The evidence was sufficient to establish the material allegations of plaintiff's petition and to justify the jury's findings that the negligence alleged on the part of the defendant was the proximate cause of his injuries, and

that plaintiff was not guilty of contributory negligence and sustained damages in the amount awarded by the verdict.

The court charged the jury that "ordinary care means that degree of care which a person of ordinary prudence would usually exercise under the same circumstances, and the failure to use such care is negligence." It is contended that this charge is an incorrect definition of "ordinary care" because of the qualification of the word "exercise" by the word "usually." With this contention we do not agree. The definition given, if not entirely accurate, is substantially correct, and furnishes no ground for a reversal. In the case of *Railway Company v. Brown*, 30 Tex. Civ. App. 57, 69 S. W. 1010, cited by appellee, the language employed in the definition of "ordinary care" was that degree of care and caution that a person of ordinary prudence is "accustomed to use" under like circumstances, and the appellate court, after stating that there could be no valid objection to the definition, said: "There can be no practical difference between what a person of ordinary prudence would ordinarily do or usually do, and what such person is accustomed to do under similar circumstances."

Nor do we think there was any error in submitting to the jury in the main charge the question whether or not the appellant failed to furnish appellee a box or stool upon which to step in alighting from the train, of which appellant can justly complain. If the evidence did not authorize the submission of that question as one of negligence on the part of appellant, the error in submitting it was cured and rendered harmless by a special charge, given at the request of appellant, entirely withdrawing that issue from the consideration of the jury. The court's general charge and the special charge upon the question were not in conflict. By the special charge the issue of negligence, respecting the failure of appellant to furnish the stool, was expressly withdrawn, and the jury instructed not to consider the same.

Appellant's third assignment of error complains of the following paragraph of the court's charge: "On the other hand, if you believe from the evidence that the defendant's employes stopped defendant's train on said night at a reasonably safe place, and that defendant's employes in charge of the train furnished a light at or near said place where plaintiff alighted so as to enable plaintiff to alight with reasonable safety, and that the defendant's employes assisted plaintiff in alighting from said train, * * * to find for defendant." The objection to this charge is that it required the jury to believe that the appellant had performed each and all of the acts mentioned in the charge before they could return a verdict in its favor. The charge does not warrant a reversal of the judgment. The grounds of negligence al-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

leged were, in substance, that defendant had stopped its train at an unsafe place for plaintiff to alight, that it failed to have the place where plaintiff was required to leave the train lighted, and failed to assist plaintiff in alighting. If defendant was negligent in either of those respects, and the same proximately contributed to cause plaintiff's injuries, and he was not guilty of contributory negligence, he was entitled to recover; and the jury were, in effect, so instructed by the paragraph of the court's charge immediately preceding the one of which complaint is here made. So that in submitting the converse of the proposition it was essential, in order to properly guard the plaintiff's rights, to join the sentences relating to the different acts of negligence alleged by the conjunction, "and." If the disjunctive, "or," had been used in framing the charge, a verdict would have been authorized for the defendant if it was not guilty of negligence in some one of the respects charged, although it was guilty of negligence in one or all of the other respects.

It is assigned that the court erred in refusing to give a special charge requested by the defendant, to the effect that if the jury believed it was dangerous for the plaintiff to alight from defendant's train, and that the plaintiff knew, or in the exercise of ordinary care should have known, that it was dangerous to alight from defendant's train to the ground at the time and place he did alight, and that by reason of said danger in alighting in the manner and at the time and place he did alight he would fall and be injured, then he could not recover. This charge was one of two or three asked by the defendant upon the issue of contributory negligence, one of which was given by the court, and the defendant is not in a position to complain that the one in question was not given instead of the one selected by the court, or that both should have been given. Besides, the special charge requested by the defendant and given upon the subject was, especially in view of the court's main charge and other special charges given, a sufficient application of the law to the facts. In the special instruction given, the jury were told that if they believed from the evidence that an ordinarily prudent person, under the circumstances, would not have alighted from defendant's train at the time and in the manner in which the plaintiff did alight, and that the plaintiff failed to use such care to prevent being injured as an ordinarily prudent person would have used under the same or similar circumstances, to find for defendant.

For the same reason we think the court did not err in refusing to give defendant's special charge, the refusal of which is made the basis of its fourth assignment of error,

to the effect that if the jury believed that an ordinarily prudent man, situated as plaintiff was, would not have attempted to alight from the train at the time and in the manner he did without assistance, to find for defendant.

We have examined and carefully considered all of the assignments, and, because we are of opinion that none of them point out reversible error, the judgment of the court below is affirmed.

S. G. CARTER & CO. v. HARRELL & WALKER.

(Court of Civil Appeals of Texas. April 15, 1909. Rehearing Denied May 13, 1909.)

1. VENDOR AND PURCHASER (§ 84*) — CONTRACTS—CONSTRUCTION.

A vendor, in a contract for the sale and purchase of real estate stipulating that a part of the consideration shall consist of land of the purchaser to be conveyed to the vendor, that both parties shall furnish abstracts of title by a designated date, that the parties shall have 30 days from the date of the opinion of their attorneys to clear title, as shall be required, and that if the title will not pass the opinion of the attorneys the trade shall be declared void and all forfeits withdrawn, etc., permits either party to withdraw from the contract on being unable to furnish satisfactory title, and the vendor may exercise his right to withdraw after the expiration of the time within which he is to furnish satisfactory title, on the purchaser refusing to accept the title tendered.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 140; Dec. Dig. § 84.*]

2. BROKERS (§ 61*) — COMMISSIONS — WHEN EARNED.

A broker, employed to procure a purchaser, agreed to furnish an abstract of title. He procured a purchaser who entered into a contract with the vendor. The contract gave either party the right to withdraw on being unable to furnish satisfactory title. The purchaser objected to the title of the vendor, and the broker was unable to cure the defects. The vendor exercised his right to withdraw after the time fixed for the furnishing of a satisfactory title, on the purchaser insisting that the title was unsatisfactory as to a part of the land. Held, that the broker was not entitled to commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 77, 78, 92, 93; Dec. Dig. § 61.*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by S. G. Carter & Co. against Harrell & Walker. From a judgment for defendants, plaintiffs appeal. Affirmed.

Poindexter & Padelford, for appellants. Ramsey & Odell and Crane, Seay & Crane, for appellees.

HODGES, J. In 1906 the appellees, Harrell & Walker, owned 20 sections of land situated in the counties of Roberts and Gray, which they desired to sell. On May 30, 1906, they entered into a written contract with the appellants, by the terms of which the latter were given an exclusive option on the land at an agreed price till the 1st day

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of July following. It was also provided in that contract that, in the event the land was not sold by the time the option expired, it was to be listed for sale with the appellants, but no exclusive option given. Among the different provisions of the contract referred to was one binding the appellants in case of sale to prepare and furnish an abstract of title to all of the land, this to be done at their own expense, except as to matters outside of the counties of Roberts and Gray, where the land was situated. It appears that after the contract was executed, and probably on the same day, the parties entered into the following supplemental agreement: "Referring to a certain tract, an option this the 30th day of May, 1906, made by and between Harrell & Walker of Johnson county, Tex., and S. G. Carter & Co. of Miami, Tex., it is agreed and understood that in case Harrell & Walker cannot execute a good abstract of title satisfactory to the purchaser, then the said S. G. Carter & Co. are not to claim or collect a commission unless the purchaser accept the title and abstract as presented under the sale." This was signed by all of the parties in interest. The exclusive option given to the appellants having expired, it was extended by an agreement till the 28th of August following. On that date they found purchasers in the persons of Clark & Clark, who resided at Vernon, and who were willing to purchase the land upon the terms exacted by the appellees, and a written contract was on that day entered into between the appellees and the Clarks, containing the different stipulations regarding the details of the transfer, the terms of the sale, and the obligations of the parties as to the abstracts of title and conveyances necessary to consummate the trade. This contract is quite lengthy, and we deem it unnecessary to quote or refer to any part of it, except those portions bearing upon the questions involved in this appeal. A part of the consideration to be paid by the Clarks consisted of 194 acres of land situated in Bell county, Tex. The contract contained the following provision: "As to the title to land here conveyed by both parties of first and second part, it is expressly agreed that both parties shall furnish to the attorneys of opposite parties an abstract of all land conveyed, said contracts to be furnished by October 1, 1906. Then said attorney shall examine within five days and report his opinion on said title, and if exceptions are found to either tract of land or tracts of land then said parties who are recited above as transferring said land shall have 30 days from the date of the lawyers' opinion to clear title as the attorney shall require, or if titles are not in shape and will not pass the opinion in due form of the attorneys of said parties of second part and said parties of first part as above set forth and within the time limit as here given, then this trade shall be declared void and all forfeits shall

be withdrawn." And also this further provision: "For a guarantee of good faith that both parties of the first and second parts hereto and to guarantee that they will perform as near as is possible the compliance of this contract and agreement the said Harrell & Walker and the said A. P. Clark, Sr., and A. P. Clark, Jr., have deposited in the First National Bank of Grandview, Tex., the sum of twenty-five hundred (\$2,500.00) dollars each, that should the said party of the first part be in position to close the trade as above set out and in the time above set out, and should fail to do so, then the said First National Bank of Grandview, Tex., shall pay to said parties of the second part the full sum of both forfeits, namely, \$5,000.00, and should the said parties of the second part be in position to make deed to land, and fail to do so, or should said parties of second part fail to comply with this contract, then the said First National Bank of Grandview, Tex., shall deliver to said parties of first part the entire forfeit pledged, namely, \$5,000.00. However, should the said parties of first part or the said parties of the second part be unable to make title to land herein set out in the time as herein given, then the said First National Bank of Grandview, Tex., shall return to parties of first part their forfeit of \$2,500.00 and to parties of second part their forfeit of \$2,500.00, and this trade shall be declared off."

It appears that no special attention was paid to the time limit within which the abstracts of title were to be presented and accepted or rejected. According to the contract this should have been done by or before November 5th. A few days after this time limit had expired, a conversation took place between Harrell, one of the appellees, and one of the Clarks, concerning the abstracts of title which each was to furnish for their respective tracts of land. This resulted in an agreement for them to meet at Vernon and discuss the matter further. About November 18th, Harrell, in response to the request of Clark, went to Vernon, and a conversation occurred between them as to the sufficiency of the abstracts which had been presented for examination. Harrell expressed a willingness to accept the title of the Clarks to the 194 acres, but Clark declined to accept that of the appellees to the 20 sections, and pointed out two objections made by his attorney to two of the sections, and at the same time delivered the abstracts to Harrell, demanding that the objections be removed before he would take the land. The defects consisted of the absence of any evidence to show that one Mary Hull was a party to a former litigation involving section 105, and that one Maud Sumner was the same person as Maud Horsford mentioned in the record relating to another section of the land. These were considered by Clark and his attorney as being material and important, and Harrell was given to understand

ing; but we think, when considered in its most favorable light toward the appellants, the evidence is sufficient to show that Clark delivered to Harrell the abstracts to the 20 sections and refused to complete the purchase till those objections mentioned by him were removed. He appeared willing, however, that Harrell should have further time in which to do this. It also appears that Harrell then agreed to visit Carter, upon whom he was relying to prepare the abstracts, and ascertain from him whether the objections had been met or could be, and agreed to wire Clark informing him of the result. They differ as to whether or not Harrell at that time informed Clark that he would call the trade off, and that Clark assented to it; these facts being affirmed by Harrell and denied by Clark. Clark, however, does say that he was unwilling to accept the land at that time unless the objections mentioned by him were removed, and that he so informed Harrell; but that he was anxious that the objections should be removed, and was still willing to take the land in the event this was done. Harrell, accordingly, visited Carter at his home at Miami, and was informed by Carter that the objections had not been met, and, from a conversation which each has detailed as having occurred, it does not appear that Carter at that time had any substantial evidence upon which he could rely to expect that the objections would be met in the future, but stated what efforts he had made to furnish the proof which Clark's attorney demanded as to those particular facts and his inability so far to procure it. He asked and received permission from Harrell to wait until the next day, in order that he might communicate with Clark. He, accordingly, visited Clark on the following day. Harrell testifies that he did wait until the following day, and, not having received any further information regarding the removal of the objections, he telegraphed Clark that fact and declared the trade off. It appears that this telegram was received by Clark during Carter's visit. Carter returned with a written agreement on the part of Clark expressing a willingness to take all of the land at the prices agreed upon, except section 105, and to permit the appellees to thereafter complete the abstracts with reference to that section, to allow them as much time as they wanted to remove the objections urged, and when this was done to take that section also. This was refused by Harrell, who stated that the land had at that time been sold. Later, and after Clark had learned that the land had been sold by Harrell, he telegraphed his willingness to accept all of the land upon the terms named and without insisting upon

sale. Carter, one of the appellants, testified that it was the duty of his firm, under their contract with the appellees, to furnish the abstracts of title to the 20 sections of land owned by the appellees.

The appellants brought this suit upon their contract for commissions, alleging a sale made to the Clarks on August 28, 1906, as evidenced by the contract hereinbefore referred to. The court instructed the jury at the conclusion of the evidence to return a verdict in favor of the appellees, defendants in the court below. Hence this appeal.

There are several errors assigned, but we think the case may be properly disposed of upon that assignment which is based upon the giving of the peremptory instruction to find for the defendants. The real question here involved is: Did the appellees have the right, under their contract with the Clarks, to withdraw their offer to sell the land at the time they did? It seems that the contract with the Clarks had been so worded as to permit either party to withdraw their offer if they were unable to furnish a satisfactory title. Appellees did not exercise that right till after the expiration of the time within which they were to do this and after the Clarks had refused to approve the abstract furnished and accept the title tendered, or to take the land unless the objections pointed out by their attorney were removed. The undisputed evidence shows that Harrell consulted Carter as to whether or not the latter had the data with which to meet the objections urged by Clark, and was informed by Carter that he had not, and from what Carter himself says it was exceedingly uncertain as to whether these could be obtained even by waiting. The appellants, by their contract with appellees, undertook to get up the abstracts, and, further, were bound to do it within the time stipulated in the contract between appellees and the Clarks; that is, within 35 days after October 1st. In this they failed. The fact that the parties had tacitly consented not to invoke the time limit after its expiration does not help the cause of the appellants. The right of either party to withdraw his offer when this time had expired did not depend upon the consent of the other, but was governed by the terms of the contract which they had made. If the appellees made a bona fide effort to furnish a title satisfactory to the Clarks within the time specified, and failed, the refusal of Clark to accept the title which they offered would release appellees from any further obligation to continue to hold their offer open, and they had the right to declare the negotiations ended. Appellants cannot claim that Harrell & Walker, the appellees, did not make a bona fide effort to furnish the title, because appellants undertook to do for them

this particular work, and the failure was theirs.

Appellants insist that, the Clarks being willing to extend the time for appellees to perfect title and remove the objections made to the abstracts, the latter had no option but to take the time. We think the position utterly untenable, and that it is opposed to the very terms of the contract. If the Clarks wanted the land, they had but to waive their objections to the title and take it before the offer was withdrawn. If they were unwilling to accept the title tendered, they had no right to thus tie up this land indefinitely and prevent sales to other parties who might be willing to accept the title which the appellees offered. The extension of the time limit beyond that stipulated in the contract was as much a matter of agreement between the parties as was the making of the original contract in the first instance. The question of forfeiture as urged by appellants is not involved. If, after the stipulated time expired within which the parties were required to furnish their abstracts of title, the bona fide offers of title had not been accepted, either party had a right to withdraw their offers, and nothing was forfeited. Appellants by their own contract with appellees made their commissions to depend upon the acceptance of appellees' title by the purchaser. It was expressly stipulated that, unless this was accepted, they should receive no commissions. In this case the purchaser refused to accept the title offered till after he knew the land, or a portion of it, had been sold to another. Clark's offer to take part of the land and wait on the appellees to perfect title to the remainder was not in accord with the terms of the contract. That instrument provided for the sale of all of the land in a lump.

We think, under the undisputed evidence in this case, considered in its most favorable aspect toward the appellants, the court properly instructed a verdict in favor of the defendants in the court below.

The judgment is, accordingly, affirmed.

KNOX et al. v. McELROY et al.

(Court of Civil Appeals of Texas. Nov. 11, 1908. On Rehearing, May 19, 1909.)

1. APPEAL AND ERROR (§ 564*) — RECORD — STATEMENT OF FACTS—NECESSITY FOR FILING IN LOWER COURT.

Act May 25, 1907, § 14 (Acts 30th Leg. 1907, p. 512, c. 24), provides that every statement of facts shall be approved and filed within 30 days after the final adjournment of the term, and that if appellee fail to agree to a statement of facts submitted by appellant, he shall prepare a statement, from which statements the court shall make up a statement and file it within the prescribed time. Section 5 provides that if the parties cannot agree upon a statement of facts, each shall submit to the court a condensed statement, and the court

shall make out a statement of facts, and may require the court stenographer to read from his notes, and may direct the stenographer to make up the statement of facts which shall be filed in the case. *Held*, that the statement of facts, whether agreed to by the parties, prepared by the judge, or under his direction by the stenographer, must be filed within 30 days from adjournment of the term.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2555; Dec. Dig. § 564.*]

2. APPEAL AND ERROR (§ 934*) — REVIEW — PRESUMPTIONS—SUFFICIENCY OF PLEA OF RECONVENTION.

In trespass to try title, where only a general demurrer was interposed to a plea of reconvention setting up defendant's claim for damages, and the demurrer was not called to the attention of, nor acted upon by, the court, every intendment that could have been indulged in favor of the plea, had the demurrer been insisted on, should be given it on appeal, where the validity of the judgment is assailed on account of the insufficiency of the plea.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3782; Dec. Dig. § 934.*]

3. APPEAL AND ERROR (§ 253*)—EXCEPTIONS BELOW—MISJOINDER OF CAUSES OF ACTION.

A misjoinder of actions should be excepted to in the lower court; and, if it is not, it cannot be objected to on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1485; Dec. Dig. § 253.*]

4. JUDGMENT (§ 235*)—SEPARATE JUDGMENTS FOR DIFFERENT PARTIES—CONSISTENCY.

A judgment in favor of one person for title to land and for another for damages in the same action is not necessarily inconsistent in itself.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 414; Dec. Dig. § 235.*]

On Rehearing.

5. TRESPASS TO TRY TITLE (§ 47*)—SUIT BY NAKED TRESPASSER—RELIEF TO DEFENDANT.

Prior possession is sufficient to recover land from a naked trespasser, and hence, where defendants were in actual possession and enjoyment of land as their property when plaintiffs sued for its recovery, and remained in possession until they were dispossessed by the sheriff by virtue of a writ of sequestration wrongfully sued out by plaintiffs, they were entitled to recover possession, where plaintiffs dismissed their suit, and defendants proceeded to trial on their pleas in reconvention, claiming title; there being no evidence tending to show title in plaintiffs.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 69; Dec. Dig. § 47.*]

6. SEQUESTRATION (§ 15*)—RIGHTS ACQUIRED BY IMPROPER SEQUESTRATION.

Where persons having no rights in land gained possession by wrongfully obtaining a writ of sequestration and having it executed, they acquired no rights by the possession so gained.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. §§ 25-32; Dec. Dig. § 15.*]

Appeal from District Court, Sabine County; W. B. Powell, Judge.

Trespass to try title by W. H. Knox and others against S. P. McElroy and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Goodrich & Synnot, for appellants.

to try title, to recover the North Half of the David White one-fourth league survey, and at the same time sued out a writ of sequestration under which the land was sequestered. After the appellees answered by pleas of not guilty and limitation, they filed a plea in reconvention, setting up title in themselves and actual possession of the premises at the time of the institution of the suit, alleging that they had been dispossessed by the sheriff under the writ of sequestration, which was wrongfully and maliciously sued out by plaintiffs, and had been damaged by the illegal suing out of said writ and seizure of their property thereunder. They prayed for recovery of the land, that their title be quieted against plaintiffs' claim, and judgment for the damages sustained. The plaintiffs answered defendants' plea in reconvention by a general demurrer and a plea of not guilty. When, on October 25, 1907, the case was called for trial the plaintiffs appeared and announced that they would no longer prosecute their suit, whereupon, as to them, a judgment of nonsuit was entered. The case was then tried, without a jury, on the defendants' plea in reconvention, and the trial resulted in a judgment in favor of the defendants S. P. McElroy and E. P. Padgett against plaintiffs for the land in controversy, and in favor of defendants Lightfoot and Hornsey against them, for the sum of \$2,400 actual damages. The appeal is from this judgment.

Among the papers of the case filed in this court are 49 pages of typewritten matter on sheets of paper which have printed on their margin in red letters, "Geo. G. Markley, Official Court Reporter, First Judicial District," and on the last sheet thereof, on the obverse side, is attached this writing:

"I have looked over the record and find the same correct except: First. The taxes. Second. The testimony of A. L. Norsworthy. Third. Affidavit, bond and writ of sequestration. Mr. Goodrich agrees to put in the record. With these added the statement is O. K. Tom C. Davis, Atty. for Lightfoot.

"November 22, 1907. The above was appended to the 49 pages when they were delivered to me by Mr. W. F. Goodrich, and is not indorsed by me except as my statement of a full page does so. H. B. S., Atty. for P. & McE."

And there is written on said page in pencil this certificate: "The foregoing statement of facts was presented to me and by me approved and ordered filed in this case"—which is signed officially by the judge of the First judicial district. These sheets are fastened together with brass brads, which are pushed through the upper corners and their ends pressed down against the paper. The brad in the left-hand corner goes through 26 sheets

papers, thus described, though it does not appear to have been filed in the court below, was evidently intended by appellants to be taken as the statement of facts, containing the oral and documentary evidence introduced upon the trial of the cause; for their brief shows that it was taken as such by them. Are we authorized to so take and consider it on this appeal? Section 14, Act May 25, 1907 (Acts 30th Leg. 1907, p. 512, c. 24), is as follows: "Each and every statement of facts to be filed in any cause as provided for in this act shall be approved by the court and filed within thirty days after the final adjournment of the term of court at which such cause was tried. Provided that the appellant shall prepare or cause to be prepared as hereinbefore provided such statement of facts and present the same to the opposite party or his attorney of record for his approval within fifteen days after the final adjournment of such court. And when presented to such opposite party or his attorney of record, such opposite party or his attorney of record shall within ten days thereafter, if he fail or refuse to agree to such statement of facts as submitted by the appellant, prepare or cause to be prepared as hereinbefore provided a statement of facts upon which he relies to be submitted to the court as hereinbefore provided, and from such statements and the record of the case, the court shall make up such statement of facts and approve and file the same as hereinbefore provided within the said thirty days after such final adjournment of such term of court." Section 5, preceding, of the same act provides: "If the parties cannot agree upon a statement of facts in any case, each party or his attorney shall make out a condensed statement of facts and submit such statement to the court and the court shall make out a statement of facts. The judge of the court may call the stenographer and require him to read from his stenographic notes for his information and may direct such stenographer to make up such statement of facts for him which, when so made, and approved by the court, shall be filed in the cause, and shall constitute the statement of facts in such cause." From these quotations from the act it will be seen that the trial judge is required to make up a statement of facts, or direct the stenographer to do so, only in the event the parties cannot agree, and that the statement of facts, whether agreed to by the parties, prepared by the judge, or under his direction by the stenographer, must be filed within 30 days from the adjournment of the term.

In this case we think it is apparent, from the judge's certificate hereinbefore copied, that the batch of papers above referred to was not made up by him, and it is hardly presumable that it was prepared by the stenog-

showing that the parties or their attorneys agreed upon it as a statement of facts. If, however, the judge's certificate showed that he made up, or required the stenographer to prepare, the statement of facts, it might be presumed it was on account of a disagreement of the parties. *Darcy v. Turner*, 46 Tex. 30; *Steinbeck v. Stone*, 53 Tex. 385. But as the certificate repels the idea that the statement was prepared by the judge, it cannot be presumed that it was made up by him because of such disagreement. If, however, the paper attached to the page on which the judge's certificate is written can be looked to for the purpose of determining the matter, it would appear that they did not agree. As, in such event, it became the judge's duty to make up the statement of facts, or direct the stenographer to do so, it might possibly be presumed that it was made up by the stenographer under the judge's direction, and presented him by the stenographer. Such a presumption, however, might be considered violent. But be this as it may, as it does not appear that such batch of papers was ever filed in the court below, or, if filed within the time prescribed by law, we do not believe we are authorized to consider it as a statement of facts; and, on our own motion, it is stricken from the record.

There being no statement of facts with the record, we cannot revise any of the rulings complained of by the assignments which relate to the admission or exclusion of testimony, or to the conclusions of the court upon evidence introduced; it not appearing from bills of exception and the record that any of such rulings was erroneous and caused injury to appellants. *A., T. & S. F. Ry. v. Lochlin*, 87 Tex. 467, 29 S. W. 469; *Brown v. Vizcaya* (Tex. Civ. App.) 55 S. W. 191; *Gatlin v. Street*, 40 Tex. Civ. App. 304, 90 S. W. 318; *M., K. & T. Ry. v. Elliott*, 42 Tex. Civ. App. 519, 98 S. W. 706.

This requires us to overrule all the assignments, except the eleventh and thirteenth. Of these the first complains that the court erred in rendering judgment in favor of the defendants *Lightfoot and Hornsey* for \$2,400 damages, for the reason there was not sufficient to base the same. Only a general demurrer was interposed to the plea of reconvention setting up defendants' claim for damages, and it was not called to the attention nor acted upon by the court below. In view of this every intendment that could have been indulged in favor of the plea, had the demurrer been insisted on, should be given it here, when the validity of the judgment is assailed on account of its insufficiency. Tested by this principle, we believe the pleading sufficient to support the judgment. The other (the thirteenth) assignment complains that the court erred in rendering such judgment

the court below; and, if it is not, it cannot be objected to on appeal. A judgment in favor of one person for title to land and for another for damages is not necessarily inconsistent in itself, as is illustrated by the pleadings in this case. For if the allegations in defendants' plea in reconvention are true (and they must, in the absence of a statement of facts, be presumed in favor of the judgment to be), defendants *Padgett and McElroy* were owners of the land. Defendants *Lightfoot and Hornsey* had contracted with them for the timber thereon, and were on the premises by virtue of the contract, when dispossessed by plaintiff by virtue of the writ of sequestration, and were thereby prevented from reaping the fruits of their contract, to their damage, etc. If these allegations were true, the owners of the land were entitled to possession, and *Lightfoot and Hornsey*, who were on it under contract with the owners, were entitled to recover any damages occasioned them by the wrongful action of plaintiffs.

The judgment is affirmed.

On Rehearing.

As appears from the original opinion, we refused to consider the batch of papers therein described as a statement of facts for the reasons therein stated. Consequently no assignments of error were considered save such as related to the pleadings, which involved their sufficiency to support the judgment. It is made satisfactorily to appear by this motion that the "batch of papers" described in the original opinion was in fact prepared by the stenographer, in accordance with law, under direction of the court, certified to by the trial judge, and handed by appellants' counsel, within the time prescribed, to the clerk of the district court as the statement of facts in the case, and that, though through inadvertence the clerk failed to indorse his file mark upon it, it was really, in contemplation of law, filed, and was entitled to be taken and considered as a paper in the case. We will therefore set aside our order striking it from the record, and consider the case in the light of it as a statement of facts.

The plaintiffs having dismissed their suit, the defendants, having proceeded to trial on their pleas in reconvention, must be regarded in the attitude of plaintiffs, and the plaintiffs in that of defendants, in the trial and on this appeal. The evidence shows that the appellees were in actual possession and enjoyment of the land as their property when the suit was instituted, and until they were dispossessed by the sheriff by virtue of a writ of sequestration wrongfully sued out by appellants. This, in the absence of evidence tending to show title in appellants, was sufficient to maintain appellees' recovery of the

land involved. For prior possession is enough for one to show in order to recover from a naked trespasser. The appellants are none the less wrongdoers for having dispossessed appellees by an abuse of the process of the courts. Such process is given to enforce and protect one in his rights, and, when he has no right that authorizes its issuance, none can be acquired by its execution. Besides we think the evidence reasonably tends to prove that the appellees McElroy and Padgett had title to the land under and by virtue of the 10-years statute of limitation when the suit was brought. They also exhibited in evidence a chain of title from David White, to whom it was admitted the land was titled, down to themselves. The several instruments and documents composing this chain were introduced in evidence over objections of appellants, and their admission as evidence over the objection is the basis, of several of the assignments of error. Inasmuch as the appellees were entitled to recover on their prior possession, as well as under the statute of limitation, we deem it sufficient to say, without discussing the assignments just referred to, that we do not believe any of them is well taken.

The evidence is amply sufficient to support the judgment in favor of defendants Lightfoot and Hornsey for the damages awarded them. None of the assignments of error relating to this part of the judgment can be sustained.

The motion for rehearing is overruled.

NEWMAN et al. v. SATTERWHITE.

(Court of Civil Appeals of Texas. May 5, 1909.)

1. APPEAL AND ERROR (§ 744*)—FILING ASSIGNMENT OF ERRORS—EFFECT OF STATUTE.

A statute requiring an appellant in all cases to file with the clerk of the court below all assignments of error, distinctly specifying the ground on which he relies, before he takes the transcript of the record from the clerk's office, is mandatory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3044; Dec. Dig. § 744.*]

2. APPEAL AND ERROR (§ 745*)—ASSIGNMENTS OF ERROR—INCORPORATION IN RECORD.

It is usual and proper to incorporate assignments of error in the record; but, in the absence of objections, assignments of error, properly filed in the lower court, and accompanied by the proper certificate, will be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 745.*]

Appeal from District Court, Houston County; Benj. H. Gardner, Judge.

Action by M. W. Satterwhite against Porter Newman and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Moore & Sallas and Porter Newman, for appellants. Nunn & Nunn, for appellee.

FLY, J. Appellee sued E. B. Hale, Nat Wetzel, Porter Newman, N. J. Badu, and W. A. Forbes to recover damages for unlawfully entering upon his land and carelessly and negligently setting fire to his house and destroying it. A plea to the jurisdiction filed by W. A. Forbes was sustained, and he was dismissed from the suit. A trial by jury resulted in a verdict and judgment for appellee, and against Hale, Wetzel, Badu, and Newman, for \$414.12. This appeal was prosecuted by Wetzel and Newman; but afterwards the appeal of Wetzel was dismissed at his request.

This cause was tried at a term of the district court ending on April 25, 1908, and the record was delivered to appellants on August 5, 1908, and filed in the Court of Civil Appeals of the First Supreme Judicial District on August 7, 1908. The record contains no assignments of error; but on December 2, 1908, an application for a writ of certiorari was filed by Newman, supported by the affidavit of appellant's attorney that he had filed assignments of error with the district clerk or his deputy, which was flatly contradicted by the affidavits of the clerk and his deputy. The Court of Civil Appeals at Galveston refused the writ of certiorari. The application of appellant shows that no assignments of error were on file in the office of the district clerk, and his object was, not to supply something on file with the district clerk, which is the office of a writ of certiorari, but to supply a record that never existed or had been lost. The assignments presented to the appellate court do not appear to have ever been filed in the district court.

The statute requires that the appellant or plaintiff in error shall in all cases file with the clerk of the court below all assignments of error, distinctly specifying the grounds on which he relies, before he takes the transcript of the record from the clerk's office. That statute is mandatory, and, while it is usual and proper to incorporate the assignments in and make them a part of the record, still, in the absence of objections, assignments of error, properly filed in the lower court, and accompanied by the proper certificate, might be considered on appeal. *McAfee v. Wheelis*, 1 Posey, Unrep. Cas. 65.

Rule 100 for district and county courts (67 S. W. xvii) provides that the party, or his counsel, who has applied for a transcript, and finds it defective, may return it for correction; and it is provided that "the reception of it by the party or his counsel, without being so returned for such purpose, will be regarded as an assumption by him of all the responsibility for any and all deficiencies found in the transcript, resulting from the violation of these rules or of the statutes." The transcript could have been filed in the appellate court for at least a week after the transcript was obtained by appellants, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the duty devolved on them to see that the assignments of error were filed in the district clerk's office before the transcript was taken out, and that they accompanied it.

There being no assignments of error, and no errors apparent of record, the judgment will be affirmed.

TEXAS & P. RY. CO. et al. v. GOLDSMITH & GARRETT.

(Court of Civil Appeals of Texas. April 29, 1909.)

EVIDENCE (§ 471*)—OPINIONS—SHIPPER OF LIVE STOCK—LENGTH OF RUN.

In an action against a carrier for delay in transporting cattle, the shipper was incompetent to testify as to what would be a reasonable run with cattle from one point to another.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2151; Dec. Dig. § 471.*]

Appeal from Midland County Court; Charley Gibbs, Judge.

Action by Goldsmith & Garrett against the Texas & Pacific Railway Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Ed. W. Smith and H. C. Hughes, for appellants. S. J. Isaachs and G. B. Smedley, for appellee.

LEVY, J. The suit was to recover damages for the alleged negligent handling and delay en route of a certain shipment of cattle. In accordance with the verdict of a jury, judgment was entered in favor of the appellees.

The appellants each, in the second assignment of error, complain of the admission of certain evidence in the trial of the case. One of the appellees, testifying as a witness, was allowed by the court, over the objection of the appellants, to state his opinion as to "what is a reasonable run with cattle from Midland to Ft. Worth over the Texas & Pacific Railway, and from Ft. Worth, to Kansas City over the Missouri, Kansas & Texas Railroad." It has been ruled in case of *Railway Co. v. Noelke* (Tex. Civ. App.) 110 S. W. 82, that similar testimony was improper and inadmissible. Also, see *Railway Co. v. May* (Tex. Civ. App.) 115 S. W. 900.

The case was ordered reversed and remanded.

GARDNER et al. v. 'PLANTERS' NAT. BANK OF HONEY GROVE.†

(Court of Civil Appeals of Texas. March 25, 1909. Rehearing Denied April 15, 1909.)

1. LIENS (§ 3*)—VALIDITY—EFFECT AS TO THIRD PERSONS.

A verbal agreement by a bank to furnish money to buy cattle upon which it should have a lien, and that, as the buyer should sell the cattle, the proceeds should be paid direct to

the bank, and should be its money so far as necessary to reimburse it for such advances, is valid between the parties and as to volunteers and persons having notice thereof.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 24; Dec. Dig. § 3.*]

2. BANKRUPTCY (§ 295*)—ACTIONS AGAINST TRUSTEE—JURISDICTION OF STATE COURTS.

Where money claimed by plaintiff has been paid by the agents of a bankrupt to his trustee in bankruptcy, an action against the trustee and the agents may be brought in a state court for the recovery of the money. As plaintiff does not seek to disturb the possession of the trustee nor interfere with the proceedings of the bankruptcy court, and the agents of the bankrupt being proper parties, plaintiff could not sue them in the bankruptcy court, and Act Cong. Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), provides that every receiver or manager of property appointed by any United States court may be sued in respect of any act or transaction of his in carrying on the business connected with such property without leave of the court in which he was appointed, but the suit shall be subject to the general equity jurisdiction of the court appointing him.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 295.*]

3. BANKRUPTCY (§ 299*)—ACTION AGAINST TRUSTEE—PARTIES.

Plaintiff was the claimant of a fund which was in the hands of agents of a bankrupt, and paid by them with full knowledge of plaintiff's rights to the trustee of the bankrupt after demand upon them by plaintiff. Held, that such agents were proper parties in a suit against the trustee to recover the money.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 299.*]

4. BANKRUPTCY (§ 295*)—ACTIONS AGAINST TRUSTEE—JURISDICTION OF STATE COURT—WAIVER OF OBJECTIONS.

Where money in the hands of agents of a bankrupt also claimed by plaintiff is garnished by a creditor of the bankrupt, and is subsequently paid to the bankrupt's trustee, and suit is brought by plaintiff in a state court against the trustee and bankrupt's agents to recover the money, if the trustee by supplemental answer seeks to have an order dismissing the garnishment set aside, he thereby waives his objections to the jurisdiction of the state court over him.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 295.*]

5. APPEAL AND ERROR (§ 916*)—REVIEW—PRESUMPTION AS TO RULING OF TRIAL COURT.

Where defendants file a plea of privilege which is overruled, and an amended answer is filed, and the record fails to show the contents of the first answer, it will be presumed in favor of the judgment that the ruling of the trial court as to such plea is correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3699-3705; Dec. Dig. § 916.*]

6. VENUE (§ 22*)—RESIDENCE OF PARTIES—CO-DEFENDANTS.

Under Rev. St. 1895, art. 1194, subd. 4, providing that, where there are two or more defendants residing in different counties, a suit may be brought in the county where any one of the defendants reside, an action against the trustee of a bankrupt and the agents of the bankrupt to recover a sum of money paid by the agents to the trustee may be brought in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court June 2, 1909.

county in which the trustee resides, although the agents do not reside in that county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 35-37; Dec. Dig. § 22.*]

7. BANKRUPTCY (§ 283*) — ACTION AGAINST TRUSTEE.

Where a contract between two parties, by which money in the hands of the agents of one party is to belong to the other party and be paid to it, is not carried out because of the failure of the agents to pay the money to the party to whom it belongs, the right of the party to collect such money will not be affected thereby, as equity looks upon that as done which ought to have been done, and the party to whom the money rightfully belongs may bring action against the trustee in bankruptcy of the other party to whom the money was paid by the bankrupt's agent.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 283.*]

8. BANKRUPTCY (§ 303*)—ACTIONS AGAINST TRUSTEE—SUFFICIENCY OF EVIDENCE.

Evidence in an action against the trustee of a bankrupt and the agents of the bankrupt to recover a sum of money paid by the agents to the trustee and claimed by plaintiff held to sustain a finding for the plaintiff.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

9. BANKRUPTCY (§ 188*) — PREFERENCES — LIENS.

An agreement by which a bank advanced money to a bankrupt to be used in the purchase of cattle, giving the bank a lien on the proceeds from the sale of the cattle, does not constitute a preference by the bankrupt in violation of the bankruptcy act, nor is the contract invalid for want of record.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188.*]

10. BANKRUPTCY (§ 195*)—PRIORITY OF GARNISHMENT TO OTHER LIEN—NOTICE TO GARNISHER.

Where a garnisher has notice of a prior lien on the money which he attempts to garnish, such lien will prevail against the rights of the garnisher, and the rights of a trustee in bankruptcy to whom the money was subsequently transferred by the persons holding it; the trustee having notice also of the prior lien.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 195.*]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by the Planters' National Bank of Honey Grove against S. H. Gardner and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Appellee, as claimant of \$1,000.77, the net proceeds of the sale of certain cattle, and for recovery of the same and to have the rights of each of the parties growing out of the transaction settled and adjusted, brought the suit in the district court of Fannin county, Tex., against the appellants Davis & Hamm and S. H. Gardner as trustee of the estate of G. F. Newberry, bankrupt. The petition alleged that on August 21, 1907, said Davis & Hamm, a partnership and doing business as commission merchants in Tarrant county, Tex., as agents of G. F. Newberry, sold a certain lot of cattle which had been shipped and consigned by Newberry to them for sale

on commission, the property of Newberry, and, after deducting freight, commissions, and other expenses, there remained in their hands the sum of \$1,000.77, the net proceeds of such sales; that the said net proceeds was the property and money of the appellee; that appellee had theretofore advanced said Newberry the money with which to buy said cattle under a contract entered into between it and Newberry, by the terms of which it was agreed, for a valuable consideration, that all cattle purchased by Newberry with the money advanced by appellee should stand as security for the repayment of such money, and that the net proceeds of all sales of such cattle should be paid directly to appellee to be applied in payment of the debt owing by Newberry on account of money advanced by appellee; "that Davis & Hamm knew of such agreement between plaintiff and Newberry on August 21, 1907, at the time they received the proceeds of such sales from the purchasers of said cattle, and they knew of the existing agreement between plaintiff and Newberry to the effect that such proceeds should be paid by Davis & Hamm to plaintiff, and not to Newberry;" that thereafter, on September 21, 1907, said Newberry was duly adjudged a bankrupt in the District Court of the United States for the Eastern District of Texas, and on October 8, 1907, said Gardner was duly appointed or elected trustee of said bankrupt's estate and qualified as such, "and afterwards, on October 15, 1907, said Gardner represented to said Davis & Hamm that said bankrupt court had ordered them to turn over said \$1,000.77 to him as trustee aforesaid, and on or about the same day Davis & Hamm, without the knowledge or consent of plaintiff, paid said money to said Gardner, trustee, who still has it in his custody as such trustee, claiming that same belongs to said bankrupt's estate, and denies the right of plaintiff thereto." It was alleged that the bankrupt court had no such order nor was appellee in any way a party to said bankrupt proceedings, but that Davis & Hamm relied upon said representation of said Gardner in making such payment, and, in fact, did not know to the contrary. Appellant Gardner pleaded to the jurisdiction of the court, and Davis & Hamm filed a plea of privilege, each of which pleas was overruled by the court, and they defended by general denial and special defenses.

It was substantially proved in the record that about January 1, 1907, the appellee bank and G. F. Newberry made an agreement, which was, in substance, that the appellee would furnish him money with which to buy cattle and hogs, and that he would ship out and sell the same along as he would accumulate small lots, and that the live stock so bought would stand for the money so advanced, and, as sales should be made,

the net proceeds from the sales should be paid to the appellee, and not to Newberry, and which money should belong to the appellee to the extent necessary to cover the advances; that the appellee would advance the money by paying Newberry's checks, thus making an overdraft at the bank. This arrangement between them was to continue as long as agreeable to Newberry and the bank. It did continue until the appellee's rights asserted in this case accrued. Newberry was insolvent when the agreement was made, and with no property subject to execution, and so continued thereafter; but he adhered strictly to his agreement with the appellee bank. As further security, and as evidenced by this agreement, Newberry gave the bank a mortgage on all his cattle and hogs and on those to be bought with the appellee's money on March 2, 1907. About June 10, 1907, the bank released this mortgage for the sole purpose of allowing the appellant Davis & Hamm to obtain a mortgage on the cattle that Newberry then owned to secure a loan they were then making him, with the agreement with Newberry that it would not change his arrangement with the appellee bank, and immediately Newberry gave the appellee bank a new mortgage on all the cattle to be purchased with the money furnished by it. The money loaned by the appellant Davis & Hamm paid Newberry's debt to this appellee bank; and soon thereafter Newberry began to buy more cattle with the appellee bank's money, and on August 19, 1907, Newberry shipped a lot of cattle to the market at Ft. Worth, Tex., consigned to appellant Davis & Hamm, which Davis & Hamm sold on the open market on August 21, 1907, and the net proceeds of that part of the cattle which Newberry had bought with the appellee bank's money since June 10, 1907, amounted to the net sum of \$1,000.77, and was in the possession of appellant Davis & Hamm on August 21, 1907, and at which time T. W. Trout sued Newberry for a debt and garnished the appellant Davis & Hamm, who refused to turn this money over to the appellee bank on their demand, but who were informed that appellee bank claimed and owned this money, and that Newberry claimed no part of it, as the appellee bank's advances to him exceeded these particular proceeds. Previous to this time, also during that year, Newberry had informed appellant Davis & Hamm of his arrangement with the appellee bank. On the 15th of September, 1907, Newberry filed his petition in the District Court of the United States for the Eastern District of Texas, and was adjudged by that court a bankrupt on September 17, 1907; and on October 7, 1907, the appellant Gardner was appointed trustee of the estate of said bankrupt, and qualified immediately thereafter. In October, 1907, Gardner as trustee demanded of Davis & Hamm the \$1,000.77, and they sent him their check in payment thereof. Gardner, trustee, and Trout, at the time and previous thereto,

each knew of the bank's claim to the said particular proceeds. Trout had dismissed his garnishment. There appears in the record, as offered by the appellant, the following ex parte order of the referee in bankruptcy: "In the District Court of the United States for the Eastern District of Texas. In the matter of G. F. Newberry, bankrupt, in bankruptcy, at Sherman, in said district, on the 8th of October, 1907. It appearing to the court that Davis & Hamm Commission Company of Fort Worth, Texas, have in their possession a large sum of money belonging to said bankrupt's estate, to wit, \$1,000.77, it is therefore ordered that said S. H. Gardner, trustee in said bankruptcy, demand of said Davis & Hamm Commission Company said sum of money." The trial was by jury, and upon their answers to the special issues submitted judgment was entered by the court. The judgment as entered on the findings of the jury, omitting formal parts, is: "It is adjudged by the court that plaintiff, the Planters' National Bank of Honey Grove, Tex., a corporation, recover of the defendants W. D. Davis and A. B. Hamm (composing the partnership Davis & Hamm) and S. H. Gardner, trustee of the estate of G. F. Newberry, bankrupt, jointly and severally, \$1,000.77, and that said plaintiff recover of said Davis & Hamm the further sum of \$20, being 6 per cent. per annum interest on \$1,000 from November 16, 1907, up to the present time, and that plaintiff recover of said Davis & Hamm all costs of this suit, and that execution issue against said Davis & Hamm for said recoveries against them, but that no execution issue against said Gardner, trustee, but, in lieu thereof, it is decreed by the court that plaintiff is the owner of the \$1,000.77 paid by Davis & Hamm to Gardner, trustee, aforesaid, and that said Gardner, trustee, is not entitled to said money, and that plaintiff may present this judgment to the United States District Court for the Eastern District of Texas in the cause therein pending entitled 'In the Matter of the Estate of G. F. Newberry, Bankrupt, in Bankruptcy,' where said money is on deposit, as authority for said bankrupt court to pay over said money to plaintiff. It is further decreed that, should said Davis & Hamm discharge this judgment, then said recovery against said Gardner, trustee, inure to their benefit and subrogate them to the rights of plaintiff; and, should plaintiff receive from said bankrupt court or from said Gardner any of said \$1,000.77, the same shall be a credit on said recoveries against Davis & Hamm."

From this judgment the appellants have brought the case on appeal to have same revised for the errors assigned.

Gross & Armstrong, for appellants. McGrady & McMahon, for appellee.

LEVY, J. (after stating the facts as above). By the first assignment of error, it is contended that the court erred in overruling the

plea of the trustee in bankruptcy to the jurisdiction of the court over his person and the subject-matter of this suit. We do not think this was error in a proceeding of the instant kind. The appellee having furnished Newberry the money to buy the cattle, under an agreement that it should have a lien on the cattle and that they should stand as security for the advances, and that, as Newberry should sell the cattle, the proceeds should be paid direct to appellee, and should be the money of appellee so far as necessary to reimburse it for such advances, such agreement is valid between the parties and as to volunteers and persons having notice thereof, and entitles appellee to the proceeds of the cattle when sold. 3 Pomeroy, Eq. Juris. § 1235; 4 Cyc. 43; 19 A. & E. Enc. 14; Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; Railway v. Hurley, 153 Fed. 503, 82 C. C. A. 453. By giving such effect, and we think it should be, to the intent and purpose of the agreement alleged, and we think sufficiently proved, between appellee and Newberry about the particular funds in the hands of Davis & Hamm, then appellee could maintain an action against the trustee and Davis & Hamm, who, having knowledge of its rights to the property, interfered with its rights, because of the fact that appellee would not claim through the estate of the bankrupt, but adversely to it. Being an adverse claimant to the particular fund in controversy, and the possession of the trustee in bankruptcy of the money not being disturbed nor sought to be disturbed, nor the proceedings in the bankruptcy court interfered with nor sought to be interfered with, then we think the court in which this suit was brought had jurisdiction to try and determine the controversy between the parties and to adjust and settle the rights of the parties to the particular property or fund. Skilton v. Codrington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885; Frank v. Vollkommer, 205 U. S. 521, 27 Sup. Ct. 596, 51 L. Ed. 911; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403. Appellant Davis & Hamm, holding the particular fund as the agent of G. F. Newberry, and with full knowledge of appellee's rights thereto and of Newberry's consent and agreement that the particular fund should be the money of appellee and be paid by them direct to the appellee, and demand upon them for the money having been made by appellee previous to the delivery by them of the money to the trustee, and having surrendered the particular fund to the trustee after such knowledge and demand without the consent of appellee or Newberry, were proper parties to the suit, and appellee had the right to make them parties. Cobb v. Barber et al., 92 Tex. 309, 47 S. W. 963. Appellee could not force Davis & Hamm into the bankrupt court. Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. That Gardner as trustee could be sued in the case we think is clear from Act Cong. Aug. 13, 1888, c. 860, § 3, 25 Stat. 436, 4 St. Ann. p. 387

(U. S. Comp. St. 1901, p. 582), which provides "that every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." A trustee in bankruptcy is appointed by a "court of the United States," and comes clearly within the meaning of the act. The portion of the act reserving in the court appointing the "manager of any property" a general equity right to protect against injustice we think shows that it was the intention of Congress to allow disputes about and adverse claims to the property to be litigated in courts other than the one appointing the manager or receiver. The judgment as rendered in this case does not disturb the possession of the bankrupt court. It only provides for a certification to that court for observance in so far as just and equitable. It appears in the record that the trustee, Gardner, by supplemental answer, sought as affirmative relief to have an order dismissing a garnishment against this particular property sued out by T. W. Trout set aside, and that he be subjected to the garnishing creditors' rights, and the court to enforce this right. This would appear to be a waiver of his objections to jurisdiction of the court over him. Slater v. Trostel (Tex. Civ. App.) 21 S. W. 285; Douglas v. Baker, 79 Tex. 499, 15 S. W. 801.

By the second assignment of error, it is claimed that the court erred in overruling the plea of privilege urged by appellant Davis & Hamm. It appears that the plea of privilege was heard and overruled on February 4, 1907, and that permission was granted to amend the answer February 26, 1907. The record failing to show the contents of the first answer, we would be required to indulge the presumption in favor of the correctness of the ruling of the trial court. The first answer may or may not have, for aught the record shows, admitted facts which showed jurisdiction, or contained a cross-bill which of itself would have waived the plea. Presumptions are in favor of the judgment rendered, unless such state of facts is shown as to enable the appellate court to say the ruling was error. Punderson v. Love, 3 Tex. 63; Pierce v. Pierce, 21 Tex. 469. But, even if it should be held that the plea had not been waived, appellant Gardner resided in Fannin county, and appellee had the right to sue all the parties in this case in the county of his residence. Article 1194, subd. 4, Rev. St. 1895; Cobb v. Barber et al., 92 Tex. 300, 47 S. W. 963.

Assignments Nos. 3 to 6, inclusive, are overruled. We think, as determined in the first assignment, that the agreement between appellee and Newberry was legally sufficient to

give appellee the right to the particular fund in the hands of Davis & Hamm. If the agreement so made between appellee and Newberry had been allowed to be carried out as intended by them, and not interrupted by appellants, the effect of this intention and purpose would have given to appellee the power to collect. This would constitute a sufficient transfer of interest to maintain a recovery. See *Rollson v. Hope*, 18 Tex. 446; *Crews v. Harlan*, 99 Tex. 93, 87 S. W. 656. Equity looks upon that as done which ought to have been done. This agreement would be valid, though wholly verbal, or if part verbal and part written. 3 *Pomeroy, Eq. Juris.* § 1237. The evidence was sufficient to warrant the finding returned by the jury, and the court did not err in submitting the issue as submitted to the jury. The transaction between plaintiff and Newberry was not a preference in violation of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), nor invalid for want of further record. *Eason v. Garrison*, 36 Tex. Civ. App. 574, 82 S. W. 800; *Hall v. Keating*, 33 Tex. Civ. App. 526, 77 S. W. 1034; *Mercer's Trustee v. Mercer (Ky.)* 74 S. W. 285; *Kaufman v. Treadway*, 195 U. S. 271, 25 Sup. Ct. 33, 49 L. Ed. 190; *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956.

We do not think that the seventh and eighth assignments could be sustained, and they are overruled.

The garnishment by Trout, even if it had been reserved to the trustee in bankruptcy instead of being dismissed, could not avail against the prior rights of the plaintiff; and the ninth assignment is overruled. Trout dismissed his garnishment. Both Trout and the trustee had notice of the appellee's claim to the particular proceeds. *Grocer Co. v. Jackson*, 18 Tex. Civ. App. 353, 45 S. W. 615; *Smith v. Bank (Tex. Civ. App.)* 40 S. W. 1038; *Smith v. Railway (Tex. Civ. App.)* 39 S. W. 969.

Finding no reversible error in the case, we are of the opinion that the same should be affirmed.

HOUSTON & T. C. R. CO. v. JOHNSON.

(Court of Civil Appeals of Texas. April 24, 1909. Rehearing Denied May 15, 1909.)

1. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—INSTRUCTIONS—NEGLIGENCE.

In an action for injuries to an employé while erecting a coal derrick, there being evidence that defendant's foreman in moving a brace suddenly applied the power used in moving it, thereby causing the brace to be carried up, and plaintiff with it, about 20 feet, that the foreman could have released the power, but did not until plaintiff fell to the ground, and the brace turned over and injured him, an instruction is not erroneous which authorizes the jury to find for plaintiff if they believe that such

conduct of the foreman constituted negligence, unless under other instructions they should find for defendant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1155, 1156; Dec. Dig. § 293.*]

2. MASTER AND SERVANT (§ 281*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to an employé while erecting a coal derrick, caused while attempting to raise and put in position a brace, the evidence held sufficient to justify a finding that plaintiff was not guilty of contributory negligence in adjusting the rope with which the brace was raised.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 992; Dec. Dig. § 281.*]

3. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

Plaintiff, while assisting in the erection of a coal derrick, in attempting to remove a brace connected therewith, was carried up into the air about 20 feet and fell and was injured. Held, that an instruction that if the jury believe that plaintiff was guilty of negligence in continuing to hold onto the brace when the same was started upward until he was carried into the air, and caused to fall, and that such negligence, if any, proximately contributed to his injury, they will find for the defendant, submitted the issue of contributory negligence as favorably as defendant was entitled to have it submitted.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1192; Dec. Dig. § 296.*]

4. MASTER AND SERVANT (§ 245*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

If an employé, while engaged in erecting a coal derrick, attaches a rope to a brace in order to move the same, and does so under the orders of defendant's foreman, he is justified in obeying the orders of the foreman as to the place at which he should tie the rope, unless he knew that it was dangerous to tie it at that place, and his obedience would not constitute contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 781; Dec. Dig. § 245.*]

5. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS—NEGLIGENCE.

In an action for injuries to an employé while erecting a coal derrick, allegations in the complaint that defendant's foreman, in moving a brace connected with such derrick, applied the power with such suddenness as to lift the brace with a jerk, causing it to overturn and the part upon which plaintiff was at work to go upward, and that the foreman, after he found that the brace would go upward and overbalance and probably injure plaintiff, failed to shut off the power so as to prevent the same, justifies an instruction allowing a recovery if, in the exercise of ordinary care for plaintiff's safety, defendant's foreman should have discovered that the brace would go upward and overbalance and probably injure plaintiff.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1136; Dec. Dig. § 291.*]

6. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—"ESTABLISH."

In an action by an employé for injuries, an instruction that: "The burden of proof is on the plaintiff to show by preponderance of the evidence, by which is meant the greater weight and degree of credible testimony, the facts which will entitle him to recover. A like burden is on defendant to establish its plea of contributory

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

negligence of plaintiff—is not erroneous; the word “establish” being used therein as synonymous with proof, which would make the burden of proving contributory negligence no greater than that of proving negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1144; Dec. Dig. § 291.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2469-2473.]

7. TRIAL (§ 260*)—INSTRUCTIONS—REPETITION.

It is not error to refuse to give an instruction which is contained in the court's main charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 851; Dec. Dig. § 260.*]

8. TRIAL (§ 194*)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—WEIGHT OF EVIDENCE.

Plaintiff, while helping to erect a coal derrick, fastened a rope to a brace connected with such derrick for the purpose of moving the same, and in moving it by power, applied by defendant's foreman, the brace turned over and injured plaintiff. *Held*, that it was not error to refuse to give instructions to find in favor of defendant if plaintiff's injuries were caused by the rope being tied at an improper place by plaintiff; such instructions being on the weight of the evidence as authorizing the jury to find for defendant if plaintiff tied the rope, regardless of whether or not the act was negligence or whether or not it was the proximate cause of the injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-466; Dec. Dig. § 194; * Negligence, Cent. Dig. §§ 356-360.]

9. MASTER AND SERVANT (§ 267*) — ACTIONS FOR INJURIES—ADMISSIBILITY OF EVIDENCE.

In an action against a railroad company for injuries to an employé, evidence showing that plaintiff had sustained an injury while employed by another railroad company, had brought suit for damages, and had settled the same, having been introduced by defendant, evidence as to the amount for which he settled such claim was irrelevant, immaterial, and argumentative.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 909; Dec. Dig. § 267.*]

10. EVIDENCE (§ 471*)—OPINION EVIDENCE—BODILY CONDITION—CONCLUSION OF WITNESS.

In an action by an employé for injuries, evidence by plaintiff's wife as to a difficulty which he had in passing urine was not inadmissible as being the opinion of a witness who did not testify as an expert, as she was asked no technical question, but was asked as to what she knew and saw.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149, 2150; Dec. Dig. § 471; * Witnesses, Cent. Dig. §§ 833-836.]

11. EVIDENCE (§ 553*)—OPINION EVIDENCE—EXAMINATION OF EXPERT—HYPOTHETICAL QUESTIONS.

In an action by an employé for injuries, defendant proved by a physician that he had examined plaintiff after a prior injury, while he was at work for another employer, and defendant then asked: “If those injuries for which you examined him at that time, and if the symptoms you had found, had been real or true symptoms, what would be your opinion as to whether or not they would still be existing at this time?” *Held*, that the question was objectionable as being argumentative, in that it contained an inference that plaintiff's symptoms were not real or true, which was a matter for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2373; Dec. Dig. § 553.*]

12. WITNESSES (§ 240*)—LEADING QUESTIONS.

Plaintiff, an employé, was injured, while helping to erect a coal derrick, by the overbalancing of a brace that was being moved under the supervision of defendant's foreman. In an action for the injuries, defendant's foreman, after explaining how the accident occurred, was asked by plaintiff if there was any way for him to prevent plaintiff from getting hurt after the brace was overbalanced. *Held*, that the question was leading.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 838, 839, 844; Dec. Dig. § 240.*]

13. EVIDENCE (§ 471*)—CONCLUSIONS OF WITNESSES.

The question was also objectionable as calling for a conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149, 2150; Dec. Dig. § 471; * Witnesses, Cent. Dig. §§ 833-836.]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Action by John Johnson against the Houston & Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Baker, Botts, Parker & Garwood and Head, Dillard, Smith & Head, for appellant. C. B. Randell and J. H. Wood, for appellee.

BOOKHOUT, J. On October 21, 1906, appellee was in the employ of appellant, working under Foreman C. H. Steele, and engaged, with other employes, in erecting a contrivance to be used for loading locomotives with coal, known as a “coal derrick,” or “dinky,” when he sustained personal injuries, to recover damages for which this suit was instituted. A trial before a jury, on April 18, 1908, resulted in a verdict and judgment in favor of appellee for \$7,000, to reverse which this appeal is prosecuted.

The first assignment of error reads: “The verdict of the jury is contrary to the undisputed evidence in finding that defendant's foreman, C. H. Steele, after he applied the air in the first instance, discovered, or in the exercise of ordinary care for plaintiff's safety should have discovered, that said arm or brace would go upward and overbalance and probably injure plaintiff, and that said Steele, after he had thus seen the probable result of the application of the air, failed and refused to shut same off, and that said Steele, after he had made such discovery, could have shut off the air in time to have prevented the injury to plaintiff.” The proposition presented is that the evidence was not sufficient to authorize or sustain a finding that Steele could have shut off the air in time to have prevented the injury to plaintiff after he discovered that the arm or brace would overbalance and probably cause the injury.

The charge of the court complained of is as follows: “Or if you believe from the evidence that the said foreman applied said air at said time with such suddenness as to

lift said arm or brace suddenly and with a jerk; and if you further believe from the evidence that the said Steele, when said air was so applied, if you have found said air was so applied, discovered, or in the exercise of ordinary care for plaintiff's safety should have discovered, that said arm or brace would go upward and overbalance and probably injure plaintiff; and if you further believe from the evidence that said Steele, after he had thus seen the probable result of the application of said air, if you should find that he did so see same, failed and refused to shut off said air; and if you further believe from the evidence that, after the said Steele had made said discovery, if you find he did make same, he could have shut off said air; and if you further believe from the evidence that the shutting off of said air at said time would have prevented the injury to plaintiff; and if you further believe from the evidence that in his failure to shut off said air at said time, if you find he did so fail, the said Steele was guilty of negligence that proximately contributed to plaintiff's injury, if any—then in either of these events you will find for the plaintiff and assess his damages as hereinbefore instructed, unless you should find for defendant under other instructions given you." The court in the former part of this paragraph instructed the jury to the effect that if they should find and believe from the evidence that Foreman Steele applied the air with such suddenness as to lift said arm or brace suddenly and with a jerk, and the same was caused thereby to overturn and to go upward and injure plaintiff, and his acts in so doing constituted negligence to find for plaintiff.

The allegations of negligence set out in the petition, and upon which a recovery was asked, are as follows: That on said date he was a common laborer, and under the direction of a foreman then and there superintending and directing the work in which plaintiff was engaged. That on said date plaintiff was engaged in the due performance of his duties, acting with proper care and caution, in working on an apparatus known as a "coal derrick," or "dinky," a contrivance used for the purpose of hoisting coal onto locomotives and tenders. That the arm and brace of said coal derrick or dinky was being put in place by power applied by the use of air and steam on a similar coal derrick or dinky situated by and near the one upon which plaintiff was at work. Plaintiff was undertaking to adjust the bottom of the brace of said coal derrick into the socket on the upright part of said derrick, and in order to do so it became necessary to raise said arm and brace. That defendant's foreman was then and there situated upon the other derrick or dinky through and by which the power, consisting of air or steam, was being applied for the purpose of raising said arm and brace.

That said foreman applied the air and steam with such suddenness as to lift said arm and brace suddenly and with a jerk, thereby causing the same to overturn, and the part upon which plaintiff was at work to go upward. That defendant's said foreman then and there, after he found that said arm and brace would go forward and overbalance and probably injure plaintiff, failed and refused to shut off the air or steam, so as to prevent the same, but kept the air or steam applied. That he caused the rope, or cable, to be fastened on the arm of said derrick or dinky for the purpose of raising the same, at a place that, when said air or steam was applied, it would cause said arm to overbalance and overturn, and caused the brace where plaintiff was at work to go upward. That defendant's said foreman then and there in charge of and operating said derrick and dinky, by the application of air or steam, applied said air and steam so suddenly and with such force and with such irregularity as to overturn said arm and said brace, and cause it to go upward, and strike the plaintiff and cause him to fall as aforesaid. That by reason of the fastening of said rope or cable at a point where it would cause said arm to overbalance, and by reason of applying the power for lifting the same with such irregularity and suddenness, and by reason of failing to shut off the power after said foreman was aware of the danger, said foreman was then and there guilty of gross negligence and carelessness, and said arm and brace was caused to overbalance and overturn, and the part thereof on which plaintiff was at work to go outward and upward with great force and violence, thereby striking and throwing, and causing plaintiff to fall with great force and violence, inflicting upon him serious, painful, and permanent injuries. There was evidence tending to support each and all of these allegations. There was evidence that Foreman Steele, who applied the air, could have shut it off by turning a valve, and could have done so before appellee was carried as high as he was. He was carried up about 20 feet. Steele did not release the air until appellee had fallen to the ground and was injured. His injuries resulted from the negligence of the foreman in applying the air suddenly and with a jerk and failing to shut off the air after he discovered that the arm or brace would overbalance and overturn. There was no error in giving the charge complained of. The court fully submitted the negative of these issues.

It is contended that the verdict of the jury is not supported by the evidence, in finding that plaintiff was not himself guilty of contributory negligence in tying and adjusting the rope used in raising said arm or brace, in the manner in which and at the place where he did tie or adjust same. It is insisted that the undisputed evidence

showed that the rope was tied by plaintiff himself, to the bottom piece of a heavy, triangular shaped machine, for the purpose of raising it, and that it was negligence to so tie said rope which proximately contributed toward causing plaintiff's injury. The court on this issue instructed the jury as follows: "On the other hand, if you believe from the evidence that plaintiff was himself guilty of negligence in tying and adjusting the rope used in raising said arm or brace, and that such negligence, if any, proximately contributed to his injuries, you will find for defendant." The evidence was amply sufficient to justify the jury in finding that appellee was not guilty of contributory negligence in tying and adjusting the rope. There is evidence that he tied the rope under the foreman's directions and at the place directed by him. There is no evidence that appellee was aware of the danger of tying the rope at the place he did.

Again, it is insisted that appellee was guilty of contributory negligence in holding to said arm or brace when the same was carried upward until he was carried in the air and caused to fall. The court submitted this issue to the jury as follows: "Or if you believe from the evidence that plaintiff was guilty of negligence in continuing to hold to said arm or brace, when same was started upward, until he was carried into the air and was caused to fall, and that such negligence, if any, proximately contributed to his injuries, if any, you will find for defendant." This charge submitted this issue to the jury as favorably as appellant was entitled to under the law. It is doubtful whether, under the evidence, the court should have submitted the issue of contributory negligence. The plaintiff and two other witnesses testified that Foreman Steele directed appellee to tie the rope and where to tie it. Foreman Steele testified, on cross-examination, as follows: "I am working for the Houston & Texas Central now in the same capacity, hostler. I don't think I was foreman of this work at all. I was not directing those negroes. We were all working there together. I was there to see that they did the work. They were to do what I told them. I had the right to direct them in the performance of their duties. John suggested that we move that rope. I have told that before. I don't know whether John suggested moving the rope first or I did. I will say that we agreed to move it, and we agreed to the place where it should be tied." If appellee ties the rope under the orders of Foreman Steele, then, unless he knew that it was dangerous to tie it at the place he did, he was justified in obeying the orders of his foreman, and could not be charged with contributory negligence in tying the rope at such place. *Gulf, C. & S. F. Ry. Co. v. Duvall*, 12 Tex. Civ. App. 348, 35 S. W. 699; *Railway v. Watkins*, 88 Tex. 20, 29 S. W. 232; *Jackson v. Railway*, 90 Tex. 372, 38 S. W. 745.

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The appellant assigns as error the clause of the court's charge reading as follows: "Or, in the exercise of ordinary care for plaintiff's safety, should have discovered that said arm or brace would go upward and overbalance and probably injure plaintiff." It is insisted that there is no allegation in plaintiff's pleading of failure on the part of Steele to exercise ordinary care to discover that the brace or arm would go up and overbalance and probably injure plaintiff; but, the sole allegation on this point being of negligence on the part of Steele, in failing to shut off the air after he actually discovered the danger, it was error for the court to give that part of paragraph 5 of the general charge set out in the assignment. We do not concur in this contention. The petition set out the facts, and the charge was fully authorized by the allegations therein.

Error is assigned to that part of paragraph 9 of the main charge as follows: "A like burden (burden of proof) is on defendant to establish its plea of contributory negligence of plaintiff." The entire paragraph is as follows: "The burden of proof is on the plaintiff to show by a preponderance of the evidence, by which is meant the greater weight and degree of credible testimony, the facts which will entitle him to recover. A like burden is on defendant to establish its plea of contributory negligence of plaintiff. You are the exclusive judges of the facts proven, of the credibility of the witnesses, and of the weight to be given the testimony; but the law you will receive from the court and be governed thereby." Construing the entire paragraph as a whole, we think it apparent that the word "establish" as used therein, was used in the sense of the word proof. The jury must have so understood it and understood the charge as instructing them that a like burden of proof was on defendant to prove its plea of contributory negligence.

The court did not err in refusing appellant's requested charge reading as follows: "Unless you believe, from a preponderance of the evidence, that Foreman C. H. Steele failed to exercise that degree of care that a man of ordinary prudence would have used under the circumstances which then surrounded him, either in the way he applied the air in the first instance, or in the way he afterwards controlled or handled it, and that such failure on his part was the cause of the injuries to plaintiff, you will find in favor of the defendant, and in this connection you are instructed that, in deciding as to whether or not said Steele did exercise such ordinary care, you must view the facts as they would have appeared to a man of ordinary prudence under the circumstances which surrounded him at the time Steele was called upon to act, and not as they may have appeared to one looking back after the accident had happened." This charge was fairly contained in the court's main charge.

Nor was there error in refusing appellant's

requested charge No. 4, as follows: "You are instructed that, in deciding as to whether or not C. H. Steele exercised, or failed to exercise, ordinary care in the matters submitted to you in other paragraphs of the charge, you must view the facts as they would have appeared to a man of ordinary prudence, under the circumstances that surrounded him at the time said Steele was called upon to act, and not as they may have appeared to one looking back after the accident had happened." The charge of the court clearly refers to the acts of negligence of Steele at the time the injuries were inflicted, and the special charge was not called for by the facts.

Complaint is made of the court's refusal to give appellant's requested charges 6 and 7, as follows: "(6) If you believe from the evidence that C. H. Steele exercised ordinary care, both in the way he applied the air in the first instance, and in the way he afterwards controlled or handled it, and that plaintiff's injuries were caused by the rope being tied at an improper place, you will find in favor of the defendant. (7) If you believe from the evidence that plaintiff's injuries were caused by the rope being tied at an improper place upon the hoist, and that said rope was so tied at said place by plaintiff himself, you will find in favor of the defendant." There was no error in refusing these charges. The question of negligence on the part of plaintiff in tying the rope at the place where it was tied was fully submitted in the court's charge. Again, said special charges are not correct propositions of law, and are upon the weight of evidence, in this: They tell the jury to find for defendant if plaintiff tied the rope, regardless of whether or not the act was negligence, or whether it was the proximate cause of the injury.

Error is assigned to the action of the court in refusing to allow defendant to prove the amount received by plaintiff from the Missouri, Kansas & Texas Railway Company in settlement of his former injuries sustained by him while working for that company. The proposition presented is that, one of the most important issues in this case being whether or not plaintiff was attempting to perpetrate a fraud by making his injuries appear more serious than they really were, defendant should have been allowed to prove, not only that plaintiff had claimed to receive similar injuries while at work for another railroad for which he had procured a settlement by compromise, but should also have been allowed to go further and show that the amount which he received in such settlement was a large sum, to wit, \$2,500. H. V. Rankin, a witness for defendant, testified that in the year 1902 he was employed as claim agent by the Missouri, Kansas & Texas Railway Company of Texas, and as such claim agent had investigated the claim of plaintiff against that road for the injury claimed

to have been received while in its employ, and had attended to the settlement of said claim with plaintiff. He was then asked the following question: "What was the amount at which said claim was settled?" This question and answer were objected to as irrelevant, immaterial, hearsay, and argumentative. The objections were sustained, and the witness not permitted to answer. Defendant then sought to prove by plaintiff himself that his claim against the Missouri, Kansas & Texas Railway Company was settled for \$2,500. The same objections and ruling were made to this testimony. There was no error in this ruling. The testimony was irrelevant, immaterial, and argumentative. The witness was permitted to prove that plaintiff had sustained a former injury, had brought suit for damages by reason of same, and had settled it.

Error is assigned to the admission in evidence of the testimony of the witness Rosa Johnson. It is contended that her testimony was only the opinion and conclusion of a nonexpert witness. Rosa Johnson was the wife of plaintiff, and, while testifying as a witness in his behalf, was asked the following questions: "After he was hurt, do you know anything about any trouble he had in reference to passing water? A. Yes, sir; he had trouble of passing water. Q. Now just state to the jury what you know—what you saw—in reference to passing water, while he was there in bed. A. Well, on the first his urine—he passed some blood, and his water then kind of passed leaking like. Q. Explain what you mean by leaking? A. Well, he couldn't—his kidneys, or something, was so weak he couldn't hold water on the first at all. I had to keep clothes under him, same as I would a baby." The objection was overruled, and defendant took its bill of exception. There was no error in this ruling. The witness did not testify as an expert. She was not asked any technical question. She was asked as to what she knew and saw, and her testimony stated a fact and was properly admitted. While defendant's witness Dr. E. J. Neathery was on the witness stand in their behalf, and after he had testified that he had examined plaintiff at the time of his former injury by the Missouri, Kansas & Texas Railway Company of Texas, and had testified to his opinion as to the character, the nature, and extent of plaintiff's injuries and symptoms at that time, as shown by statement of facts, defendant asked him this question: "Now, Doctor, if those injuries for which you examined him at that time, and if the symptoms that you had found had been real symptoms, true symptoms, what would be your opinion as to whether or not they would still be existing at this time?" This question was objected to as irrelevant and immaterial and not a proper hypothetical question, and argumentative, that the question was too indefinite, which objections were by the court sustained. If

permitted, the witness would have answered that in his opinion, if the symptoms of plaintiff's injury at the time of his examination, as to which he had testified, had been true symptoms, the injuries would be existing to a considerable extent at this time. The court's action in this respect is assigned as error. There was no error in this action of the court. Appellant proved by Dr. Neathery the result of his examination of plaintiff as to his former injuries. He was permitted to testify that he thought that the plaintiff would improve and would ultimately recover from such injuries. The question inferred that appellee did not have real or true symptoms, which was a matter for the jury. It sought to base an inference upon an inference and was argumentative.

While the defendant's witness C. H. Steele was on the witness stand, and after he had explained how the accident had occurred, said Steele was asked the following question, in behalf of defendant: "Was there any way for you to prevent Johnson getting hurt, after it was overbalanced that way?" To which question and answer thereto plaintiff's counsel objected, on the ground that the same was an opinion and conclusion of the witness, and leading, which objection was by the court sustained, and the witness was not permitted to answer, to which action of the court defendant then and there in open court excepted. The witness, if permitted to answer the question, would have answered that he could have done nothing to have prevented Johnson's getting hurt, after the derrick was overbalanced in the way mentioned. There was no error in this ruling. The question was leading and called for a conclusion and opinion. The witness had testified fully as to how the injury occurred.

The twenty-second assignment, which complains of the verdict as excessive, is overruled. The evidence was amply sufficient to sustain a verdict for \$7,000.

Finding no error in the record, the judgment is affirmed.

ST. LOUIS, S. F. & T. RY. CO. et al. v. ADAMS.

(Court of Civil Appeals of Texas. April 14, 1909. Rehearing Denied May 12, 1909.)

1. EVIDENCE (§ 244*)—ADMISSIONS—BY CARRIER'S AGENTS.

In an action against a carrier for damages from negligently putting cattle in quarantine pens so that they could not be forwarded to their destination, evidence as to what the carrier's agent at the place told plaintiff when the cattle were there in regard to some of them being placed in the pens was admissible, the declarations being within the scope of the agent's apparent authority and in the line of his duty, and at the time and place when and where the negligent act occurred.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 925; Dec. Dig. § 244.*]

2. EVIDENCE (§ 244*)—ADMISSIONS—BY CARRIER'S AGENTS.

In an action against a carrier for damages from negligently putting cattle in quarantine pens so that they could not be forwarded to their destination, evidence as to declarations of a person whose duty was to load and unload cattle for the carrier at the place in question as to his unloading a car of plaintiff's cattle in the quarantine pens was improperly admitted, where the declarations were made long after the unloading occurred.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 933; Dec. Dig. § 244.*]

3. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF IMPROPER EVIDENCE.

The act of negligence to which declarations testified to related having been indisputably shown by other evidence free from objection, the admission of the declarations was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.*]

4. CARRIERS (§ 229*)—CARRIAGE OF STOCK—INJURIES IN TRANSIT—ACTIONS—MEASURE OF DAMAGES.

Where a carrier negligently placed cattle in quarantine pens, so that they had to be sold under the requirements of the quarantine authorities, and could not be forwarded to their destination, the rule as to damages where a carrier negligently fails to transport property to its destination applied, and the measure of damages was the value of the cattle less the freight, if unpaid, at the time and place where they should have been delivered, and not at the place where the enforced sale occurred.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 963, 964; Dec. Dig. § 229.*]

5. APPEAL AND ERROR (§ 759*)—BRIEFS—COPYING ASSIGNMENTS OF ERROR.

Breaking up an assignment of error in the brief by copying its several subdivisions separately, and presenting propositions under each of them, is not a compliance with the rules of the Court of Civil Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3094; Dec. Dig. § 759.*]

6. DEPOSITIONS (§ 107*)—OBJECTIONS—TIME FOR TAKING—MANNER AND FORM OF TAKING.

Under Rev. St. 1895, art. 2289, providing that, if a deposition shall have been filed at least one entire day before trial, no objection to the form or manner of taking shall be heard unless made in writing, on notice given before the trial commences, objections as to the manner and form of taking a deposition made when it was offered in evidence were properly overruled.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 315, 316; Dec. Dig. § 107; * Trial, Cent. Dig. § 189.]

Appeal from Hardeman County Court; J. C. Marshall, Judge.

Action by J. M. Adams against the St. Louis, San Francisco & Texas Railway Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

O. H. Yoakum and Decker & Clarke, for appellants. M. M. Hankins and D. E. Magee, for appellee.

NEILL, J. Appellee brought this suit against the St. Louis, San Francisco & Texas Railway Company and the St. Louis & San

Francisco Railway Company to recover \$743.30 damages to a shipment of 300 head of calves delivered to defendants at Quanah, Tex., on the 20th of October, 1907, to be transported thence over their road to St. Louis, Mo., and there delivered to their connecting carriers, to be carried from there and delivered to plaintiff at Coshocton, Ohio. The negligence charged against defendants was delay and rough handling between Quanah and St. Louis, by reason of which the animals' value was diminished \$1 per head, and that one car containing 62 head of the calves was unloaded en route at Sapulpa by defendants, and negligently placed in their quarantine pens at their yards at that station, in consequence of which they could not lawfully be carried to their destination, and were sold by defendants at St. Louis for \$12.50 per head, and that, had it not been for such negligence, they would have been carried to Coshocton, where they would have brought \$20, whereby plaintiff lost \$7.15 per head on said car load of calves. The defendants answered by a general denial, and pleaded specially certain stipulations in the contract of affreightment in limitation of their common-law liability as common carriers. The trial of the case resulted in a verdict and judgment against the defendants for the damages sued for.

Conclusions of Fact.

The evidence was reasonably sufficient to warrant the jury in finding that the defendants were guilty of delay and of negligent handling of the calves in transportation between Quanah and St. Louis, and that, by reason of such negligence, the market value of those which arrived at Coshocton, Ohio, was \$1 less per head in their damaged condition than it would have been had it not been for such negligent delay and rough handling.

The evidence shows beyond question that one car load of 62 head of the calves was negligently placed by the defendants in their quarantine pens at Sapulpa, by reason whereof they could not be delivered to plaintiff at Coshocton, but were sold by defendants at St. Louis and brought \$7.50 less per head than they would have sold for at their destination had they been transported there with the other part of the shipment, and of the proceeds of sale \$681.22 were paid to plaintiff.

Conclusions of Law.

1. The testimony of plaintiff as to what defendants' agent at Sapulpa said to him when the cattle were there in regard to a car load of them being placed in the quarantine pens is not obnoxious to the objections urged by the first assignment of error, because the declarations of the agent were in respect to a matter within the scope of his apparent authority, were made in the line of his duty, and at the time and place the neg-

ligent act complained of occurred. However, it is wholly immaterial whether such declarations were admissible or not, since the undisputed evidence shows that a car load of the cattle were placed in the quarantine pens by defendants' employees at Sapulpa, and that plaintiff was damaged in consequence of such act of negligence as alleged in his petition.

2. It was undoubtedly error for the court to admit in evidence the testimony of the witnesses Speer and Harper, complained of in the second and third assignments of error, as to what the man charged with the duty of loading and unloading cattle for defendants at Sapulpa told them about unloading a car of plaintiff's cattle at that station in the quarantine pens, because such declarations were made to each of the witnesses long after the negligent act spoken of by declarant occurred. *Wagoner v. Snody*, 98 Tex. 512, 85 S. W. 1134. But such errors could not possibly have injuriously affected the defendants, because the act of negligence to which the declarations testified to relates was indisputably shown by other evidence free from objection.

3. It is urged by the fourth assignment of error that the court erred in admitting evidence as to the market value of the car load of calves at East St. Louis which had been placed in the quarantine pens and were sold at that place by the order of defendants; the objections being that the measure of damages for conversion is the market value of the property at the time and place of conversion. If such rule was applicable in a case like this, it could not be said that such evidence was inadmissible; for, if defendants can be regarded under the facts in this case as having converted plaintiff's property, it cannot be said that the conversion actually occurred until the calves were offered for sale by defendants in East St. Louis. But in this case the sale of the cattle was the natural sequence of defendant's negligence in placing the calves in the quarantine pens at Sapulpa. When this occurred, the cattle could not be legally carried to Coshocton, but were required by the quarantine authorities to be sold by defendants at East St. Louis. Therefore the rule that the measure of damages where a common carrier negligently fails to transport the property to its destination is the value of the property, less the freight, if unpaid, at the time and place it should have been delivered, is the one which applies in this case. As the plaintiff was paid \$681.22 of the proceeds of the sale, he was entitled to recover the difference between that amount and the market value at Coshocton at the time the cattle should have arrived there, had it not been for defendants' negligence, which difference was \$443.30. Really it is a matter of no moment, so far as plaintiff is concerned, what the market value of the calves was in East St. Louis when sold; for plaintiff was entitled to recover of de-

fendants their market value at Coshocton at the time they should have arrived there but for their negligence.

4. The fifth assignment of error, as it appears in the record, is not copied in appellants' brief; but is broken up and its several subdivisions copied separately, and propositions presented under each of them. This is hardly in compliance with the rules of this court; but, as it does not appear from the statement under the several propositions that the objections to the deposition, they being as to the manner and form of taking, were made as required by article 2289, Rev. St. 1895, it appearing from the bill of exceptions that the objections were made when the deposition was offered in evidence, there was no error in the court's overruling them. *El Paso & S. W. Ry. Co. v. Barrett* (Tex. Civ. App.) 101 S. W. 1025.

5. The fourteenth, eighteenth, and nineteenth assignments, which complain of the court's charge, are overruled, because the charge correctly presents the law of the case as made by the pleadings and evidence.

There is no error in the judgment, and it is affirmed.

ALLEN v. HERRICK HARDWARE CO.

(Court of Civil Appeals of Texas. April 14, 1909. Rehearing Denied May 12, 1909.)

1. BILLS AND NOTES (§ 134*)—COLLATERAL AGREEMENTS—AS EQUITABLE DEFENSE.

In an action on a note by the payee against the maker, an answer alleging a contemporaneous verbal agreement that there should be an accounting between the parties at a later date, and, if the note was in excess of the maker's indebtedness, he should have credit, and that the note was in excess of what the maker owed, stated an equitable defense.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 326; Dec. Dig. § 134.*]

2. EVIDENCE (§ 441*)—PAROL EVIDENCE.—VARYING TERMS OF WRITTEN CONTRACT.

Evidence of the contemporaneous agreement would not vary the terms of the contract embodied in the note.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2044; Dec. Dig. § 441.*]

3. EVIDENCE (§ 442*)—PAROL EVIDENCE.—VARYING TERMS OF WRITTEN CONTRACT—APPLICATION OF RULE.

The rule that, when parties reduce their contracts to writing, the writing is to be taken as embodying all previous negotiations and understandings about its terms, and cannot be varied by parol, does not apply where the instrument was not intended to be a complete and final settlement of the whole transaction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1874; Dec. Dig. § 442.*]

4. EVIDENCE (§ 441*)—ACTIONS—EQUITABLE RELIEF.

In an action by the payee against the maker of a note, if the strict letter of the law would preclude defendant from offering proof entitling him to credits on the note by reason of a contemporaneous oral agreement, because the note was evidence of a full settlement, equity would allow him to show that the note

was not intended as a full settlement between the parties, but that it was agreed that there should be a further settlement, in which the maker should have the benefit of credits claimed by him. •

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2044; Dec. Dig. § 441.*]

5. EVIDENCE (§ 417*)—PAROL EVIDENCE—ENTIRE CONTRACT NOT IN WRITING.

Where an entire contract was not placed in writing, the whole contract could be proved by parol testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1882; Dec. Dig. § 417.*]

Error from District Court, Harris County; W. P. Hamblen, Judge.

Action by the Herrick Hardware Company against A. C. Allen. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Masterson, Atkinson & Masterson, for plaintiff in error. Baker, Botts, Parker & Garwood, for defendant in error.

FLY, J. This is a suit on a promissory note for \$3,640.20, together with interest and attorney's fees, instituted by defendant in error against plaintiff in error, who answered that the note was given under a verbal agreement that there should be an accounting between the maker and payee on a later date, and if the note did not represent the true balance between them, or if the note was in excess of the indebtedness of the maker, the latter should have credit for the excess; that the amount was in excess of what the maker owed in the sum of \$1,500. Plaintiff in error also pleaded in offset an account for \$845 for guns, pistols, wagons, and "sundry articles," and asked that the \$1,500 excess and \$845 account be deducted from the amount of the note. Plaintiff in error also pleaded that he was not liable for \$400 claimed in the suit.

It was alleged in the answer that the note was given for implements, harness, cutlery, mules, and other things, and further alleged: "That on the day said note was given J. W. Orand, who, as plaintiff is informed and believed, if not the largest, is one of the largest, owners of the said Herrick Hardware Company, came to Houston with a purported statement of this defendant's account with said Herrick Hardware Company for business done by him with them at Whitney, Morgan, and Blum, Tex., said account being very long, and consisting of many items the correctness of which could only have been ascertained by a long and thorough audit of same, by comparison with orders given by this defendant to said hardware company. That all the said machinery, implements, and other articles bought by this defendant from said hardware company were bought for, and used upon, the ranch and farm of said defendant and his mother, situated in Bosque county, Tex., and at said ranch and farm were all the papers, account slips, and all

orders were filed, and without which it was impossible for this defendant to know, with any degree of certainty, the correctness or incorrectness of the account as presented. That when said purported account was presented to this defendant with the request that he give to the Herrick Hardware Company a note for the amount of said account, this defendant stated to said Orand, who has charge of the Morgan house of said hardware company, that this defendant had no means of testing the accuracy of the account, because all papers pertaining to the same were at his farm and ranch in Bosque county, Tex., and further made known to said Orand that there were certain credits due this defendant for merchandise bought by the Herrick Hardware Company of this defendant, consisting of certain guns, pistols, rifles, and other articles, for which there appeared to be no credit on the account, but said Orand insisted that these matters could all be adjusted hereafter, that personally he knew nothing about these matters, as they occurred with the Whitney house, and that the Herrick Hardware Company and this defendant had done business together for a great many years, and that said hardware company was in very straightened circumstances, and had been able to collect but a very small percent of what was owing it, and that it was in a position where its doors could be closed by its creditors unless it get immediate help, and that, as defendant's was one of the largest, if not the largest, account they had out, if they could get a note for the amount, it would put it in a position to do something to protect itself from harsh action by creditors, said Orand stating that, if the defendant would give him said note, it would probably aid said hardware company very materially in being able to resist the pressure that was being brought to bear on it by persons to whom it was indebted, and that it was not a question of months or weeks, but a question of days in which it must have help or suffer the consequences, and asked defendant to sign said note, and take up the matter of adjustment of the difference between them, and promised in behalf of said company they would do so later on, saying that as those transactions wherein this defendant was entitled to credits were with the Whitney house, he knew it would do what was right in the matter. That it was on these representations of the strained financial condition of plaintiff, and its inability to meet the demands of its creditors and of the promise by plaintiff, as aforesaid, to take up and adjust any difference between plaintiff and defendant, that this defendant executed the note sued upon, defendant believing that plaintiff might not be able to withstand the pressure brought to bear upon it, unless

it being placed in an embarrassing position that defendant executed said note without any knowledge of its correctness as to amount. Defendant avers that by reason of the facts alleged said note represents more than this defendant owes said hardware company, and that, while said note was given and intended to settle the account of this defendant, it was only intended to pay what defendant actually owed said Herrick Hardware Company, and that, as to any balance over and above what defendant owed it, defendant would be protected by said Herrick Hardware Company. In other words, said note, to the extent it exceeds the amount defendant owed plaintiff, as to such excess, as defendant is informed and believes, is, to wit, \$1,500 accommodation paper. Thereafter, to wit, November 12, 1907, W. T. Herrick, of Whitney, Tex., one of the proprietors of said Herrick Hardware Company, came to Houston and brought with him the note herein sued on, and stated to defendant that, owing to the bank panic then existing, and owing to the fact that they would have to negotiate the note elsewhere than at Whitney, unless the note was secured, the Herrick Hardware Company could not handle the same and get the benefit of it. Said Herrick stated to defendant that the Herrick Hardware Company was right at the point where it could go no further without financial assistance; that it was being crowded very much by its creditors, and particularly by creditors to whom it owed on money loaned. Said Herrick represented to this defendant that it was now not a question of days, but only perhaps one day, before the creditors would take harsh measures, unless they could raise money, that it had a note for \$10,000 due the Provident National Bank in Waco, and that said bank was crowding said hardware company, and had indicated to said Herrick that it would only wait until the next day or would take action against plaintiffs. Defendant, having given the note to said plaintiff was under no obligation whatever to secure the same in any way, but, believing the representations made by said Herrick, and believing that the Herrick Hardware Company was in danger of being pressed to such an extremity as would operate to close its doors for business, said defendant suggested to said Herrick to ring up the Provident National Bank in Waco and see if he could not get said bank to extend the time a day or two longer, in order that this defendant might consider what security he could get up or offer to said Herrick to assist him in putting the note in such shape that he could handle same and get relief by means of it. Said Herrick thereupon told this defendant he would go to the telephone office and ring up the Provident National

Bank of Waco and see if he could get said bank to wait for a day. About two hours after said Herrick returned to the office of this defendant, and made known to him that he had gotten in communication over phone with the Provident National Bank of Waco; and, while they were very impatient and very stern with him, it had consented to wait another day, but this was final, and no further or other delays would be tolerated or considered. Thereupon, and being influenced thereby, and with the purpose to help plaintiff, and at great inconvenience to defendant himself, this defendant executed the deed of trust referred to in plaintiff's petition in order to enable plaintiff to handle said note and assist said Herrick Hardware Company and prevent its doors being closed, plaintiff having its attention called by defendant to the fact that defendant had had no opportunity to examine said account or have the same audited, by reason of the fact that the account was handed to him in Houston, was very lengthy, and represented many business transactions, while all the papers, vouchers, data, etc., necessary to audit said account were at defendant's farm and ranch in Bosque county; that whatever difference there might be in defendant's favor would be adjusted by said hardware company; it being the understanding and the intention of both plaintiff and this defendant that this note was not binding or operative any further than as to the amount defendant actually and honestly owed said hardware company upon and after checking of the account and ascertaining the true amount." The answer set up a valid equitable defense to the claim, and the court erred in sustaining a general demurrer thereto.

While the cross-action of plaintiff in error may have been founded on an unliquidated demand, which could not have been pleaded as an offset to the promissory note, still there was in the matter herein copied an equitable defense to the demand of defendant in error, concerning which plaintiff in error should have been permitted to introduce evidence to sustain the allegations of a contemporaneous agreement that certain claims of the maker should be allowed in a settlement of the note. The evidence would not vary the terms of the contract embodied in the note. "A parol agreement, made at the time when a note was given, that a certain claim should be allowed as a credit, and be entered as such on the note, which was not done, is not liable to the objection that it was a contemporaneous understanding that would vary the terms of the written contract." *Nalle v. Gates*, 20 Tex. 315. It is the rule that, when parties reduce their contracts to writing, such writing is to be taken as embodying all previous negotiations and understandings about its terms, and they cannot be varied by parol; but the rule does not apply where it can be

made to appear that the instrument was not intended to be a complete and final settlement of the whole transaction. It was held in a Pennsylvania case, and approved by the Court of Appeals of Texas in *James v. King*, 2 Willson, Civ. Cas. Ct. App. § 544, as follows: "A verbal promise by one of the parties at the making of a written contract, if it was used to obtain the execution of the writing, may be given in evidence." *Powelton Coal Co. v. McShain*, 75 Pa. 238. In this case it was alleged that plaintiff in error was induced to execute the note by the promise that there should be an adjustment of the accounts between the parties, and credit allowed for what was due to plaintiff in error, and proof of those facts did not tend to vary the written contract, but rather to explain it, and place the parties on the plane upon which they contracted with each other. If it could be held that by the strict letter of the law plaintiff in error should not be allowed to offer proof entitling him to credits on the note, because the note was evidence of a full settlement, a court of equity would come to the relief of the maker of the note, and permit him to show that the note was not intended as a full settlement between the parties, but that it had been agreed that there should be a further settlement, in which the maker of the note should have the benefit of credits claimed by him. To hold otherwise would be to allow defendant in error to profit by an ironclad rule, and obtain from plaintiff in error something which is not justly due him. The note is still in the hands of the original payee; and, if it was executed under the circumstances alleged in the answer, proof of the indebtedness of the payee to the maker of the note should be allowed as a credit on the note. The note was not a final settlement between the parties, if they did not intend that it should be. The entire contract was not placed in writing, and under such circumstances the whole contract can be proved by parol testimony. *Greenl. Ev.* 284a. It follows that the general demurrer should not have been sustained to the answer, and that the continuance should have been granted in order to obtain evidence to sustain the allegations of the answer. It is probable that the questions raised as to the attorney's fees will not arise on another trial.

The judgment is reversed, and the cause remanded.

ROBERTSON et al. v. HEFLEY.

(Court of Civil Appeals of Texas. April 21, 1909.)

1. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—EVIDENCE.

Where it was admitted that a certain person was the common source of title, the admission in evidence of a deed to him was not error. [Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4164; Dec. Dig. § 1031.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. TRESPASS TO TRY TITLE (§ 45*)—EVIDENCE—ADMISSIBILITY.

In trespass to try title, the exclusion of evidence that plaintiff's grantor attempted to get a third person to execute a deed of the land to him, which she refused, was not error.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 45.*]

8. HOMESTEAD (§ 161*)—ABANDONMENT.

Where a husband and wife abandoned a homestead, whether before or after the conveyance thereof by the husband, and established a new homestead, the conveyance was valid without the wife joining therein.

[Ed. Note.—For other cases, see *Homestead*, Dec. Dig. § 161.*]

4. FRAUDULENT CONVEYANCES (§ 271*)—REMEDIES OF PARTIES—BURDEN OF PROOF.

Representatives of a grantor claiming that his deed to his wife was a simulated transaction not intended to be effective as a conveyance had the burden of so proving.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 796-798, 821; Dec. Dig. § 271.*]

5. FRAUDULENT CONVEYANCES (§ 299*)—REMEDIES OF PARTIES—WEIGHT OF EVIDENCE.

Where a husband and wife lived together, the fact that he retained possession of land which he conveyed to her is of little force in determining whether the transaction was simulated.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 885; Dec. Dig. § 299.*]

6. DEEDS (§ 96*)—CONSIDERATION—RECITALS.

A recital in a deed as to the consideration is evidence, and should be deemed sufficient if it recites a fact sufficient to create either a good or a valid consideration.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 260; Dec. Dig. § 96.*]

7. DEEDS (§ 17*)—CONSIDERATION—LOVE AND AFFECTION.

Love and affection is a sufficient consideration of a deed between husband and wife.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 29; Dec. Dig. § 17.*]

8. DEEDS (§ 15*)—CONSIDERATION—NECESSITY.

A consideration is not necessary to support a deed or conveyance that is fully executed and delivered.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 23; Dec. Dig. § 15.*]

9. DEEDS (§ 195*) — CONSIDERATION — EVIDENCE.

In determining the legal effect of an executed conveyance in the absence of evidence to the contrary, the law will imply a consideration.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 584-586; Dec. Dig. § 195.*]

10. FRAUDULENT CONVEYANCES (§ 298*)—REMEDIES OF PARTIES—EVIDENCE.

Testimony of a grantor that he conveyed property to his wife to put it beyond the reach of a third person holding a claim against him is insufficient to show that as between the parties the transaction was simulated, or that the grantee should hold the legal title in trust for the vendor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 298.*]

11. FRAUDULENT CONVEYANCES (§ 172*)—REMEDIES OF PARTIES.

When a debtor conveys property to defraud his creditors, the conveyance, though void-

able as to the latter, is conclusive as between the parties.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 523-529; Dec. Dig. § 172.*]

12. FRAUDULENT CONVEYANCES (§ 216*)—REMEDIES OF CREDITORS.

One having a valid claim for unliquidated damages, as a right of action for slander, may be a creditor entitled to protection as against a fraudulent conveyance by the wrongdoer.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 642; Dec. Dig. § 216.*]

Appeal from District Court, Milam County; J. C. Scott, Judge.

Action by J. D. Hefley against Mrs. Ida L. Robertson and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Appellee, J. D. Hefley, instituted this suit in trespass to try title to recover the lands described in the plaintiff's petition against the defendants Mrs. Ida B. Robertson, Wilton Lee Robertson, Washington Prentiss Robertson, Charles David Robertson, Mrs. Desdemona Elizabeth Joslin, and Mrs. Georgia E. Robertson, all of whom answered by general denial and not guilty, except Mrs. Joslin, who did not answer, and against whom judgment final by default was entered. The court below instructed a verdict for plaintiff against the defendants, and upon which judgment was rendered in plaintiff's favor, and from which all of the defendants, except Mrs. Joslin, have perfected an appeal to this court.

The land in controversy was originally the community property of W. J. Robertson, now deceased, and his wife, Mrs. Malvina Robertson, and now Mrs. Hitt; she having married since the death of her first husband. Mrs. Joslin is the daughter of W. J. and Malvina Robertson, and Mrs. Ida Robertson and Mrs. Georgia Robertson are the daughters-in-law of W. J. and Malvina Robertson. Wilton Lee Robertson, Washington Robertson, and Charles Robertson are the children of the marriage of Ida Robertson and her deceased husband, a son of W. J. and Malvina Robertson. The husband of Mrs. Joslin and the husband of Mrs. Georgia Robertson, sons of W. J. and Malvina Robertson, are both dead. Appellants assert a claim to a part of the community interest of W. J. Robertson, deceased, to the land in controversy. Plaintiff contends that this interest was conveyed by Robertson to his wife, Malvina Robertson, and by her down to him. Upon this point the briefs of appellants contain this statement: "Plaintiffs claim title by mesne conveyances from W. J. Robertson, the ancestor of defendants, and defendants, claiming under the same source of title, contended that the conveyance by W. J. Robertson to his wife Malvina Robertson, through whom the plaintiff claims, was void, first, because the land was a part of the homestead, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dered, and it was never intended to change the status of the title to the land."

The entire evidence contained in the record is as follows:

"(1) The plaintiff offered in evidence the original warranty deed from W. T. Hefley to the plaintiff, J. D. Hefley, same bearing date January 25, 1907, and being for the land described in plaintiff's petition, said deed being duly acknowledged by the grantor and duly recorded in the deed records of Milam county, Tex., in volume 74, p. 396, the said deed reciting a cash consideration of \$3,660 and four vendor's lien notes for \$1,875 each, due one, two, three, and four years after date, with interest from date at 7 per cent. per annum, payable to the order of W. T. Hefley.

"(2) Plaintiff next offered in evidence an original warranty deed from Mrs. Malvina Hitt and her husband, W. N. Hitt, to W. T. Hefley for the land in controversy and described in plaintiff's petition, the same bearing date January 2, 1907, and duly acknowledged by both of the grantors in accordance with law, and duly recorded in the deed records of Milam county, Tex., in volume 73, pp. 562-565; the said deed reciting a cash consideration of \$8,280, paid by W. T. Hefley.

"(3) Plaintiff next offered in evidence an original warranty deed from W. J. Robertson to M. E. Robertson to the land in controversy and described in the plaintiff's petition, the same bearing date of June 14, 1898, and being duly acknowledged for record and duly recorded in the deed records of Milam county, Tex., in volume 48, pp. 379-380, and the same reciting a consideration of \$5 'and other valuable consideration' paid by the grantees.

"(4) The plaintiff next offered in evidence an original general warranty deed from T. C. Fowler and wife to W. J. Robertson to the land in controversy, bearing date March 18, 1885, and showing that it was filed in the office of the county clerk of Milam county, Tex., on the 7th day of August, 1885, and duly recorded in deed records of said county on the 19th day of August, 1885, in volume 14 on page 535 et seq.; the said deed reciting a cash consideration of \$5,600.

"(5) The plaintiff next offered and read in evidence an original warranty deed from W. H. Fowler and wife to Mrs. Malvina Hitt to 2½ acres of land, being part of the land in controversy and described in plaintiff's petition, the said deed bearing date April 10, 1906, and duly acknowledged for record and duly recorded in volume 66, p. 346, of the deed records of Milam county, Tex.

"(6) The plaintiffs next offered and read in evidence an original general warranty deed from Mrs. Hattie Williams to M. M. Hitt and wife to 2½ acres of land, part of the land in controversy and described in plain-

Plaintiff next offered the testimony of the witness Mrs. Malvina Hitt, who, after being duly sworn on oath, testified as follows: 'My name is Mrs. Malvina Hitt, and I live in Cameron, Tex., at present. My husband's name is W. N. Hitt. I knew W. J. Robertson in his lifetime. He was my husband, and was commonly known as Bee Robertson. I remember the circumstances of Mr. Robertson buying the tract of land from T. C. Fowler and wife, described in the deed just read in evidence. He bought the land in 1885. I was married to W. J. Robertson February 22, 1869, and lived with him all his life as his wife up to his death, and the date of his death was May 11, 1900, having lived with him as his wife for a period of about 21 years continuously. I remember the circumstance of him buying the land from Fowler, and we moved on it and took possession of it after the purchase. After we bought the land, Mr. Robertson went down and took possession and made a crop on it, and I continued to live in Davilla for something over a year after that before I moved down with him on the place. No one ever disputed our right to the place or our possession of it from the time we bought it in 1885 until about the time of the institution of this suit. We lived upon the place and raised our family there, and made crops on it, and we claimed it and paid the taxes on it during the entire time until I sold it, and we lived there 12 or 13 years, and then Mr. Robertson bought a place known as the Hennington place, about three miles from this Fowler place, situated in a westwardly direction towards Davilla from our place. This Fowler tract of land is the same tract of land we sold to Mr. Hefley, and it is the same land involved in this suit, and we were in the exclusive possession of it all the time from the time of the purchase until that sale, and no one ever disputed our right or title to it, and, at the time of the sale to Mr. W. T. Hefley, we delivered possession of the same to him.' Cross-examined: 'The description of the land given in the deed is the land sold to Mr. Hefley, but I could not undertake to give the field notes. I was married to Bee Robertson in 1869, and lived with him continuously as his wife until his death, which occurred on May 11, 1900. At the time of Mr. Robertson's death, he was ailing for some time. He had been confined to his bed from the month of October preceding, and at times prior to the time he was taken to his bed he had suffered considerably. I think the trouble with him was a cancer. He did not have Bright's disease. For 19 months prior to his death he had been considerably under the weather as to his health. I think he had had catarrh of the head for about 10 years, but had gotten better of it, and it was not troubling him at the time of his death.

shortly after the purchase. At the time of his death, we were not living on the Fowler place. We had been away from the Fowler place about three years at the time of his death. Mr. Robertson had sustained an injury in a runaway in Davilla and gotten hurt, but had recovered from that, and I suppose it was about three months after that injury before he could turn his head, but after that he entirely recovered from that trouble. The place we bought and moved to from the Fowler place was known as the Hennington place, and consisted of 88 acres. I sold this place to Hennington after my husband's death, and my children that were then living joined with me in the deed. My husband continued to farm on the Fowler place after moving to the Hennington place, and we rented some of it out; that is, he himself sowed one small grain crop, and the balance of it he rented to tenants. Mr. Robertson and myself had three children. The oldest was a boy named Willis. The next was a boy named Charles. Both of these boys were married men at the time of their father's death. Willis was married two or three years before his father's death and had one child, and Willis married Ida Robertson. Charles married on the 8th day of November prior to his father's death in May, and his wife is one of the defendants in this suit, being Mrs. Etta Robertson. After Willis married, he lived in several different places, sometimes on the farm and sometimes in Davilla. He was living on the farm at the time of his father's death. That is the Fowler place, the one I sold to Mr. Hefley. Willis had three children, all boys. The oldest is named Wilton Lee, and he is 10 years old. The next one is named Washington Prentiss, and is about 8 years old, and the third is named Charles Galloway, and is now about 4 years old. Willis died on the 1st day of May, 1904, and Charles died the 4th day of October, 1900, about six or eight months after my husband's death. He died on the Hennington place. He was farming down on the Fowler place at the time of his death, but was living with me on the Hennington place, and also had some crop there. He left a widow surviving him, whose name is Etta Robertson, but left no children. One of my children was a girl, who is now Mrs. Joslin, one of the defendants in this case. She is a widow and had three children, and she and her children are now living with me in Cameron. When I made the trade with Mr. Hefley, part of the consideration was paid me in property here in town and part of it in money. I got two brick buildings from him in the trade. Mrs. Etta Robertson has been living with me ever since her marriage to my son. She has no children. My present husband's name is W. N. Hitt.

My name is J. C. Gibson, and I live two miles this side of Davilla. I lived in that community five or six years prior to 1900, then moved to Burnet county, and came back there two years ago. I was living in that community when Bee Robertson died, and had known about him about four or five years at the time of his death. I know the place he lived on near the river known as the Fowler place, and I also knew a man in that community by the name of Henry Cox. This man Henry Cox lived near Bee Robertson, and rented some land from him. I think he rented the land from Mr. Robertson in 1898, and this man Cox and Bee Robertson had some dispute or disagreement along in the spring before Mr. Robertson was taken sick and confined to his bed in the fall. He was sick along about the time he had the trouble with Cox, and could not cultivate his place, and rented some of it to Cox, and they had some trouble. Mr. Robertson came to me about the trouble he was having with Cox, and said that Cox was going to sue him for slander, and that he was going to kill Cox. I advised Robertson not to kill Cox, but to go and make a deed over to his son to prevent Cox from getting judgment against him for slander. Cox was threatening to sue Bee Robertson for slander because Robertson had called him a thief. Robertson came and told me that he thought he would get a gun and kill Cox, and I advised him not to do it, but to make a deed to his son to prevent Cox from getting anything, and Robertson said "I will do that," and came back and said to me that he had made it to Malvina, and that it will keep Cox from getting the slander out of him; that is, any of the property. He did not state to me right then what effect that would have on the property, but, after that, he said something about giving the children certain land, and went on and stated where the land was. He said he would give the place at the bridge to B. Joslin, Willis the old place, and Charles down in the field next to the creek. At the time he first called on me, he was excited. He sent me to Mr. Cox, and told me to give a cow and calf, and Cox told me to get out of his yard, and that he would not get any compromise. I went to see Cox and failed to get a compromise, and came back and reported it to Robertson, and I talked to Mr. Robertson about it after I returned. He was then at my house. At that time I told him that he could put his property out of the way by deeding it to Willis. I don't know whether it was that day or the next evening that he told me that he had deeded it to Malvina, but it was one or the other. He went to John Crunk at Davilla to make the deed.

ing the place. The time that I had that conversation with Mr. Cox and Robertson in reference to the matter was along in the latter part of May or some time in June, 1898, and it was about that time that he told me that he had deeded the property to Malvina.' Cross-examination: 'I was not Bee Robertson's lawyer. I was his neighbor, and the reason why I told him to convey his land to his oldest son so Cox could not get it was because I had seen something similar like that done. He had called Cox a thief, and my advice to him was to convey his land to his oldest son so Cox could not get it, and he told me that he would do it, but afterwards told me that he had conveyed it to his wife so Cox could not get it, and stated to me that that was his purpose to keep Cox from getting it because he had called Cox a thief, and that Cox was going to sue him for slander.'

"J. C. Hardy, witness for defendant, being duly sworn, testified as follows: 'My name is J. C. Hardy. I live in Milam county, Tex., south of where Bee Robertson used to live, and I knew him in his lifetime, and I knew his son Willis, and I rented land from Willis one year; that is, in 1901. The land I rented from him was on the Bee Robertson homestead tract or the Fowler place. The part I rented from him was on the south end of the farm. It was on the south end of the field, the land nearest the house. It seems to me like about 20 acres I rented. I never went on it. He planted it for me, and he cut the oats and kept the rent himself.' Cross-examination: 'This was in 1901, after Bee Robertson's death. Mrs. Robertson was living on the place at the time. I did not go on the place. I never went on the place but one time, and that was after the oats came up. Willis was working for me for wages and worked the land himself, and I think it was about 20 acres, and all I know about the rent was that it was kept out when he cut the oats. Of my own knowledge I do not know who took the rent on it. All that I know about it is that he was hired to me and I rented the land from him, and he worked and planted the oats, and, when they were cut, he brought me part of them.'

"R. D. Alexander, a witness for defendant, being duly sworn, testified as follows: 'I live near Baxter in Bell county, Tex., and I knew Bee Robertson in his lifetime and also his son Willis Robertson. I think I rented from Willis Robertson in the year 1904. The land I rented was in cultivation. I rented the land on the third and fourth—that is, $\frac{1}{2}$ of the cotton and $\frac{1}{4}$ of the corn—and rented it from Willis Robertson. I went to him to rent it and paid the rent to Mrs. Ida

in that field. There was as much as 50 acres. I had 35 acres, but did not have all that was in the field. Judging from the looks of the field, I assumed there was three times as much in the field as I had. Mrs. Hitt was then living on the place. She was not Mrs. Hitt then, but Mrs. Bee Robertson. She married after I left the place.'

"Ida L. Robertson, one of the defendants, being duly sworn on oath, testified as follows: 'I am one of the defendants in this case, and I live four miles east of Davilla, and am now a widow. My husband's name was Willis K. Robertson. At the time of his death, he lived down on the farm near the river, and was the Fowler place and the one that Mrs. Hitt afterwards conveyed to Hefley. My husband and I lived there most of the time after we were married, and we married in 1896. When we first moved down there, Mr. Bee Robertson, my husband's father, and his family were living at the Hennington place. Mrs. Hitt and family were living on the Fowler place near us at the time of my husband's death. My husband and myself and family were living in one of the houses on the farm. At the time we moved on the farm, Bee Robertson gave my husband 25 acres of land below the ditch. There was a ditch running through the farm. After the death of Bee Robertson, there was an exchange made. Mrs. Hitt wanted to exchange land, and gave him 35 acres of land near the gate, and for it she wanted the 25 acres of land to go with the house next to the river, and he made the exchange of this 25 acres that Willis' father had gave him. He did not put any improvements on it, just worked it himself, and he continued in possession of it up to the time he died. In 1900 they made the exchange of the 25 acres for the 35 acres. He was in possession of the 35 acres afterwards continuously up to the time of his death. I remember about the time Mr. Bee Robertson is said to have made the deed to his wife. This was after Mr. Robertson had given the 25 acres to Willis. I did not know about the making of the deed at the time, but afterwards it was generally known. The deed was placed to record about the 17th day of June. Mr. Robertson came by our house to have it put of record. This is how I know about it. He told me and my husband that he was going to do so. He came to our house in his everyday clothes. He came to our house and then dressed up, and the reason he came to our house in his everyday clothes was to keep Mr. Cox from suspecting he was coming. He did not want Cox to know that, because Cox was going to sue him for slander. He stated that the reason he came in his every-

day clothes was that he did not want Cox to know. He changed clothes at our house and left, and that evening he came back and changed his clothes again. After having changed his clothes, he told us he had been to Cameron. He stated that his object in making the deed was to keep Mr. Cox from getting his property. After he made this deed, he continued to manage the property, just like he always had, as far as I know, and at the time he came to our house and changed his clothes as before stated he was then living at the Hennington place, and this was about four miles west of where we were living on the Fowler place. He did not come by Cox's house and come to our house because Cox lived beyond him. He came down the big road, and, when he got to our house, it was early in the morning. After Bee Robertson's death, my husband farmed the land himself or rented it out. Part of it he worked and part of it he rented out. Mr. Bee Robertson died in 1900, and Mrs. Robertson married Mr. Hitt in 1905, and they made the trade with Mr. Hefley in January, 1907. I did not sign the deed. They did not ask me themselves to sign the deed. My husband and I had three children. Their names were Wilton Lee, Washington Prentiss, and Charles Galloway.' Cross-examination: 'The land that Willis worked was in cultivation. Willis did not pay any taxes on it that I know of. I have never paid any. I offered to, but Mrs. Hitt would not let me. This 35 acres that Willis cultivated was in the large field, and was never fenced off separately. There was never any house built on it, but Mrs. Hitt bought a house and gave it to Willis, but this house was not put on the 35 acres, but was up near the residence of Mrs. Hitt. I expect it was 300 yards from the land. Part of the time Willis lived in this house, and part of the time he lived at Davilla. When Willis rented the place out, he did not stay on it, and, when he rented it, he was not there. I expect this house was about a quarter of a mile from the 35-acre tract. I obtained a certified copy of the deed from Bee Robertson to Mrs. Hitt about two years ago, but it is not from that deed that I remember the date of Mr. Robertson's coming by our house and changing his clothes. At the time Willis and I moved on the Fowler place, Bee Robertson was living on the Hennington place. When Mr. Bee Robertson bought the Hennington place, he built a good house on it and dug a well and settled himself there, and put up a barn and walled up the well, and lived there on the Hennington place. Bee Robertson had another tract of 106 acres, and he gave that to Mrs. Joslin. Bee Robertson told me that he was coming down to Cameron to put that deed on record, and said that he was afraid that Cox would get a judgment against him. He said that Cox was going

to sue him for calling him a thief. Bee Robertson did not keep his Sunday clothes at our house, but brought them along with him in a flour sack. When he came back from town, he took them off, and put them in the flour sack, and carried them home.'

John P. Looney and Henderson & Lockett, for appellants. Monta J. Moore, W. J. Hefley, and W. A. Morrison, for appellee.

FISHER, C. J. (after stating the facts as above). Appellants' brief contains four assignments of errors, which are as follows:

"(1) The court erred in admitting in evidence deed from T. C. and A. E. Fowler to W. J. Robertson, as shown by bill of exceptions No. 1.

"(2) The court erred in excluding the testimony of witness Mrs. Ida L. Robertson, as shown by defendant's bill of exception No. 3.

"(3) The court erred in giving peremptory instruction to find for the plaintiff, because it appears from the evidence that the property in controversy was the homestead of W. J. Robertson and his wife, Mrs. Malvina Robertson, and the pretended deed from W. J. Robertson to his wife through which plaintiff claims title was void, because the same was not executed by the husband and the wife with the formalities and requirements of the Constitution of the state, relating to conveyances of the homestead.

"(4) The court erred in peremptorily instructing the jury to find for the plaintiff, because it appears from the evidence that the deed by W. J. Robertson to his wife, Malvina Robertson, for the land in controversy, through which plaintiff claims title, was not intended, and did not, in fact, operate to convey the title to said land; but was merely a simulated transfer, and there was no change in the ownership, control, or possession of said land during the life of said W. J. Robertson, but same remained in his possession until his death, and he exercised all the rights of ownership over the same just as he had previously done, and the purpose of said conveyance was merely to pretend and not in fact to convey the title, and at the time of his death said property was the community property of said W. J. Robertson and his said wife, and one-half descended to his children through whom defendants claim and they are entitled to one-half thereof."

These assignments will be disposed of in the order named, and our conclusions of fact on the evidence will be indicated in disposing of them.

1. In view of the undisputed evidence in the record and the admission of the appellants made in their brief that J. W. Robertson was common source of title, there could be no error in the action of the court in admitting the deed from Fowler to Robertson, as complained of in the first assignment of error, although that deed was not properly acknowledged. If Robertson was common

source of title, there was no necessity for either of the parties to go back of him, and there is a distinct admission in appellants' brief that such was the case.

2. There was no error in the action of the trial court in not admitting the testimony of Mrs. Ida Robertson. If it could be held that that evidence was admissible, it certainly could not have affected the result. If admissible at all, it would be merely upon the question that W. T. Hefley, the vendor of the plaintiffs, had notice or knowledge of the fact that Mrs. Ida L. Robertson was asserting some claim to the land. The proposed evidence is to the effect that it was expected to be proved by Mrs. Ida Robertson that Hefley endeavored to get Mrs. Robertson to execute a deed to the land, which she refused to do. While it is insisted by appellee that the plaintiff ought to be protected as an innocent purchaser, we in disposing of the case lay no stress upon that issue. It is true that he held the legal title, and it appears that he paid a valuable consideration for the property, and the defendants, asserting an equitable title, would rest under the burden of proving facts tending to show that the holder of the legal title acquired it with knowledge or notice of their rights. But, as said before, we have pretermitted this question, because it is not necessary to be decided, and for the further fact that there is some evidence in the record showing that some of the appellants were in possession of the land at the time that the Hefleys purchased. Consequently the question might arise whether such possession was not sufficient to charge the plaintiff and his vendor with notice of whatever right the appellants may be able to assert.

3. There is evidence both ways as to the question whether the property was occupied as a homestead when the deed from W. J. Robertson to his wife, Malvina, was executed in June, 1898. There is evidence to the effect that it was then so occupied and used. On the other hand, Mrs. Hitt, formerly Mrs. Robertson, testified, in effect, that she and her husband lived on the place 12 or 13 years after they bought it in 1885; and, again, that her husband died on May 11, 1900, and that at that time they had been away from the Fowler place, the one in controversy, three years, they in the meantime occupying as their homestead another farm, known as the Hennington place. Of course, if she is correct as to the time stated, the place in controversy was not the homestead when the deed to her was executed in 1898; and, if that was the case, the conveyance by the husband was sufficient to convey title without her joining in it. But, if we should conclude that it was homestead when the deed was executed, the result is the same, for it is clearly and beyond question shown by the evidence that she and her husband abandoned the premises in controversy, and established their homestead on another place,

known as the Hennington place, and this was the condition of affairs when her husband died. She has not asserted since the abandonment of the premises a homestead right in it, and, so far as shown, she assented to the change. On the facts this case is stronger in favor of the conveyance than the one before the court in *Marler v. Handy*, 88 Tex. 422, 31 S. W. 636. That was a deed by the husband, Marler, to Handy of the homestead, which was community property. The wife refused to join in the deed, and always claimed her homestead right in the property, but shortly after the conveyance by the husband they moved from the premises and acquired a place elsewhere, and there the husband and wife established their homestead. The Supreme Court, after discussing a number of cases, said: "From these authorities and we believe upon sound principle the rule may be stated that the husband, acting in good faith, may select the homestead of the family; and that when he has acquired a new home, and his wife has removed with him to the newly acquired homestead, a deed made by him without her concurrence to the former homestead becomes operative as to the husband as an estoppel against his right to recover the property. The wife's right, being that of homestead only, ceases when a new homestead has been acquired, and she removes thereto. The deed made by Marler to Handy was not void under our Constitution; and, although inoperative so long as the property was occupied by him and his wife as a home, yet when he and his family removed therefrom to another homestead, he acting in good faith for the best interests of himself and his family, the deed became operative to vest title in Handy, and the property could not be recovered by the husband, because he would be estopped by the deed, and it could not be recovered by the wife because her homestead right ceased when her husband acquired, and she removed with him to another homestead." There is no question raised in this case but that the husband was acting in good faith in abandoning the old homestead and acquiring a new, and we can see no reason why the principle announced in *Marler v. Handy* should not apply in affording protection to a conveyance from the husband to the wife as it would from the husband to a stranger.

4. The deed in question from her husband vesting in Mrs. Malvina Robertson the legal title, and the evidence of the plaintiff throwing no suspicion upon the same, the burden was upon the appellants to introduce evidence of some probative force showing either that she held the legal title in trust or that it was a simulated transaction as between the parties to it, and that as between them it was not intended that it should be effective as a conveyance. If the evidence in the record is of no force in establishing these issues, the trial court properly instructed a

verdict for the plaintiff. Appellants in their brief make no point that the deed from Robertson to his wife was not delivered; but, however, what evidence there is upon this subject tends to show a delivery. As having some bearing on the question that the purpose was not to convey title and that the transaction was simulated, appellants lay some stress upon the fact that, after the execution of the deed, Robertson, the grantor, remained in possession. Little, if any, force can be given to this fact, because the grantor and grantee were husband and wife, were living together as such, and in such a case their occupancy of the premises is entirely consistent with the rights of the wife, who is asserting title under a deed from the husband. There is no direct charge made in appellant's brief that the deed was not supported by a consideration, and there is nothing upon this subject except the inference that arises from the evidence offered by the appellants tending to show what they term a simulated transaction, and from what appears from a recital contained in the deed indicating a consideration which is: "In consideration of \$5 and other valuable considerations paid by the grantee." As between the parties to a conveyance, the recital contained in it as to the consideration is evidence, and, when not explained or contradicted, should be given some effect; and in such a case, if a consideration could be held necessary to support an executed conveyance, the recital should be deemed sufficient if it recites a fact sufficient in law to create either a good or a valuable consideration. The deed we are considering was executed, and it appears from its face, as well as we are able to determine from the meager facts stated, to be based upon a valuable consideration. Besides, the consideration of love and affection as between husband and wife is sufficient. Furthermore, in determining the legal effect of an executed conveyance, in the absence of evidence to the contrary, the law will imply a consideration; and this may be said to be the rule applied to all written contracts which have been executed and acted upon, and, when there is no issue of fact made by the evidence upon this question, the court construing the instrument should treat it as based upon a sufficient consideration. But, aside from all this, is a consideration necessary in order to support a deed or conveyance that is fully executed and delivered? The weight of authority answers this question in the negative, and it has been recently so held by this court, but at present I am not able to recall the decision that so decides; but in *Baker v. Westcott*, 73 Tex. 129, 11 S. W. 157, this principle is recognized. There it is said: "That a consideration is not necessary to the validity of a deed conveying land has been held in the courts of many states. *Ruth v. Ford*, 9 Kan. 17; *Perry v. Price*, 1 Mo. 553; *Doe v. Hurd*, 7 Blackf. (Ind.) 510; *Green v.*

Thomas, 11 Me. 318; *Marshall v. Fisk*, 6 Mass. 24, 4 Am. Dec. 76. If the instrument in this case was a mere executory contract, the rule of equity would probably require proof of consideration in order to enforce it, although this is ordinarily presumed from the use of a seal. But we think this instrument in effect a deed which conveyed the legal title to Westcott. If it were competent at any time for the grantor or his heirs to avoid it for want of a consideration, this could only be done by affirmative proof of the fact that the conveyance was purely voluntary." The deed importing a consideration and vesting the apparent legal title in the vendee, the appellants, if they expected any benefit from the fact that no consideration existed, should have offered some evidence to that effect, which was not done, except, as before said, the mere inference that arises from the statement of the grantor that he conveyed the land to his wife in order to defeat the claim of Cox. Mrs. Robertson, the only other surviving party to this transaction, says nothing about it, although she testified as a witness in the case. This much is said upon this subject merely to anticipate a contention that a consideration was necessary, and we do not desire to be understood as holding that a want or absence of consideration could not be shown and considered in determining the main question whether the parties to the deed intended it as a simulated transaction, which question we will now dispose of.

All of the evidence upon this subject, reduced to a concise statement, is the fact that Robertson was advised to execute a conveyance in order to defeat the collection of a supposed claim of Cox for slander, and his statement to the effect that, with that purpose in view, he had conveyed by deed the land in controversy to his wife. Mrs. Robertson testified, but said nothing about the purpose and object of the deed and the consideration, but her evidence shows that she acted upon the deed as conveying title to her, and so treated it. If there was any agreement or understanding between the husband and wife to reconvey or upon her part to hold in trust or any recognition of the fact that the deed was a simulated transaction and was not to be given the effect that the law implies from the words of conveyance in which it is framed, it was not shown by the evidence. In all the cases upon this subject where the deed was avoided by the vendor some fact of this character was shown, and we have found no instance in which, between vendor and vendee, an executed conveyance has been canceled or voided, or the legal title thereby created has been charged with a trust merely upon the evidence of the grantor that he did not intend to convey. But the declarations of the grantor in this instance do not go this far, for he merely says that he had conveyed the property to his wife for the purpose of putting it beyond the

the conveyance, as between them, should not take effect, or that the vendee should hold the legal title in trust for the vendor. While Robertson may have intended to defeat a collection of the claim of Cox, he may also have intended to convey title to his wife, which purpose would have comported with the legal effect of the deed and his act in having the same recorded, and the fact that during the remainder of his life he never indicated a purpose to recall the deed or question the full and complete title which by its terms it purports to convey to the wife. She was the natural object of his bounty, and, as between them, no suspicion is imposed upon the deed that it does not reveal the truth, and was not intended, as between them, to pass title, merely upon evidence that the vendor in executing it intended thereby to defeat a supposed claim of some third party. As between the parties to an executed conveyance, proof merely of this fact was not sufficient. The evidence should have gone further in establishing additional facts, which in this case were not shown. Such facts, for instance, as are indicated by the cases of *Taylor v. Ferguson*, 87 Tex. 2, 26 S. W. 46, and *Rivera v. White*, 94 Tex. 539, 63 S. W. 125. These cases and others of like kind upon the facts are in no wise similar to this case, for in all of them the evidence tended to show an agreement to reconvey or a holding by the vendee in trust or in recognition of a superior right in the vendor.

This discussion of this phase of the case is sufficient to indicate our views that the trial court was justified, under the evidence, in treating the deed as passing title, and the evidence assailing it was not sufficient to overcome it; but there is another view of the case which may have influenced the trial court in directing a verdict which can be based upon the facts of the case and the law as thereto applied as molded by the decisions. When the debtor conveys with the purpose of defrauding his creditors, the conveyance, though voidable as to the latter, is conclusive and binding between the former and his vendee. *Rivera v. White*, supra. One having a valid claim and demand for unliquidated damages may be a creditor entitled to such protection. 2 *Bigelow on Frauds*, p. 148; *Holden v. McLaury*, 60 Tex. 228; *Cole v. Terrell*, 71 Tex. 550, 9 S. W. 668. And of that class of creditors entitled to such protection are those having an action for slander is recognized by the cases of *Clapp v. Leatherbee*, 18 Pick. (Mass.) 131-138; *Stevens v. Works*, 81 Ind. 445; *Shean v. Shay*, 42 Ind. 375, 13 Am. Rep. 366; *Cooke v. Cooke*, 43 Md. 522, and others that might be mentioned. The conveyance before the

was it shown that such a claim existed or that she was entitled thereto. The court held that it did not follow in a divorce proceeding that the wife was entitled to alimony as a matter of course, but that that right would depend upon the facts, and held that, as the statute intended only to protect creditors, they must be shown to exist, and the mere fear of the vendor that someone might assert a supposed demand would not be sufficient to show that the conveyance was in fraud of creditors, although his intent was to place the property beyond the reach of such supposed claims. In other words, that a mere intent to defeat an unreal or a fancied claim was not sufficient. But in our opinion there is a difference between the facts of that case and this. Here there is no question but that Cox had a cause of action against Robertson for slander, and all the evidence upon this point was introduced by the appellants, and the facts in evidence show a prima facie case against Robertson, and they offered and introduced no evidence to the contrary. They did not undertake to show that the charge made against Cox was true, or any other fact that would defeat his recovery. The words used by Robertson were actionable per se, and, if no defense was offered damages for some amount would follow as a matter of course. If in such a case evidence would be admissible to show that the plaintiff sustained no injury, which, by the way, the case of *Belo v. Fuller*, 84 Tex. 452, 19 S. W. 616, 31 Am. St. Rep. 75, holds to the contrary, it is sufficient answer to say that nothing of the kind was offered. Robertson had called Cox a thief, and he was threatening to sue him for damages. He prevailed upon his friend Gibson to see Cox with a view of settlement or compromise. He interviewed Cox, and was unsuccessful. Thereafter Robertson executed to his wife the deed in question with the expressed and avowed intention to defeat a collection of the claim of Cox, a demand which the evidence shows Robertson recognized existed, and which the evidence tends to show was asserted by Cox. The evidence is silent upon the question as to whether Cox instituted against Robertson an action of slander, but, if he failed to do so, such fact would not affect the nature and effect of the transaction resulting in the conveyance, if the purpose was to defeat a real and meritorious claim.

Therefore we think there was no error in treating the conveyance as executed by Robertson for the purpose of defrauding the creditors; and, such being the case, neither he, if living, nor his heirs who now assert under him, could attack it.

We find no error in the record, and the judgment is affirmed.

1. TAXATION (§ 689*)—SALE FOR TAXES—PROCEEDINGS ON — MOTION TO SET ASIDE — FINDINGS.

Though, in a tax suit on the hearing of a motion to set aside a sale of a lot for taxes on the ground that the sheriff failed to notify an attorney of the date of the sale as agreed, the court's direction to the sheriff to give no promise to notify attorneys in the future seems inconsistent with a finding that none had been given in the case in question, it was not equivalent to a direct finding that the sheriff promised to notify the attorney as was claimed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 689.*]

2. APPEAL AND ERROR (§ 1010*)—REVIEW—MOTION TO SET ASIDE EXECUTION SALE—WEIGHT OF EVIDENCE.

A motion to set aside an execution sale lies on the law side of a court, and the evidence taken at the hearing cannot be weighed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

3. EXECUTION (§ 247*)—SALES—GROUNDS FOR SETTING ASIDE IN GENERAL.

Execution sales may be set aside on motion for about the same reason as judicial sales in the strict meaning of the words may be.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 687-695; Dec. Dig. § 247.*]

4. TAXATION (§ 689*)—INADEQUACY OF PRICE — GROUND FOR SETTING ASIDE SALE FOR TAXES.

Though for inadequacy of price a sale on execution will not be set aside, gross inadequacy is a circumstance to be considered.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 689.*]

5. EQUITY (§ 4*)—"ACCIDENT OR SURPRISE."

Accident or surprise, as used in equity jurisprudence, embraces not only various forfeitures due to accidents in the popular sense, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of negligence or misconduct of the party.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 13, 20; Dec. Dig. § 4.*]

6. EQUITY (§ 4*)—"ACCIDENT."

Accident is an unforeseen and unexpected event, occurring external to the party affected by it and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 13, 20; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 1, pp. 70-71.]

7. EQUITY (§ 4*)—"ACCIDENT"—"SURPRISE."

The word "surprise" is used interchangeably with "accident" to designate the emer-

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6818, 6819.]

8. TAXATION (§ 689*)—SALE FOR TAXES — GROUNDS FOR SETTING ASIDE.

Where, owing to a misunderstanding, an attorney fully believed he was to be notified by the sheriff of a sale on execution for taxes of his client's lot, and was thereby led to make no further inquiry, or watch for advertisement of the sale made for an inadequate price, it should be set aside.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1381; Dec. Dig. § 689.*]

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Tax suit by the State, on the relation of J. H. Hartley, against Belle Innes and others. From a judgment overruling a motion to set aside a sale of a lot under the judgment for delinquent taxes, defendants appeal. Reversed.

J. P. McCammon, for appellants. J. W. Goad, for respondent.

GOODE, J. Appeal from a judgment overruling a motion to set aside an execution sale of a lot in the city of Springfield under a judgment for the amount of the delinquent taxes on the lot for the year 1902, rendered against Rosina I. Kellett and 29 other defendants, as the heirs of Susan Ann Innes, deceased. The tax suit was permitted to correct a flaw in the title, and the attorney for Mrs. Kellett looked after the case, wrote the execution on the judgment, had it put in the hands of the sheriff to advertise and sell the property, and told said officer he (said attorney) wished to be present at the sale, which would occur during the September term of the circuit court, 1905. During the term the attorney for the heirs went to the sheriff's office and asked a deputy once or twice or the sheriff or both if a day had been fixed for execution sales for taxes, and was told no day had been fixed. According to the attorney, the deputy agreed to notify him when a sale day was fixed so he (the attorney) could be present and bid in the property for his client, and the attorney, relying on this promise, which was not kept, failed to attend the sale and the property was sold to other parties for \$100, or less than one-fifth its conceded value. A motion was filed in the circuit court before the purchasers had paid their bid to set aside the sale, and was overruled after a hearing. The testimony of the deputy sheriff and that of the attorney for Mrs. Kellett agreed regarding inquiries by the attorney about

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

when the sale would take place; but the deputy denied promising to notify the attorney of the day of the sale. On the sale day a man called the deputy's attention to the fact that Mrs. Kellett's attorney was interested in the sale, and the deputy said he did not speak to or telephone said attorney after being told this, because he supposed the latter would be present at the sale. The attorney testified he did not see the published advertisement of the sale, and knew nothing of notice having been given until after the property had been sold; that he was diligent in inquiring at the sheriff's office, but; after the deputy promised to notify him of the day of sale when it was fixed, he relied on the promise, and gave no further attention to the matter. When appellant's attorney testified to the promise by the deputy, the court said: "Mr. Sheriff, you must not hereafter make any promises to notify attorneys, nor notify them of the time of sale under execution. Let the notice that is published be the only notice given. It is the business of attorneys to look after the executions in which they are interested."

Without conceding the sale should be set aside if the sheriff or his deputy promised to inform Mrs. Kellett's attorney the date it would occur, the attorney for the purchasers argues that, as the motion to set aside was overruled and the facts were not expressly found or declarations of law given, the court below must be presumed to have found the promise was not made. The court's direction to the sheriff to give no promise to notify attorneys of the dates of execution sales in the future seems rather inconsistent with a finding that none had been given in the present instance, and suggests the motion was determined against appellant for some other reason. But this remark was not equivalent to finding positively the attorney had been promised, and we must dispose of the appeal on the assumption the court below found he had not been. We do this in deference to the decision of the Supreme Court in *Holden v. Vaughan*, 64 Mo. 588, that a motion to set aside an execution sale lies on the law side of a court, and the evidence taken at the hearing of such a motion cannot be weighed on appeal. The extent of the contention for the purchasers upon this point is that the court below found the deputy gave no promise, and not that the attorney was without a belief or impression to the contrary. It is palpable if no promise was given, there was a misunderstanding between the deputy and the attorney, and that the latter fully believed he was to be notified, acted on the belief, and was thereby led to make no further inquiry or watch for an advertisement of the sale. The testimony is uniform that he inquired one or more times whether a day for execution sales had been fixed, and was known by the sheriff and his deputy to be interested in the sale of the premises. In the course of the con-

versations which occurred, if no definite promise was made by the deputy to let him know when the sale would occur, the attorney might have gathered the opposite impression without being so remiss in the discharge of duty as to deprive his client of the relief to which otherwise she would be entitled. We say this because careful men often misapprehend the substance and effect of conversations over business affairs, and it is manifest the attorney could have understood the deputy would notify him of the day of sale from statements made by the latter which were not meant as a promise. Such workings of two minds at cross-purposes are common, and would justify our ruling if there were no apposite precedents; whereas there are many, as will be seen *infra*.

The question for decision comes down to this: Considering all the facts we have stated, including the purpose of the tax suit, the sacrifice of the property at less than one-fifth of its value, the prompt move to set aside the sale before the purchase money had been paid or the sheriff's deed executed, and that it is possible to do so without causing loss to the purchasers, can a court grant relief consistently with settled legal doctrines? Execution sales may be set aside on motion for about the same reasons judicial sales in the strict meaning of the words may be. The reason of this rule is that on motion a court can control its own process to prevent injustice. *Ray v. Stobbs*, 28 Mo. 35; *McKee v. Logan*, 82 Mo. 524, 528; *Bryant v. Russell*, 127 Mo. 422, 30 S. W. 107; *Rogers & Baldwin Hardware Co. v. Building Co.*, 132 Mo. 442, 34 S. W. 57, 31 L. R. A. 335, 53 Am. St. Rep. 494; 2 Freeman, Executions (3d Ed.) § 308. Though the rule prevails in this state that these motions must be heard and determined according to legal procedure, it is none the less true that equitable principles are applied to the facts to ascertain whether the sale should stand or be vacated, as is shown in the cases just cited and those to be cited. Gross inadequacy of price is a circumstance of weight; for, though the courts have professed on numberless occasions they would not vacate a sheriff's sale for this reason, the judgments actually pronounced by them show their bark is worse than their bite in these matters. When the inadequacy of the bid was very great, some circumstance of irregularity, mistake, fraud, or injustice was searched for diligently and usually found, which enabled the court to prevent confiscation. In *Idw. Co. v. Building Co.*, 132 Mo., loc. cit. 462, 34 S. W. 57, 31 L. R. A. 335, 53 Am. St. Rep. 494, the dissenting opinion declared inadequacy of price was usually no ground for setting aside sheriff's sales which had become final, but that this was not more than a half truth as applied to the review of such a sale upon motion made before it had become a finality, and that re-

mark expresses what is even more strongly the doctrine of the majority opinion. In *Davis v. McCann*, 143 Mo. 172, 44 S. W. 795, a proceeding in the nature of a suit in equity to set aside a sheriff's sale of land, and controlled by the same principles which ought to be applied to the present motion, the Supreme Court said inadequacy of price alone would not justify setting aside sales of lands under executions unless the price was so low as to shock the moral sense and outrage the conscience; but, if it was, the courts would interfere for justice. In *Holdsworth v. Shannon*, *infra*, it was said "inadequacy of price without more, unless so gross as to shock the moral sense," would not suffice as ground to set aside a foreclosure or execution sale. Notwithstanding those expressions, we consider that other decisions leave the question unsettled in this state. As additional facts are available for the ends of justice in the present matter, we will follow the fashion of other courts in similar cases, and refrain from resting our decision in favor of appellant on the single circumstance that the property was sacrificed. The element of accident or surprise is in the case in the meaning of those terms as used in equity jurisprudence, which embraces not only various forfeitures due to accidents in the popular sense, "but such unforeseen events, misfortunes, losses, acts or omissions as are not the result of any negligence or misconduct of the party." 1 Story, Eq. Jur. § 78. According to the definition of another eminent writer, accident "is an unforeseen and unexpected event, occurring external to the party affected by it and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain." 2 Pomeroy, Eq. Jur. (3d Ed.) § 823. A standard illustration of "accident" in this sense is the payment by an executor of legacies under the mistaken belief there will be sufficient assets of the estate left to meet its obligations, when, unless negligence or bad faith can be imputed to him, he will be allowed to recover of the legatees. 2 Pomeroy, § 837, par. 5, and cases cited in the notes. The word "surprise" is used interchangeably with "accident" to designate such emergencies; both words signifying a detrimental condition or situation wherein a party is placed unexpectedly, and against which ordinary prudence would not have guarded. 1 Am. & Eng. Ency. Law (2d Ed.) 278; *McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312. This ground of relief has been utilized by courts in setting aside execution and judicial sales upon the motion or at the suit of parties who were prevented by some misunderstanding

or mistake of theirs, or their agents or attorneys, from being present to protect their interests; and that, too, in cases where the misapprehension or other fortuity could not be laid at the door of either the officers conducting the sale or the purchasers, but was due to an erroneous belief or impression of the petitioner for relief or his attorney, for which no one was to blame. A reading of the opinions cited *infra* will demonstrate that the doctrine we have stated has been sanctioned by eminent masters of jurisprudence in judgments rendered on facts practically identical with those before us, the prices having been no more shocking or the fault of the complainant less, and wherein the decision was put squarely on the ground that the party moving against the sale had been prevented by surprise or accident from learning when or where it would occur. We refer particularly to the eight authorities first cited, which are from outside jurisdictions, and to *Holdsworth v. Shannon*, 113 Mo. 508, 21 S. W. 85, 35 Am. St. Rep. 719, wherein their doctrine was approved by our Supreme Court, as it ought to be if justice is to be preferred to opportunism in these controversies. *Seaman v. Riggins*, 2 N. J. Eq. 214, 34 Am. Dec. 200; *Howell v. Hester*, 4 N. J. Eq. 266; *Wetzler v. Schaumann*, 24 N. J. Eq. 60; *Williamson v. Dale*, 3 Johns. Ch. (N. Y.) 290; *Bixley v. Mead*, 18 Wend. (N. Y.) 611; *Tripp v. Cook*, 26 Wend. (N. Y.) 143; *Hoppock v. Conklin*, 4 Sandf. Ch. (N. Y.) 532; *Griffith v. Hadley*, 10 Bosw. (N. Y.) 587; *Hdw. Co. v. Build. Co.*, 132 Mo. 442, 34 S. W. 57, 31 L. R. A. 335, 53 Am. St. Rep. 404; *McKee v. Logan*, 82 Mo. 524; *Am. Wine Co. v. Scholer*, 13 Mo. App. 435, 85 Mo. 496; *Grafham v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 636, 29 L. Ed. 839; *Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721; *Rorer, Judicial Sales* (2d Ed.) § 1095.

We have examined the cases cited for the purchasers, chief of them being *Meir v. Zelle*, 31 Mo. 331, and *Bailey v. Smock*, 61 Mo. 213, and find nothing therein which stands in the way of relief to appellant. In the first named there appears to have been no evidence to prove the attorney of the land owner had been misled concerning the sale, and it was distinctly stated he had not been. The other case did not involve the point of law in hand, but was an action against an indorser for a balance left due on a promissory note after foreclosure of a mortgage given to secure it. The indorser set up the defense that the indorsee had agreed to notify him of the date the foreclosure sale would occur and had not done so, and the question was whether this averment constituted a defense.

The judgment is reversed and the cause remanded to be proceeded with in accordance with this opinion. All concur.

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KLIX et al. v. POLISH ROMAN CATHOLIC ST. STANISLAUS PARISH et al.

(St. Louis Court of Appeals. Missouri. April 6, 1909.)

1. RELIGIOUS SOCIETIES (§ 21*)—PROPERTY—DIVERSION.

Lots conveyed to a Roman Catholic archbishop in trust for the congregation of a certain church or parish could not be diverted from the purposes of the trust, and must be applied according to the terms of the settlement, and, either in their original or some converted form, devoted to the pious uses of the congregation, whether the title continued in the original trustee, or was conveyed by him to an incorporated society.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 144, 145; Dec. Dig. § 21.*]

2. RELIGIOUS SOCIETIES (§ 1*)—INCORPORATED SOCIETIES—STATUS—"CIVIL BODIES POLITICAL."

Incorporated religious societies are, in this country, "civil bodies politic," and are amenable to the ordinary courts of the state, and governed by the statutes under which they are organized, so far as statutory regulations are prescribed.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. RELIGIOUS SOCIETIES (§ 4*)—INCORPORATION—COLLATERAL ATTACK.

While the establishment of religious corporations, except to hold title to such real estate as may be prescribed for church edifices, etc., is forbidden by Const. 1875, art. 2, § 8 (Ann. St. 1906, p. 131), the validity of the incorporation of a religious society cannot be questioned collaterally by a private suitor; the appropriate remedy being by quo warranto at the suit of the Attorney General, or perhaps a prosecuting attorney.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 10; Dec. Dig. § 4.*]

4. CORPORATIONS (§ 56*)—BY-LAWS—BY WHOM ADOPTED.

The by-laws of a corporation must be adopted by the members of the corporate body, and cannot be by the directors unless the charter or fundamental law so provides.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 152; Dec. Dig. § 56.*]

5. CORPORATIONS (§ 281*)—DIRECTORS—HOW CHOSEN.

The directors of a corporation must be chosen by the members—that is, by the corporators—unless the latter have authorized some other mode of choice which the law will tolerate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1187; Dec. Dig. § 281.*]

6. RELIGIOUS SOCIETIES (§ 12*)—JUDICIAL SUPERVISION.

When a church has been incorporated, the regulations and customs of the communion to which it belongs regarding the disposition of secular business will be respected by the courts as far as possible; and, if the mode of government in force in the denomination at large is not by congregations, but by superior clerical personages, assemblies, synods, councils, or consistories, the authority of these will not be displaced, if it can be upheld consistently with the laws of the sovereignty.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 88; Dec. Dig. § 12.*]

7. RELIGIOUS SOCIETIES (§§ 12, 23*)—JUDICIAL SUPERVISION—PROPERTY—RIGHTS OF MEMBERS.

Where a schism occurs in a congregation over a tenet of faith, and two factions claim

the church property, it will be awarded to the one adhering to the original doctrines of the church, and the decisions of the church judicatories as to what these doctrines are will be accepted by the civil courts, when such judicatories exist and have authority to decide; the civil courts being concerned with points of faith only when they must be ascertained in order to know where the property belongs.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 88, 147-153; Dec. Dig. §§ 12, 23.*]

8. RELIGIOUS SOCIETIES (§ 7*)—PROPERTY—RIGHTS OF MEMBERS.

Const. 1865, art. 1, § 12, provided that by a general law any religious society might become a body corporate for the purpose of acquiring land required for a house of worship, etc., "and contracting in relation to such land through a board of trustees selected by themselves." Const. 1875, art. 2, § 8 (Ann. St. 1906, p. 131), declaring that no religious corporation can be established in this state except those created under the general law for holding title to real estate for church edifices, etc., does not provide for management of the property of a religious society by a board selected by themselves. Rev. St. 1879, § 970 (Rev. St. 1899, § 1394 [Ann. St. 1906, p. 1103]), provides that any three or more persons may associate themselves, by written articles of agreement, as a society formed for religious, etc., purposes, and become a corporation. Section 1895, Rev. St. 1899 (Ann. St. 1906, p. 1104), provides for the submission to the circuit court of the articles, with a petition for a pro forma decree, and declares that, as soon as the decree is granted, the Secretary of State must issue a certified copy of the articles, etc., and "thereupon the petitioners, their associates and successors shall be a body politic." Section 1397, Rev. St. 1899 (Ann. St. 1906, p. 1105), enumerating the classes of associations which may be organized under the article, includes "any association, congregation or church organization formed for religious purposes." Section 1400, Rev. St. 1899 (Ann. St. 1906, p. 1106), provides that corporations may be formed under the article to execute any trust whose purpose is within the purview of the article, and may take, by deed or devise, property for the uses of the trust, and execute the trust so created. Held that, in view of legislative history, and of the fact that in the Roman Catholic communion the title to church possessions is vested in the bishops, who manage them either directly or through the parish priest, without participation by the congregation, where property conveyed to an archbishop in trust for a congregation was by such trustee conveyed to a religious corporation organized by certain members of the congregation, the other members were neither members of the corporation, nor entitled to a decree conferring membership on them.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 24; Dec. Dig. § 7.*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Suit by Leon Klix and others against the Polish Roman Catholic St. Stanislaus Parish, a corporation, and others. From a judgment dismissing the bill, plaintiffs appeal. Affirmed.

Mackay & Mackay, for appellants. Daniel Dillon, for respondents.

GOODE, J. On February 29, 1883, an incorporated religious society, styled the "Franciscan Fathers of the State of Mis-

ouri," by a deed duly executed, conveyed to Peter Richard Kendrick, archbishop of the city of St. Louis, certain described tracts of land in said city "in trust for the congregation of St. Stanislaus of the city of St. Louis and assigns forever," the said Franciscan Fathers covenanted that they and their successors would warrant and defend the title to the premises unto the said party of the second part (Archbishop Kendrick) and unto his successors in trust and assigns forever. This deed recited a consideration of \$12,000, but, according to the evidence, no consideration was paid. The cestui que trust, the congregation of St. Stanislaus, is composed of Polish communicants of the Roman Catholic Church, residing in St. Stanislaus parish in the city of St. Louis, and who are members of a certain church in said parish. The pastor or priest of the parish in 1885 was Rev. Urban Stanowski, and he has been the incumbent ever since. At the origin of the controversy which gave rise to this litigation the congregation was a large and wealthy one, we understand, consisting of nearly 2,000 members, owning property, including a church and a parochial school building, valued at about \$300,000, and receiving and dispensing annual revenues amounting to \$7,000 and upwards. The buildings were erected with contributions from the members, and the yearly income is collected in the same way. The congregation maintained a parochial school, and perhaps other auxiliary enterprises. In 1891 a new church house was to be erected, at a cost which made it necessary to borrow money, and it was deemed best to form a corporation to take and secure the loan. Rev. Urban Stanowski, the pastor, announced the purpose to do this to the congregation, and no one objected, though it is not in proof that a vote was taken on the question. Said Stanowski and five other members of the congregation, selected by him, to wit, Joseph Olszewski, John Grabowski, Josef Grabowski, Michal Werozynski, and Wlodyslaw Pilinski, signed a document styled "Articles of Agreement of the Polish Roman Catholic St. Stanislaus Parish," and declared in the preamble they had associated themselves for the purpose of forming a religious association, and had agreed on what followed in said articles as a constitution. The first article of the constitution merely said the name of the association should be the Polish Roman Catholic St. Stanislaus Parish. The second declared the purpose of the association should be to unite in a church congregation Polish Roman Catholics, maintain a Polish Roman Catholic Church, encourage attendance at Roman Catholic religious services, attendance at lectures of a religious, scientific, or educational character, and maintain a parochial school. The third article declared the business meetings of the association

should be held at the residence of the priest of the parish at such times as might be determined by the by-laws to be adopted by the association. These three articles, which constituted the articles of agreement and also the constitution of the proposed society, were submitted to the circuit court with a petition praying for a pro forma decree of incorporation, and in due time a decree was entered. The articles of agreement, with the proper certificate from the clerk of the circuit court and the recorder of deeds, were filed in the office of the Secretary of State, and the latter issued a certified copy of the same as the charter of the corporation. This business was concluded May 2, 1891, and on May 8th Archbishop Kendrick, as trustee for the congregation of St. Stanislaus, executed a deed to the "Polish Roman Catholic St. Stanislaus Parish, a corporation organized under the laws of the state of Missouri," conveying to said corporation all the properties which had theretofore been conveyed to him by the Franciscan Fathers in trust for the said congregation. The deed to the corporation recited the former conveyance by the Franciscan Fathers in trust to Archbishop Kendrick, and that the corporation was "successor to the rights of the cestui que trust, the congregation of St. Stanislaus."

The six men who had petitioned for incorporation adopted certain regulations, part of which are styled "Charter" and part "By-laws," but all of them are at the most merely by-laws; for the statutes of the state and the articles of agreement constitute the charter of the society. It is enough to state concerning the adopted regulations that they provided for the government of the corporation by six directors, to be appointed by the archbishop of St. Louis; for the filling of vacancies in the board by him; the adoption of by-laws and the election of new members of the corporate body by the directors; and that all the powers of said board should be exercised in conformity to the discipline and usages of the Roman Catholic Church, and such regulations as might be established from time to time for the good of said church. Broad powers were vested in the priest of the parish as president of the board, and primarily he and the directors control the corporation, but ultimately the archbishop of the diocese, by virtue of his authority to appoint the directors. The members and officers of the body politic must be members of the St. Stanislaus congregation. These defendants, except one of them, have continued as directors of the corporation, managed its affairs, and dealt with its property as they deemed best, without interference from the members of the congregation. In truth the evidence shows Rev. Urban Stanowski, the pastor, has dominated directly the entire management of the temporal and spiritual affairs of the church,

and through him the archbishop of the diocese of St. Louis. Once a year the pastor would read a statement of the receipts and disbursements to the congregation, but he did not hold himself responsible to them, nor bind himself to make a report. In 1904 many members of the parish became dissatisfied with the parish school, believing the teachers, who were members of a certain sisterhood, were inefficient. These teachers were removed, and others substituted in their places. Nevertheless dissatisfaction continued, and it was aggravated by the refusal, in that and the succeeding year, to allow the St. Stanislaus society to commemorate, as it theretofore had done, one of the Polish national anniversaries in the hall of the parish. Plaintiffs, and those who sided with them, held they were entitled to vote for directors, have a voice in the management of the affairs of the church, the disposition of its funds, and, in short, have the board of directors elected by, and represent, the wishes of the majority of the congregation. These matters the pastor refused to concede, and the outcome of the controversy was the institution of the present suit in equity, wherein the plaintiffs allege, *inter alia*, they have been unlawfully excluded from the meetings of, and their rights in, the corporation, and from holding an election of officers and trustees; further allege all the defendants, except Father Stanowski, are ignorant, incompetent, and unfit to act as trustees, have turned over to the pastor the entire management of the affairs of the church and have been unduly influenced by him in all matters; that the parish school was formerly flourishing, but is now in a ruinous condition, and they have been deprived of the use of the church and buildings for corporate purposes; that they are remediless at law, and relievably only in a court of equity, and pray that each and every paragraph of the charter and by-laws be declared null and void; the board of directors be enjoined from further enforcing the by-laws, and conducting the business of the corporation according to them; from further acting as directors and trustees; that the court order a meeting of the members of the congregation, to be held to adopt suitable by-laws and elect proper officers; and for other and proper relief. Plaintiffs say they prosecute this suit in behalf of many members of the congregation who have contributed to the expense of prosecuting it, and all other members who have like interests and have elected to share in the benefits of the suit; it being alleged the dissident members are too numerous to be joined as plaintiffs, and, indeed, that some 1,200 or 1,300 out of a total membership of more than 1,600 are in sympathy with the plaintiffs and their cause. No misuse of the funds of the church, either fraudulently or carelessly was proved, and the grievances

complained of finally come down to this contention: Plaintiffs are entitled to be recognized as members of the corporation, have a voice in making its by-laws, choosing its directors, and generally in governing the church. At the conclusion of the evidence the court below held plaintiffs were not members of the corporation; that the charter of the society transcended the provisions of the Constitution of the state, and hence plaintiffs were not entitled to be declared members, because the court would not decree a man should enter a corporation created in violation of the Constitution. Thereupon the bill was dismissed, and plaintiffs appealed.

As will be perceived from the stated facts, this controversy did not grow out of a schism over questions of faith, but out of dissensions regarding the temporal affairs of the parish, including the use of the buildings and the conduct of the parochial school. These disagreements finally developed in plaintiffs a consciousness of the sole grievance they ask to have redressed, namely, that they are excluded from participation in the government of the incorporated society. The evidence introduced by the parties was not directed toward proving the church economy of the Roman Catholic communion, but nevertheless this was revealed in large measure, and in our judgment must have much to do with the disposition of the appeal. The evidence indicates that the Franciscan Fathers settled the lots conveyed to Archbishop Kendrick in trust for the congregation of St. Stanislaus; and, if this is true, they cannot be diverted from the purposes of the trust. We do not mean they can never be sold or otherwise disposed of in any exigency, and their proceeds devoted to the trust, but simply that, like all other properties settled to specific charitable uses, and for a designated class of beneficiaries, they were to be applied according to the terms of the settlement, and, either in their original or some converted form, consecrated to the pious uses of the congregation of St. Stanislaus, no matter whether the title continued in the original trustee, Archbishop Kendrick, and his successors in the St. Louis diocese, or, as happened, was conveyed to an incorporated society. *Atty. Gen. v. Pearson*, 3 Mer. 352; *Gram v. Society*, 36 N. Y. 162; *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415; *Venable v. Coffin*, 2 W. Va. 310; *Gibson v. Armstrong*, 7 B. Mon. (Ky.) 481; *Kynett, Laws Relig. Corp.* 88.

Unless the contention of these plaintiffs that they and the other members of the congregation should have a voice in the control of the property is to prevail, the courts could not interfere with the trust, except to prevent a diversion of the property to other uses, or mismanagement and waste. These things would be done upon the solicitation of the proper parties, and in a proper proceed-

ing; but who might sue, or in what forum, is not for inquiry on the present appeal, because no abuses of management were proved. Yet the extent of the relief plaintiffs could have obtained if the title to the property had remained in the archbishop of St. Louis ought to be remembered. They might have invoked the appropriate civil court to check maladministration, but could not have been awarded participation in the administration; could not have been made, in effect, co-trustees, at least, unless the laws and usages of the Roman Catholic denomination entitled them to participate; and the evidence tends to prove they do not. Hence, if the successive archbishops had handled the property discreetly, and for the purposes for which it was donated or acquired, the members of St. Stanislaus parish would have suffered no wrong of either legal or equitable cognizance. Therefore the question confronting us is whether the rights of said members were enlarged by incorporating; whether passing the title to a body politic, which Archbishop Kendrick, in order to acquire corporate advantages, caused to be organized under our statutes for the incorporation of religious societies, conferred on the members of the congregation membership in the corporation, with the concomitant privileges to adopt by-laws, elect directors, and share in controlling the temporalities of the parish. The correct decision of this question depends entirely on a sound interpretation of the pertinent statutes. This is true because incorporated religious societies are, in this state and nation, civil bodies politic, and unlike the ecclesiastical corporations of England, which are composed only of clericals, such as archbishops, deans, monks, and abbots, and amenable only to spiritual courts. Incorporated societies like the Polish Roman Catholic St. Stanislaus Parish, being civil institutions, are amenable to the ordinary courts of the state, and governed by the statutes under which they are organized, so far as statutory regulations are prescribed. 1 Blackst. 470; Robertson v. Bullions, 9 Barb. (N. Y.) 64, 87; Id., 11 N. Y. 243; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84; West Koshkonong v. Ottesen, 80 Wis. 62, 49 N. W. 24; Holm v. Holm, 81 Wis. 374, 51 N. W. 579; Spiritual, etc., Temple v. Vincent, 127 Wis. 93, 105 N. W. 1026; Wilson v. Livingston, 90 Mich. 594, 58 N. W. 646; Calkins v. Cheney, 92 Ill. 463.

To clear the way for the decision of the point of law more directly at issue, we will state first some propositions of indirect relevancy. The establishment of religious corporations, except to hold title to such real estate as may be prescribed for church edifices, parsonages, and cemeteries, is forbidden by the Constitution of the state. Const. 1875, art. 2, § 8 (Ann. St. 1906, p. 131); Lilly v. Tobbein, 103 Mo. 477, 488, 15 S. W. 613, 23 Am. St. Rep. 887. But the validity of the incorporation of a religious society cannot be drawn into question by a private suitor

in a collateral proceeding. The appropriate remedy is by writ of quo warranto at the suit of the Attorney General, or perhaps a prosecuting attorney. Catholic Church v. Tobbein, 82 Mo. 418; St. George Church Soc. v. Branch, 120 Mo. 226, 243, 25 S. W. 218; Reorganized Church, etc., v. Church (C. C.) 60 Fed. 937; Dubs v. Egil, 167 Ill. 514, 47 N. E. 766. The by-laws of a corporation must be adopted by the members of the corporate body, and cannot be by the directors unless the charter or fundamental law so provides. Carroll v. Sav. Bank, 8 Mo. App. 249; Sav. Inst. v. Nixon-Jones Printing Co., 25 Mo. App. 642; Albers v. Merch. Exch., 39 Mo. App. 583; Watson v. Printing Co., 56 Mo. App. 145; Trust, etc., Co. v. Lumber Co., 118 Mo. 447, 24 S. W. 129. And the directors of a corporation must be chosen by the members—that is, by the corporators—unless the latter have authorized some other mode of choice which the law will tolerate. Angell & Ames, Corporations (11th Ed.) c. 9, § 277. Our statutes say every religious corporation shall make by-laws for its government and support, and the management of its property, and shall provide how new members are to be admitted, and prescribe their qualifications, unless the charter does so. Rev. St. 1899, § 1403 (Ann. St. 1906, p. 1106). The by-laws of the incorporated body denominated "Polish Roman Catholic St. Stanislaus Parish" were adopted by the six persons who signed the articles of agreement, and these by-laws authorized the appointment of directors by the archbishop of St. Louis. As the statutes left the adoption of by-laws to the members, if the six men who subscribed the articles of agreement composed the entire membership of the corporate body, they had power to enact by-laws, and to say how directors should be elected, inasmuch as no statutory method is prescribed. On the contrary, if all the communicants of the congregation of St. Stanislaus became members of the corporation by force of the statutes, and simultaneously with the act of incorporating, those members had the right to frame by-laws and fix the method of choosing directors. In the latter contingency no office of director has been created; for such an office is provided for only in the by-laws, and these were a nullity if enacted by but a remnant of the membership. We incline to the opinion that members of an incorporated religious society who are deprived of their privileges by usurpers may invoke the writ of injunction to redress the wrong, and cases in support of this practice will be cited; but, as our decision of the present cause is to rest on another ground than the form of procedure, it is unnecessary for us to treat of the latter. 1 Thompson, Priv. Corp. §§ 906, 911.

From what has been said it will be apparent that the decision must turn on whether all the members of the congregation were members of the corporation, or none were members of the latter body except the six

country, following the New York Court of Appeals in the cases cited supra, have held that when a corporation is formed for religious purposes, every one who belongs to the congregation becomes, by force of the statutes, a member of the corporation, even though a few individuals are named in the charter as trustees or directors, and that document is issued to them. The pioneer opinion on the subject, which was the one delivered in *Robertson v. Bullions* held the majority of a congregation could control the secular affairs of the church, and even retain possession and enjoyment of the temporalities after abjuring the creed of the sect, against a minority which adhered to the creed. Otherwise stated, the effect of said decision and others like it, is this: A church or congregation by incorporating is constituted a civil political institution composed of the members of the congregation, and the sovereignty of the body, so to speak, vests in, and remains with, the majority, regardless of whether they adhere to the orthodox faith of the sect and continue in fellowship with its synods, presbyteries, or other governing bodies, or become heretical and recusant. It is believed all the statutes on which the courts pronounced in those cases made the members of the congregation corporators either by express words or reasonable implication, thereby excluding, as was thought, any different construction. Manifestly, under such a doctrine, the bare act of organizing a legal body to take title to real property, and attend to such business affairs as the law intrusts to corporations, might operate disastrously on the enjoyment of the property by the orthodox members of a congregation, if a schism arose and the dissenters were the more numerous, and might radically alter the mode of conducting secular affairs if no doctrinal disagreement occurred, and every one preferred the denominational mode.

In view of the general spirit of religious tolerance prevailing in this nation likely the Legislatures of the states where the statutes in question were enacted never intended such consequences which came to pass from a careless use of language, or, perchance, an extreme construction of the acts, as was said in *Isham v. Trustees*, 63 How. Prac. (N. Y.) 465. At all events, the original statute of the state of New York worked so badly as to induce changes whereby various religious denominations, with diverse forms of church government, were enabled to incorporate their separate churches, without necessarily making the members of the congregations corporators, or conferring control on the majority of the congregation, and thus it became possible to incorporate a

cited chapter, which authorizes a Roman Catholic church to incorporate by a certificate executed and acknowledged by the archbishop and vicargeneral of the diocese, the rector of the parish, and two laymen chosen by those officials, and says these trustees shall constitute a self-perpetuating body. Distinct statutes were enacted for incorporating churches of the Presbyterian, Episcopal, Dutch Reformed, and perhaps other communions; the purpose being to provide for the creation of organic bodies in the different sects, and at the same time permit the internal economy of the churches to continue according to the usual methods, instead of arbitrarily superseding it. By this means all legal and business benefits to be derived from organizing under the statutes are afforded a congregation, without forcing it to submit to a form of control alien to the essential character of the communion, and out of harmony with its general usages.

The later statutes of New York were enacted around the year 1875, and it is of some significance that, beginning at the same time, changes suggestive of a similar purpose were made in our laws on the subject of religious societies, as will be shown infra. In *Isham v. Trustees*, contrary to the doctrine of the earlier cases, the court declared the majority of a congregation could not divert the temporalities from the objects to which they were originally devoted, and that the trustees were bound to hold them for the benefit of, and according to the rules, discipline, and usages of, the denomination, and in truth the statutes so provided. The change of legislative policy was commented on in *First Reformed Church v. Bowden*, 10 Abb. New Cas. (N. Y.) 3, where it was said that, prior to the new statutes, the courts paid no attention to the faith or usages of a denomination, and would not enforce any ecclesiastical law or rule of church government; that in at least one particular such bodies did not have the ordinary rights of a business company; for the courts would interfere to prevent a diversion of business assets, but not ecclesiastical assets. Still further construing the later laws, the New York Court of Appeals, in *People's Bank v. Catholic Church*, 109 N. Y. 512, 17 N. E. 408, said that under them the members of a congregation became, in a sense, members of the corporation; but nevertheless in an incorporated Roman Catholic Church, the trustees were invested with exclusive power to manage and control the corporation, and were self-perpetuating and independent of the congregation. Sometimes it will be very useful for churches to incorporate in order to transact their secular

them the Roman Catholic, are of world-wide extent and vast membership, with congregations, parishes, and established hierarchies and councils in every land. For ages they have observed a uniform polity, not only in spiritual matters, but in the transaction of secular business and the management of their properties. To force upon them an unaccustomed economy would introduce confusion and embarrassment; whereas to refuse them corporate capacity, except on the condition of renouncing their customs, would be illiberal treatment by the state. The record indicates that in the Roman Catholic communion, the titles to church possessions are vested in the bishops and archbishops, who manage them, either directly or through the parish priests, and without participation by the congregation. A statutory alteration of the form of church government may not constitute interference with matters of faith, yet, nevertheless, the right of every religious sect to preserve the peculiar economy it prefers, and perhaps has obeyed immemorably, touches closely, if it is not part of, that religious freedom which American Constitutions guarantee. Const. Mo. 1875, art. 2, §§ 5, 6, 7 (Ann. St. 1906, pp. 130, 131).

This truth was admirably set forth in the opinion of the Court of Appeals of South Carolina in the cognate case of *Harmon v. Dreher*, Speer's Eq. 87, 123, wherein, in answer to the argument that the congregation should govern, the court said, if it was the case of a Congregational church, this might be true, because, if the congregation had been so incorporated, it would be according to the very terms of the association that the majority should govern. "But if the incorporation of the church as a Lutheran church imports what has been stated in evidence, it would be a breach of all liberty, as well as of faith, that the majority should impose a new contract upon the minority. Suppose a majority should next year spring up in favor of the Roman Catholic or Mohammedan religion, and introduce auricular confession and indulgences, or the Koran, into this congregation, would not these defendants, however small a minority they might form, see and feel that their liberties were trampled on, by so gross a violation of the contract of association contained in their charter? The truth is that liberty is violated wherever contracts are infringed, as much where the infringement consists in the provision of a charter as where a majority of mercantile copartners choose to make their will, and not their articles, the rule of their conduct; as much where the charter is to a religious body as where it is to a civil corporation." It would be tyrannical to

such a course is required in order to safeguard some paramount policy of the state; and we do not see that the weal of the public in this commonwealth would be threatened by tolerating different kinds of church government any more than it is by tolerating different creeds and devotional rites. Moreover, the property conveyed by the Franciscan Fathers was granted by an order of the Roman Catholic Church to a high prelate of said church, in trust for one of its congregations, and, as we may reasonably presume, in the expectation it would be held and administered according to Roman Catholic usages. The evidence proves there is a graded hierarchy in the Catholic Church, extending from the priests of parishes through bishops and archbishops, to the Roman See; and, as said, the higher clericals, and not the congregation, hold title to and manage temporalities.

The courts of the country have been called on often to adjudicate property rights in consequence of divisions in churches and sects, and have expounded the principles of law which ought to govern these rights with learning, wisdom, and serious concern to promote perfect freedom, not only of conscience and creed, but of denominational usages. We cannot review the judgments of eminent tribunals in cases cited *infra* where these questions were considered, but will state what we think is the principle pertinent to the point in present controversy, and deducible from them, looking with more care into the two or three decisions which are most germane. The principle is this: When a church has been incorporated, the regulations and customs of the communion to which it belongs regarding the disposition of secular business will be respected by the courts as far as possible; and, if the mode of government in force in the denomination at large is not by congregations, but by superior clerical personages, assemblies, synods, councils, or consistories, the authority of these will not be displaced if it can be upheld consistently with the laws of the sovereignty. In *Prickett v. Wells*, 117 Mo. 502, 505, 24 S. W. 52, 53, our Supreme Court said: "The people of that society (Christian Church) in the exercise of their religious liberty, had the undoubted right to adopt rules for their own church government, if not inconsistent with the Constitution and laws of the land. In adjusting their respective claims to the use of the church property, as between themselves, the civil courts will give effect to those rules, subject to the qualification just adverted to." That language was copied with approval in *Russle v. Brazzell*, 128 Mo. 93, 112, 30 S. W. 526, 49 Am. St. Rep. 542, and both cases were controversies over church

property. In passing on a similar controversy in an incorporated Presbyterian church, a sect governed by graded assemblies, and not by congregations, the Supreme Court of the United States decided the property was held by the trustees according to the constitution, usages, and laws of the Presbyterian communion. *Watson v. Jones*, 80 U. S. 679, 720, 20 L. Ed. 668. It will be seen, in the report of the decision of the Court of Appeals of Kentucky in the same case (2 Bush [Ky.] 382), that land had been conveyed to three persons and their successors, to be chosen by the congregation, in trust for the Third Presbyterian Church of Louisville. The congregation split into two factions over the question of slavery, and the General Assembly of the denomination ordered an election by the congregation of four additional trustees, plainly to give control of the property to the faction favored by the General Assembly. Said faction elected the new trustees, and the question was whether they were entitled to act. The judgment of the Supreme Court of the United States in their favor was contrary to the judgment of the state Court of Appeals, and its ultimate effect was to award control of the property of the church to the General Assembly, instead of leaving it with the congregation, on the ground that the former body was supreme by the laws of the denomination. The same principle was applied in passing on nearly the identical point, by our Supreme Court in *State ex rel. v. Farris*, 45 Mo. 183. That controversy was over the right of certain persons to act as trustees of Lindenwood College. Those persons had been elected trustees by the St. Louis Presbytery, and this was according to the charter of the college granted by the Legislature. But prior to their election the St. Louis Presbytery had been cut off from the denomination by a resolution of its General Assembly. The Supreme Court held this fact invalidated the election, because under the usages and laws of the denomination the Assembly possessed "the unlimited control of superintending the concerns of the whole church and of suppressing schismatical contentions and disputations." The general rule is in accordance with those decisions, and is followed most frequently under these circumstances: A schism occurs in some congregation over a tenet of faith, and two factions claim the church property, whereupon it will be awarded to the one which adheres to the original doctrines of the church; and the decisions of the church judicatories as to what these doctrines are will be accepted by the civil courts, when such judicatories exist and have authority to decide. The civil courts are concerned with points of faith only when they must be ascertained in order to know where the property belongs.

In *Harmon v. Dreher*, supra, the controversy was over the power of a dissident

Lutheran congregation, which had been incorporated, to employ a certain pastor and control the property of the church as against the decree of the synod, and the claim of the congregation was rejected. In *Gibson v. Armstrong*, 7 B. Mon. (Ky.) 481, 491, there was a factional struggle over a church house of the Methodist Episcopal denomination, the government of which is by a General Conference, and the court said: "It is, in fact, the local society worshipping at the place that is entitled to the use, and individuals are entitled only as members of, and in subordination to the society, to which in its organized form and in subjection to the rules and discipline and general legislation of the church of which itself is a part belong the immediate use and control of the local premises. Any dispute between individuals and the society in regard to the fact of membership, or the rights pertaining to that relation, must present an ecclesiastical question, of which the decision by the tribunals of the church would, in general, be regarded as final by the civil power." Other cases which accept the proposition we have quoted are *Shannon v. Frost*, 3 B. Mon. (Ky.) 263; *Den v. Bolton*, 12 N. J. Law, 206; *Den v. Pilling*, 24 N. J. Law, 653, 657; *German Refd. Church v. Seibert*, 3 Pa. 291; *Pulis v. Iserman*, 71 N. J. Law, 408, 58 Atl. 554; *Duessel v. Proch*, 78 Conn. 343, 62 Atl. 152, 3 L. R. A. (N. S.) 854; *Ferraria v. Vasconcellos*, 31 Ill. 25; *Schradi v. Dornfeld*, 52 Minn. 465, 55 N. W. 49; *Andrews v. Andrews*, 110 Ill. 223; *Christian Church v. Church of Christ*, 219 Ill. 503, 76 N. E. 703. Our present interest in those opinions has no relation to schismatical dissensions, but is with the underlying principle of the judgments that deference will be accorded, when possible, to the established tribunals and settled usages of a denomination, not only in matters of doctrine, but of church government; and certainly the principle ought to apply in a case like this, where there has been no attempt to deprive any member of the congregation of the enjoyment of its property, and the question goes only to who shall administer the trust. Hence *Watson v. Garvin*, 54 Mo. 353, whatever was the exact point therein decided, is not apposite.

The foregoing examination of the adjudged cases, and reflections upon them, have been indulged rather because they suggest the spirit in which we should approach the interpretation of our statutes for the incorporation of religious bodies, which is the main task before us, than because they make manifest what the true interpretation is. We should adopt, if we can, such a view of the law as will permit religious bodies to be incorporated, and yet preserve their original form of church government, instead of revolutionizing it from a hierarchial or synodical into a congregational form; and we ask whether our statutes can be so construed without do-

ing violence to their language and intention. At this point the course of constitutional and legislative enactments on the subject becomes important, as pointing to an alteration in the policy of the state. The Constitution of 1865 declared no religious corporation could be established in this state, except that by a general and uniform law any religious society might become a body corporate for the sole purpose of acquiring, holding, using, and disposing of such land as might be required for a house of public worship, chapel, etc., "and contracting in relation to such land and the buildings thereon through a board of trustees selected by themselves." Article 1, § 12. The Constitution of 1875 declared: "No religious corporation can be established in this state except such as may be created under the general law for the purpose of holding title to real estate for church edifices," etc. Article 2, § 8 (Ann. St. 1906, p. 131). This Constitution, unlike that of 1865, says nothing about the management of the properties of an incorporated religious society by a board of trustees "selected by themselves." Hence, whereas the former required the board of trustees to be selected by members of the society or congregation, the second required nothing of the kind, but left the matter open to legislative regulation; and, if no statutory rule was imposed, then presumably to the laws and usages of the denomination. Turning to the legislation under the Constitution of 1865, we find the first statute enacted did not, in express terms, empower religious societies to organize under it, but allowed any association of persons desirous of becoming incorporated for benevolent or charitable purposes to present to the circuit court, or judge in vacation, a copy of the articles of agreement of the association, and a list of all their members, together with a petition for a certificate of incorporation. 1 Wag. St. c. 37, art. 8, § 2. Whether a church might have organized under that article was never determined; for the first case which occurred regarding a church corporation and who composed it fell under the amending act of 1872 (Laws 1871-72, p. 16), which provided specifically for the formation of religious bodies politic, and empowered any number of persons not less than three to become an incorporated church, religious society, or congregation, by complying with the provisions of said article 8, save that it declared, if the petition was signed by all the persons making the application, this would be sufficient, and that "when so incorporated such persons and their associates and successors" should be known by the name specified in the certificate, and be entitled to all the privileges and powers conferred by the Constitution of the state on such bodies. 1 Wag. St. p. 340, c. 37, art. 8, § 5; Sess. Acts 1871-72, p. 16. The amendment related only to religious societies, and involved two noticeable variations from the prior provisions of the article regarding the organiza-

tion of such associations as were previously either enumerated or implied by its language. The variations were that no list of members of the congregation was required in connection with the petition for incorporation, and the persons who applied for the charter, and their associates and successors, were to constitute the body politic. It is unlikely the article was passed because it was deemed impossible for religious societies to incorporate under the article as it stood; for said article, as well as the amendatory act of March 5, 1868 (Laws 1868, p. 28), and chapter 70 of the General Statutes of 1865, all purported in their captions to relate to the incorporation of "Benevolent, Religious and Educational Associations," thus fairly implying that a religious association might organize under the provisions. More probably the purpose was to evade the necessity of appending a list of members of a congregation to the petition for a certificate, and especially to evade taking them into the incorporated body. Whether the act was passed from this motive or not, it certainly attempted to dispense with those requirements, and the reason for the attempt is clear. It must be inconvenient, if not mischievous, to include all the communicants of a congregation in an organic body.

We have dwelt on the injustice of requiring a change of church polity as the condition of corporate existence, and it is to be considered that religious assemblies, unlike most nonmercenary associations, usually contain children who are unfit to share in the government of a corporation, far more so than they are to sign the petition for a certificate, and their incapacity to do this was remarked in *North St. Louis, etc., Church v. McGowan*, 62 Mo. 279, 287. Nevertheless, the Supreme Court in said case frustrated the purpose of the amendment by construing it in connection with section 2 of the act of 1868 (1 Wag. St. c. 37, art. 8, § 1), and holding that, by force of the latter section, the law continued to confer membership in the corporation on every member of the congregation. The statutes thus construed must have worked unsatisfactorily; for in the Revision of 1879, and after the announcement of the decision in *North St. Louis, etc., Church v. McGowan*, radical alterations were made in the law, and we note the omission to require a list of the members of the association out of which the corporation arises. The present statutes say "any number of persons, not less than three, who shall have associated themselves by articles of agreement in writing, as a society, company, association or organization formed for benevolent, religious, scientific, fraternal-beneficial or educational purposes, may be consolidated and united into a corporation. Such articles of agreement may be organic regulations, or a constitution, or other form of association." Rev. St. 1879, § 970 (Rev. St. 1899, § 1394, art. 11, c. 12 [Ann. St. 1906, p. 1103]). The next section

provides the method of incorporating, which is for the president, secretary, and treasurer, or other chief officers, to submit articles of agreement with a petition praying for a pro forma decree. As soon as the decree is granted, the Secretary of State must issue a certified copy of the articles of agreement and the appended certificates, and "thereupon the petitioners, their associates and successors shall be created and be a body politic." From that language we understand the constituents of the corporation are the petitioners, such persons as they shall associate with them, and their successors. In section 1397 of the present Revised Statutes of 1899 (Ann. St. 1906, p. 1105), the classes of associations which may be organized under the article are enumerated, and include "any association, congregation, society or church organization formed for religious purposes." This section would permit an entire congregation to incorporate, but does not require it to do so, though we think, if the form of church government was congregational, the law would compel the reception of every communicant, or at least every one of adult years, into the corporate body organized to control the policy and property of the church to which they belonged. Section 1400 (Ann. St. 1906, p. 1106) says a body politic may be formed under the article to execute a trust, the purpose of which is within its purview, and to take title to any property, real or personal, for the purposes of such trust. By virtue of this section corporations may be formed, as the one under examination was, to execute trusts of property settled to the uses of churches and benevolent societies; and it looks improbable that the Legislature contemplated the necessity of admitting children to share in such a responsibility. The more reasonable view is that no inflexible methods of constituting membership and regulating the economy of the several species of corporations authorized by the article were prescribed, but the intention was for these matters to depend largely on the various purposes of the organized bodies, the duties they were to perform, and the character of the voluntary associations out of which they would spring. Sometimes it will be proper or necessary for all the members of such assemblies to be united in the organic body, and sometimes this will be unnecessary, or, perhaps, impossible. The language employed in the several sections of the article is nowhere definite regarding who shall compose said body; but, so far as this is implied, the implication seems to be that the subscribers to the articles of agreement, and such persons as they may associate with them, shall be the incorporators. It is certain no enumeration of the members of the congregation or other voluntary assembly is required, nor do we find any words which signify they shall be constituents of the corporation; and it was

such a requirement that induced the Supreme Court, in construing the act of 1872, to hold the entire congregation composed the corporation. The constitutional and statutory alterations we have pointed out were not accidental, but purposive, and were made to give effect to a different policy from what had formerly prevailed. In our opinion the object was to endow religious societies and churches with corporate franchises and powers without sacrificing their established polity. We so conclude, mainly for two reasons: The act of 1872, which initiated the departure in legislation, referred only to those associations, plainly sought to eliminate the necessity of submitting to majority rule in every instance, and, when this purpose miscarried, other alterations in the law were made to realize it.

We hold the plaintiffs were neither members of the incorporated body known as "Polish Roman Catholic St. Stanislaus Parish," nor entitled to a decree to confer membership on them. Hence the judgment will be affirmed. All concur.

CRAMER v. BARMON.

(Kansas City Court of Appeals. Missouri.
May 3, 1909.)

1. MALICIOUS PROSECUTION (§ 64*)—WANT OF PROBABLE CAUSE—EVIDENCE.

In an action for malicious prosecution, it is not necessary to show by direct testimony that defendant did not believe plaintiff guilty of the crime charged, or that false testimony was sought and procured, but it is sufficient to establish the facts by indirect evidence.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 151; Dec. Dig. § 64.*]

2. MALICIOUS PROSECUTION (§ 67*)—DAMAGES—MENTAL SUFFERING.

One suing for malicious prosecution may recover for the mental distress suffered during the continuance of the criminal case obtained at his request to enable him to prepare his defense.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 155; Dec. Dig. § 67.*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by Jacob Cramer against William Barmon. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 126 Mo. App. 54, 103 S. W. 1086.

Ringolsky & White, for appellant. Leon Block and Frank P. Sebree, for respondent.

ELLISON, J. This action is for malicious prosecution on a charge of receiving stolen goods, in which plaintiff recovered judgment in the trial court. It appears that the parties each owned a clothing store in the north part of Kansas City, Mo.; that they were formerly friends of the same nationality. This is the second appeal of the case. The first is reported in 126 Mo. App. 54, 103 S.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

W. 1086, to which we refer for a full history of the matters leading up to the institution of the action and upon which it is founded. The second trial, as did the first, resulted in a verdict for the plaintiff. The principal objections urged against the judgment in a general way amount to an attack upon the sufficiency of the evidence to sustain the verdict.

Objections are particularized in criticism of an instruction given by the court of its own motion, submitting the hypothesis of defendant having prosecuted plaintiff without believing him to be guilty, or by false and fraudulent evidence. It is claimed that there is no evidence that defendant did not believe him guilty, or that false testimony was sought and procured. This claim is argued as though there should be direct or affirmative testimony which in express terms showed those things. It is, of course, not necessary that such should be the character of the evidence. It is sufficient if the evidence be of such nature that reasonable inference would lead to a conclusion that those things were true; and of this character of proof there was an abundance. Defendant was an active prosecutor of the charge against plaintiff from the beginning, and many circumstances and incidents developed in the evidence which justified giving the instruction. Among other circumstances it was shown, and since the verdict was for plaintiff we must assume was truly shown, that defendant offered to settle the matter if plaintiff would pay him \$500, and that he stated he did not wish to prosecute the man who stole the goods, but merely to hold him as a menace to plaintiff.

On July 10, 1899, plaintiff appeared in the criminal court, and that court of its own motion continued the case to the October term "for want of time to try the same." At the October term the state appeared by the prosecuting attorney, and the plaintiff (defendant there) applied for and obtained a continuance (cause not stated in the record) until the January term following, when the case was dismissed. At the trial of the case at bar plaintiff was asked, over defendant's objection, the following question: "Were you worried about this case?" He answered: "I am pretty near played out all my life since the first time in the beginning when they took me to jail." The objection was that as the state was ready for trial, and the continuance, at least from October to January, was at plaintiff's request, he should not be allowed damage for his mental distress, etc., during that period. The objection is not well taken. It would be unjust and unreasonable to permit one to escape a part of his liability from the fact that his unlawful and malicious conduct extended over a space of time it would not have covered had the party wrongfully accused not procured a continuance. Presumably a continuance granted at

his request was that he might become prepared to resist the false accusation. The damage accruing during such period would certainly be the proximate result of the wrongdoer's conduct.

In our opinion there is no sufficient cause for disturbing the judgment; and it is affirmed. All concur.

WILLIAMS v. CITY OF ST. JOSEPH.

(Kansas City Court of Appeals. Missouri.

May 3, 1900.)

APPEAL AND ERROR (§ 222*)—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS TO RULINGS ON MOTION FOR NEW TRIAL.

Where a motion for new trial is overruled, and no objections taken or exceptions saved, the appellate court cannot pass upon matters of exception during the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1333; Dec. Dig. § 222.*]

Appeal from Circuit Court, Buchanan County; W. D. Rusk, Special Judge.

Action by Anna M. Williams against the City of St. Joseph. Judgment for plaintiff, and defendant appeals. Affirmed.

W. B. Norris and O. E. Shultz, for appellant. James W. Boyd, for respondent.

ELLISON, J. This action was brought against the defendant city for damages alleged to have been caused to plaintiff's property. The judgment in the trial court was for the plaintiff in the sum of \$200, and defendant appealed.

The defendant's motion for new trial was overruled, and it acquiesced therein, since it did not object and except. In such circumstances we cannot pass upon the matters of exception during the trial; and, as there does not appear to be any error in the record proper, the judgment will be affirmed. All concur.

JONES v. WHITNEY et al.

(Kansas City Court of Appeals. Missouri.

May 3, 1900.)

PLEADING (§ 248*)—AMENDMENT OF COMPLAINT—DIFFERENT CAUSE OF ACTION.

Rev. St. 1890, § 3431 (Ann. St. 1906, p. 1969), makes a stakeholder liable to every party placing money in his hands, provided a demand is made for the return previous to the expiration of the time agreed on for the determination of the wager; and section 3432 provides that actions for the recovery of money placed in the hands of a stakeholder shall be brought within three months from the time the right of action accrues. A petition in an action to recover money wagered on a foot race based the right to recover on the ground that defendants conspired together to steal plaintiff's money, and was brought against the stakeholder and others, and, after the expiration of the time for bringing the action had elapsed under section 3432, plaintiff by an amended petition sought to recover on the ground that he lost his money on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

covery under such amended petition against the stakeholder and the other defendants.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 248.*]

Appeal from Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Action by John C. Jones against J. M. Whitney and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Mytton & Parkinson, for appellants. Duncan & Utz, for respondent.

BROADDUS, P. J. The plaintiff sues to recover money wagered on a foot race. On the 23d day of July, 1908, the plaintiff laid a wager with defendant Scott on the result of a foot race to be made between Ray Leach and A. Sportsman. There were articles of agreement for the race by defendant Scott and by plaintiff under the name of J. Smith, as principals, and A. Sportsman and Ray Leach under the name of Lew Woodruff, as the runners. Altogether \$1,840 was wagered, as follows: \$920 by defendant Scott, and \$920 by plaintiff, \$200 of which plaintiff obtained from defendant S. Q. Brown, who was the stakeholder. A 100 yards' distance was measured off, and at the report of a pistol the race started. From this time on there is a great deal of conflict in the evidence. On the part of plaintiff the evidence tends to show that, before the race was finished, defendant Scott drew a pistol, and, when near the finish, thrust it in the face of Sportsman, who was in the lead, and threatened to kill him, which caused Sportsman to dodge and fall, and in so doing he tripped and threw the other runner; that Scott met Brown some distance back from the place of finish, and immediately demanded the money, at the same time threatening and flourishing his pistol; that plaintiff objected to the money being given to him, on the ground that there was no decision of the judges as yet, and that the race was unfair; that defendant Brown appeared to be intimidated and delivered the money to Scott and all three defendants went away together; that afterwards on the same day the three were arrested while eating their dinner together and taken to the police department of the city of St. Joseph, where, upon being searched, it was found that Scott had upon his person \$1,094.35, Whitney \$204.20, and Brown \$420.05, making a total of \$1,808.60, or less in amount \$31.40 than the amount wagered. The defendants' evidence, on the contrary, is radically different. It tends to show that, when the runners had got within about 10 or 12 feet from the finish, Sportsman fell down, and

came across the line," which he proceeded to do. And the evidence was also conflicting whether or not the judges had decided the race when plaintiff called the race off and demanded his money. But there was no dispute that all three defendants left the place together, and that they were arrested while still in company. The next day plaintiff commenced suit and sued out a writ of attachment. Before the case was submitted to the jury, the plaintiff filed an amended petition as follows: "Plaintiff, for cause of action, says that on or about the 23d day of July, 1908, in Buchanan county, Mo., he entered into a wager with defendant Doc Scott and deposited the sum of \$720 in the hands of defendant S. Q. Brown, who was to act as stakeholder, and delivered said money with certain other money to said Brown, which said Brown was to hold pursuant to a wager upon the outcome of a foot race between Albert Sportsman and Ray Leach; that, previous to the time of the posting of said money, defendants entered into a conspiracy whereby they were to get plaintiff's money into the hands of said defendant Brown and abscond with it; that plaintiff was wagering upon the success of Sportsman and defendant Doc Scott upon the success of Ray Leach; that, while said race was in progress and said Sportsman within a few feet of the goal, and leading, defendant Doc Scott drew a revolver and presented it in the face of said Sportsman, causing him to stop under threat of being killed; that at the same time said Scott presented his revolver at defendant Brown, the stakeholder, and demanded that said Brown turn over the stake money to said Scott, which said Brown then and there did, and before any decision by the judges as to the termination of said race, and over plaintiff's protest, and then in accordance with their previous understanding all of the defendants divided plaintiff's money among themselves, and by means of said wager deprived plaintiff of the said sum of \$720." The judgment was for the plaintiff, from which defendants appealed.

The court tried the case upon the theory that the action was based upon section 3431, Rev. St. 1899 (Ann. St. 1906, p. 1969), which reads as follows: "Every stakeholder who shall knowingly receive any money or property, staked upon any betting declared gaming by the foregoing provisions, shall be liable to the party who placed such money or property in his hands, both before and after the determination of such bet; and the delivery of the money or property to the winner shall be no defense to any action brought by the losing party for the recovery

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vious to the expiration of the time agreed upon by the parties for the determination of the bet or wager." Section 3432, Id., provides that actions of this character shall be brought within three months from the time the right of action accrued. The amended petition was not filed within the time provided by the statute, and defendants contend that, as the amended petition states an entirely different cause of action from that stated in the original petition, the plaintiff's cause of action was barred. Consequently he was not entitled to recover on his amended petition. The defendants objected to the amendment at the time for the reason that it was the substitution of a new cause of action, and, as such, was barred by the statute. The objection was overruled. The defendant by way of instruction which was refused raised the question of the right of the plaintiff to recover on his amended petition for the same reasons.

If the amended petition was a substitution of a new cause of action, the court erred in permitting a recovery on that ground. The plaintiff in his original petition bases his right to recover on the ground that defendants conspired together to steal his money, whereas the amended petition seeks a recovery upon the ground that plaintiff lost his money on a wager on the result of a foot race, and that he demanded his money from the stakeholder before the expiration of the time agreed upon by the parties for the determination of the bet or wager; and the recovery was not only against the stakeholder, Brown, but also against defendants Scott and Whitney. The original petition states a common-law action for conspiracy; the amended petition a cause of action provided by the statute. It was an entire departure from, or the substitution of, one cause of action for another, which is not permissible. The plaintiff, as stated, recovered, not only against the stakeholder as provided by the statute, but also against the other defendant, thus recovering under the allegations of both the original and amended petition. This was a glaring error.

The cause is reversed and remanded. All concur.

CLINKSCALES v. CLARK.

(Kansas City Court of Appeals. Missouri.
May 8, 1909. Rehearing Denied May
17, 1909.)

1. PRINCIPAL AND AGENT (§ 79*)—FRAUD OF AGENT.

In an action against an alleged agent for damages through deceit in the sale of land, plaintiff held entitled to go to the jury on the questions of the existence of a confidential rela-

2. PRINCIPAL AND AGENT (§ 71*)—FRAUD OF AGENT—DEFENSES.

Where defendant, plaintiff's agent for the purchase of land, fraudulently induced plaintiff to pay a certain price therefor, defendant receiving an increased commission from the vendor, that the land was worth all plaintiff paid for it was no defense to an action for the deceit.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 71.*]

Appeal from Circuit Court, Carroll County; John P. Butler, Judge.

Action by F. W. Clinkscales against L. G. Clark. Judgment for plaintiff, and defendant appeals. Affirmed.

J. S. Crawford, Busby & Busby, and Jones & Conkling, for appellant. Lozier, Morris & Atwood, for respondent.

JOHNSON, J. This is a suit for damages alleged to have been sustained by plaintiff from the fraud and deceit of defendant practiced during the existence of a confidential relation between the parties. Defendant denies in his answer that he acted with reference to the subject of the controversy as the fiduciary of plaintiff, and alleges that the money obtained, which plaintiff now seeks to recover, was paid him as a commission for services he rendered as agent for the owner of land purchased by plaintiff; in other words, that he was the agent of the vendor of the land, not the agent of plaintiff, the vendee. Trial to a jury resulted in a verdict and judgment for plaintiff in the amount demanded, and defendant appealed.

The most important question for our solution (raised by the demurrer to the evidence) is whether or not the evidence most favorable to plaintiff tends to show that defendant, while acting as the fiduciary of plaintiff, abused his trust to his own advantage and to the damage of plaintiff. Material facts adduced by plaintiff are as follows: The parties both lived in Carrollton, and had been acquainted intimately for about 15 years. Plaintiff was a clerk in a bank and had some money. Defendant was a merchant. In the latter part of the year 1905 defendant made several trips to Texas, and bought three sections of land there. He was contemplating another visit to that state when he met plaintiff and engaged in conversation with him, the substance of which is thus stated by plaintiff: "I met Mr. Clark in the courthouse down in the basement here one day, and he got to talking about his Texas lands down there, and I asked him about them. He had been buying some lands, and I asked him about the country, what he thought about it. He was telling what a good country it was, and what a good soil it had there, and what

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

he thought about the chance of investment, and he remarked to me at the time that he would like for me to go down there with him some time, and I asked him when he was going down. He said he would go down on the next excursion, he thought, and would like for me to go with him. At that time I wasn't in the bank, and I could arrange to go very well, and I told him I thought I would go with him, and he told me he would give me any benefit or judgment he had on the land, quality and so on, and that he knew about the valuation of it and he would practically know just about what I was paying, what the land was worth, and he would give me the benefit of that knowledge that he had." Pursuant to this conversation, plaintiff and defendant made a trip to Texas in February, 1906, to purchase land. Defendant knew of four sections containing 2,500 acres which a man named Webb owned and had placed in the hands of a firm of Texas real estate agents for sale, agreeing to give them a commission of 5 per cent. of the proceeds of a sale effected by them. The agents were instructed to sell the land in a body for \$8.50 per acre, and in their negotiations with defendant agreed to give him half of their commission if he effected a sale for them. Defendant communicated this offer to plaintiff, and agreed to give plaintiff one-half of the commission paid to him if plaintiff would join him in the purchase of the four sections. He proposed that plaintiff take three of the sections, that he would take the one remaining, and that plaintiff might make his own selection. One of the sections, known as the "home place," was better improved and more valuable than any of the others. Its position in the tract was such that it had to be included in the three selected by plaintiff if he would have all the land selected by him in one body. Accordingly, when he accepted the proposal of defendant, he included the "home place" in his selection. At first, plaintiff was informed that the price of all the land was \$8.50 per acre, but before the sale was closed defendant had an interview with Webb in which he suggested that the home section be priced at \$9.50 per acre—an advance of \$640 for the section—that the price on the three remaining sections remain at \$8.50 per acre, and that the advance on the home section be paid to defendant as an additional commission. Webb and his agents accepted this proposition, and the inference that they agreed to keep the arrangement secret from plaintiff is supported by facts and circumstances in the record. When the parties met to close the sale, plaintiff stated that he understood the price was \$8.50 per acre for the entire tract. Defendant told him he was mistaken, that the price on the home section was \$9.50 per acre, and appealed to Webb to confirm the statement. Webb did confirm it, but in somewhat ambiguous language. In the course of the conversation plaintiff expressed his confidence in the hon-

esty of defendant and his reliance on him, and, satisfied that he was being fairly treated by his friend, entered into a written contract with Webb for the purchase of three sections, including the home place at the price above stated. At the same time defendant contracted with Webb for the other section at \$8.50 per acre. Afterward plaintiff carried out the terms of the contract, paid for the land as agreed, and received a deed from Webb. Defendant likewise performed his contract with Webb and received his deed. When Webb settled with his Texas agents, he paid as commission \$1,088, which was 5 per cent. of the proceeds of all the land at \$8.50 per acre. He would not pay commission on the \$640, the amount of the rise in price on the home section. Defendant was at Carrollton when he received his half of this commission. The draft sent him was \$560, which represented $2\frac{1}{2}$ per cent. of the proceeds of the sale, figuring the price of the home section at \$9.50 per acre. He exhibited this draft to plaintiff, and divided its proceeds with him. Defendant also received at Carrollton a draft for \$600, the amount due him from Webb on account of his secret commission. He explains that the other \$40 of this commission had been paid to him previously. He took pains to conceal from plaintiff knowledge of the fact that he had received the last-mentioned draft. A railroad agent at Carrollton cashed it for him, and, at his request, refrained from "putting it through" any bank in Carrollton. The man to whom the railroad agent gave the draft endeavored unsuccessfully to cash it at Kansas City, and finally succeeded in cashing it at Bosworth. When plaintiff learned that defendant had received a secret commission of \$640, and that he (plaintiff) had paid it in the guise of a fictitious rise in the price of the home section, he demanded of defendant the restoration of the money, and, the demand being refused, brought this suit to recover the money.

The above is a condensed statement of the facts most favorable to the cause of action asserted. Defendant admits receiving a commission of \$640 in addition to that paid him by the Texas agents, and admits that Webb did raise the price on the home section that amount. He denies that he caused the advance to be made by Webb, but we venture the assertion that no one can read his testimony without becoming convinced that the advance was made solely for the purpose of giving him a secret profit of \$640 to be paid by plaintiff. Though with apparent fairness and generosity he offered plaintiff the option of selecting any three of the four sections, he anticipated that plaintiff would take the home section. Two potent reasons support this conclusion. No reasonable person in plaintiff's situation would have his land in two separate tracts when he could have it in one compact body, and defendant would derive no advantage from a secret commission

and escape liability on the following grounds: First. He says that he was not in a position that charged him with the performance of any fiduciary duty to plaintiff; that he was the agent of Webb, the vendor; that this fact was known to plaintiff, and therefore that plaintiff knew and acted as though he knew that he must deal at arm's length with defendant as well as with Webb, the vendor. Consequently defendant assumes that he had a right to contract with his principal for an additional commission to be paid out of an advance in the price of the land bought by plaintiff and to keep knowledge of that fact from plaintiff, since the amount of his compensation and the manner of its payment concerned only him and his principal, and were none of plaintiff's business. Second. He contends that the home section was actually worth more than plaintiff paid for it, and that, as plaintiff sustained no actual damage, he has no cause of action, though it be found that he was deceived by false statements of defendant into paying more for that section than the owner was willing to accept for it.

In this connection, complaint is made of the refusal of the trial court to permit defendant to introduce evidence to show that the value of the home section equaled, and, in fact, exceeded, the price plaintiff paid. We shall dispose of these propositions in the order of their statement. That defendant placed himself in a fiduciary relation to plaintiff is a fair and reasonable inference from all of the facts and circumstances in evidence in the voluminous record before us, many of which we have deemed it unnecessary to state. The parties were neighbors and close friends. Defendant had bought Texas lands and was familiar with their quality and values. Plaintiff had no knowledge of the subject. Certainly defendant took pains to impress plaintiff with the conviction that he would give plaintiff the full benefit of his knowledge, judgment, and friendship if plaintiff would join him in the purchase of a tract of land which was too large for him to purchase alone. He assured plaintiff, in effect, that he would make no profit at plaintiff's expense, and his offer to divide with plaintiff what he expected to receive from the Texas agents is a strong indication of such assurance. The fact that defendant was to receive a part of the agent's commission by no means conclusively supports his contention that he was Webb's, and not plaintiff's, agent. It is compatible with the belief which obviously defendant sought to inculcate in the mind of plaintiff that he stood in the relation to Webb of a prospective buyer of the land, and that the proposal by Webb's agents to divide their commission was made to induce a sale to defendant and plaintiff,

land defendant was the agent of plaintiff, and, as such, had no right to make a secret profit out of the transaction. His clever attempts to conceal important facts from the knowledge of plaintiff were most self-incriminatory, and demonstrate that he knew he was violating a duty he owed his associate. If this were not so, what was the necessity for having the Texas agents send him a draft for \$560 as his half of their commission when his half amounted only to \$544? Obviously, he did not want plaintiff to know that his commission on the home section had been figured and paid on the basis of \$8.50 per acre, and not \$9.50, the price paid by plaintiff. To carry out this deception, defendant was willing to pay plaintiff \$8 more on this account than plaintiff was entitled to receive. Again, if defendant thought it was none of plaintiff's concern that he was paid an extra commission, why go to such elaborate pains to have the draft received in payment of that commission cashed outside of Carrollton? Consciousness of wrongdoing must have been the impelling motive, since ordinarily men do not exhibit such excessive secretiveness in the absence of a real cause for concealment. Plaintiff was entitled to go to the jury on the questions of the existence of a confidential relation between him and defendant and of the fraudulent breach by defendant of one of the duties of that relation.

What we have said answers defendant's second proposition. We are not dealing here with a question of deceit practiced by a vendor on a vendee, as was the case in *Thompson v. Newell*, 118 Mo. App. 405, 94 S. W. 557, greatly relied on by defendant, but with a question of deceit practiced by an agent on his principal. It is immaterial that the land bought by plaintiff was worth all he paid for it. He was entitled to fair treatment at the hands of his agent and a full disclosure of all the terms of the agreement made for his benefit. It is elementary that an agent has no right to derive any secret profit or advantage at the expense of his principal, but must give his principal the full benefit of the bargain he makes. The demurrer to the evidence was properly overruled, and it was not error for the court to reject evidence of the actual value of the land.

Objections to the instructions have been sufficiently considered in what we have said. On the whole, we find the instructions placed a heavier burden on plaintiff than he was compelled by the law of the case to bear, but they are free from error prejudicial to defendant. As far as defendant is concerned, the case was fairly tried, and manifestly the judgment is for the right party.

Accordingly it is affirmed. All concur.

that the judgment was sufficient to show eviction, but that it still remained for "plaintiff to show that the title under which he was ousted was paramount to that of his grantor"; but such would not be the rule where suit was instituted at the instigation of the defendant, wherein he is as much bound by the judgment as if he were the nominal party, he being in fact the real party to the proceedings. *Koontz v. Kaufman*, 81 Mo. App. 397. The suit was to test his right and paramount title to the land. The finding and judgment therefore were, in effect, that the title of the defendants in that proceeding was paramount to that of the defendant herein.

There was some confusion in the manner in which the evidence was introduced as to the value of the land in question, which can be avoided at another trial, as the cause will have to be reversed for an error in an instruction given for plaintiffs.

Plaintiffs' instruction No. 1 reads as follows: "The court instructs the jury that, if you find for the plaintiffs, you will find for such part of the purchase price of the whole tract in question as the value of the part lost by plaintiffs bears to the whole tract, taking into consideration the value of the whole tract, the value of the part lost, and the value of the part retained by plaintiffs without the part lost, together with 6 per cent. interest on the sum found from the date of the payment of the purchase price, and for the court costs," etc. The chief objection to the instruction is that it does not limit values to the time of the date of the deed in question, and the instruction should also be confined to the market value.

We believe that instruction No. 2 given for plaintiffs worked no prejudice to defendant, but it should have been limited in its recitals to the language of the petition, viz., that said ejectment suit was instituted "at the instance and suggestion of defendant," or similar language. The defect consisted in calling the attention of the jury to evidence going to show that the suit was so instituted.

Reversed and remanded. All concur.

STATE v. VAUGHAN.

(Kansas City Court of Appeals. Missouri.
May 8, 1909.)

1. WITNESSES (§ 52*)—COMPETENCY—HUSBAND AND WIFE.

At common law, a husband or wife is an incompetent witness in a case, civil or criminal, in which the other is a party.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 124; Dec. Dig. § 52.*]

2. WITNESSES (§ 61*)—COMPETENCY—HUSBAND AND WIFE.

Where violence has been committed on the person of the wife by the husband, she is competent to prove such violence.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 174; Dec. Dig. § 61.*]

3. WITNESSES (§ 61*)—HUSBAND AND WIFE.

In a prosecution of a husband for disturbance of the peace of his wife, the wife was not competent as a witness, though her testimony might have been admissible in a prosecution of defendant for an assault.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 174; Dec. Dig. § 61.*]

Appeal from Circuit Court, Cooper County; Wm. H. Martin, Judge.

George Vaughan was convicted of an offense, and appeals. Reversed, and defendant discharged.

W. V. Draffen, for appellant. W. F. Johnson, for the State.

BROADDUS, P. J. The defendant was convicted in the circuit court upon an information charging him with disturbance of the peace of his wife. The prosecution was begun in a justice's court, where defendant was found guilty. He appealed to the circuit court, where he was again tried and found guilty, and from judgment of his conviction he has appealed to this court.

The prosecution was instituted upon the complaint of his wife. She refused to voluntarily testify against her husband, but was compelled by the court to do so. There were other witnesses whose testimony tended to prove defendant's guilt. The wife testified that defendant came home drunk one night, cursed and abused her, jerked her up and down the bed, and threw her out and hurt her arm, and that he called her a "damn bitch and whore." The only question raised on the appeal is the error of the court in compelling the wife to testify against defendant. It has been the general understanding among the legal profession that a wife is not a competent witness against her husband in a criminal prosecution, except where the offense with which he is charged is in the nature of a wrong committed against her person. The state has undertaken to show that there are exceptions to the rule, and that the facts of this case bring it within the latter class. The common-law rule is that a wife or husband is an incompetent witness in a case, civil or criminal, in which the other is a party. 1 Greenleaf on Evidence, §§ 334, 335. The same author states that the rule of necessity has created exceptions to the general rule, which are allowed "partly for the protection of the wife in her life and liberty, and partly for the sake of public justice. But the necessity which calls for this exception for the wife's security is described to mean 'not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed, without remedy, to personal injury.'" Id. § 343.

In a case where the husband was charged with an assault upon the wife with intent to murder, the wife was compelled to testify against the husband. The testimony discloses

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed that in a quarrel between them defendant discharged a pistol, remarking at the time that they both had better be dead. The court held that the wife was a competent witness against her husband. *Bramlette v. State*, 21 Tex. App. 611, 2 S. W. 765, 57 Am. Rep. 622. *Turner v. State*, 60 Miss. 351, 45 Am. Rep. 412, was a case of assault and battery committed upon the person of the wife. The wife was compelled to testify. Where violence has been committed upon the person of a wife by the husband, she is competent to prove such violence. *Wharton's Criminal Evidence*, § 393. In *Johnson v. State*, 94 Ala. 53, 10 South. 427, on a prosecution of a husband for an assault committed on his wife, the wife was not only not held to be incompetent to testify to the assault, but might be compelled to so testify. In *State v. Bean*, 104 Mo. App. 255, 78 S. W. 640, the husband was charged with the abandonment of his wife. It was held that she was a competent witness on the ground that she was the "particular individual directly injured by the crime committed by her husband, and the facts were peculiarly within her knowledge, and impossible or difficult of proof by any witness other than the wife." In *Maget v. Maget*, 85 Mo. App. 6, a civil proceeding, this court said: "A wife is excluded as a witness from motives of public policy; but, when necessity for her testimony overbalances public policy she is competent." In *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106, the wife is held to be a competent witness as to the injury threatened and attempted to her person by the husband.

All the foregoing authorities have been called to our attention by the state to sustain the proposition that the wife was a competent witness, and was rightfully compelled to testify against her husband. All the authorities mentioned only go to the extent of showing that the exceptions to the common-law rule allowing the wife to testify against her husband are confined to instances where an injury has been threatened or inflicted upon the person of the wife, except *Maget v. Maget*, where necessity, it was said, overbalanced public policy—and that case does not by any means sustain the state's contention. Public policy, in our opinion, is to be reckoned against the admission of the wife's testimony in cases like this. There is no telling, if a wife under such circumstances should be permitted to testify, to where such a course would lead. To permit the mere quarrels between husband and wife to be used as a basis for a prosecution, under the pretense that the peace of the wife had thereby been disturbed, would, in our opinion, be against public policy, and unnecessary for the protection of the wife.

The argument of the state that, as the evidence showed defendant also committed an assault at the same time on his wife, her evi-

dence would be admissible under the theory of the foregoing authorities is not good in this proceeding, notwithstanding it would be admissible in a prosecution against defendant for an assault. The two offenses are distinct, and the punishment is different.

The cause will be reversed, and defendant discharged. All concur.

STATE v. SIMPSON.

(Kansas City Court of Appeals. Missouri. May 3, 1909.)

1. LIBEL AND SLANDER (§ 159*)—CRIMINAL SLANDER—INSTRUCTIONS.

Under Rev. St. 1899, § 2262 (Ann. St. 1906, p. 1426), providing that in prosecutions for libel or slander the truth shall constitute a complete defense, and that the jury, under the direction of the court, shall determine the law and the fact, it was error, in a trial for criminal slander, to instruct that certain words alleged to have been spoken by accused constituted a charge of fornication, and that if the jury believed they were spoken by accused they should convict.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 444; Dec. Dig. § 159.*]

2. INDICTMENT AND INFORMATION (§ 52*)—AFFIDAVIT—SUFFICIENCY.

An affidavit, that the facts stated in an information are according to the best "knowledge, information, and belief" of affiant, is insufficient as a basis for the information.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 163; Dec. Dig. § 52.*]

3. WORDS AND PHRASES—"INFORMATION."

"Information" implies lack of knowledge. As, for instance, where one says he is informed of a thing, he knows he is informed of it, but he does not know it exists—he does not know his information is true, but he impliedly affirms that he does not know.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 4, pp. 3585-3589.]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

James Simpson was convicted of criminal slander, and appeals. Reversed and remanded.

A. J. King, for appellant. Lee B. Ewing, Pros. Atty., and M. T. January, for the State.

ELLISON, J. Defendant was tried and convicted on a charge of criminal slander prohibited by section 2253, Rev. St. 1899 (Ann. St. 1906, p. 1424). The charge was by information filed in the circuit court. The charge was that defendant said to the prosecuting witness that, "I have been told that you caught a bad disease from her," meaning a certain-named woman. The statute (section 2262, Rev. St. 1899 [Ann. St. 1906, p. 1426]) is that: "In all prosecutions for libel or slander, the truth thereof may be given in evidence to the jury, and shall constitute a complete defense; and the jury, under the

direction of the court, shall determine the law and the fact."

The court instructed the jury that the words quoted above constituted a charge of fornication, and that, if they believed they were spoken by defendant, they should convict him. This was error. The foregoing statute leaves to the jury the question whether a certain charge is slander, and whether they will convict. *State v. Armstrong*, 106 Mo. 395, 16 S. W. 604, 13 L. R. A. 419, 27 Am. St. Rep. 361; *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614; *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205, 54 S. W. 457; *State v. Powell*, 86 Mo. App. 598. We considered the subject in *Sands v. Marquardt*, 113 Mo. App. 490, 87 S. W. 1011, and *Grimes v. Thorp*, 113 Mo. App. 652, 88 S. W. 638. In the latter case we stated that in criminal prosecutions for either libel or slander the jury determine the law and the fact, and that they could not be peremptorily directed to find a verdict of guilty if certain evidence was believed. The court should instruct in an advisory, but not peremptory, way that certain words would, in the opinion of the court, sustain a verdict of guilty if found by the jury, at the same time informing them that the court's opinion was merely advisory and not binding on them, and that they were the sole judges of whether the words constituted libel or slander, and as to whether the accused should be found guilty. It is said in *State v. Armstrong*, supra: "That while the judge may assist and inform them what the law is, and it is his duty to do so, still they are, by virtue of organic law, the final judges in a prosecution for criminal libel."

The information in this case is on the affidavit of the woman charged to have been slandered. The wording of her affidavit is that "the facts in the above and foregoing information are true according to her best knowledge, information, and belief." In *State v. Bennett*, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717, affirmed without comment in *State v. Armstrong*, supra, it was ruled that an affidavit by a private person on "best knowledge and belief" was sufficient. As will be seen by the opinion in the *Bennett Case*, it was not without a struggle that the court came to the conclusion it did. It was determined that the word "belief" did not qualify the other word, "knowledge." While we readily concede the soundness of the position there taken, yet it did not involve an affidavit like the one before us. In that case knowledge and belief were reasoned out to amount to the same thing as applied to the affidavit; but in this case we are asked to go a step further and approve of a pleading based, partly at least, upon information. "Information" implies lack of knowledge. One may say "I believe" a thing because he knows it. When one says he is informed of a thing, he knows he is informed of it; but

he does not know it exists. He does not know his information is true. He impliedly affirms that he does not know. So in *State v. Hayward*, 88 Mo. 299, an affidavit "to the best of his information and belief" was held to be bad. That ruling is approved in the *Bennett Case*. We therefore conclude that the affidavit in this case does not fall within the limit of the *Bennett Case*, and is more nearly controlled by the *Hayward Case*, and should be declared not sufficient ground upon which to base an information by the prosecuting attorney. While we are now passing upon the affidavit as it appears on its face, yet it may be well to state that matters developed after the motion to quash had been overruled showed clearly why the word "information" was put in the affidavit. It appeared in evidence that the affiant knew nothing of the matter whatever of her own knowledge, and merely made the affidavit on the word of another. Thus appears the wisdom of the ruling in the *Hayward Case*.

We will state in this connection that the statute, as applied to the matters here considered, is the same as it was when the *Hayward* and *Bennett Cases* were decided, and that the court in deciding the *Hayward Case* was aware of the statute prescribing a form of affidavit on "information and belief." That statute is now known as sections 2478 and 2479, Rev. St. 1899 (Ann. St. 1906, p. 1490). Those sections, however, relate to the institution of a prosecution by an affidavit apart from the information. Such affidavit is not a verification of the information, nor an affidavit filed with it, as contemplated by section 2477 (page 1487), for it is a paper made and filed before the information comes into existence. It is the foundation for the information.

Counsel for the state insist that the record here is not sufficient to show a bill of exceptions, or that exceptions were taken. We have examined the transcript, including the certificate of the clerk to the different parts of the record, including a bill of exceptions, and we find it sufficient.

The judgment is reversed, and the cause remanded. All concur.

STATE ex rel. BURNS et al. v. ROMJUE
(Kansas City Court of Appeals. Missouri.
May 3, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 19*)—
APPOINTMENT—RENUNCIATION OF RIGHT.

Under Rev. St. 1899, § 7 (Ann. St. 1906, p. 341), requiring letters of administration to be granted first to the wife and next to one or more of those entitled to distribution, as the court believes will best manage the estate, and section 8, permitting letters to be granted to any person or persons deemed suitable if the persons entitled to preference file their renunciation in writing, the right to administer is personal and cannot be delegated to another,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

so that a renunciation by heirs of their right to administer cannot be made conditionally upon the appointment of one of their selection, and, when once made, cannot be recalled.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 19.*]

2. EXECUTORS AND ADMINISTRATORS (§ 20*) — APPOINTMENT — PROCEEDINGS FOR APPOINTMENT—REVIEW.

Where the appointment of an administrator by the probate court, upon the renunciation by heirs of their right to administer, was made in the exercise of sound judgment, and not an arbitrary abuse of power, it will not be disturbed by the appellate court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 102; Dec. Dig. § 20.*]

Appeal from Circuit Court, Macon County; Nat M. Shelton, Judge.

Mandamus by the State, on the relation of Waller Burns and another, against M. A. Romjue. From a judgment for respondent, relators appeal. Affirmed.

Higbee & Mills, C. G. Buster, and Guthrie & Franklin, for appellants. John T. Barker, for respondent.

JOHNSON, J. This is a mandamus suit brought by relators in the circuit court of Macon county to compel the respondent, the probate judge of that county, to revoke letters of administration improvidently issued and to issue letters to relators. An alternative writ was issued, appropriate pleadings were filed by the respective parties, and the issues were tried and determined in favor of respondent. Relators bring the cause here by appeal.

Nathaniel Broyles died intestate in Macon county, February 1, 1908. He left neither widow nor issue, and of his heirs three were residents of this state, namely: Martha J. Neet, of Sullivan county, a sister; relator Simeon A. Broyles, of Harrison county, a half-brother; and relator Waller Burns, of Macon county, a nephew. The estate was quite large and consisted of both real and personal property. Letters of administration were issued March 21, 1908, by respondent to Roscoe E. Goodding and John W. Gross, both residents of that county and both strangers to the estate. Goodding was cashier of the Bank of La Plata, of which decedent had been president, and Gross was the public administrator of Macon county. They duly qualified as administrators and proceeded to administer the estate. The revocation of their letters is one of the principal objects of the present suit, and the question of whether they were issued improvidently is the main issue before us for solution. Facts material to this issue are as follows: Relator Simeon Broyles, who was one of the resident heirs, is an old man engaged in farming in Harrison county. His wife was over 71 years old and was in such ill health that she required the constant attention of her hus-

band. He did not wish to be burdened with the cares of the estate, and so expressed himself. February 13, 1908, he filed with respondent the following "waiver": "I hereby waive my right to administer on the estate of Nathaniel Broyles, deceased, and request you to appoint Jas. Neet and John Burns as administrators of said estate." Relator Burns likewise expressed a strong disinclination to serve as administrator, and on February 15, 1908, filed with respondent his renunciation in writing, as follows: "We, Waller Burns and N. J. Bunce, hereby waive our rights to administer on the estate of the late Nathaniel Broyles, deceased, being heirs of the deceased, living in Missouri, and entitled to administer thereon, and we request and waive in behalf of John S. Burns and James Neet and no others, and request the probate court to appoint them to act as said administrators." The remaining resident heir, Martha J. Neet, was an aged widow, in very poor health. She did not wish to be appointed administratrix and renounced her right on February 17, 1908, in the following written instrument filed with respondent: "I hereby waive my right to administer upon the estate of N. Broyles, deceased, said right being conferred upon me by right of being an unmarried sister of deceased, and respectfully ask the court to appoint Roscoe E. Goodding of La Plata, Macon county, Missouri, as administrator of such estate, believing as I do that such appointment will be to the best interest of all concerned."

James Neet and John Burns, whose appointment was requested by relators, were strangers to the estate. Neet was the son of Martha J. Neet, who expressed to respondent her disapprobation of her son's application. She claimed that his unfitness for the place had been demonstrated by his conduct in past business affairs. A majority of the heirs favored the appointment of Neet and Burns; but, without reflecting on the moral character of either, we think the evidence as a whole supports the conclusion of respondent that neither was as well qualified for the administration of a large estate as Goodding and Gross. From the view point of the welfare of the estate, the choice of respondent appears to have been the result of sound judgment. That it was made in good faith is indisputable. Whether respondent had the right to make the choice among strangers is another question that calls for reference to other facts in the record. The immediate effect of the filing by the resident heirs of their renunciations was to raise a multitude of candidates for the office, most of whom pressed their claims with great assiduity. Lawyers were employed by various contestants, and much feeling was engendered among the factions. Evidently respondent, who was trying to perform his duties properly, endeavored by proceeding slowly

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Goodding and Gross. On March 3d relators, actuated by the fear that their candidates might lose in the race, filed with respondent the following instrument in writing: "Now come Simeon Broyles and Waller Burns and show to the court that they have heretofore waived their rights to administer as distributees in the estate of Nathaniel Broyles, deceased, in favor of John Burns and James Neet and them alone, and, if the court should deem it best not to appoint the said John Burns and James Neet, these distributees assert their rights as distributees to administer on the estate of the said Nathaniel Broyles, deceased, since the said Simeon Broyles is a half-brother of the said deceased, and the said Waller Burns is a nephew of the said deceased, whose mother, ——— Burns, is dead, and she was a sister of deceased, Nathaniel Broyles. These applicants would say that they are all residents of the state of Missouri and that the said Waller Burns lives in Macon county and the said Simeon Broyles in Harrison county in said state of Missouri, and they are fully qualified in all regards to administer in said estate." On the same day, March 3, 1908, respondent issued and caused to be served on relators and Martha J. Neet citations all similar in form to that served on relator Waller Burns, which was as follows: "Whereas, I am informed that Nathaniel Broyles has departed this life intestate, and you as his nephew and an heir are by the statutes of the state of Missouri given some priority in the right to administer his said estate, you are therefore cited to appear before the undersigned judge of the probate court at my office in the city of Macon, state of Missouri, and apply for letters of administration on said estate, within five days after the receipt of this notice; or in default thereof letters will be granted to such person as the court or judge thereof shall consider most suitable." On March 10th relators, in response to these citations, filed a written application for letters. Before appointing Goodding and Gross, respondent heard the claims of the respective candidates argued by counsel. On that occasion relators made it plain, as they had done before, that they did not desire the appointment for themselves, that they were still in favor of the candidacy of Neet and Burns, and that their own application was merely a strategical move designed to force their candidates on respondent. In effect, they said to respondent: "Appoint Neet and Burns; but, if you are resolved not to appoint them, then our application as resident heirs stands in the way of the appointment of any other stranger." Relators did not file a written revocation of their renunciations. They argue that the necessity for such action was obviated: First, by the cita-

ly to the contention of relators, are these: First, may a resident heir entitled by law to letters of administration renounce his priority conditionally? Second, when the right is once renounced, may it be recalled?

Letters of administration cannot be granted to a nonresident of the state. Section 10, Rev. St. 1899 (Ann. St. 1906, p. 341). The statutes provide that letters shall be granted: First, to the husband or wife; second, "to those who are entitled to distribution of the estate or one or more of them, as the court or judge or clerk in vacation shall believe will best manage and preserve the estate." Section 7, Rev. St. 1899 (Ann. St. 1906, p. 340). "If no such person apply for letters within thirty days after the death of the deceased, the court * * * may issue citations to him or them * * * to appear and qualify for administration, giving at least five days' time for that purpose and if the person or persons so cited fail to administer within the time appointed letters may be granted to any person whom the court * * * may deem most suitable." Section 8. "Letters testamentary and of administration may at any time be granted to any person deemed suitable if the person or persons entitled to preference file their renunciation thereof in writing," etc. Section 9. Since the decedent left no widow nor issue, relators and Martha J. Neet, being the only resident heirs, were possessed of the first right to administer, and, had they refrained from renouncing that right and made application for letters in response to the citation issued by respondent, it would have been the duty of respondent to select an administrator from among them; but all of the members of this privileged class renounced their right in writing within the time prescribed by statute for the exercise thereof. The right was purely a personal privilege and could not be delegated to another. In *re Cresse's Case*, 28 N. J. Eq. 236; In *re Scott's Estate*, 76 Neb. 28, 106 N. W. 1003, 107 N. W. 1004; In *re Estate of Sargent*, 62 Wis. 130, 22 N. W. 131. Our statute does not extend the scope of the right to include the privilege of nominating an administrator. If the members of the privileged class renounce their right or lose it by failing to exercise it within the time prescribed by statute, then the duty devolves on the probate court of selecting an administrator. In the performance of such duty, the court is not compelled to accede to the demands of the resident heirs or other interested parties, though he should give due consideration and weight to their recommendations. The court should exercise a sound discretion and appoint the person who, in his judgment, is best qualified to give an honest and efficient administration of the estate. Since the right

an administrator, we think it should follow logically that a renunciation cannot be coupled with a condition that in effect is but an attempt to dictate to the court whom it shall appoint. This view is contrary to that expressed by some of the authorities to which our attention has been directed, but we think it is supported by the weight of authority and reason. The law intends to put the resident heirs to the choice of administering the estate, or of permitting the probate court to appoint a stranger. It does not intend that the privilege shall be used to coerce the court into appointing a person it may deem unsuitable.

We regard the renunciations filed by relators as unconditional, and pass to the question of whether relators could retract them at any time before the appointment of an administrator. In our opinion the better doctrine is that, when the privilege once is renounced or waived, it is lost forever and cannot be recalled. Two very potent reasons may be given in support of this doctrine: First, as a general rule, the estates of deceased persons demand speedy attention, and injury would result from delays that might be caused if resident heirs could renounce and recall their privilege at will; and, second, the right of revocation, if it existed, might be used, as was attempted in the present case, not in good faith for the purpose of enjoying the privilege, but as a club to hold over the probate court to compel it to appoint, not the persons whom the court in the exercise of its judgment found were best qualified to administer, but those whom the resident heirs favored. The doctrine just announced is abundantly, though not unanimously, sustained by the authorities. We refer to the briefs of counsel, where the authorities for and against it are collated.

We conclude that respondent acted within the scope of his right and duty in refusing to acknowledge the right of relators to recall their renunciations, and as the appointment made by him appears to have been the result of the exercise of sound judgment, and not of an arbitrary abuse of power, we find no occasion to interfere.

Accordingly, the judgment is affirmed. All concur.

DAVIS v. FOSTER.

(Kansas City Court of Appeals. Missouri. May 3, 1909.)

1. APPEAL AND ERROR (§ 671*)—ABSTRACT OF RECORD—QUESTIONS PRESENTED FOR REVIEW.

Where the abstract of the record proper consists merely of the pleadings and the filing

that they are shown in the abstract of the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2872; Dec. Dig. § 671.*]

2. APPEAL AND ERROR (§ 590*)—SUPPLEMENTAL ABSTRACT—RIGHT TO FILE.

Where a respondent on appeal points out in his brief that appellant's abstract of record is insufficient in not showing that a motion for new trial was filed or an order showing time given for filing bill of exceptions, appellant may not correct the error by filing an amended or supplemental abstract without leave of court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2613; Dec. Dig. § 590.*]

Appeal from Circuit Court, Holt County; W. C. Ellison, Judge.

Action by W. F. Davis against John J. Foster. From a judgment for plaintiff, defendant appeals. Affirmed.

John W. Stokes and R. B. Bridgeman, for appellant. T. C. Dungan and H. M. Dungan, for respondent.

PER CURIAM. This action was for rent, with an attachment in aid. There was a trial on both the plea in abatement and merits. The judgment in each was for the plaintiff.

The abstract of the record proper presented by appellant consists merely of the pleadings and the filing of the bill of exceptions. There is nothing to show that a motion for new trial was filed or an order showing time given for filing bill of exceptions. These things are shown in the abstract of the bill of exceptions, but it has been ruled time and again, in each of the appellate courts, that that will not do. They must appear in the record proper. *Clay v. Union Publishing Co.*, 200 Mo. 665, 98 S. W. 575; *Stark v. Zehnder*, 204 Mo. 442, 102 S. W. 992; *Harding v. Bedoll*, 202 Mo. 630, 100 S. W. 638; *Pennowsky v. Coerver*, 205 Mo. 135, 103 S. W. 542; *Thompson v. Ruddick*, 213 Mo. 561, 111 S. W. 1131; *Stark Bros. v. Martin*, 126 Mo. App. 575, 105 S. W. 33; *City of Macon v. Jaeger* (Mo. App.) 113 S. W. 1138. By reference to these authorities it will be seen that the abstract should distinguish between the record proper and the bill of exceptions, so that it may be seen which one of these contains the matters abstracted, and not leave it in such confusion that it cannot be told whether the recital is taken from the record proper or the bill of exceptions. An amended or supplemental abstract was filed by appellant without leave of court after respondent had complained in his brief of the defects above noted. This cannot be done. *Everett v. Butler*, 192 Mo. 564, 91 S. W. 890; *Harding v. Bedoll*, supra. In the latter case it is said that in such instance leave should not be given.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

CHITWOOD v. HATFIELD et al.
(Kansas City Court of Appeals. Missouri.
May 8, 1909.)

PRINCIPAL AND SURETY (§ 28*)—LIABILITY ON NOTE—OBLIGATION OF SURETIES.

Where the payee of a negotiable note never promised to loan any money to the maker, or authorized the party who cashed it for the maker to make the loan, the latter, after procuring the payee to indorse the same to him without recourse, cannot recover against the sureties, as their undertaking was with the payee to whom the note was not delivered and accepted for a consideration so as to make him a party to the contract.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 26.*]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by H. R. Chitwood against C. E. Hatfield and others. From a judgment in favor of M. L. Long and other defendants, plaintiff appeals. Affirmed.

Thomas Dolan, for appellant. Cole, Burnett & Williams, for respondents.

JOHNSON, J. This is an action on a negotiable promissory note brought by plaintiff against defendants Hatfield, Long, Rozelle, and Lortz. Hatfield was the principal maker. The other defendants signed the note as sureties. Among other defenses the sureties alleged that the note was without a consideration, that it was not delivered to the payee, and that it was not indorsed by the payee to plaintiff "for value received." The cause was tried to the court without the aid of a jury. No declarations of law were asked or given. Judgment was rendered for plaintiff against Hatfield, but in favor of defendant sureties. Plaintiff appealed.

There is no substantial controversy over the facts of the case. Plaintiff was a banker at Carl Junction, a town about nine miles from Joplin. Hatfield was a customer of plaintiff, and was indebted to him on a note and overdraft. He applied to plaintiff for an additional loan of \$700, and was referred to T. W. Cunningham, a banker at Joplin, with whom plaintiff kept an account. He went to Cunningham's bank, obtained a blank note, filled it out, signed it, and procured the signatures of defendants Long and Rozelle, and of three other sureties, viz., H. S. Bowman, J. W. Jameson, and Joseph Story. Afterward he presented the note to Cunningham, who refused to accept it on the ground that the security was insufficient. A day or two later Hatfield saw plaintiff at Carl Junction, and told him of the refusal of Cunningham to take the note. Plaintiff advised Hatfield to procure defendant Lortz as a surety, and

come due six months after its date. At no time did Cunningham promise to lend any money to Hatfield nor had he authorized plaintiff to make such loan. A few days after obtaining the note, plaintiff took it to Cunningham, who indorsed it without recourse at plaintiff's request. It is a general as well as a statutory rule of law that "every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto." Section 16, p. 245, Laws 1905 (Ann. St. 1906, § 463-16). By the terms of the note the sureties undertook to enter into contractual relations with Cunningham, the payee named therein. They did not propose to contract with plaintiff, and it would seem to be too clear for serious discussion that they could become bound only in the event of a delivery of the note to Cunningham and his acceptance thereof. Until he should bring himself into a contractual relation with them and their principal, the contract necessarily remained incomplete, and in fact and law was no contract at all. Plaintiff, who did not act as the agent of Cunningham, did not make him a party to the contract by voluntarily cashing the note, nor could he make himself an original party without the consent of the sureties. We think he could not give life to the contract by subsequently obtaining the indorsement of Cunningham without recourse. Already he had voluntarily parted with his money on his own responsibility. At no time did Cunningham assume any contractual obligations to the makers of the note. There was no delivery of the instrument to him, no acceptance thereof by him, and no consideration from him to the makers. Since he never became a party to the contract, his indorsement without recourse which imposed no obligation on him did not constitute him a party, and was ineffective for any purpose. Authorities in point may be found in the briefs of counsel.

We conclude that the learned trial judge was right in discharging the sureties. Accordingly the judgment is affirmed. All concur.

STATE v. NICKELSON.

(Kansas City Court of Appeals. Missouri.
May 8, 1909. Rehearing Denied May
17, 1909.)

SUNDAY (§ 28*)—VIOLATION OF SUNDAY LAW — PROSECUTION — INDICTMENT — ALLEGATIONS BY INTENDMENT — APPLICATION OF RULE.

In a prosecution for violation of Rev. St. 1899, § 2240 (Ann. St. 1906, p. 1446), prohibiting the doing of certain work on Sunday, an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

allegation that accused "on the 18th day of August, A. D. 1907, did on the first day of the week commonly called Sunday, keep open a barber shop," etc., is a direct statement that the date mentioned was Sunday.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 69; Dec. Dig. § 29.*]

Appeal from Circuit Court, Ray County; Francis H. Trimble, Judge.

Tyd Nickelson was convicted of Sabbath breaking, in violation of Rev. St. 1899, § 2240 (Ann. St. 1906, p. 1446), and he appeals. Affirmed.

J. L. Farris, Jr., and M. G. Roberts, for appellant. W. G. Roberts, for the State.

JOHNSON, J. Defendant, a barber doing business at Richmond, was prosecuted and convicted for an offense against the provisions of section 2240, Rev. St. 1899 (Ann. St. 1906, p. 1446). The information under which he was tried is as follows: "Now on this day comes George W. Jenkins, prosecuting attorney within and for the county of Ray and state of Missouri, leave of court having been first had and obtained, and for his second amended information informs the court that Tyd Nickelson, in the county of Ray and state of Missouri, on the 18th day of August, A. D. 1907, did, on the first day of the week, commonly called Sunday, keep open a barber shop located in the county of Ray and state of Missouri, and did wilfully and unlawfully perform certain labor, then and there shaving the face and cutting the hair of one Robert Bates, and performing the labor and services of a barber on divers and sundry other persons to this affiant unknown in the said barber shop, and said shaving and cutting hair and other labor then and there performed not being the household offices of daily necessity, and not being then and there work of necessity, or of charity, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state."

A demurrer to this information was overruled. Defendant argues that it should have been sustained on the ground that the information fails to aver that the 18th day of August, 1907, was the first day of the week, commonly called Sunday. The objection is without merit. The allegation that defendant "on the 18th day of August, A. D. 1907, did on the first day of the week, commonly called Sunday, keep open a barber shop * * * and did * * * perform certain labor, then and there shaving the face and cutting the hair of one Robert Bates," etc., contains a direct statement of the fact that the date mentioned was Sunday. The rule that material allegations in criminal proceedings may not be made by intendment (State v. Clinkenbeard [Mo. App.] 115 S. W. 1069, and cases cited), no matter how strictly it may be construed, can have no application here,

since the language employed does not require a resort to inference.

Finding no error in the record, the judgment is affirmed.

BROADDUS, P. J., concurs. He is of opinion that the business of a barber performed on Sunday is a work of necessity; but, as the Supreme Court has held otherwise, he does not feel at liberty to dissent from the opinion of JOHNSON, J. ELLISON, J., concurs.

PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA v. MANSUR.

(Kansas City Court of Appeals. Missouri. May 8, 1909. Rehearing Denied May 17, 1909.)

1. PROCESS (§ 1*)—"SUMMONS"—OFFICE.

The office of a summons is to bring the defendant to whom it is directed into court to answer plaintiff's petition.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6787, 6788; vol. 8, p. 7810.]

2. PROCESS (§ 45*)—"ALIAS SUMMONS"—OFFICE.

An alias summons is issued when the original summons has not produced its effect because defective in form or manner of service, and, when issued and served, the second writ supersedes the first, and defects in the first cannot be pleaded in abatement of the second.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 42; Dec. Dig. § 45.*]

3. PROCESS (§ 45*)—"ALIAS SUMMONS"—EFFECT OF ORDER FOR ISSUE.

An order of record that an alias summons be issued constitutes an abandonment of the original writ, though the alias summons be not issued or served; and hence where, after original summons was issued and served, defendant did not appear, and the court made an order of record that an alias summons issue and the cause be continued, and no alias summons was issued nor the order set aside, the court had no jurisdiction to hear the case at the next term of court on the original service.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 45.*]

Error to Circuit Court, Livingston County; Francis H. Trimble, Judge.

Action by William H. Mansur against the Pacific Mutual Life Insurance Company of California. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. C. Rosenberger, Clyde Taylor, and Kersey Coates Reed, for plaintiff in error. Scott J. Miller, for defendant in error.

JOHNSON, J. Defendant in error brought this suit in the circuit court of Livingston county against plaintiff in error, a nonresident life insurance company, and caused summons to be issued returnable to the May term, 1908, the first day of which fell on May 4th. The summons was served and returned in the manner prescribed by law, and no point is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made of its sufficiency to command the appearance of the defendant (plaintiff in error here) at the May term to answer the petition. Defendant did not answer, and on the eleventh day of the term the court, at the request of plaintiff (defendant in error here), made the following order of record: "Ordered by the court that alias summons be issued for defendant the Pacific Mutual Life Insurance Company, directed to the sheriff of Cole county, Missouri, and cause continued." No alias summons was issued in obedience to this order, nor was the order set aside. The defendant did not appear at the following term, but the court heard evidence introduced by the plaintiff, and rendered judgment against the defendant as prayed in the petition. Afterward defendant brought the case here by writ of error.

We think the court had no jurisdiction over the person of the defendant in that suit at the time the judgment was rendered. The office of a summons is to bring the defendant to whom it is directed into court to answer the petition of the plaintiff. The original summons, being regularly issued and properly served and returned, performed its mission, and the defendant was bound to appear at the May term and answer the petition in the time prescribed by law, or suffer the consequences of having judgment rendered against it by default. An alias summons is issued when the original summons has not produced its effect. 1 Rap. & L. Law Dict. 44. It is employed in cases where the original summons is defective in form or manner of service, and cannot be held to have performed its function. An order of record that an alias summons be issued necessarily must constitute an abandonment of the original service. 20 A. & E. Encyc. Pl. & Pr. 1180; *Finley v. Richards*, 1 Blackf. (Ind.) 487. When issued and served, the second writ supersedes the first and defects in the first cannot be pleaded in abatement of the second. *Goodlett v. Hansel*, 56 Ala. 346. No alias writ was issued and served in the case in hand, but nevertheless the order of record that one be issued was an abandonment of the original writ for the following reason: Constructively the defendant was present in court in obedience to the original summons, heard the plaintiff ask for the alias order, witnessed the pronouncement of the order by the court, and saw it entered of record. In effect, plaintiff there confessed and the court ruled that the summons was insufficient, and the defendant was told by the court to depart with the assurance that it need not reappear to answer the petition until commanded so to do by the service upon it of the alias summons. To hold that the failure to follow up the order had the effect to restore the original service would be to say that a defendant dismissed from court to await further commands of the court still

is bound to remain in court and proceed with his defense as though no such order of dismissal had been made. We conclude that plaintiff in error did not have his day in court, and therefore that the judgment should not be allowed to stand.

Point is made by the plaintiff in error that the petition is fatally defective. We think the petition is deficient, but that its defects may be cured by amendment.

The judgment is reversed and the cause remanded. All concur.

RAGLAND et al. v. CONQUEROR ZINC COS.
(Kansas City Court of Appeals. Missouri.
May 3, 1909.)

1. MINES AND MINERALS (§ 62*)—CONTRACT FOR SUBLEASE—RECOVERY FOR BREACH.

Where defendants unconditionally contracted with plaintiffs to sublease land to them for 10 years if they should develop paying ore, the fact that defendants, at the date of contract, have a good and subsisting lease of the land, which plaintiffs knew was subject to forfeiture for failure of defendants to do work required, would not preclude plaintiffs from recovery for defendants' failure to comply with the contract caused by the subsequent forfeiture of their lease.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 62.*]

2. MINES AND MINERALS (§ 62*)—CONTRACT FOR SUBLEASE—COVENANT FOR QUIET ENJOYMENT.

A covenant for quiet enjoyment may be inferred from a contract to sublease, whereby the sublessees were to enter on the leased land and prospect for ore, which, if found in paying quantities, was to be followed by the sublease.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 62.*]

3. MINES AND MINERALS (§ 62*)—CONTRACT TO SUBLEASE—RECOVERY FOR BREACH.

For breach of a contract to sublease land for mining on the contingency that sublessees found paying ores, they may recover for their expenditures in endeavoring to find the same, though their prospective profits would be too uncertain and speculative as a basis for recovery.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 62.*]

4. MINES AND MINERALS (§ 62*)—CONTRACT FOR SUBLEASE—ACTION FOR BREACH—MEASURE OF DAMAGES.

In an action for breach of a contract to sublease land for mining on the contingency that plaintiffs found paying ores, the court properly instructed that the measure of damages was the actual expense incurred by plaintiffs in their work.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 62.*]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by C. E. Ragland and others against the Conqueror Zinc Companies and others. From a judgment for plaintiffs, the Conqueror Zinc Companies appeal. Affirmed.

Thomas Dolan, for appellants. Curry, Owen & Farris, for respondents.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

BROADDUS, P. J. This is a suit for damages. The petition, in substance, alleges: That in August, 1906, the defendant Houk for himself and the other defendants represented to plaintiff Ragland that the defendants had a valid and subsisting lease for 10 years on certain mining property in Jasper county, and that defendants had the right and power to sublease said property; and that defendants, so representing to plaintiff, entered into a contract with plaintiff, whereby he was to enter upon the said leased land to prospect and mine for lead and zinc ore, and if the said Ragland or his assigns should strike and develop ore sufficient to warrant the erecting of a mining plant or to pay the expense of handling and cleaning of ore by hand jigs, then the defendants were to furnish plaintiffs with a written lease or license to mine said land for 10 years under a royalty of 20 per cent. The petition sets forth that, after said contract was made, Ragland assigned to each of his coplaintiffs one-fourth interest in the lease. It is alleged that, after plaintiffs entered upon the performance of said contract, they were notified that defendants had no lease upon the land, and thereupon were about to cease work, when defendant Houk for himself and defendant corporations guaranteed and assured the plaintiffs that they had full right upon said land under the said lease, and agreed to protect plaintiffs and assure them their full rights under the contract aforesaid. And plaintiffs say that, by reason of the aforesaid contract, representations, and assurance, they continued to mine and carry on mining operations, and expended in the performance thereof in mining said land the sum of \$600. Plaintiffs further allege that thereafter, by a judgment of the circuit court of the county against defendants, it was adjudged that defendants had no right upon said land and no right to sublease the same. They allege that, if the contract for a lease had been performed, it would have been worth \$5,000. They claim that they are damaged in the sum of \$2,500 in addition to said sum of \$600, for all of which they asked judgment. The defendants by their answer set up that they had a lease on the land in question, dated November 9, 1904, for a term of 15 years, and which was duly recorded in the office of the recorder of deeds for the county, and that it was in force at the time of the contract made with plaintiff Ragland, and subject to the usual conditions of a mining lease, but that no work was being done on the land on the said 17th day of August and for a short time prior thereto, all of which plaintiffs well knew, and that plaintiffs had notice of the terms of the lease to defendants, and also had notice of the manner in which said lease had been complied with in regard to the mining on said ground. The plaintiffs' reply put in issue the matters set out in the answer.

The plaintiffs introduced the contract as set out in their petition and evidence tending to show the value of the work and expenditures in prospecting for ores, but failed to prove the allegation that defendants guaranteed and assured plaintiffs, after they had received notice that defendants' lease had been forfeited, that they had full right upon said land under their lease, and agreed to protect plaintiffs and assure them their full rights under the said contract. Some of the conditions of defendants' lease from the owner of the land were that mining should commence immediately and be carried on in good faith and continuously. The provision for a forfeiture is as follows: "Any failure to comply with and perform the requirements of this lease in good faith at any time shall end and determine the same, and the said party of the first part may declare an ouster and re-enter upon and hold said demised premises. Subject to these conditions, this lease shall remain in full force for the term of 15 years from the date thereof." The judgment of the circuit court against plaintiffs and defendants rendered in favor of the original lessor was introduced in evidence. The plaintiffs recovered judgment for \$285.50, from which defendants appealed.

The contention of defendants is that plaintiffs under the evidence were not entitled to recover. We think defendants' argument does not sustain their theory of the case, which is to the effect that at the time of the making of the contract they had a good and subsisting lease from the lessor; it not at that time having been forfeited. It may be assumed that the provision for a forfeiture was a condition subsequent, which right if not exercised a forfeiture would not result. It is said: "The title to land conveyed upon a condition subsequent vests in the grantee, and his failure to perform the condition does not divest the title. The title is divested only upon the entry of the grantor or his heirs for the condition broken or by a suit for the recovery of possession," etc. Jones' Law of Real Property & Conveyancing, vol. 1, § 708. The lessor may waive the right of forfeiture. *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303. These authorities go to show that defendants did in fact have a subsisting lease at the date of the contract, subject, however, to the right of defendants' lessor to declare a forfeiture for a failure to perform its conditions. Such being the case, we cannot see how plaintiffs' knowledge that the lease was subject to a forfeiture, because its conditions had not been complied with, can be a basis for defendants' argument that plaintiffs cannot recover. There was a subject-matter for the contract, and, so far as knowledge of the conditions was concerned, the plaintiffs and defendants stood upon an equal footing. There being a subject-matter and a sufficient consideration, it was a valid contract, and the undertaking by plaintiffs to comply with

its terms imposed a like duty upon defendants.

The plaintiffs were prevented by the action of the defendants' lessor in forfeiting the lease from complying in full with their contract with defendants. The defendants' contract was to furnish plaintiffs with a lease on the land for a period of 10 years if they should develop paying ore. There is no reservation whatever or no condition that would exonerate defendants from making such lease upon plaintiffs' compliance with the contract and the finding of paying ores. The defendants contracted without reference to the contingency that the lease was liable to be forfeited. The defendants' undertaking, in effect, was that there would be no forfeiture of the lease. However, the defendants insist that there was no covenant for quiet enjoyment of the premises. There are no express words to that effect; but from the very nature of the duties imposed upon plaintiffs by the contract they could not be performed unless plaintiffs had peaceable possession, from which it follows that quiet enjoyment may be reasonably inferred. *Taylor's Landlord & Tenant*, vol. 1, § 251.

As plaintiffs were to have a lease on the contingency that they found paying ores, it is argued that their expenditures in the enterprise were their own loss. That which plaintiffs lost was the right to continue the mining venture, which, if continued, might or might not result in reimbursing them. It is true that the profits which plaintiffs might have realized from a continuance of their mining contract would be too uncertain and speculative as a basis for recovery; but it does not necessarily follow that their expenditures in their endeavor to perform the contract are not proper subjects for which they might recover. The defendants by their contract invited plaintiffs to prospect for ores, which, if found in paying quantities, would have been of value to them as well as to defendants, who were to receive a certain royalty from the product. Plaintiffs did a part of the work, and incurred expense, and were prevented by no fault of their own, but by that of defendants, in prosecuting the enterprise to a conclusion. In certain regions in Jasper county, where rich ores of lead and zinc are found in great quantities, the right to mine may be considered as a property right, and it was so considered by the parties to the contract in controversy. It is true there may be in some instances a failure to realize any profits from such mining, but it ought not to be said for that reason a contract of such character should be viewed differently in the eye of the law from a contract giving the right to cultivate a farm for vegetable products. The only difference is that in the latter contract there would probably be greater certainty of profitable results.

The defendants contend that the measure of damages on account of a disturbance of possession is the difference between the rent reserved and the value of the lease. The court instructed the jury that the measure of plaintiffs' damages was the actual expense incurred by them in their work. The instruction was correct. This is not a suit to recover damages for ouster of the premises held under a lease. Therefore the rule that defendants invoke has no application.

Finding no error, the cause is affirmed. All concur.

BRAECKEL et al. v. SHADE et al.

(Kansas City Court of Appeals, Missouri.
May 8, 1909. Rehearing Denied
May 17, 1909.)

1. MECHANICS' LIENS (§ 5*) — STATUTES — CONSTRUCTION.

The rule calling for a strict construction of statutes in derogation of the common law does not apply to mechanic's lien statutes. Such statutes, being remedial in nature, should receive a liberal construction.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 5; Dec. Dig. § 5.*]

2. MECHANICS' LIENS (§ 124*) — NOTICE TO OWNER—MISTAKE IN NAME.

Rev. St. 1899, § 4207 (Ann. St. 1906, p. 2290), requires the statement of a mechanic's lien to contain the name of the owner if known. Section 4221 (page 2311) requires the claimant to serve notice of his purpose to file a lien on the owner or agent of the property. *Held*, that a lien is not lost by a mistake, through misinformation by an abstract clerk, in the first name of the owner in the notice of lien, where the owner was not misled by the error, and no rights of third persons had intervened.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 165; Dec. Dig. § 124.*]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by Frank H. Braeckel and another against D. E. Shade and another. From a judgment for defendants, plaintiffs appeal. Reversed.

H. S. Miller, for appellants. J. H. Spurgeon, for respondents.

JOHNSON, J. Plaintiffs, who are partners doing business in the name of the Joplin Sash & Door Works, brought this suit before a justice of the peace to enforce a mechanic's lien for materials furnished under contract with defendant Shade (the contractor) for a building erected on premises owned by defendant James. Shade, though duly served with summons, failed to appear in the circuit court, where the cause was taken by appeal, and personal judgment was rendered against him for the amount of plaintiff's demand. James appeared and contested the lien. A jury was waived, and judgment was entered in favor of James. Plaintiffs appealed.

The last item of the account is for material

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

furnished October 1, 1907. The notice that plaintiffs intended to file a lien was served on defendant James January 15, 1908. The lien paper was filed with the circuit clerk January 27, 1908. Notice that suit would be brought in the justice's court was filed February 6, 1908, and on the following day the action was begun, as stated in the notice. In these notices and in the lien statement, the name of the owner of the premises was given as James D. James; but the notices and the summons were served on defendant whose name is John D. James. The mistake was discovered by plaintiffs after the suit was brought, and they were given leave by the justice to amend the petition and statement "by changing the name of the defendant James D. James to John D. James; John D. James having been personally served with summons." It appears from the evidence of plaintiffs that they did not know who was the owner of the premises. The lawyer employed by them inquired at the office of an abstractor and was informed by the person in charge of the office that the books showed the owner of the premises to be James D. James. The lawyer acted on this information in preparing the notices, lien statement, and petition. The fact that plaintiffs and their attorney acted in good faith is not disputed and is established by evidence. The question of the effect of the mistake is the only issue considered by the trial court and argued here.

The rule that calls for a strict construction of statutes in derogation of the common law is not applicable to the mechanic's lien statutes. "The better doctrine now is that these statutes are highly remedial in their nature and should receive a liberal construction to advance the just and beneficial objects had in view in their passage." *De Witt v. Smith*, 63 Mo. 268; *Hicks v. Scofield*, 121 Mo. 381, 25 S. W. 755; *Sawyer v. Clark*, 172 Mo., loc. cit. 598, 73 S. W. 187. Section 4207, Rev. St. 1899 (Ann. St. 1906, p. 2290), requires the lien statement to contain "the name of the owner or contractor or both if known to the person filing the lien." Section 4221 (page 2311) requires the claimant to serve notice of his purpose to file a lien on "the owner, owners or agent," of the property. Under the doctrine stated, a proper construction of these statutes imposes on the claimant the duty of giving the true name of the owner in the lien statement and notices and of serving the notices on the owner, provided the name of the owner is known to the claimant; but the statutes contemplate that subcontractors, materialmen, and mechanics may not know who is the owner of the premises, and the intent is manifest that the lien of such claimant and his right to enforce it shall not be lost by his failure to ascertain the name of the true owner, and the consequent failure to state it in the lien

paper and notices. Where, as here, it appears that the mistake was honest, that the defendant owner was not misled, and that no rights of third persons have intervened, a liberal construction of the statutes prompts us to hold that the right to enforce the lien was unaffected by the mistake. *Gorman v. Dierkes*, 37 Mo. 576; *Miller v. Faulk*, 47 Mo. 262; *Lumber Co. v. Clark*, 172 Mo., loc. cit. 598, 73 S. W. 187; *Steinmann v. Strimple*, 29 Mo. App. 478; *Madden v. Realty Co.*, 75 Mo. App. 363; *Dwyer Brick Works v. Flanagan Bros.*, 87 Mo. App. 340; *Darlington v. Tozer*, 88 Mo. App. 525; *Baltis v. Friend*, 90 Mo. App. 408; *Kneisley Lumber Co. v. Stoddard Co.*, 113 Mo. App. 308, 88 S. W. 774; *Crane Co. v. Construction & Real Estate Co.*, 121 Mo. App., loc. cit. 225, 98 S. W. 796; *Boisot on Mechanic's Liens* (1897 Ed.) §§ 382, 383; *New Cyc.* 27, p. 167; *Getchell v. Moran*, 124 Mass. 404; *McPhee v. Litchfield*, 145 Mass. 565, 14 N. E. 923, 1 Am. St. Rep. 482; *Pavement Co. v. Lyons*, 183 Cal. 114, 65 Pac. 329; *Hopkins v. Mill Co.*, 11 Wash. 308, 39 Pac. 815; *Hays v. Tryon*, 2 Miles (Pa.) 208.

The judgment is reversed, and the cause remanded. All concur.

STATE v. BIESEMEYER.

(Kansas City Court of Appeals. Missouri.
May 8, 1909.)

1. CRIMINAL LAW (§ 1083*)—APPEAL—JURISDICTION.

After an appeal is granted, the jurisdiction of the case is with the appellate court, although the record may be corrected by the trial court, and the order granting the appeal cannot be set aside without notice to the appellant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2732; Dec. Dig. § 1083.*]

2. INDICTMENT AND INFORMATION (§ 15*) — SUCCESSIVE INDICTMENTS.

It is a sufficient defense in a criminal prosecution that an appeal from a conviction under a prior information is pending.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 83, 84; Dec. Dig. § 15.*]

Appeal from Circuit Court, Osage County; Wm. A. Davidson, Judge.

L. F. Biesemeyer was convicted of practicing dentistry without a license, and appeals. Reversed, and defendant discharged.

Pope & Vaughan, Monroe & Zevely, and J. W. Voshell, for appellant. John P. Peters, Pros. Atty., and W. E. Owen, for the State.

ELLISON, J. On information by the prosecuting attorney of Osage county the defendant was convicted in the circuit court for practicing dentistry without procuring a license, as required by Laws 1905, p. 217 (Ann. St. 1906, § 8534). In due time he filed a motion for new trial and in arrest of judgment. These motions were overruled, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

days afterwards, but during the same term, it seems the trial court discovered that defendant had not been arraigned, and thereupon, without any notice to him, set aside the order granting him his appeal, and set the case down to be tried on June 18th, a day of the same term. On that day the prosecuting attorney entered a nolle prosequi, and then filed a new information for the same offense. Defendant was again put upon trial and again convicted. He made due plea of his former conviction and appeal. These were overruled. Again he appealed to this court; the latter being the appeal before us.

The law seems well settled that, while a record may be corrected by the trial court after an appeal has been granted, yet the appeal itself is pending in the appellate court from the time of its being granted, and the jurisdiction of the case is with the appellate court. *Ladd v. Couzins*, 35 Mo., loc. cit. 515; *De Kalb Co. v. Hixon*, 44 Mo., loc. cit. 342; *Ross v. Railway Co.*, 141 Mo. 397, 38 S. W. 928, 42 S. W. 957; *Sublette v. Railway Co.*, 66 Mo. App., loc. cit. 334. The St. Louis Court of Appeals in *Werckmann v. Taylor*, 112 Mo. App. 365, 87 S. W. 44, decided that, while the appeal vested jurisdiction of the case in the appellate court, yet that was only true so long as the order granting the appeal remained in force, and that the trial court had authority during the term to set aside the order and thus annul the appeal. But it seems to us that question is not for decision in this case from the fact that the order here made was made without notice to defendant. When he was granted his appeal and had given his bond and was discharged, he had a right to assume that no further steps would be taken in the case without notice to him. It was not a matter in which he had no part or interest or right to be heard. An appeal may be from a trial in which the defendant may have the right to demand a judgment that he is not guilty, or that he is not liable to the action, if a civil suit. The mere mention will suggest the many things in a record which are of such vital interest to a party as that they will entitle him to an absolute discharge. If, then, the court or appellee

and then by amendment, or, as here, by a new proceeding, again bring him to trial, they can grant a new trial or nonsuit in a manner altogether new. If such practice can be indulged, an appellee who finds a record upon which the appellant is properly entitled to a final acquittance at the direction of the appellate court can have the order of appeal set aside and a new trial granted, or a new action instituted, so that he may by different procedure, or by additional evidence, make another attempt to develop a case. It seems to us the practice would be revolution of the established order of procedure.

When one has taken his appeal from the judgment against him, whether for murder or for debt, he cannot be deprived of the rights to which the record shows he is entitled. It may be that the order of appeal can be set aside and the appellant be then given whatever judgment the record shows he should have had on that record, whether that be merely a new trial for error or a final discharge. But all this shows the absolute necessity of notice to the appellant, so that he may protect himself in these vital particulars. "It is a cardinal principle that whenever a party's rights are to be affected by a summary proceeding, or motion in court, that party should be notified, in order that he may appear for his own protection." *George v. Middough*, 62 Mo. 549; *Rich Hill Mining Co. v. Neptune*, 19 Mo. App. 438; *Wickham v. Page*, 49 Mo. 526, 529; *Laughlin v. Fairbanks*, 8 Mo. 367. It is true that during the progress of a case after a party has been duly arrested or summoned he is presumed to be in court, and only such notice of different steps is necessary as the rules of court may prescribe. But, as is said in the case last cited: "No such presumption can arise after the case is disposed of. * * * In every case, therefore, of a special motion, unless there has been an express or implied waiver of notice, the want of such notice would of itself be sufficient to vitiate the proceedings."

We think the defendant's objections to the second trial should have been sustained, and the judgment will be reversed, and he will be discharged. All concur.

MEMORANDUM DECISIONS.

HARROD v. HAMMOND PACKING CO. (Kansas City Court of Appeals. Missouri. May 8, 1909.) Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge. Action by Sam Harrod, by his next friend, against the Hammond Packing Company. From a judgment for plaintiff, defendant appeals. Affirmed. Vinton Pike, for appellant. Mytton & Parkinson and C. C. Crow, for respondent.

PER CURIAM. This case was here on a former appeal (125 Mo. App. 357, 102 S. W. 637), and was reversed and remanded for an error in an instruction given in behalf of the plaintiff. As the case was tried upon practically the same facts and in accordance with the opinion rendered, it is affirmed.

UMBARGER v. SUPREME COUNCIL OF THE ROYAL LEAGUE. (Kansas City Court of Appeals. Missouri. March 29, 1909.) Appeal from Circuit Court, Jackson County. Action by Emma B. Umbarger against the Supreme Council of the Royal League. From a judgment for plaintiff, defendant appeals. Affirmed. R. P. & C. B. Williams, for appellant. Reed, Yates, Mastin & Harvey, for respondent.

JOHNSON, J. This case is similar in all material respects to that of *Small v. Court of Honor*, decided by this court March 10, 1909, and reported in 117 S. W. 116. For the reasons stated in the opinion filed in that case, the judgment before us must be affirmed. It is so ordered. All concur.

COMMONWEALTH v. TURNER. (Court of Appeals of Kentucky. May 12, 1909.) Appeal from Circuit Court, Mercer County. "Not to be officially reported." Thomas Turner was arrested for bringing liquor into a town in violation of an ordinance. From a judgment sustaining a demurrer to the warrant, the Commonwealth appeals. Affirmed. See, also, 117 S. W. 888. Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., Chas. H. Morris, and R. W. Keenon, for the Commonwealth. J. F. Manarsdale, for appellee.

LASSING, J. This is an appeal from a judgment of the Mercer circuit court sustaining a

demurrer to a warrant of arrest, in which the appellee, Thomas Turner, is charged with the offense of having violated the provisions of an ordinance of the town of Harrodsburg, by bringing into said town a certain quantity of whiskey in excess of one gallon. The ordinance under which the warrant of arrest was drawn is in effect the same as that which was fully considered and passed upon by this court in the recent case of *Commonwealth v. Campbell*, 117 S. W. 383, in which case the ordinance was declared to be unconstitutional and void. For the reasons given in that opinion, and on the authority thereof, the judgment of the lower court is affirmed.

GULF, C. & S. F. RY. CO. v. PEASLEE et al. (Court of Civil Appeals of Texas. March 17, 1909. Rehearing Denied April 28, 1909.) Appeal from Williamson County Court; T. J. Lawhon, Judge. Action by Otis Peaslee and others against the Gulf, Colorado & Santa Fe Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed. S. R. Fisher, J. H. Tallichet, S. W. Fisher, and Terry Cavin & Mills, for appellant. Nunn & Hudson and Wilcox & Graves, for appellees.

FISHER, C. J. The cases of *Turner v. Brooks*, 2 Tex. Civ. App. 451, 21 S. W. 404, and *Leahy v. Ortiz* (Tex. Civ. App.) 85 S. W. 824, cited in the conclusions of law of the trial court, sustain the conclusions of the trial court in disposing of the plea in abatement. We have examined all the questions raised in the assignments of error. Finding no error in the record, the judgment is affirmed.

HOGA v. COLEMAN COUNTY. (Court of Civil Appeals of Texas. March 10, 1909. Rehearing Denied April 21, 1909.) Appeal from Coleman County Court; F. M. Bowen, Judge. Action between W. S. Hoga and Coleman County. From the judgment, said Hoga appeals. Affirmed. Woodward & Baker, for appellant. W. C. Woodward and Snodgrass & Dibrell, for appellee.

FISHER, C. J. We find no error in the record, and the judgment is affirmed.

END OF CASES IN VOL. 118.

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ABANDONMENT.

Of homestead, see Homestead, §§ 145, 161-181.

ABATEMENT.

Of purchase price of land, see Vendor and Purchaser, § 176.

Pleas in abatement, see Pleading, § 106.

ABATEMENT AND REVIVAL.

Judgment as bar to another action, see Judgment, §§ 570-622.

Pleas in abatement, see Pleading, § 106.

Substitution of parties, see Parties, § 52.

I. OBJECTIONS TO JURISDICTION.

§ 8. A defect of jurisdiction over the person or subject-matter appearing on the face of the record proper must be raised by demurrer.—*Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co.* (Mo. App.) 500.

II. ANOTHER ACTION PENDING.

§ 14. Refusal to abate a suit to determine title to land claimed by plaintiffs under a will and codicil, on the ground of the pendency of a suit to contest the codicil, *held proper*.—*McMahon v. Hubbard* (Mo.) 481.

V. DEATH OF PARTY AND REVIVAL OF ACTION.

(A) ABATEMENT OR SURVIVAL OF ACTION.

§ 58. Where an amended petition stated a new cause of action, and additional process had issued thereon, the abatement of the original cause of action was no ground for abating that raised by the amendment.—*Board of Councilmen of City of Frankfort v. Herndon's Adm'r* (Ky.) 347.

ABDUCTION.

See Seduction.

ABSTRACTS.

Of record on appeal or writ of error, see Appeal and Error, §§ 585, 590.

ABUTTING OWNERS.

Assessments for expenses of public improvements, see Municipal Corporations, §§ 414-519.

Compensation for taking of or injury to lands or easements for public use, see Eminent Domain, § 84.

Rights in streets in cities, see Municipal Corporations, §§ 665-671.

ACCEPTANCE.

Of dedication, see Dedication, §§ 1-45.

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ACCIDENT.

Cause of death, see Death, §§ 9-31.

Cause of personal injuries, see Negligence, §§ 2-15.

ACCIDENT INSURANCE.

See Insurance, §§ 183, 460, 539.

ACCORD AND SATISFACTION.

See Compromise and Settlement; Payment; Release.

ACCOUNT.

Accounting by particular classes of persons.

See Executors and Administrators, § 496.

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Partners, see Partnership, §§ 322, 325.

Accounting incidental to particular actions or proceedings.

To restrain consolidation of insurance associations, see Insurance, § 684.

II. PROCEEDINGS AND RELIEF.

Transfer of case involving complicated account to equity side of docket, see Trial, § 11.

ACCRUAL.

Of right of action, see Limitation of Actions, § 55.

ACKNOWLEDGMENT.

Operation and effect of admissions as evidence, see Criminal Law, §§ 412, 419; Evidence, §§ 213-253.

Operation and effect of admissions as ground of estoppel, see Estoppel, § 75.

I. NATURE AND NECESSITY.

Necessity to transfer of lease of school lands, see Public Lands, § 178.

§ 6. A deed of land executed by a husband and wife, sufficiently acknowledged as to the husband, but defectively acknowledged as to the wife, *held* properly received in evidence.—*Colville v. Colville* (Tex. Civ. App.) 870.

III. OPERATION AND EFFECT.

§ 53. An unacknowledged assignment of conveyance of standing timber, *held* not entitled to registration.—*Childers v. Wm. H. Coleman Co.* (Tenn.) 1018.

§ 53. Omission of certain words from certificate of acknowledgment *held* fatal to registration of instrument.—*Childers v. Wm. H. Coleman Co.* (Tenn.) 1018.

ACTION.

Abatement, see Abatement and Revival.

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Bar by former adjudication, see Judgment, §§ 570-622.

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tions.
 Malicious actions, see Malicious Prosecution.
 Pendency of action, see Abatement and Revival, § 14.
 Restraining action at law, see Injunction, §§ 7, 28.
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 Actions between parties in particular relations.
 See Master and Servant, §§ 256-296; Partnership, §§ 322, 325.
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 Actions by or against particular classes of persons.
 See Brokers, § 80; Carriers, §§ 51-193, 223-230, 246-384; Corporations, § 508; Counties, § 208; Infants, §§ 80, 89; Innkeepers, § 11; Municipal Corporations, §§ 818-822; Partnership, §§ 199, 216; Principal and Agent, § 195.
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 Bond of husband as administrator of community, see Husband and Wife, § 276.
 Breach of contract, see Contract, §§ 338-353; Sales, §§ 369, 413; Vendor and Purchaser, §§ 342-352.
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 Breach of covenant, see Covenants, §§ 121, 122.
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 Ejection of passenger or intruder, see Carriers, §§ 380-384.
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 Injuries to animals caused by operation of railroad, see Railroads, §§ 443-446.
 Injuries to passenger, see Carriers, §§ 314-321.
 Injuries to servant, see Master and Servant, §§ 256-296.
 Injuries to traveler on city street, see Municipal Corporations, §§ 818-822.
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 Price of goods, see Sales, §§ 348-366.
 Recovery of land sold by vendor, see Vendor and Purchaser, §§ 284, 298.
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 Services, see Work and Labor.
 Wrongful attachment, see Attachment, §§ 375, 377.
 Wrongful execution, see Execution, §§ 465, 472.
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See Creditors' Suit; Divorce; Injunction; Partition, §§ 13-95; Performance; Quieting Title. Admeasurement or assignment of dower, see Dower, § 59.
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 Construction of will, see Wills, § 707.
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 Establishment and enforcement of right of exemption, see Exemptions, §§ 141, 147.
 Establishment and enforcement of right of homestead, see Homestead, §§ 191-201.
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 Establishment of will, see Wills, §§ 300-354.
 Foreclosure of mortgage, see Mortgages, §§ 420-534.
 Removal of cloud on title, see Quieting Title.
 Restraining consolidation of insurance associations, see Insurance, § 694.
 Setting aside fraudulent conveyance, see Fraudulent Conveyances, §§ 216-301.

Particular proceedings in actions.

See Appearance; Costs; Damages; Depositions; Dismissal and Nonsuit; Evidence; Execution; Judgment; Judicial Sales; Jury; Parties; Pleading; Process; Reference; Removal of Causes; Stipulations; Trial; Venue.
 Default, see Judgment, §§ 118-170.
 Notice of action, see Process, § 87.
 Verdict, see Trial, § 352.

Particular remedies in or incident to actions.

See Attachment; Garnishment; Injunction; Sequestration; Tender.
 Counterclaim, see Set-Off and Counterclaim.

Proceedings in exercise of special or limited jurisdictions.

Criminal prosecution, see Criminal Law.
 Suits in equity, see Equity.
 Suits in justices' courts, see Justices of the Peace, §§ 73-135.

Review of proceedings.

See Appeal and Error; Exceptions, Bill of; Judgment, §§ 336-382; Justices of the Peace, §§ 141, 174; New Trial.

II. NATURE AND FORM.

Action to recover penalty for usury, see Usury, § 142.
 To recover penalty for usury, see Usury, § 142.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

Misjoinder, review of objections as dependent on presentation in lower court, see Appeal and Error, § 258.

§ 48. Two causes of action held to arise under the same transaction so as to be properly joined under Rev. St. 1899, § 593 (Ann. St. 1906, p. 619).—*Stevens v. Fitzpatrick* (Mo.) 51.

IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

Stay of action against bankrupt, see Bankruptcy, § 391.

ACTION ON THE CASE.

See Trespass, §§ 44-52.

Of courts in general, see Courts, §§ 89-116.
Operation and effect of former adjudication, see Judgment, §§ 570-622, 651-739.

ADMEASUREMENT.

Of dower, see Dower, § 59.

ADMINISTRATION.

Of estate of decedent, see Executors and Administrators.

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Of trust property, see Trusts, § 198.

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As evidence in civil actions, see Evidence, §§ 213-253.

As evidence in criminal prosecutions, see Criminal Law, §§ 412, 419.

In pleading, see Pleading, § 121.

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ADVERSE CLAIM.

To real property, see Quieting Title.

ADVERSE POSSESSION.

See Limitation of Actions.

Coverture affecting, see Husband and Wife, § 69½.

Of mining rights, see Mines and Minerals, § 49.

Sufficiency of title by to sustain action by abutting owner to compel removal of obstruction in street, see Municipal Corporations, § 671.

I. NATURE AND REQUISITES.

(A) ACQUISITION OF RIGHTS BY PRESCRIPTION IN GENERAL.

§ 8. The statute of limitation operates against the right of way of a railroad which is held adversely.—St. Louis & S. F. R. Co. v. Ruttan (Ark.) 705.

§ 13. The adverse possession of vacant lands, believing them to be state lands, held not affected by the fact that it was private property.—Hoencke v. Lomax (Tex. Civ. App.) 817.

(C) VISIBLE AND NOTORIOUS POSSESSION.

§ 31. Railroad held to have notice of hostile claim of portion of right of way.—St. Louis & S. F. R. Co. v. Ruttan (Ark.) 705.

(E) DURATION AND CONTINUITY OF POSSESSION.

§ 51. Defense of adverse possession held defeated by the execution of a writ of possession against defendants within the statutory period.—Riley v. Roach (Ky.) 321.

(F) HOSTILE CHARACTER OF POSSESSION.

§ 63. A purchaser, taking possession of land under a contract of sale, cannot, without repudiation of the title of his grantor, hold adversely against him.—Tipton v. Tipton (Tex. Civ. App.) 842.

§ 68. Where, before the statutory period had run, one in possession of land disclaimed title, his possession thereafter was not adverse or under color of title.—McBurney v. Glenmary Coal & Coke Co. (Tenn.) 694.

85. Acts by a person who has acquired title to land by occupancy and payment of taxes for seven years under color of title, in recognition of the claim of the original owner, would only be important as a circumstance tending to show the character of the possession, whether adverse or not.—Price v. Greer (Ark.) 1009.

(G) PAYMENT OF TAXES.

§ 92. Payment of taxes by one who has never been in possession will not avail under the statute of limitations of five years.—Brunner Fire Co. v. Payne (Tex. Civ. App.) 602.

II. OPERATION AND EFFECT.

(A) EXTENT OF POSSESSION.

§ 97. An entry on a parcel of land embraced within a patent boundary claimed by another, who is in actual possession of the whole, does not oust him from the possession thereof, except to the extent of the actual inclosures made by the person making such entry, unless he has a superior title.—Meade v. Ratliff (Ky.) 271.

§ 100. In view of Rev. St. 1895, arts. 3344, 4597, 4600, held that persons' possession of a part of land for 10 years did not constitute possession of another part which would bar an action against them by limitation.—Wall v. Lubbock (Tex. Civ. App.) 886.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 114. Evidence held to show title in defendant by adverse possession.—McBurney v. Glenmary Coal & Coke Co. (Tenn.) 694.

§ 114. In trespass to try title to land, evidence held to sustain a finding that the grantors of plaintiff held title by adverse possession, both under the five and ten year statute of limitations.—Hoencke v. Lomax (Tex. Civ. App.) 817.

§ 116. Evidence held to raise the issue of adverse possession, justifying instruction thereon.—Brunner Fire Co. v. Payne (Tex. Civ. App.) 602.

§ 116. Instruction held not erroneous as requiring a general finding for plaintiff.—Brunner Fire Co. v. Payne (Tex. Civ. App.) 602.

ADVERTISEMENT.

Publication of process, see Process, § 87.

ADVICE OF COUNSEL.

As defense to action for wrongful attachment, see Attachment, § 377.

AFFIDAVITS.

See Depositions.

Particular proceedings or purposes.

See Injunction, § 145.

Continuance in criminal prosecutions, see Continuance, § 603.

Verification of pleading, see Pleading, § 291.

AFTER-ACQUIRED TITLE.

Estoppel to assert, see Estoppel, §§ 38, 47.

AGENCY.

See Principal and Agent.

AGGRAVATION.

Of damages, see Damages, §§ 62, 64.

AGREEMENT.

See Contracts.

AIDER BY VERDICT.

In civil actions, see Pleading, § 433.

ALIAS WRITS.

See Process, § 45.

ALLOTMENT.

Of homestead, see Homestead, §§ 200, 201.

ALTERATION.

Of geographical or political divisions, see Municipal Corporations, § 35; Schools and School Districts, §§ 24-42.

ALTERATION OF INSTRUMENTS.

§ 29. Evidence held to show that an alteration in a deed was made and executed by the grantee therein in fraud of the creditors of the grantor authorizing the setting aside of the same.—Childers v. Pickenpaugh (Mo.) 453.

AMENDMENT.

Of court records, see Courts, § 116.
Of pleading, effect on limitations, see Limitation of Actions, § 127.

In particular remedies or special jurisdictions.
See Trial, § 412.

Of particular acts, instruments, or proceedings.
See Indictment and Information, § 162; Judgment, § 334; Pleading, §§ 243-279; Statutes, § 188.

Petition for divorce, see Divorce, § 104.
Record on appeal or writ of error, see Appeal and Error, §§ 635-655.
Return in attachment, see Attachment, § 324.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see Appeal and Error, §§ 61, 64.

ANIMALS.

Carriage of live stock, see Carriers, §§ 207-230.
Injuries caused by animals frightened by operation of railroad, see Railroads, § 305.
Injuries from operation of railroads, see Railroads, §§ 411-446.
Larceny of, see Larceny, § 3.
Liability of carrier for injuries from infectious disease, see Carriers, §§ 215, 217, 228.

ANNEXATION.

Of territory to municipal corporation, see Municipal Corporations, § 35.

ANSWER.

In pleading, see Pleading, §§ 79-121.

ANTI-PASS LAW.

See Carriers, §§ 23, 35.

ANTI-TRUST LAW.

Fees of prosecuting attorneys in actions under, see District and Prosecuting Attorneys, § 5.

APPEAL AND ERROR.

See Exceptions, Bill of; New Trial.
Appellate jurisdiction of particular courts, see Courts, §§ 223, 231.
Costs, see Costs, §§ 232-238.
Review in actions for accounting by guardian, see Guardian and Ward, § 161.
Review in criminal prosecutions, see Criminal Law, §§ 1020-1177; Homicide, § 340.
Review in habeas corpus, see Habeas Corpus, § 113.
Review of proceedings of assessors of taxes, see Taxation, § 453.
Review of proceedings of justice of the peace, see Justices of the Peace, §§ 141, 174.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

§ 19. Where defendant, whose lumber was attached under writs issued by a justice, sold it, before trial of the case on appeal to the circuit court, without obtaining an order releasing it, the issue as to the attachment became a moot question, which would not be considered by the Supreme Court on appeal.—Booker v. Blythe (Ark.) 401.

§ 20. The circuit court on appeal from the county court acquires only such jurisdiction as the county court had, and can render only such judgment as the county court should have rendered.—Price v. Madison County Bank (Ark.) 706.

III. DECISIONS REVIEWABLE.**(C) AMOUNT OR VALUE IN CONTROVERSY.**

§ 61. Supreme Court held to have jurisdiction of appeals in actions brought by subscribers to stock to have their subscriptions canceled.—Chicago Bldg. & Mfg. Co. v. Peterson (Ky.) 384; Same v. Beaven, Id.; Same v. Mahon, Id.

§ 61. Where two actions, though tried together, were separate, and separate judgments were rendered, jurisdiction of the Court of Appeals would depend upon the amount involved in each, so that, under Civ. Code Prac. § 734, that court would not have jurisdiction of an appeal in one of the actions in which less than \$200 was involved.—Sealey v. Combs (Ky.) 972.

§ 64. The amount which was necessary to make a judgment exceed \$100 held not "interest" within Sayles' Ann. Civ. St. 1897, art. 998, subd. 3, so that the judgment appealed from was for more than \$100, exclusive of interest, giving the Court of Civil Appeals jurisdiction.—Pecos & N. T. Ry. Co. v. Faulkner (Tex. Civ. App.) 747.

(D) FINALITY OF DETERMINATION.

§ 78. A ruling sustaining a demurrer to a petition for a writ of mandamus and dismissing the action before the making of a motion for the writ is a final order from which an appeal lies, though no notice of motion for the writ was given, as provided by Civ. Code Prac. § 474.—Gay v. Haggard (Ky.) 299.

§ 78. An order overruling plaintiff's motion to have an amended petition treated as a petition, and directing the abatement of the action, held appealable.—Board of Councilmen of City of Frankfort v. Herndon's Adm'r (Ky.) 347.

§ 82. A judgment on a motion to vacate a judgment in lieu of the common-law writ of error coram nobis is a final judgment and appealable.—State ex rel. Potter v. Riley (Mo.) 647.

§ 82. An order overruling a motion to vacate a judgment of dismissal and for costs is a special order after final judgment, and appealable under Rev. St. 1899, § 806 (Ann. St. 1903, p. 769).—State ex rel. Potter v. Riley (Mo.) 647.

(E) NATURE, SCOPE, AND EFFECT OF DECISION.

§ 115. An appeal lies from an order confirming a judicial sale.—*Bank of Pine Bluff v. Levi (Ark.)* 250.

IV. RIGHT OF REVIEW.

In drainage proceedings, see *Drains*, § 36.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.**(A) ISSUES AND QUESTIONS IN LOWER COURT.**

§ 169. Under *Sayles' Ann. Civ. St. 1897*, art. 2989, as amended by *Acts 30th Leg. 1907*, p. 208, c. 107, §§ 2, 8, error not brought to the attention of the court granting the injunction will not be reviewed unless it is fundamental.—*Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Tex. Civ. App.)* 790.

§ 171. Where an action was tried as if based on a statute, plaintiff will not be allowed on review to base the action on the common law.—*Mathieson v. St. Louis & S. F. Ry. Co. (Mo.)* 9.

§ 173. Where the case was tried below on the theory that defendant conceded its negligence, which all of the instructions assumed, and defendant did not deny its negligence in its brief, it cannot deny its negligence for the first time on appeal.—*MacDonald v. Metropolitan St. Ry. Co. (Mo.)* 78.

(B) OBJECTIONS AND MOTIONS, AND RULINGS THEREON.

§ 193. Where the record does not show that an exception to the petition, that it appeared that the cause of action was barred by limitations, was presented below, an assignment of error as to sustaining the exception cannot be considered.—*Schneider v. Schneider (Tex. Civ. App.)* 789.

§ 194. Where it was pleaded that the cause of action accrued more than 13 years before suit, its sufficiency cannot be called in question for the first time on a writ of error.—*Schneider v. Schneider (Tex. Civ. App.)* 789.

§ 197. If there is but a variance at the trial in plaintiff's proof, defendant is bound to proceed in the statutory mode by filing an affidavit of surprise.—*Avery v. Tucker (Mo. App.)* 672.

§ 204. An assignment that the court erred in admitting certain testimony will be overruled, where no objection was made at the trial.—*Van Cleave v. St. Louis, M. & S. F. Ry. Co. (Mo. App.)* 116.

§ 216. Where a party made no request for submission of a question to the jury, he cannot complain that the court failed to instruct on the point.—*Price v. Greer (Ark.)* 1009.

§ 216. A party failing to request an instruction on a particular point cannot complain of the failure of the court to instruct.—*Allen v. Fleck (Tex. Civ. App.)* 176.

§ 219. A finding of fact of the trial court, not complained of, is conclusive on appeal.—*Savage v. Umphries (Tex. Civ. App.)* 893.

§ 222. Where a motion for new trial is overruled, and no objections taken or exceptions saved, the appellate court cannot pass upon matters of exception during the trial.—*Williams v. City of St. Joseph (Mo. App.)* 1180.

§ 230. Improper remarks of counsel held not reviewable in the absence of objection thereto at the time.—*American Freehold Land Mort-*

gage Co. of London v. Brown (Tex. Civ. App.) 1106.

§ 237. A party held estopped to complain on appeal that the court did not of its own motion transfer the case to equity.—*Stevenson v. Moore (Ky.)* 951.

(C) EXCEPTIONS.

§ 253. A misjoinder of actions should be excepted to in the lower court; and, if it is not, it cannot be objected to on appeal.—*Knox v. McElroy (Tex. Civ. App.)* 1142.

§ 265. The failure of the court to make special findings of fact requested will not be considered on appeal, where no exception was taken thereto.—*Texas & P. Ry. Co. v. Shawnee Cotton Oil Co. (Tex. Civ. App.)* 776.

§ 285. It is not necessary to take exceptions to findings of law and fact, when there is a statement of facts in the record, in order to review them on appeal.—*Savage v. Umphries (Tex. Civ. App.)* 893.

§ 286. One who has neither appealed nor saved exceptions to the refusal of the court to disregard exceptions to the report of the referee cannot urge in the appellate court that the trial court erred in failing to disregard the exceptions to the report.—*Snyder v. Crutcher (Mo. App.)* 489.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.**(A) TIME OF TAKING PROCEEDINGS.**

§ 339. Appeal from judgment more than two years after rendition held too late.—*Nickell v. Nickell (Ky.)* 963.

(C) PAYMENT OF FEES OR COSTS, AND BONDS OR OTHER SECURITIES.

§ 373. A county may not prosecute an appeal without first giving an appeal bond.—*Midland County v. Slaughter (Tex. Civ. App.)* 762.

§ 387. Where parties fail to execute a bond within the time required by *Rev. St. 1895*, art. 1387, they are not entitled to the benefits of the statute authorizing the Court of Civil Appeals to permit a party to file a new bond in lieu of a defective one.—*Estes v. Estes (Tex. Civ. App.)* 174.

§ 387. On motion to affirm a judgment on certificate, transcript held not to show that the jurisdiction of the Court of Civil Appeals had attached under *Rev. St. 1895*, art. 1387.—*Carney v. Menefee (Tex. Civ. App.)* 1083.

§ 389. An affidavit in lieu of an appeal bond made before an officer authorized to take the affidavit held sufficient if approved by the county judge.—*Green v. Hewett (Tex. Civ. App.)* 170.

§ 389. The statute authorizing an affidavit in lieu of an appeal bond to be made before the county judge of the county where appellant resides does not comprehend county judges of other states.—*Green v. Hewett (Tex. Civ. App.)* 170.

§ 392. Effect of defects in an affidavit in lieu of an appeal bond stated.—*Green v. Hewett (Tex. Civ. App.)* 170.

§ 392. Under *Rev. St. 1895*, art. 7, subd. 2, defects in an affidavit in lieu of an appeal bond held not to vitiate it, and to have been waived.—*Green v. Hewett (Tex. Civ. App.)* 170.

(D) WRIT OF ERROR, CITATION, OR NOTICE.

§ 401. The Court of Civil Appeals does not acquire jurisdiction of a writ of error until service of the writ.—*Carney v. Menefee (Tex. Civ. App.)* 1083.

§ 499. An assignment of error complaining of the admission of evidence will be overruled when no objection or exception appears in the record.—Hogsett v. Northern Texas Traction Co. (Tex. Civ. App.) 807.

§ 500. An assignment complaining of the overruling of a motion to bring in a new party cannot be considered when the record fails to show that it was presented to the court or was overruled.—Dayton Lumber Co. v. Stockdale (Tex. Civ. App.) 805.

§ 501. To preserve exceptions to rulings on motion for leave to file a reply and to strike out the reply, exceptions must be preserved in the bill of exceptions to the overruling of the motion for new trial.—Tarr v. Crump (Mo. App.) 488.

§ 501. Rulings as to the admission of evidence will not be reviewed, where the record fails to show that the rulings were excepted to, or any bill of exceptions taken.—Brunner Fire Co. v. Payne (Tex. Civ. App.) 602.

§ 510. Deeds and tax receipts which are made exhibits to the complaint are a part of the record on review, though they bear no file marks.—McMillan v. Morgan (Ark.) 407.

§ 512. Appeal from the county court, in a case brought in justice court, dismissed.—Roberson v. First State Bank (Tex. Civ. App.) 173.

(C) NECESSITY OF BILL OF EXCEPTIONS, CASE, OR STATEMENT OF FACTS.

§ 544. Where there is no bill of exceptions filed by authority of the court, only the record proper is open to review.—Goodhart, Hartman Co. v. Kinney (Mo. App.) 679.

§ 544. If the record contains no statement of facts, alleged errors in instructions, admission of testimony, and the insufficiency of the evidence to support the verdict cannot be considered on appeal, unless there is error so apparent, when considered in connection with the pleading and verdict, as to show that the verdict was rendered by improper instructions, or upon an issue not made by the pleadings.—International & G. N. R. Co. v. Hood (Tex. Civ. App.) 1119.

§ 547. A party moving for new trial on the ground of newly discovered evidence as shown by affidavits must show by the bill of exceptions or statement of facts that the affidavits were brought to the attention of the court.—Colville v. Colville (Tex. Civ. App.) 870.

§ 548. Where a judgment appealed from is one that the court could have rendered on uncontroverted findings, it will be sustained, in the absence of a statement of the facts.—McLean v. Gulf & I. Ry. Co. of Texas (Tex. Civ. App.) 578.

§ 549. The bill of exceptions must show that exceptions were taken to the denial of motions for new trial and in arrest, to require the court to review the ruling.—Tarr v. Crump (Mo. App.) 488.

(D) CONTENTS, MAKING, AND SETTLEMENT OF CASE OR STATEMENT OF FACTS.

§ 564. Rule governing reservation in the statement of facts of an exception to the admission of testimony, stated.—Dobson v. Zimmerman (Tex. Civ. App.) 236.

§ 564. Under Act May 25, 1907, §§ 5, 14 (Acts 30th Leg. 1907, pp. 510, 512, c. 24), held

(E) ABSTRACTS OF RECORD.

§ 585. Where the answer shown by the abstract was a general denial, and appellee filed no counter or additional abstract, she cannot contend that the trial answer contained a plea of contributory negligence.—MacDonald v. Metropolitan St. Ry. Co. (Mo.) 78.

§ 590. An appellant held not entitled to file a supplemental abstract of record without leave of court.—Davis v. Foster (Mo. App.) 1191.

(F) MAKING, FORM, AND REQUISITES OF TRANSCRIPT OR RETURN.

§ 597. Photographs filed as exhibits should be filed with the transcript in the circuit court and certified by the circuit court clerk with the transcript.—Southern Ry. Co. in Kentucky v. Schmidt (Ky.) 324.

§ 601. Under Act May 25, 1907 (Acts 31st Leg. 1907, pp. 509-513, c. 24), held that, on an appeal from the county court to the Court of Civil Appeals, the original statement of facts should be sent up.—St. Louis, S. F. & T. Ry. Co. v. Wall (Tex.) 131.

§ 601. Under Act May 25, 1907 (Laws 1907, p. 509, c. 24), the original statement of facts must be sent up on appeal.—Whitfield v. Burrell (Tex. Civ. App.) 153.

(H) TRANSMISSION, FILING, PRINTING, AND SERVICE OF COPIES.

§ 622. The transcript on writ of error need not be filed in the Court of Civil Appeals until after service of the writ.—Carney v. Menefee (Tex. Civ. App.) 1083.

(I) DEFECTS, OBJECTIONS, AMENDMENT, AND CORRECTION.

§ 635. Where appellant failed to comply with Supreme Court rule 9, requiring instructions given and refused to be set out in the abstract, the judgment will be affirmed.—Karatsfasky v. Fybus Bros. (Ark.) 1008.

§ 638. A statement of facts, not bearing the file mark of the trial clerk, will not be considered.—Belt v. Cetti (Tex. Civ. App.) 241.

§ 640. Appellant may file a new transcript of the record, where the first one is defective.—Nail v. First Nat. Bank (Tex. Civ. App.) 1084.

§ 641. Appellant cannot complain where appellee furnishes for his use the entire record of the case, nor can appellee object to the record he has himself filed.—Southern Ry. Co. in Kentucky v. Schmidt (Ky.) 324.

§ 644. Copying the statement of facts into the record on appeal to the Court of Civil Appeals, instead of sending up the original statement, as required by Gen. Laws 1907, p. 509, c. 24, is an irregularity which is waived, unless proper objection is made, and appellee held not to have objected within the time required by Court of Civil Appeals rule 8 (67 S. W. xiv), so that his objection to considering the record on that ground was waived.—International & G. N. R. Co. v. Hood (Tex. Civ. App.) 1119.

§ 649. Refusal of court to consider appellant's motion to correct the court's statement of facts held error.—Brunner Fire Co. v. Payne (Tex. Civ. App.) 602.

§ 654. Where a statement of facts does not show filing in the trial court, appellant should be permitted to correct the record.—Belt v. Cetti (Tex. Civ. App.) 241.

(J) CONCLUSIVENESS AND EFFECT, IMPEACHING AND CONTRADICTING.

§ 664. An agreed statement of facts will control, in case of a variance between the statement of facts and the bill of exceptions.—Chicago, R. I. & G. Ry. Co. v. Jones (Tex. Civ. App.) 759.

(K) QUESTIONS PRESENTED FOR REVIEW.

§ 671. An abstract of record, not showing that a motion for new trial was filed, held to present nothing for review except the record proper.—Davis v. Foster (Mo. App.) 1191.

§ 679. The sufficiency of pleadings to support a judgment will not be reviewed on appeal, where neither the pleadings nor a statement of their substance is contained in the abstract.—Goodhart, Hartman Co. v. Kinney (Mo. App.) 679.

§ 692. A ruling excluding a question put to a witness will not be reviewed in the absence of an avowal as to what the answer would have been.—Stevenson v. Moore (Ky.) 951.

§ 692. Before error can be predicated on the refusal to permit a witness to testify, it must appear from the bill of exceptions what the testimony would have been and that the testimony would have been beneficial to the party complaining.—Missouri, K. & T. Ry. Co. of Texas v. Neiser (Tex. Civ. App.) 166.

§ 699. An instruction not incorporated in the bill of exceptions cannot be considered on appeal.—Wellman v. Metropolitan St. Ry. Co. (Mo.) 31.

§ 709. An assignment that the court erred in refusing to hear evidence in support of a motion to tax the costs, failing to set out the evidence, is insufficient.—Unknown Owner v. State (Tex. Civ. App.) 803.

(L) MATTERS NOT APPARENT OF RECORD.

§ 712. The record held to show affirmatively, as it must, error in exclusion of impeaching evidence.—Biggins v. Gulf, C. & S. F. Ry. Co. (Tex.) 125.

§ 713. Under District and County Court Rule 53 (20 S. W. xv), held, that the ruling on special exceptions to the petition are improperly shown by bills of exception.—Dobson v. Zimmerman (Tex. Civ. App.) 238.

XI. ASSIGNMENT OF ERRORS.

Waiver of rules of court as to, see Courts, § 82.

§ 731. An assignment of error complaining of the verdict on the ground that it is contrary to the evidence is too general to require consideration on appeal.—Goodwin & McFarland v. Burton (Tex. Civ. App.) 587.

§ 739. A single assignment of error complaining of the refusal to give special charges not germane to each other, but presenting distinct propositions of law, will not be considered.—Missouri, K. & T. Ry. Co. of Texas v. Neiser (Tex. Civ. App.) 166.

§ 742. The Court of Civil Appeals will consider an assignment of error complaining of an instruction, though the point is not presented in the brief by such proposition as is contemplated by the rules.—Keystone Mills Co. v. Chambers (Tex. Civ. App.) 178.

quired by Court of Civil Appeals Rules, it need not be considered.—Boardman v. Woodward (Tex. Civ. App.) 550.

§ 742. Assignments of error cannot be considered, where they are grouped in appellants' brief, and propositions are made under two or more of them raising distinct questions of law.—Lowrance v. Woods (Tex. Civ. App.) 551.

§ 742. An assignment of error not followed by a statement from the record will not be considered.—Brunner Fire Co. v. Payne (Tex. Civ. App.) 602.

§ 742. Assignments of error not submitted as propositions and not followed by propositions cannot be considered.—Hermann v. Allen (Tex. Civ. App.) 794.

§ 742. An assignment that the court erred in giving a charge because of the absence of evidence on which to base it, not followed by any statement of the evidence, may be disregarded on appeal.—Northern Texas Traction Co. v. Hunt (Tex. Civ. App.) 827.

§ 742. An assignment of error should be followed by a proper statement of the facts, and mere references to the record are not the statement required by the rules.—St. Louis & S. F. R. Co. v. Lane (Tex. Civ. App.) 847.

§ 742. Where an assignment of error is not followed by a proper statement of the facts, as required by the rules, it may be disregarded.—St. Louis & S. F. R. Co. v. Lane (Tex. Civ. App.) 847.

§ 742. A proposition which cannot be deduced from an assignment of error will not be considered on appeal.—Savage v. Umphries (Tex. Civ. App.) 893.

§ 744. A statute requiring an appellant to file assignments of error in the clerk's office held mandatory.—Newman v. Satterwhite (Tex. Civ. App.) 1145.

§ 745. Assignments of error, filed in the lower court and accompanied by the proper certificate, will be considered on appeal, in the absence of objections.—Newman v. Satterwhite (Tex. Civ. App.) 1145.

§ 747. In the absence of cross-assignments of error calling in question the correctness of the trial court's ruling in striking out appellee's plea in reconvention on exception, the ruling cannot be reviewed.—Mitchell v. Rushing (Tex. Civ. App.) 582.

§ 750. Where the findings do not support the judgment, the Court of Civil Appeals will consider assignments of error attacking the judgment as unsupported by the evidence.—Belt v. Cetti (Tex. Civ. App.) 241.

§ 753. Where no assignments of error were copied into the transcript, error alleged in the brief cannot be considered on appeal unless it is shown by the record.—Engleman v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 1089.

§ 754. As against a defendant, which filed no brief in the appellate court, held plaintiff, not having complained below, could not have the judgment reformed so as to be against such defendant for the whole amount of the verdict, though he would have been entitled thereto below.—Ft. Worth Light & Power Co. v. Moore (Tex. Civ. App.) 831.

XII. BRIEFS.

§ 759. Breaking up an assignment of error in the brief by copying its several subdivisions separately and presenting propositions under

each of them *held* not a compliance with the rules of the Court of Civil Appeals.—*St. Louis, S. F. & T. Ry. Co. v. Adams* (Tex. Civ. App.) 1155.

§ 760. An assignment of error to exclusion of evidence cannot be considered; the ground of the objection to the evidence not being shown.—*Uecker v. Zuercher* (Tex. Civ. App.) 149.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 787. An appeal dismissed for failure of appellant to summon appellees within a reasonable time.—*Birmingham v. Rice* (Ark.) 1017.

§ 787. Power of Supreme Court to dismiss an appeal for delay under Kirby's Dig. § 1198, stated.—*Birmingham v. Rice* (Ark.) 1017.

XVI. REVIEW.

(A) SCOPE AND EXTENT IN GENERAL.

§ 837. In passing on the question of error in exclusion of evidence, *held*, that reference cannot be had to an allegation of a pleading properly stricken therefrom.—*Uecker v. Zuercher* (Tex. Civ. App.) 149.

§ 837. No notice can be taken of an unsworn answer, in determining whether a trial court erred in dissolving a temporary injunction.—*Dawson v. Baldrige* (Tex. Civ. App.) 598.

§ 839. Where a jury was waived, and no motion for a new trial was made, nor a separation of the law and facts asked, the only question on appeal is the sufficiency of the pleadings to support the verdict.—*Stone v. Lamb* (Ky.) 942.

§ 852. That the evidence strongly preponderates in favor of the verdict is of weight in determining whether it resulted from an alleged erroneous theory presented by an instruction.—*Houston & T. O. R. Co. v. Shapard* (Tex. Civ. App.) 596.

§ 854. A verdict sustaining an attachment on each ground alleged should be upheld, though erroneous as to one of the grounds, where the others are valid.—*Seasinghaus v. Knoche* (Mo. App.) 104.

(C) PARTIES ENTITLED TO ALLEGE ERROR.

§ 882. An instruction, though erroneous, is not ground for reversal where identical with an instruction offered by the complaining party.—*Camden Interstate Ry. Co. v. Lester* (Ky.) 283.

§ 882. Where the instructions given for plaintiff were correct and those given for defendant were erroneous, defendant is not entitled to complain on review that the instructions are conflicting.—*Hall v. Missouri Pac. Ry. Co.* (Mo.) 56.

§ 882. A defendant voluntarily treating the issue of contributory negligence as one for the jury *held* not entitled to complain of plaintiff's instructions submitting the issue to the jury.—*Dahmer v. Metropolitan St. Ry. Co.* (Mo. App.) 493.

§ 882. Errors in declarations of law invited by appellant *held* not available on appeal.—*Campbell v. Tinker* (Mo. App.) 660.

§ 882. Error in a personal injury action against an employer in authorizing recovery on a theory not pleaded *held* not ground for reversal.—*Texas & N. O. R. Co. v. Geiger* (Tex. Civ. App.) 179.

§ 882. The error of submitting a cause on an erroneous theory cannot be said to have been invited by appellant by requests for instructions, where such requests were offered in ex-

planation and amplification of the general instructions.—*Atchison, T. & S. F. Ry. Co. v. Pickens* (Tex. Civ. App.) 1133.

(E) PRESUMPTIONS.

§ 907. The decree in a chancery case, shown by the record to have been heard on oral evidence, *held* presumed to be correct; error not appearing on the face of the record, and the evidence not having been brought into the record.—*Barringer v. Bratcher* (Ark.) 1015.

§ 907. Where the record does not show that any action was taken by the trial court on defendant's exceptions to the petition, error therein, if any, is presumed to have been waived.—*Boardman v. Woodward* (Tex. Civ. App.) 550.

§ 909. In view of recital of record that an officer gave notice of an election on creation of a school district, it will be presumed he published it as required by law.—*Taylor v. Cundiff* (Ky.) 879.

§ 909. Where there is neither a statement of facts nor conclusions of fact in the record, it must be presumed in favor of the judgment that the evidence warranted sustaining a plea of limitations.—*Schneider v. Schneider* (Tex. Civ. App.) 789.

§ 916. Where, on appeal in an action for breach of contract, the transcript of the testimony contains a statement that the contract was put in evidence, but it is not made a part of the record, and the transcript states that the contract was correctly set forth in the pleadings, the court may assume that the contract put in evidence was correctly set forth in the petition.—*St. Louis, S. F. & T. Ry. Co. v. Fenley* (Tex. Civ. App.) 845.

§ 916. The ruling of a trial court on a plea not in the record will be presumed to be correct, unless the contrary is shown.—*Gardner v. Planters' Nat. Bank of Honey Grove* (Tex. Civ. App.) 1146.

§ 927. On review of the direction of a verdict, the question is whether there was evidence to warrant a verdict for the adverse party.—*McGrory v. Ultima Thule, A. & M. Ry. Co.* (Ark.) 710.

§ 928. Where appellant fails to set out instructions in the abstract, it will be presumed that they were correct.—*Bray Clothing Co. v. McKinney* (Ark.) 406.

§ 931. Under *Sayles' Ann. Civ. St. 1907*, art. 1331, and in circumstances stated, *held* that a trial court will be presumed to have found favorably to plaintiff on an issue not submitted.—*Lowrance v. Woods* (Tex. Civ. App.) 551.

§ 934. Where findings are sufficient to support the judgment, it will be presumed to have been based thereon, in the absence of a showing to the contrary in the record.—*Lowrance v. Woods* (Tex. Civ. App.) 551.

§ 934. Where only a general demurrer was interposed to a plea of reconvention, and the demurrer was not acted upon by the court, every intendment that could have been indulged in favor of the plea had the demurrer been insisted on should be given it on appeal, where the judgment is assailed on account of the insufficiency of the plea.—*Knox v. McElroy* (Tex. Civ. App.) 1142.

§ 938. An abstract of record *held* not to show that there was a valid extension of the time in which to file a bill of exceptions.—*Goodhart, Hartman Co. v. Kinney* (Mo. App.) 679.

§ 938. In the absence of a bill of exceptions signed by the judge or bystanders, it will be assumed on appeal that a qualification of a bill of exceptions presented by appellant was made with appellant's consent.—*Brunner Fire Co. v. Payne* (Tex. Civ. App.) 602.

§ 939. Where the only part of the record proper that is brought up on appeal is a certified copy of the judgment, which is regular on its face, the court will presume that the record proper is sufficient.—Goodhart, Hartman Co. v. Kinney (Mo. App.) 679.

(F) DISCRETION OF LOWER COURT.

§ 945. An appellate court will not review the ruling of the trial court in matters of discretion, unless prejudice appears.—Jones v. Springfield Traction Co. (Mo. App.) 675.

§ 959. Denial of trial amendment held not to be reversed unless it allowed the adverse parties to succeed on a technical point which might have been determined against them without prejudice to their substantial rights.—Fresier v. Harrison (Mo. App.) 108.

§ 959. Refusal or allowance of a reply to an answer setting up new matter is discretionary with the trial court, and will not be reviewed on appeal, unless abused.—Tarr v. Crump (Mo. App.) 488.

(G) QUESTIONS OF FACT, VERDICTS, AND FINDINGS.

§ 1001. The court on appeal in determining whether there is sufficient evidence to sustain the verdict must take that view of it which is most favorable to the successful party.—Priest v. Hodges (Ark.) 253.

§ 1001. A verdict supported by evidence will not be disturbed on appeal.—Wellman v. Metropolitan St. Ry. Co. (Mo.) 81.

§ 1001. A verdict based on contradictory and highly improbable testimony of an unreliable witness will not be allowed to stand.—Atchison, T. & S. F. Ry. Co. v. Wiley (Tex. Civ. App.) 1127.

§ 1002. Controverted questions of fact are for the jury in the trial court.—A. G. Brown & Co. v. McKnight (Ark.) 408.

§ 1002. A verdict on conflicting evidence will not be disturbed on appeal.—Stevenson v. Moore (Ky.) 951.

§ 1002. A jury finding upon conflicting evidence is conclusive on appeal.—International & G. N. Ry. Co. v. Williams (Tex. Civ. App.) 758.

§ 1008. Findings of fact in a case tried before the court will not be disturbed unless clearly wrong.—Ross v. Thomas (Ky.) 948.

§ 1008. Ordinarily findings are conclusive on appeal.—Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co. (Mo. App.) 500.

§ 1009. A finding of the chancellor supported by a preponderance of the evidence will not be disturbed on appeal.—West v. Burks (Ark.) 397.

§ 1009. Where on appeal the mind is left in doubt, the finding and judgment of the chancellor exercises a controlling influence.—Rathfon v. Gaines (Ky.) 937.

§ 1009. A finding of fact by the chancellor on conflicting evidence will not be disturbed on appeal.—Travis v. Taylor (Ky.) 988.

§ 1009. Though in equity the Supreme Court may weigh the evidence, it will defer largely to the chancellor's judgment.—Collins v. Harrell (Mo.) 482.

§ 1009. The Court of Appeals in an equity case will defer largely, on disputed matters, to the conclusions of the trial judge based on oral testimony heard by him.—Ball v. Reyburn (Mo. App.) 524.

§ 1010. A motion to set aside an execution sale lies on the law side of a court, and the evidence taken at the hearing cannot be weighed

on appeal.—State ex rel. Hartley v. Innes (Mo. App.) 1168.

§ 1010. An appellate court will not substitute different conclusions of fact for those of the trial court, where it cannot say that the findings have not sufficient evidence to support them.—Thigpen v. Russell (Tex. Civ. App.) 1080.

§ 1011. A finding of the trial court on conflicting evidence will be sustained on appeal.—Jones v. Plummer (Mo. App.) 109.

§ 1011. A finding on conflicting evidence held conclusive on appeal.—McKallip v. Collins Bros. (Tex. Civ. App.) 546.

§ 1011. Findings on conflicting evidence not acquiesced in may be revised in a proper case from the statement of facts.—Maury v. McDonald (Tex. Civ. App.) 812.

§ 1012. Findings of the chancellor not against the preponderance of the evidence will not be disturbed on appeal.—Bank of Pine Bluff v. Levi (Ark.) 250.

§ 1018. There being evidence that would have warranted a verdict for more than the damages found the judgment will not be reversed as excessive.—Gulf, C. & S. F. Ry. Co. v. Thomas (Tex. Civ. App.) 780.

§ 1024. The finding of the trial court on the issue of whether a juror's opinion disqualifies him will not be set aside, except for manifest error.—Palmer v. State (Tenn.) 1022.

(H) HARMLESS ERROR.

§ 1027. Where the action was for work done under a contract with defendant's agent, and, in the alternative, for the value of work done with the knowledge and consent of its agent, and the jury found for plaintiff in the terms of the contract, any errors as to the question of quantum meruit could not have been misleading.—Suderman-Dolson Co. v. Hope (Tex. Civ. App.) 216.

§ 1028. Where the correct judgment was rendered on the undisputed evidence, any error of procedure was immaterial.—Wright v. Hooker (Tex. Civ. App.) 765.

§ 1033. Certain declarations of law, if erroneous, held not prejudicial.—Campbell v. Tinker (Mo. App.) 660.

§ 1033. A connecting carrier against which a judgment for the entire damages to a shipment of horses might have been entered cannot complain of an error in entering judgment against it for only one-half of the damages, and under the interstate commerce act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), as amended in 1906 (Act June 29, 1906, c. 3591, § 7, 34 Stat. 598 [U. S. Comp. St. Supp. 1907, p. 909]), the receiving carrier cannot complain of a division of the damages.—St. Louis, S. F. & T. Ry. Co. v. Fenley (Tex. Civ. App.) 845.

§ 1033. A party cannot complain on appeal merely because the judgment awards against it a less penalty than the pleadings and facts would have authorized, save for the limitation of the prayer for recovery.—Texas & P. Ry. Co. v. Andrews, Reynolds & Co. (Tex. Civ. App.) 1101.

§ 1039. Whether the answer filed below contained a plea of contributory negligence is immaterial on appeal, where that issue was not submitted to the jury.—MacDonald v. Metropolitan St. Ry. Co. (Mo.) 78.

§ 1042. Refusal to strike an allegation of an answer held harmless; the matter not having been submitted to the jury.—Uecker v. Zuercher (Tex. Civ. App.) 149.

§ 1043. Appearance of witnesses before the closing of the hearing of evidence cured any error in the denial of an application for a continuance because of their absence.—Weatherford, M. W. & N. W. Ry. Co. v. White (Tex. Civ. App.) 799.

§ 1043. A carrier in an action for injuries to a passenger *held* not prejudiced by the denial of an application for a continuance for the absence of witnesses.—Weatherford, M. W. & N. W. Ry. Co. v. White (Tex. Civ. App.) 799.

§ 1044. The error of the court in directing a compulsory reference, and thereby depriving a party of his right to trial by jury, is reversible.—Snyder v. Crutcher (Mo. App.) 489.

§ 1046. An erroneous remark by the court that he did not believe a question not objected to was proper *held* not prejudicial.—Houston & T. C. R. Co. v. Shapard (Tex. Civ. App.) 596.

§ 1050. Evidence of a conversation consisting of self-serving declarations *held* harmless.—Ellerman v. Farmer (Ky.) 289.

§ 1050. Where the ground relied on for a recovery is the commission of a negligent act in one respect, it is prejudicial to permit evidence establishing another and different negligent act.—Louisville & N. R. Co. v. Payne (Ky.) 352.

§ 1050. The error in admitting immaterial evidence not influencing the verdict is harmless.—Rainey v. Kemp (Tex. Civ. App.) 630.

§ 1050. The admission of opinion evidence *held* harmless error.—Bond v. International & G. N. R. Co. (Tex. Civ. App.) 867.

§ 1050. In a local option election contest, the admission of certain testimony, if error, *held* harmless.—Savage v. Umphries (Tex. Civ. App.) 893.

§ 1051. A party cannot complain of the omission of testimony in support of a fact established by other evidence received without objection.—International & G. N. R. Co. v. McCullough (Tex. Civ. App.) 558.

§ 1051. Defendant's objection to certain evidence *held* waived by his consent to the introduction of a part of plaintiff's written statement containing practically the same facts.—Houston & T. C. R. Co. v. Malloy (Tex. Civ. App.) 721.

§ 1051. In a local option election contest, the admission of certain testimony *held* not prejudicial.—Savage v. Umphries (Tex. Civ. App.) 893.

§ 1051. Admission of a letter from the land commissioner to show an award of land to defendant in an action to try title to the land, if error, was harmless, where the award to defendant was otherwise shown.—McKee v. West (Tex. Civ. App.) 1135.

§ 1051. Admission of improper evidence *held* not prejudicial.—St. Louis, S. F. & T. Ry. Co. v. Adams (Tex. Civ. App.) 1155.

§ 1051. Where it was admitted that a certain person was the common source of title, the admission of evidence of a deed of the property to him *held* not error.—Robertson v. Hefley (Tex. Civ. App.) 1159.

§ 1053. In an action for malpractice, the error in permitting evidence as to the physician's policy of insurance against accidents *held* not reversible, in view of the evidence and the instructions of the court.—Samuels v. Willis (Ky.) 339.

§ 1053. In trover for cattle, error in admitting evidence of a difficulty which occurred when the cattle were taken was harmless, where the court did not submit the issue of exemplary damages.—Boardman v. Woodward (Tex. Civ. App.) 550.

§ 1054. In an action against a railroad for damages to plaintiff's shipments of cabbages, the erroneous admission of certain evidence *held* not prejudicial to defendant.—Missouri, K. & T. Ry. Co. of Texas v. McLean (Tex. Civ. App.) 161.

§ 1056. In a local option election contest, any error in excluding certain testimony *held* harmless.—Savage v. Umphries (Tex. Civ. App.) 893.

§ 1056. Where there was no specific allegation as to certain irregularities, and the case was tried without a jury, the erroneous rejection of testimony as to such irregularities was not ground for reversal.—Savage v. Umphries (Tex. Civ. App.) 893.

§ 1056. The exclusion of a letter to prove a fact concerning which there was no controversy was without prejudice.—Little v. Rich (Tex. Civ. App.) 1077.

§ 1057. Sustaining an objection to a question *held* harmless.—Uecker v. Zuercher (Tex. Civ. App.) 149.

§ 1058. The refusal to allow defendant's physician to examine plaintiff's injuries in the presence of the jury *held* harmless error.—St. Louis Southwestern Ry. Co. of Texas v. Browning (Tex. Civ. App.) 245.

§ 1060. Remarks of plaintiff's attorney in an action for personal injuries *held* harmless error.—St. Louis Southwestern Ry. Co. of Texas v. Browning (Tex. Civ. App.) 245.

§ 1062. The erroneous submission of such an issue as to the meaning of a written contract to a jury is harmless error, except where the jury places a wrong construction on the instrument.—Mitchell v. Rushing (Tex. Civ. App.) 582.

§ 1062. In an action against a carrier for damages caused by the ejection of plaintiff's wife, and for loss of time to plaintiff caused thereby, any error in submitting the issue of loss of time without proof of the value and amount thereof was cured by requiring plaintiff to remit a sum sufficient to cover that item of damage.—International & G. N. Ry. Co. v. Williams (Tex. Civ. App.) 753.

§ 1064. The use of certain words in an instruction, as to duty to construct drains through a road so as not to overflow upper proprietors with surface water, *held* not prejudicial.—Ames Shovel & Tool Co. v. Anderson (Ark.) 1013.

§ 1064. Defendant *held* not prejudiced because an instruction on contributory negligence contained the words "that plaintiff saw or might by the exercise of ordinary care have seen," instead of the words "that plaintiff knew or might by the exercise of ordinary care have known."—Ellerman v. Farmer (Ky.) 289.

§ 1064. An instruction in an action against a carrier to recover for injuries to a passenger *held* harmless error.—Joyce v. Metropolitan St. Ry. Co. (Mo.) 21.

§ 1064. Error in an instruction upon the weight and credibility of plaintiff's testimony *held* prejudicial.—Quinn v. Metropolitan St. Ry. Co. (Mo.) 46.

§ 1064. An error in an instruction in an action against a carrier for personal injuries

proper culverts, an instruction, if erroneous as being on the weight of evidence, *held* not prejudicial under the evidence.—*Ft. Worth & D. C. Ry. Co. v. Suter* (Tex. Civ. App.) 215.

§ 1064. In an action for wrongful attachment, an instruction *held* not prejudicial to plaintiff.—*Rainey v. Kemp* (Tex. Civ. App.) 630.

§ 1064. Error in submitting issue of defendant telegraph company's negligence in failing to deliver telegram at a certain time *held* harmless.—*Western Union Telegraph Co. v. Cobb* (Tex. Civ. App.) 717.

§ 1064. Request that the jury bring in a verdict as speedily as possible consistent with their duties *held* not error.—*Hermann v. Allen* (Tex. Civ. App.) 794.

§ 1066. The giving of an abstract instruction is not ground for reversal where the instructions when read together could not have worked prejudicially to the party complaining.—*Wellman v. Metropolitan St. Ry. Co.* (Mo.) 31.

§ 1066. As under Rev. St. 1899, § 4123 (Ann. St. 1906, p. 2239), it is essential in attachment proceedings for rent that the jury find defendant liable for the rent, certain instruction *held* not prejudicial error.—*Sessinghaus v. Knoche* (Mo. App.) 104.

§ 1068. An instruction submitting a rule for estimating damages, including the element of loss of earnings, is reversible error, where the evidence does not sustain that element.—*Leach v. St. Louis & S. F. R. Co.* (Mo. App.) 510.

§ 1068. An instruction in an action to recover for architect's plans *held* not harmless error.—*Hall v. Parry* (Tex. Civ. App.) 561.

§ 1068. In an action against a carrier for injuries to an alighting passenger, an erroneous charge *held* not prejudicial.—*Southworth v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.) 861.

§ 1067. In a street car passenger's action for injuries claimed to have been sustained by the car starting while he was boarding it, *held* not reversible error to refuse a requested instruction upon the care required by defendant, in view of other instructions given.—*Quinn v. Metropolitan St. Ry. Co.* (Mo.) 46.

§ 1068. Appellant *held* not prejudiced by erroneous instructions submitting the question of his adverse possession, which the evidence failed to sustain.—*Ramsey v. Morrow* (Ky.) 296.

§ 1068. An erroneous charge in a personal injury action *held* not prejudicial in view of the size of the verdict.—*Town of Bellevue v. England* (Ky.) 994.

§ 1068. Where the verdict was correct on the merits, it will not be disturbed for error in instructions.—*Quinn v. Metropolitan St. Ry. Co.* (Mo.) 46.

§ 1068. Error in an instruction authorizing double recovery of damages is presumptively prejudicial.—*Keystone Mills Co. v. Chambers* (Tex. Civ. App.) 178.

§ 1068. Where the verdict was correct under the evidence, errors in instructions were not prejudicial.—*Suderman-Dolson Co. v. Hope* (Tex. Civ. App.) 216.

§ 1068. The error in an instruction as to exemplary damages in an action for wrongful attachment *held* harmless.—*Rainey v. Kemp* (Tex. Civ. App.) 630.

§ 1068. A charge as to the damages recoverable for the death of a minor child *held* not

where counsel had agreed that the testimony should be read provided all of it was read, *held* not prejudicial error under the circumstances.—*Quinn v. Metropolitan St. Ry. Co.* (Mo.) 46.

§ 1071. An erroneous finding of fact was immaterial, where it did not affect the other findings, which were supported by the evidence.—*St. Louis Southwestern Ry. Co. of Texas v. Alsop & Gray* (Tex. Civ. App.) 194.

§ 1073. In an action against a railroad for damages to plaintiff's shipments of cabbages, defendant *held* not prejudiced under the evidence by a judgment based on the market value of the cabbages at the point of shipment.—*Missouri, K. & T. Ry. Co. of Texas v. McLean* (Tex. Civ. App.) 161.

§ 1074. The refusal to stay process for the enforcement of a decree rendered on constructive service until a retrial on the merits is had is not prejudicial where on the final hearing the court properly refused to set aside the decree.—*West v. Burks* (Ark.) 397.

§ 1074. Error in failure of court to consider appellant's motion to correct court's statement of facts *held* harmless.—*Brunner Fire Co. v. Payne* (Tex. Civ. App.) 602.

(K) SUBSEQUENT APPEALS.

§ 1097. The decision on appeal is the law of the case on a subsequent appeal.—*Loughridge v. Ball* (Ky.) 321.

§ 1097. The decision of the Court of Appeals on a former appeal, directing certain instructions to be given on remand, *held* binding on the Court of Appeals on a subsequent appeal.—*Lexington Ry. Co. v. Woodward* (Ky.) 965.

§ 1097. An instruction approved by the court on appeal is the law of the case on a subsequent appeal.—*Van Cleve v. St. Louis, M. & S. E. Ry. Co.* (Mo. App.) 116.

§ 1097. The decision of the Court of Civil Appeals is the law of the case on a subsequent appeal.—*Missouri, K. & T. Ry. Co. of Texas v. Redus* (Tex. Civ. App.) 208.

§ 1099. Questions that are raised or could have been raised on an appeal *held* concluded on a second appeal.—*Jackson's Adm'rs v. McHargue* (Ky.) 944.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) DECISION IN GENERAL.

§ 1106. Where an action is brought for an amount in an amended petition larger than the jurisdiction of the county court, the appeal will not be dismissed where the original petition is not in the record, but will be remanded.—*International & G. N. R. Co. v. Flory* (Tex. Civ. App.) 1116.

(B) AFFIRMANCE.

§ 1140. In an action for the balance due for railroad construction work, including clearing stations of the right of way, error in refusing to instruct that plaintiff could not recover for certain work *held* obviated by deducting the contract price of such work from the verdict.—*A. G. Brown & Co. v. McKnight* (Ark.) 409.

§ 1140. Error in judgment *held* cured by remittitur.—*Price v. Greer* (Ark.) 1009.

§ 1140. A cause *held* not to be reversed for the allowance of a recovery in excess of that pleaded, where plaintiff offers to remit the excess.—*Texas & P. Ry. Co. v. Graffeo* (Tex. Civ. App.) 873.

(C) MODIFICATION.

§ 1151. Certain relief granted to complainant on appeal only on payment of costs by complainant.—*McBurney v. Glenmary Coal & Coke Co. (Tenn.)* 694.

§ 1151. The court, on appeal from a judgment against a carrier for damages to live stock, *held* authorized to reform the judgment and render judgment for a specified sum on the shipper remitting the excess.—*Missouri, K. & T. Ry. Co. of Texas v. Rogers (Tex. Civ. App.)* 738.

§ 1151. That a judgment for double usurious payments of interest was excessive by the amount of interest awarded would not necessitate a reversal.—*Baum v. Daniels (Tex. Civ. App.)* 754.

§ 1151. Error in including interest in a judgment for damages can be remedied by the appellate court.—*St. Louis & S. F. R. Co. v. Lane (Tex. Civ. App.)* 847.

§ 1152. A decree on the report of the commissioner may be modified on review, though there were no exceptions filed to the report before confirmation.—*Webster v. Cadwallader (Ky.)* 327.

(D) REVERSAL.

§ 1175. Where the uncontradicted evidence failed to establish a cause of action, the court, on appeal from a judgment for plaintiff, will render the proper judgment.—*Missouri, K. & T. Ry. Co. of Texas v. Davis (Tex. Civ. App.)* 234.

§ 1175. Where the evidence was fully developed on the trial, the court on appeal from an erroneous judgment will reverse it and render a proper judgment.—*Missouri, K. & T. Ry. Co. of Texas v. Rogers (Tex. Civ. App.)* 738.

§ 1177. New trial *held* necessary upon reversal, where a question of fact was involved and a general verdict was rendered.—*Mitchell v. Rushing (Tex. Civ. App.)* 582.

§ 1178. When a judgment is reversed, because exceptions have been erroneously sustained to pleadings, a judgment cannot be rendered on evidence which would have been admissible under the pleadings, if the exceptions had not been sustained.—*Savage v. Umphries (Tex. Civ. App.)* 893.

§ 1178. Where a judgment is reversed, the Court of Civil Appeals cannot render judgment for the other party, based on evidence not admitted on the trial.—*Savage v. Umphries (Tex. Civ. App.)* 893.

(F) MANDATE AND PROCEEDINGS IN LOWER COURT.

§ 1195. Where instructions have been approved by the appellate court as the law of the case, only such instructions should be given on a retrial where the evidence on the retrial is the same as on the former trial.—*Louisville & N. R. Co. v. Payne (Ky.)* 352.

APPEARANCE.

§ 24. Defective service of process *held* waived by special appearance for the purpose of demurrer and afterwards filing an answer.—*Lohefener v. Mercantile Town Mut. Ins. Co. (Mo. App.)* 515.

APPLIANCES.

Liability of employer for defects, see Master and Servant, §§ 101-129.

APPLICATION.

Of assets of partnership, see Partnership, §§ 181, 186.

APPOINTMENT.

Of corporate officers, see Corporations, § 281.
Of executor or administrator, see Executors and Administrators, §§ 19-21.

ARBITRATION AND AWARD.

See Reference.

ARCHITECTS.

Contract to furnish plans and specifications, action for breach, see Contracts, §§ 338, 346, 353.

ARGUMENT OF COUNSEL.

In civil actions, see Trial, §§ 110-133.
In criminal prosecutions, see Criminal Law, §§ 714-726.

ARMY AND NAVY.

Right of member of national guards employed in service of United States Army to vote, see Elections, § 74.

ARREST.

See Bail.
Illegal arrest, see False Imprisonment.

II. ON CRIMINAL CHARGES.

Presumptions as to regularity of warrant issued by judge of county court, see Evidence, § 82.

§ 65. Where a warrant for plaintiff's arrest was issued in B. county, but no warrant was issued or transferred to defendants in G. county, when they arrested plaintiff without a warrant, the arrest was wrongful under White's Ann. Code Cr. Proc. art. 258.—*Little v. Rich (Tex. Civ. App.)* 1077.

ARREST OF JUDGMENT.

In criminal prosecutions, see Criminal Law, §§ 972, 974.

ARSON.

Charge of, as slander, see Libel and Slander, § 7.

ASSAULT AND BATTERY.**I. CIVIL LIABILITY.****(A). ACTS CONSTITUTING ASSAULT OR BATTERY AND LIABILITY THEREFOR.**

§ 3. Recovery for accidental, though negligent, act may not be had under complaint for assault and battery.—*Biggins v. Gulf, C. & S. F. Ry. Co. (Tex.)* 125.

§ 13. Where reasonable inferences from the evidence justify it, *held*, the question of defendant has provoked the difficulty, depriving him of the right of self-defense, is properly submitted.—*Johnson v. Daily (Mo. App.)* 530.

(B) ACTIONS.

§ 26. Defendant in an action for assault and battery *held* to have the burden of justification.—*Johnson v. Daily (Mo. App.)* 530.

§ 38. As part of the damages for assault and battery, *held*, there may be recovery for any humiliation and disgrace shown to have been suffered therefrom.—*Johnson v. Daily (Mo. App.)* 530.

§ 43. Instruction in an action for assault and battery *held* not misleading.—*Johnson v. Daily (Mo. App.)* 530.

Of loss on insured, see Insurance, § 188.
Of tax, see Taxation, §§ 411, 453.

ASSETS.

Of estate of decedent, see Executors and Administrators, § 43.
Of partnership, see Partnership, §§ 181, 186.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 731-754.

ASSIGNMENTS.

Admeasurement or assignment of dower, see Dower, § 59.
Fraud as to creditors, see Fraudulent Conveyances.
In bankruptcy, see Bankruptcy, §§ 148, 156.
Of contracts of sale of standing timber, see Logs and Logging, § 8.

I. REQUISITES AND VALIDITY.

(A) PROPERTY, ESTATES, AND RIGHTS ASSIGNABLE.

§ 8. A deed by which the grantors attempted to convey their interest in land owned by their mother in fee during the latter's lifetime, subject to her use for life, *held* void.—Spears v. Spaw (Ky.) 275.

§ 8. A covenant of warranty in a void deed of an expectancy *held* also void.—Spears v. Spaw (Ky.) 275.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy, §§ 148-308.

ASSOCIATIONS.

Mutual benefit insurance associations, see Insurance, §§ 694-755.

ASSUMED NAMES.

Chattel mortgage executed under, see Chattel Mortgages, § 150.

ASSUMPSIT, ACTION OF.

See Money Received; Work and Labor.

ASSUMPTION.

Of risk by employé, see Master and Servant, §§ 203-219, 280, 295.

ATTACHMENT.

See Execution; Garnishment; Sequestration. Exemptions, see Exemptions; Homestead.

I. NATURE AND GROUNDS.

(B) GROUNDS OF ATTACHMENT.

Default in payment of rent, see Landlord and Tenant, § 229.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

§ 228. An affidavit for attachment should not be quashed for uncertainty in the amount sued for, where the original petition alleges rea-

nonresidence should not be quashed because of statements in the complaint that defendant is temporarily within the state.—Hall v. Parry (Tex. Civ. App.) 561.

IX. RETURN.

§ 324. The return of an attachment signed by a deputy constable, which was in fact served by a deputy sheriff, may be amended by the sheriff.—Kramer v. Lilley (Tex. Civ. App.) 735.

XI. WRONGFUL ATTACHMENT.

Action for, in justices' court, see Justices of the Peace, § 86.

Impeachment of witness in action for, see Witnesses, § 331½.

§ 375. The measure of damages for wrongful attachment defined.—Rainey v. Kemp (Tex. Civ. App.) 630.

§ 375. In an action for wrongful attachment, depreciation in value of the goods is an element of actual but not of exemplary damages.—Rainey v. Kemp (Tex. Civ. App.) 630.

§ 377. One sued for wrongful attachment *held* not relieved from liability for exemplary damages because he acted on advice of counsel.—Rainey v. Kemp (Tex. Civ. App.) 630.

ATTENDANCE.

Of juror, see Jury, § 58.

ATTORNEY AND CLIENT.

Absence of counsel as ground for new trial, see New Trial, § 86.

Argument and conduct of counsel at trial in civil actions, see Trial, §§ 110-133.

Argument and conduct of counsel at trial in criminal prosecutions, see Criminal Law, §§ 714-726.

Attorneys as public officers, see District and Prosecuting Attorneys.

Attorney's fees in action on note, see Bills and Notes, § 534.

Attorney's fees in garnishment, see Garnishment, § 191.

Attorneys in fact, see Principal and Agent. Harmless error in argument and conduct of counsel, see Appeal and Error, § 1060.

Validity of contract by attorney to secure contract from county, see Contracts, § 131.

II. RETAINER AND AUTHORITY.

§ 76. The death of the client terminates the relation of attorney and client.—State ex rel. Potter v. Riley (Mo.) 647.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) FEES AND OTHER REMUNERATION.

Recovery in particular actions or proceedings.

See Divorce, § 197.

By county taxpayer, see Counties, § 196.

On injunction bond, see Injunction, § 252.

§ 143. Unconscionable bargain for attorney's services defined.—Ball v. Reyburn (Mo. App.) 524.

§ 143. A contract to pay \$500 for attorney's services in representing defendant in a suit to enjoin a city from lowering a street grade *held* not unconscionable.—Ball v. Reyburn (Mo. App.) 524.

(B) LIEN.

§ 182. Under St. 1909, § 489 (Russell's St. § 1806), an attorney successfully prosecuting an action by a taxpayer to recover county money illegally appropriated *held* not entitled to assert a lien on the money recovered.—Marion County v. Rives & McChord (Ky.) 309.

AUTHORITY.

Of agent, see Principal and Agent, §§ 69-79, 119-136.

Of broker, see Brokers, § 44.

Of justice of the peace, see Justices of the Peace, § 47.

BAIL**II. IN CRIMINAL PROSECUTIONS.**

§ 56. In view of Code Cr. Proc. 1896, art. 443, relating to the requisites of the citation in proceedings to forfeit a bail bond, it is not necessary in such proceedings to show that accused was arrested, so that it is immaterial whether the capias was valid.—Trail v. State (Tex. Cr. App.) 714.

§ 58. It is not necessary that a bail bond should state whether accused was charged by information or indictment.—Trail v. State (Tex. Cr. App.) 714.

§ 76. Though a bail bond in a criminal case be a joint obligation in terms, the Court of Criminal Appeals will construe it a joint and several obligation.—Trail v. State (Tex. Cr. App.) 714.

§ 77. A judgment nisi for forfeiture of bail need not state whether the accused was charged by information or indictment.—Trail v. State (Tex. Cr. App.) 714.

§ 77. Since it is not necessary that either the bail bond or the judgment nisi state whether accused was charged by information or complaint, that the judgment stated that he was charged by information and the bond stated that he was charged by complaint was an immaterial variance.—Trail v. State (Tex. Cr. App.) 714.

BAILMENT.

Particular species of bailments, and bailments incident to particular occupations.

See Carriers, §§ 51-193; Innkeepers; Pledges.

BALLOTS.

See Elections, §§ 180, 190.

BANKRUPTCY.**III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.****(B) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF TRUSTEE IN GENERAL.**

§ 148. The life estate of a bankrupt acquired by will after the adjudication of his bankruptcy does not pass to his trustee.—Hackett's Ex'rs v. Hackett's Trustee (Ky.) 377.

§ 156. A petition of intervention filed by a trustee in bankruptcy claiming the estate created by will *held* insufficient where it failed to show that testator died before the adjudication in bankruptcy.—Hackett's Ex'rs v. Hackett's Trustee (Ky.) 377.

§ 156. Where a petition of intervention filed by a trustee in bankruptcy failed to show that the testator died before the adjudication in bankruptcy, *held*, that it must be presumed that

the adjudication in bankruptcy was before testator's death.—Hackett's Ex'rs v. Hackett's Trustee (Ky.) 377.

§ 156. The wife and children of a bankrupt *held* necessary parties to a petition of intervention filed by the trustee in bankruptcy to reach the bankrupt's estate under a will.—Hackett's Ex'rs v. Hackett's Trustee (Ky.) 377.

(C) PREFERENCES AND TRANSFERS BY BANKRUPT, AND ATTACHMENTS AND OTHER LIENS.

Bank taking checks in good faith, paying part of proceeds and receiving balance on deposit as holder in due course, see Bills and Notes, § 356.

§ 188. A lien on the proceeds of property sold by a bankrupt *held* not a preference, nor invalid for want of record.—Gardner v. Planters' Nat. Bank of Honey Grove (Tex. Civ. App.) 1146.

§ 195. The lien of a garnishor with notice of a prior claim and the lien of a trustee in bankruptcy to whom money was subsequently transferred *held* inferior to such claim.—Gardner v. Planters' Nat. Bank of Honey Grove (Tex. Civ. App.) 1146.

(E) ACTIONS BY OR AGAINST TRUSTEE.

Cure of defects in pleading, see Pleading, § 403. General demurrer to petition of intervention by trustee, see Pleading, § 205.

Privilege of co-defendants as to venue, see Venue, § 22.

§ 288. Equity looks upon that as done which ought to have been done.—Gardner v. Planters' Nat. Bank of Honey Grove (Tex. Civ. App.) 1146.

§ 295. An action against a trustee in bankruptcy by a claimant of money paid to the trustee by agents of the bankrupt as the property of the bankrupt may be brought in a state court, under Act Cong. Aug. 13, 1883, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582).—Gardner v. Planters' Nat. Bank of Honey Grove (Tex. Civ. App.) 1146.

§ 295. An attempt by a trustee in bankruptcy in an action brought against him in a state court to have an order dismissing a garnishment affecting the property in question set aside *held* to be a waiver of objections to the jurisdiction of the state court.—Gardner v. Planters' Nat. Bank of Honey Grove (Tex. Civ. App.) 1146.

§ 299. Agents of a bankrupt who held a fund claimed by plaintiff, who pay it to the trustee in bankruptcy after demand has been made on them, may be joined in an action against the trustee to recover the money.—Gardner v. Planters' Nat. Bank of Honey Grove (Tex. Civ. App.) 1146.

§ 303. Evidence in an action against the trustee of a bankrupt and the agents of the bankrupt to recover a sum of money paid by the agents to the trustee and claimed by plaintiff *held* to sustain a finding for the plaintiff.—Gardner v. Planters' Nat. Bank of Honey Grove (Tex. Civ. App.) 1146.

§ 304. Certain facts *held* sufficient to take the right to recover the amount paid in satisfaction of a note to the jury or to the court sitting as a jury, as having been the payment of the individual debt of a partner out of firm assets.—Blake v. Third Nat. Bank (Mo.) 641.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 391. An appeal and supersedeas not operating to vacate a judgment, but only to state proceedings thereunder, where a petition in bankruptcy was not filed until more than four

BANKS AND BANKING.

III. FUNCTIONS AND DEALINGS.

(B) REPRESENTATION OF BANK BY OFFICERS AND AGENTS.

§ 102. Manager of a private bank conducted by a partnership *held* without authority to bind it by a payment of the individual debt of a partner out of firm assets.—*Blake v. Third Nat. Bank (Mo.)* 641.

BAR.

Of action by former adjudication, see Judgment, §§ 570-622.

Of action by limitation, see Limitation of Actions, § 167.

Of dower, see Dower, §§ 46, 47.

Pleas in bar, see Pleading, § 121.

BATTERY.

See Assault and Battery.

BENEFICIAL ASSOCIATIONS.

Mutual benefit insurance associations, see Insurance, §§ 694-755.

Sufficiency of service of process by publication in action to restrain merger, see Process, § 87.

BENEFITS.

Acceptance of, as ground of estoppel, see Estoppel, § 76.

BEQUESTS.

See Wills.

BEST AND SECONDARY EVIDENCE.

In civil actions, see Evidence, § 158.

BIAS.

Of juror, see Jury, §§ 88-142.

BIDS.

At mortgage sale, see Mortgages, § 518.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF EXCHANGE.

See Bills and Notes.

BILL OF LADING.

See Carriers, § 51.

BILLS AND NOTES.

Effect of usury, see Usury, § 26.

I. REQUISITES AND VALIDITY.

(C) EXECUTION AND DELIVERY.

Delivery in escrow, see Escrows, § 12.

(E) CONSIDERATION.

§ 92. A note executed by a legatee to a contestant to procure the withdrawal of the con-

§ 102. In an action on a note, an answer *held* to state an equitable defense.—*Allen v. Herrick Hardware Co. (Tex. Civ. App.)* 1157.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(B) INDORSEMENT FOR TRANSFER.

§ 299. The failure of the payee to fix the liability of the indorser by suit, as provided by Rev. St. 1895, art. 304, may be waived by the indorser.—*Ketterson v. Inscho (Tex. Civ. App.)* 626.

(D) BONA FIDE PURCHASERS.

§ 333. The drawer of a check on a bank notified the bank through its president to refuse payment. The check was later bought for a valuable consideration by a firm of which the president of the bank was one of the partners. *Held*, that notice to the president was not notice to the firm.—*Flynn v. Bank of Mineral Wells (Tex. Civ. App.)* 848.

§ 356. A bank *held* a holder in due course of a check under St. 1909, § 3720b, subsecs. 51, 52 (Russell's St. §§ 1920, 1921).—*Chouteau Trust & Banking Co. v. Smith (Ky.)* 279.

§ 363. Though a bank was a bona fide holder of a check for value when it acquired it, it could not recover thereon against the maker if he pleaded and showed that it had parted with its interest and was simply suing for the benefit of an indorser who had paid back to the bank the money it had paid him.—*Chouteau Trust & Banking Co. v. Smith (Ky.)* 279.

§ 368. Under St. 1909, § 3720b, subsec. 57 (Russell's St. § 1926), *held*, that the holder in due course of a check received from an indorser could, upon dishonor, sue both the maker and indorsers or any one of them for the full amount of the check.—*Chouteau Trust & Banking Co. v. Smith (Ky.)* 279.

§ 369. A maker of a note *held* estopped as against an innocent purchaser thereof from urging that the note had never been delivered to the payee.—*Goodwin & McFarland v. Burton (Tex. Civ. App.)* 587.

§ 370. That the balance due on a void contract is the consideration for a draft is no defense to its payment in the hands of innocent purchasers for a valuable consideration.—*Flynn v. Bank of Mineral Wells (Tex. Civ. App.)* 848.

VII. PAYMENT AND DISCHARGE.

Notice to payee's agent of insolvency of maker at time of payment, see Principal and Agent, § 179.

VIII. ACTIONS.

Restraining action, see Injunction, § 26.

Venue of action against maker of note and executrix of indorser as dependent on residence of parties, see Venue, § 22.

§ 452. The right to sue the buyer on a note for the price is not affected because, after the maturity of the note, the seller executed, without consideration and when he had no title, a bill of sale of the goods to the indorser at the latter's request.—*Ketterson v. Inscho (Tex. Civ. App.)* 626.

§ 460. The indorsee of a note may sue in one action the maker and the independent executrix of the payee on his indorsement of the note.—*Goodwin & McFarland v. Burton (Tex. Civ. App.)* 587.

§ 489. In an action on a note it was *held* proper under the issues to receive evidence of account books and other testimony to show from what transactions the indebtedness accrued.—Avery v. Tucker (Mo. App.) 672.

§ 498. Metal checks issued to employés, by which the employer promises to pay a certain amount to redeem the same, are presumed in the hands of holders for value to be based on an adequate consideration.—Kentucky Coal Mining Co. v. Mattingly (Ky.) 850.

§ 520. Evidence *held* to warrant a finding that a note secured by a mortgage had not been obtained by duress.—Wright v. Bayless (Ky.) 918.

§ 527. Certain proof *held* to *prima facie* show that a note had been paid by the maker.—Gray v. Tribue (Tex. Civ. App.) 808.

§ 534. The mere clerical error of omitting the pronoun "I" in the blank space of a printed note providing for an attorney's fee is immaterial in an action on the note.—Rutherford v. Gaines (Tex. Civ. App.) 866.

§ 534. Plaintiff *held* entitled to an allowance of attorney's fee provided in a note for the purchase price of land.—Rutherford v. Gaines (Tex. Civ. App.) 866.

BLASPHEMY.

§ 1. Reply of defendant while testifying as a witness before a grand jury, "It is none of your damn business," *held* not to constitute cursing and swearing in a public place.—Morrison v. State (Tex. Cr. App.) 541.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see Bills and Notes, §§ 333-370.

Of lands, see Vendor and Purchaser, §§ 229-245.

BONDS.

Sureties on bonds, see Principal and Surety.

Bonds for performance of duties of trust or office.

See Trusts, § 378.

Husband as administrator of community, see Husband and Wife, § 276.

Bonds in judicial proceedings.

See Bail; Injunction, §§ 250, 252.

Bonds on appeal, see Appeal and Error, §§ 373-392.

BOOK AGENTS.

See Hawkers and Peddlers, § 3.

BOOKS OF ACCOUNT.

As evidence, see Evidence, § 354.

BOUNDARIES.

Of city, see Municipal Corporations, § 35.

Of school district, see Schools and School Districts, §§ 24-42.

I. DESCRIPTION.

§ 3. The rule that distances yield to courses, and both to natural objects or marked monuments, does not apply where proximate certainty may be accomplished by changing a course instead of the distance.—Ramsey v. Morrow (Ky.) 296.

§ 7. The rule for establishing a lost stake corner to run the courses from known corners to the intersection of the lines cannot be applied,

where the lines so extended would never meet.—Ramsey v. Morrow (Ky.) 296.

§ 7. In a suit to determine a lost corner, a marked line *held* to establish itself, though the corner was not marked.—Ramsey v. Morrow (Ky.) 296.

§ 9. A description in a deed *held* not fatally defective for failure to state the length of two of the lines necessary to include the quantity, and because of the omission of a line necessary to close the survey.—Tompkins v. Thomas (Tex. Civ. App.) 581.

§ 10. Boundaries of lots, conveyed in accordance with the plat, will not be affected by the transfer of another lot under a prior plat.—Toudouse v. Keller (Tex. Civ. App.) 185.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

Judicial notice of boundaries, see Criminal Law, § 304.

§ 40. In an action to establish a lost corner, whether certain marks, designated an "ancient line," were made by the surveyor or by another, *held* for the jury.—Ramsey v. Morrow (Ky.) 296.

§ 40. In ejectment, whether a patent included all of the land in controversy or a part of it *held* for the jury.—Loughridge v. Ball (Ky.) 321.

§ 55. Width of a lot, in a plat in which the width of all are specified except that one, will be the length of the block minus the sum of the width of the other lots.—Toudouse v. Keller (Tex. Civ. App.) 185.

BRANDS.

Evidence of other offenses in prosecution for defacing, see Criminal Law, § 369.

Indictment in language of statute for defacement of, see Indictment and Information, § 110.

On lumber, see Logs and Logging, § 37.

BREACH.

Of condition, see Insurance, §§ 255-282, 330, 335.

Of contract, see Contracts, §§ 230, 322; Sales, §§ 150-181; Vendor and Purchaser, §§ 129-184.

Of contract to sublease land for mining, see Mines and Minerals, § 62.

Of covenant, see Insurance, §§ 330, 335.

Of warranty, see Insurance, §§ 255-282, 330, 335.

BRIDGES.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

Validity of contract by attorney to secure contract from county for erection of bridge, see Contracts, § 181.

BRIEFS.

On appeal or writ of error, see Appeal and Error, §§ 759, 760.

BROKERS.

See Principal and Agent.

Specific enforcement of contract for sale of lands made by broker, see Specific Performance, § 65.

IV. COMPENSATION AND LIEN.

§ 44. An owner employing a broker to effect an exchange of lands *held* authorized to with-

draw his proposition before its acceptance and defeat the right of the broker to commissions.—*Arthur v. Porter* (Tex. Civ. App.) 611.

§ 49. A contract for the sale of lots construed.—*Mitchell v. Rushing* (Tex. Civ. App.) 582.

§ 54. Broker's agency contract held to require plaintiff, in order to recover compensation, to procure within the period of his agency a purchaser able, ready, and willing to buy on the very terms stipulated.—*Hamburger & Dreyling v. Thomas* (Tex. Civ. App.) 770.

§ 57. Real estate brokers held not entitled to commissions on a sale, where the contract negotiated by them stipulated for a forfeiture by the owner not authorized by him.—*Evants v. Fuqua* (Tex.) 132.

§ 57. A broker held entitled to his contract compensation, though the sale falls through because of the owners' failure to comply with the contract of sale.—*Hamburger & Dreyling v. Thomas* (Tex. Civ. App.) 770.

§ 61. Where vendors contracted to furnish a title good in the opinion of the purchaser and he rejected the title, whether the abstract furnished showed a good title or whether the vendors had title in fact was immaterial.—*Hamburger & Dreyling v. Thomas* (Tex. Civ. App.) 770.

§ 61. Where a vendor agrees to sell and furnish title good in the opinion of the purchaser procured by the vendor's broker, the vendor is, liable for commissions in case the sale is not effected because of the purchaser's opinion that the title is defective.—*Hamburger & Dreyling v. Thomas* (Tex. Civ. App.) 770.

§ 61. A broker employed to procure a purchaser and to furnish an abstract of title held not entitled to his commissions on the showing made.—*S. G. Carter & Co. v. Harrell & Walker* (Tex. Civ. App.) 1139.

§ 64. A real estate broker employed to sell land earns his commissions when he procures a purchaser who is ready and able to buy on the terms offered and enters into an enforceable contract therefor, but who subsequently refuses to perform.—*Moss & Raley v. Wren* (Tex. Civ. App.) 149.

§ 64. Where a contract has been made between the owner of land and the broker's customer, the broker's right to commissions is not dependent on the purchaser's ability to pay for the land.—*Hamburger & Dreyling v. Thomas* (Tex. Civ. App.) 770.

V. ACTIONS FOR COMPENSATION.

§ 80. An independent undertaking of a party to a contract for the sale of lots to use diligence held to be one for the breach of which the other parties could recover in a separate action for damages, or by a plea in reconvention in an action by him for his contract compensation.—*Mitchell v. Rushing* (Tex. Civ. App.) 582.

BUREAU OF ANIMAL INDUSTRY.

Evidence as to rules of in action for injuries to livestock in transportation, see Carriers, § 228.

BURGLARY.

II. PROSECUTION AND PUNISHMENT.

§ 41. Evidence held to sustain a conviction of burglary of a railroad car with intent to commit theft.—*Crowson v. State* (Tex. Cr. App.) 1036.

BUSINESS.

Reports as to credit of business concerns, see Mercantile Agencies, § 1.

BY-LAWS.

Of corporations in general, see Corporations, § 56.

Of mutual benefit insurance association, see Insurance, § 760.

CALENDARS.

Computation of time, see Time.
Of causes for trial, see Trial, § 11.

CANCELLATION OF INSTRUMENTS.

See Quieting Title.

Grounds for cancellation of deed of insane person, see Insane Persons, § 28.

Rescission of contracts for sale of realty, see Vendor and Purchaser, §§ 84-127.

Setting aside fraudulent conveyances, see Fraudulent Conveyances, §§ 216-301.

II. PROCEEDINGS AND RELIEF.

Jurisdiction of justice's courts, see Justices of the Peace, § 47.

§ 39. An allegation of ratification in an answer held not necessarily to have reference to plaintiff being insane, where the petition seeks to set aside a deed not only on the ground that plaintiff was insane when she executed it, but also, proceeding on the theory of her sanity, on the ground of fraud.—*Uecker v. Zuercher* (Tex. Civ. App.) 149.

§ 43. Where a vendee alleged that false representations were made by the vendor, evidence that the vendor's agent made the representations was objectionable as a variance.—*Stevenson v. Cauble* (Tex. Civ. App.) 811.

§ 52. An issue submitted to the jury in a suit to set aside a deed on the ground that grantor was insane held to give a proper test.—*Uecker v. Zuercher* (Tex. Civ. App.) 149.

§ 52. A special issue in suit to set aside a deed for fraud held not open to objection by plaintiff of not submitting the proper test of whether fraud had been perpetrated.—*Uecker v. Zuercher* (Tex. Civ. App.) 149.

CARNAL KNOWLEDGE.

See Rape.

CARRIERS.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) IN GENERAL.

Deprivation of property without due process of law, see Constitutional Law, § 803.

§ 2½. The statute authorizing penalties for failure to furnish cars (Rev. St. 1895, arts. 4497-4502), and which provides, by article 4499, a penalty of \$25 per day for each car not furnished, held not a violation of the Constitution as authorizing an imposition of excessive fines and punishment.—*Texas & P. Ry. Co. v. Andrews, Reynolds & Co.* (Tex. Civ. App.) 1101.

§ 13. The term "discrimination" is used in Rev. St. 1895, art. 4574, in its ordinary acceptation as meaning a delivery showing a preference in favor of or against a shipper in the performance of any act essential to the completion of that service, and is synonymous with "delay" as

used in the section.—*Missouri, K. & T. Ry. Co. of Texas v. Thompson* (Tex. Civ. App.) 618.

§ 18. A breach of duty of a carrier in requiring a connecting carrier to disregard routing directions of a shipper in violation of its duty under Rev. St. 1895, art. 4535, held not an "unjust discrimination" within article 4574.—*Missouri, K. & T. Ry. Co. of Texas v. Thompson* (Tex. Civ. App.) 618.

§ 18. A contract between a shipper and a carrier held not to create an unjust discrimination in favor of the shipper, in violation of *Sayles' Ann. Civ. St. 1897, art. 4574*.—*Texas & P. Ry. Co. v. Shawnee Cotton Oil Co.* (Tex. Civ. App.) 776.

§ 20. Rev. St. 1895, art. 4574, being a penal statute, held to be strictly construed.—*Missouri, K. & T. Ry. Co. of Texas v. Thompson* (Tex. Civ. App.) 618.

§ 20. Rev. St. 1895, art. 4502, relating to the failure to furnish cars, is not void for uncertainty.—*Texas & P. Ry. Co. v. Taylor* (Tex. Civ. App.) 1097.

§ 20. The phrase "on hand," as used in Rev. St. 1895, art. 4502, defined.—*Texas & P. Ry. Co. v. Taylor* (Tex. Civ. App.) 1097.

§ 20 Under Rev. St. 1895, art. 4499, the penalty for failure to furnish cars is to be charged at the rate of \$25 per day for each car, and be continued for the whole time of the carrier's delinquency, and the penalty is not forbidden if cars were eventually furnished.—*Texas & P. Ry. Co. v. Taylor* (Tex. Civ. App.) 1097.

§ 20. In an action for penalties for failure to furnish cars for a shipment of stock, it is sufficient if the evidence shows plaintiff was one of the owners, and had the actual custody and control thereof, and he need not be shown to be the sole owner.—*Texas & P. Ry. Co. v. Taylor* (Tex. Civ. App.) 1097.

§ 20. The statutes authorizing a penalty for failure to furnish cars (Rev. St. 1895, arts. 4497-4502) apply to a contract for local transportation, though the shipper intended, when it was completed, to deliver to a connecting carrier for further transportation into Mexico.—*Texas & P. Ry. Co. v. Taylor* (Tex. Civ. App.) 1097.

§ 20. Evidence, in an action for penalties for failure to furnish cars, held to authorize a finding that the carrier's failure to furnish cars within the time demanded was without sufficient legal excuse.—*Texas & P. Ry. Co. v. Taylor* (Tex. Civ. App.) 1097.

§ 20. An application by a shipper for cars held to be a sufficient compliance with the statute (Rev. St. 1895, arts. 4497-4499) to authorize recovery of a penalty for its disobedience.—*Texas & P. Ry. Co. v. Andrews, Reynolds & Co.* (Tex. Civ. App.) 1101.

§ 20. A finding, in an action against a railroad company for penalties for failure to furnish cars, held to require the conclusion, if necessary to support the judgment for plaintiff, that defendant was without excuse for its delay at any time after a certain date.—*Texas & P. Ry. Co. v. Andrews, Reynolds & Co.* (Tex. Civ. App.) 1101.

§ 20. In view of Rev. St. 1895, art. 4497, 4500, held, that Rev. St. 1895, art. 4502, requiring a shipper to have his property "on hand at the time any demand for cars was made," means that he has the property so circumstanced that it may be shipped within the time named by the statute after delivery of the cars.—*Texas & P. Ry. Co. v. Smith* (Tex. Civ. App.) 1118.

(B) INTERSTATE AND INTERNATIONAL TRANSPORTATION.

Regulation of interstate transportation as regulation of commerce, see Commerce, § 80.

§ 23. Act Cong. June 29, 1906, c. 3591, §§ 1, 2, 34 Stat. 584, 586 (U. S. Comp. St. Supp. 1907, pp. 892, 895), prohibiting the issuance of free passes by interstate carriers, held not retroactive and not to apply to a contract made in 1871, by which a carrier agreed to issue annual passes for life to one injured, in settlement of his claim for damages.—*Louisville & N. R. Co. v. Mottley* (Ky.) 982.

§ 32. Rev. St. 1895, art. 4497, requiring railway companies to supply cars, held to apply to interstate shipments.—*Texas & P. Ry. Co. v. Smith* (Tex. Civ. App.) 1118.

§ 35. Annual passes issued pursuant to contract by which the railroad agreed to issue annual passes in settlement of a personal injury claim held not a "free pass" within Act Cong. June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), or to violate section 2.—*Louisville & N. R. Co. v. Mottley* (Ky.) 982.

II. CARRIAGE OF GOODS.

Mandamus to compel shipment by certain route and give bill of lading therefor, see Mandamus, § 133.

(A) DELIVERY TO CARRIER.

Deprivation of property without due process of law by statute imposing penalties, see Constitutional Law, § 303.

(B) BILLS OF LADING, SHIPPING RECEIPTS, AND SPECIAL CONTRACTS.

§ 51. Where a shipper accepts a bill of lading, upon which the routing specified by him had been erased and another substituted, with knowledge of the change, he is bound by the bill as changed.—*Missouri, K. & T. Ry. Co. of Texas v. Thompson* (Tex. Civ. App.) 618.

(C) CUSTODY AND CONTROL OF GOODS.

§ 76. A shipper may recover for injuries to the property covered by his contract of shipment with the carrier, for which the latter is liable, though the shipper did not own the property.—*Chicago, R. I. & G. Ry. Co. v. Jones* (Tex. Civ. App.) 769.

(D) TRANSPORTATION AND DELIVERY BY CARRIER.

§ 79. The provisions of a contract of shipment, whether verbal or written, under which goods are carried, determine the route and connections to be observed.—*Missouri, K. & T. Ry. Co. of Texas v. Thompson* (Tex. Civ. App.) 618.

§ 79. After a carrier has refused to route cars as desired by a shipper, if he permits it to take the cars for shipment, he acquiesces in the routing actually given by the carrier.—*Missouri, K. & T. Ry. Co. of Texas v. Thompson* (Tex. Civ. App.) 618.

§ 84. The place where property is to be delivered by a carrier is at the usual place for making such delivery at the point of destination, unless the specific place is named in the contract of shipment.—*Missouri & N. A. R. Co. v. Pullen* (Ark.) 702.

(E) DELAY IN TRANSPORTATION OR DELIVERY.

§ 104. The derailment and wreck of a train causing delay in transportation of property by a carrier is prima facie evidence of the carrier's negligence.—*St. Louis Southwestern Ry. Co. v. Wallace* (Ark.) 412.

§ 104. In an action against a carrier for negligent delay in transporting perishable freight, the verdict of the jury for plaintiff *held* to settle the question of unreasonable delay in the transportation authorizing a recovery.—*Parsons v. Louisville & N. R. Co.* (Mo. App.) 101.

§ 105. The measure of damages for the negligent delay in the transportation of perishable freight is the difference between the market value of the freight when delivered and the market value of the same when it should have been delivered had no reasonable delay occurred.—*Parsons v. Louisville & N. R. Co.* (Mo. App.) 101.

§ 106. In an action against a carrier for injuries to a shipment of perishable freight, an instruction on the measure of damages *held* erroneous because enlarging the scope of the cause of action pleaded.—*Parsons v. Louisville & N. R. Co.* (Mo. App.) 101.

(F) LOSS OF OR INJURY TO GOODS.

§ 110. A carrier receiving for transportation a refrigerator car loaded with perishable fruit *held* required to use ordinary care to protect the fruit by keeping the car ventilated and properly iced.—*St. Louis Southwestern Ry. Co. of Texas v. A. A. Jackson & Co.* (Tex. Civ. App.) 853.

§ 117. A common carrier undertaking to carry perishable property in cars specially adapted to preserve it is responsible for any defects in the cars resulting in injury to the property, and the duty to provide suitable cars extends to proper refrigeration according to established custom.—*Missouri, K. & T. Ry. Co. of Texas v. McLean* (Tex. Civ. App.) 161.

§ 117. A carrier *held* liable for the loss of cabbage, from failure to refrigerate the car with reasonable dispatch.—*McLean v. Gulf & I. Ry. Co. of Texas* (Tex. Civ. App.) 578.

§ 121. Though a shipper may discover before loading or the departure of the car that it is not suitable for carrying perishable goods, he will not thereby be deemed guilty of contributory negligence, or of having assumed the risk, where he has no means of relieving himself of the situation.—*Missouri, K. & T. Ry. Co. of Texas v. McLean* (Tex. Civ. App.) 161.

§ 131. In an action against a railroad for damages to plaintiff's shipment of cabbages, there was a variance between an allegation that the damage was caused from delay in transportation and proof that it arose from lack of refrigeration, which was not alleged.—*Missouri, K. & T. Ry. Co. of Texas v. McLean* (Tex. Civ. App.) 161.

§ 133. In an action against a railroad for damages to plaintiff's shipments of cabbages, certain testimony as to the amount for which the cabbages were sold in their damaged condition *held* admissible on the question of damages.—*Missouri, K. & T. Ry. Co. of Texas v. McLean* (Tex. Civ. App.) 161.

§ 134. In an action against a railroad for damages to plaintiff's shipments of cabbages through failure to ice the cars, certain evidence *held* not to tend to disprove a finding that ice was ordered by plaintiff.—*Missouri, K. & T. Ry. Co. of Texas v. McLean* (Tex. Civ. App.) 161.

§ 134. In an action against a railroad for damages to a shipment of cabbages, certain evidence *held* to warrant a finding that defendant's cars were either not properly constructed or not refrigerated.—*Missouri, K. & T. Ry. Co. of Texas v. McLean* (Tex. Civ. App.) 161.

§ 134. In an action against a carrier for damages to perishable fruit, evidence *held* to show negligence.—*St. Louis Southwestern Ry. Co. of Texas v. A. A. Jackson & Co.* (Tex. Civ. App.) 853.

§ 135. Defendant railroad was not liable for special damages where it had no notice that plaintiff's shipments of cabbages were made to fill a contract of sale at any special price.—*Missouri, K. & T. Ry. Co. of Texas v. McLean* (Tex. Civ. App.) 161.

§ 135. A carrier *held* liable for the difference in the value of the freight in the condition in which it was delivered at its destination and the condition it would have been in had there been no negligence.—*Texas Cent. R. Co. v. Watson* (Tex. Civ. App.) 175.

§ 136. The act of a carrier in changing the route of shipment from that stated in the contract is not negligence per se; but proof of the change, without good cause, coupled with proof of unusual delay causing damage to freight, is evidence of negligence sufficient to raise an issue of fact.—*Parsons v. Louisville & N. R. Co.* (Mo. App.) 101.

§ 137. An instruction in an action for injuries to freight *held* erroneous, as leading the jury to include in their estimate of damages injuries incident to the shipping of the goods.—*Texas Cent. R. Co. v. Watson* (Tex. Civ. App.) 175.

(H) LIMITATION OF LIABILITY.

§ 150. A carrier cannot contract for exemption from liability for its own negligence or the negligence of its servants, though not inhibited from making such exemption by statute.—*St. Louis Southwestern Ry. Co. v. Wallace* (Ark.) 412.

(I) CONNECTING CARRIERS.

Assumptions by judge as to facts in actions against connecting carrier, see Trial, § 191. Concurrent and conflicting jurisdiction of state and federal courts in actions against connecting carriers, see Courts, § 489. Pleading federal statute in action against connecting carriers, see Statutes, § 279. Validity of interstate commerce act, see Commerce, § 30.

§ 169. A railway company engaged in shifting cars delivered to it by a carrier to the house tracks of consignees is not a connecting carrier, but is the agent of the carrier.—*St. Louis Southwestern Ry. Co. of Texas v. A. A. Jackson & Co.* (Tex. Civ. App.) 853.

§ 177. Liability of initial carrier, where it accepts property for transportation over another line, stated.—*St. Louis Southwestern Ry. Co. v. Wallace* (Ark.) 412.

§ 177. A carrier of freight is only liable for injury thereto resulting from its own negligence.—*Texas Cent. R. Co. v. Watson* (Tex. Civ. App.) 175.

§ 180. An instruction that two of several connecting carriers had agreed to transport an automobile safely to destination *held* error.—*St. Louis Southwestern Ry. Co. v. Patton* (Tex. Civ. App.) 798.

§ 185. Where freight transported by successive carriers is injured en route, the presumption is that the injury occurred on the line of the last carrier.—*Texas Cent. R. Co. v. Watson* (Tex. Civ. App.) 175.

§ 185. In the absence of any evidence on the subject, the presumption is that damages to freight during transportation resulted from the negligence of the last connecting carrier.—*St. Louis Southwestern Ry. Co. of Texas v. A. A. Jackson & Co.* (Tex. Civ. App.) 853.

(J) CHARGES AND LIENS.

§ 193. One of several connecting carriers, when sued for damages to an automobile, *held* entitled to the submission of a set-off for de-

Declarations by carriers agent as evidence in action against carriers of live stock, see Evidence, § 244.

Hearsay evidence in action against carriers of live stock, see Evidence, § 323.

Instructions invading province of jury in actions against carrier of live stock, see Trial, § 200.

Opinion evidence, in action against carrier of live stock, see Evidence, § 471.

§ 207. A carrier contracting to carry live stock cannot excuse a breach of the contract by proving inability to furnish cars because of unusually heavy traffic.—Texas & P. Ry. Co. v. Shawnee Cotton Oil Co. (Tex. Civ. App.) 776.

§ 207. A carrier breaching his contract to deliver cars to a shipper held liable notwithstanding the unexpected movement of freight and shortage of cars.—Texas & P. Ry. Co. v. Shawnee Cotton Oil Co. (Tex. Civ. App.) 776.

§ 210. A carrier must furnish reasonably safe pens for cattle unloaded en route.—International & G. N. R. Co. v. McCullough (Tex. Civ. App.) 558.

§ 211. Carrier held not absolved from duty to furnish shipper means to feed and water stock by fact that shipper accompanied and agreed to feed and water the same.—Missouri & N. A. R. Co. v. Pullen (Ark.) 702.

§ 215. The fact that cattle unloaded from cars and put in infected pens were unloaded in violation of the regulations of the United States Department of Agriculture held not to defeat a recovery.—International & G. N. R. Co. v. McCullough (Tex. Civ. App.) 558.

§ 215. The quarantine regulations of the United States Department of Agriculture as to where cattle may be unloaded in Texas held to refer only to cattle shipped from one state to another, and not to cattle shipped from one state through Texas to Mexico.—International & G. N. R. Co. v. McCullough (Tex. Civ. App.) 558.

§ 217. In an action against a carrier for injuries to a shipment of live stock infected with a disease, evidence held not to show contributory negligence of the shipper.—International & G. N. R. Co. v. McCullough (Tex. Civ. App.) 558.

§ 218. Delivery of no part of certain shipment held completed until delivery of entire shipment, provided the same was removed within reasonable time.—Missouri & N. A. R. Co. v. Pullen (Ark.) 702.

§ 218. Completed removal of stock from car by shipper within contract limiting carrier's liability, determined.—Missouri & N. A. R. Co. v. Pullen (Ark.) 702.

§ 218. Removal of stock to point $1\frac{1}{2}$ miles from car held not an unreasonable distance.—Missouri & N. A. R. Co. v. Pullen (Ark.) 702.

§ 218. One and one-half hours held not unreasonable time for removing household goods and live stock from car by shipper.—Missouri & N. A. R. Co. v. Pullen (Ark.) 702.

§ 218. A shipper of household goods and live stock is entitled to a reasonable time in which to remove the same.—Missouri & N. A. R. Co. v. Pullen (Ark.) 702.

§ 223. That the outfit of railroad subcontractors was transported without charge was no defense to their action against defendant for damages to their mules by negligent transportation.—Gulf, C. & S. F. Ry. Co. v. Gillespie & Carlton (Tex. Civ. App.) 628.

§ 228. In an action for injuries to a shipment of live stock from a northern state through Texas to Mexico, resulting from their being infected with a disease, the exclusion of a rule of the Bureau of Animal Industry referring to interstate shipments, and enacted for the protection of cattle at the point to which a shipment is destined, was proper.—International & G. N. R. Co. v. McCullough (Tex. Civ. App.) 558.

§ 228. In an action for injuries to a shipment of cattle from a northern state through Texas to Mexico, resulting from their becoming infected with a disease, proof of a custom as to the disinfection of cars from the South was admissible.—International & G. N. R. Co. v. McCullough (Tex. Civ. App.) 558.

§ 228. The owner of mules injured in transportation could not recover in the absence of evidence of their market value at destination.—Gulf, C. & S. F. Ry. Co. v. Gillespie & Carlton (Tex. Civ. App.) 628.

§ 228. Proof that a carrier transporting live stock delayed the train for a longer time than was usual and necessary held not to prove injury to the stock.—Missouri, K. & T. Ry. Co. of Texas v. Rogers (Tex. Civ. App.) 738.

§ 228. In an action against connecting carriers for damages for a wrongful delivery of a shipment of stock, an instruction as to the burden of proof held erroneous.—Texas & P. Ry. Co. v. Rankin (Tex. Civ. App.) 823.

§ 228. Evidence in an action against connecting carriers for injuries to a shipment of horses held to authorize a finding against the delivering carrier for all the damages.—St. Louis, S. F. & T. Ry. Co. v. Fenley (Tex. Civ. App.) 845.

§ 229. In an action against a carrier for injuries to mules, the measure of liability was the difference in their value at destination in the condition they were in and their value if properly transported.—Gulf, C. & S. F. Ry. Co. v. Gillespie & Carlton (Tex. Civ. App.) 628.

§ 229. The measure of damages to horses, injured in transit by negligent delay and rough handling, determined.—Chicago, R. I. & G. Ry. Co. v. Jones (Tex. Civ. App.) 759.

§ 229. Measure of damages stated for a carrier's negligently placing cattle in quarantine pens so that they had to be sold and could not be shipped to destination.—St. Louis, S. F. & T. Ry. Co. v. Adams (Tex. Civ. App.) 1155.

§ 230. Evidence that the value of certain mules killed by defendant carrier was \$200 each, held sufficient to justify the submission of the question of their market value to the jury.—Gulf, C. & S. F. Ry. Co. v. Gillespie & Carlton (Tex. Civ. App.) 628.

§ 230. In an action against the initial carrier for negligent delay in the transportation of horses, resulting in the death of some of them, an instruction held not objectionable as making the carrier pay for depreciation necessarily received by the horses while carried by the connecting carrier.—Chicago, R. I. & G. Ry. Co. v. Jones (Tex. Civ. App.) 759.

§ 230. In an action against a carrier for injuries to horses, an instruction authorizing the jury to find for the shipper such damages as he sustained held not erroneous, in view of an instruction defining the measure of damages.—Chicago, R. I. & G. Ry. Co. v. Jones (Tex. Civ. App.) 759.

§ 230. An instruction, in an action against a carrier for negligent delay in transporting a shipment of horses, held not open to a special

objection in view of another instruction.—Chicago, R. I. & G. Ry. Co. v. Jones (Tex. Civ. App.) 759.

§ 230. An instruction, in an action against connecting carriers to recover damages to a shipment of cattle, as to the burden of proof of negligence, *held* erroneous.—Texas & P. Ry. Co. v. Rankin (Tex. Civ. App.) 823.

IV. CARRIAGE OF PASSENGERS.

(A) RELATION BETWEEN CARRIER AND PASSENGER.

§ 246. Evidence in an action for the death of plaintiff's intestate *held* to sustain a finding that he was a passenger at the time.—St. Louis, I. M. & S. Ry. Co. v. Pate (Ark.) 260.

(B) FARES, TICKETS, AND SPECIAL CONTRACTS.

§ 253½. A contract made in 1871, by which an interstate carrier agreed to issue annual passes for life to one injured, in settlement of his claim for damages, was legal and valid when made.—Louisville & N. R. Co. v. Mottley (Ky.) 982.

(C) PERFORMANCE OF CONTRACT OF TRANSPORTATION.

§ 276. In an action by a passenger for damages from being directed to the wrong train, certain testimony *held* improperly admitted.—Louisville & N. R. Co. v. Summers (Ky.) 926.

(D) PERSONAL INJURIES.

Alder by verdict in action for injuries to passenger, see Pleading, § 438.

Application of instructions to case in action for injuries to passenger, see Trial, § 252.

Error in instruction in action for injuries to passenger cured by giving other instructions, see Trial, § 296.

Miscarriage and loss of child-bearing ability as element of damages resulting from injury to female passenger, see Damages, § 32.

§ 280. Duty of carriers to passengers on mixed trains stated.—Leach v. St. Louis & S. F. R. Co. (Mo. App.) 510.

§ 288. A carrier *held* liable for the acts of the servant in charge of or having control over the passengers.—Louisville Ry. Co. v. Kupper (Ky.) 266.

§ 288. Defendant street railway company *held* liable, under the evidence, both for an unlawful assault by its conductor on plaintiff, a passenger, and for an unlawful arrest of the latter at the conductor's instance after plaintiff left the car.—Louisville Ry. Co. v. Kupper (Ky.) 266.

§ 286. A carrier must keep its depot and approaches thereto properly lighted, so as to permit passengers to pass safely to and from the train.—Louisville & N. R. Co. v. Payne (Ky.) 852.

§ 286. It is the duty of a carrier to exercise ordinary and reasonable care in the construction and maintenance of station platforms and railings, including a railing extending from the end of a platform parallel with the track across a viaduct.—Joyce v. Metropolitan St. Ry. Co. (Mo.) 21.

§ 286. A railroad company *held* liable under Sayles' Ann. Civ. St. 1897, art. 4521, for injuries to a passenger by not having its depot open within the time required thereby at a flag station where it sold tickets and maintained a depot for passengers.—St. Louis Southwestern Ry. Co. of Texas v. Rumfield (Tex. Civ. App.) 810.

§ 287. A street railway company *held* liable for the injuries received by a passenger at-

tempting to board a car.—Wellman v. Metropolitan St. Ry. Co. (Mo.) 31.

§ 303. To back a car while the passenger is alighting and without waiting a reasonable time for him to alight is actionable negligence if injury results.—Van Cleve v. St. Louis, M. & S. R. Ry. Co. (Mo. App.) 116.

§ 303. Where a car is stopped for the purpose of allowing passengers to alight, it is the duty of the carrier to allow it to remain stopped for a reasonable time to allow passengers to alight in safety by exercising ordinary care.—Jones v. Springfield Traction Co. (Mo. App.) 675.

§ 303. Carrier's liability for injuries to a passenger alighting from a car *held* not conditioned upon knowledge of defendant's servants that she is alighting.—Jones v. Springfield Traction Co. (Mo. App.) 675.

§ 308. A carrier *held* liable for injuries sustained by a passenger induced to alight from the train at an intermediate point.—Missouri, K. & T. Ry. Co. of Texas v. Redus (Tex. Civ. App.) 208.

§ 308. A carrier is bound to exercise a high degree of care for the safety of passengers disembarking from a car.—Weatherford, M. W. & N. W. Ry. Co. v. White (Tex. Civ. App.) 799.

§ 304. One who was injured while alighting from a moving train, after assisting his sister on board, *held* to be on the train as an implied licensee, so that the company would be bound to exercise ordinary care to protect him from injury and would be liable for its failure to do so.—Huchingson v. Texas Cent. R. Co. (Tex. Civ. App.) 1123.

§ 305. Street car company *held* liable for passenger's death if it was directly caused by being thrown against a stove in a derailment, though he had suffered from other diseases.—MacDonald v. Metropolitan St. Ry. Co. (Mo.) 78.

§ 306. A railroad company, having leased the right to a lumber company to operate log trains over a portion of the track, *held* liable for injuries to a passenger in a collision between defendant's passenger train and a log train.—Big Sandy & O. R. Co. v. Blankenship (Ky.) 816.

§ 306. A carrier is liable for injuries to a passenger in a collision resulting from the negligence of the lessee of a right to operate log trains over the road.—Big Sandy & O. R. Co. v. Blankenship (Ky.) 816.

§ 314. The petition in an action for a street car passenger's death *held* only to allege negligence generally.—MacDonald v. Metropolitan St. Ry. Co. (Mo.) 78.

§ 316. In an action for a passenger's death by the sudden derailment of a street car, *held*, that there was a presumption that the derailment was caused by negligence.—MacDonald v. Metropolitan St. Ry. Co. (Mo.) 78.

§ 317. In an action for injuries to a passenger while alighting at a station, in consequence of the sudden starting of the train, evidence of negligent failure to properly light the depot was inadmissible.—Louisville & N. R. Co. v. Payne (Ky.) 852.

§ 317. In an action for injuries to a passenger while alighting at a depot, evidence of the carrier's freight business, conducted at its freight depot on one side of the track, *held* inadmissible.—Louisville & N. R. Co. v. Payne (Ky.) 852.

§ 317. Evidence to show how railings over viaducts are constructed in other cities *held* not admissible to show negligence of defendant in constructing a similar railing.—Joyce v. Metropolitan St. Ry. Co. (Mo.) 21.

§ 320. Evidence in an action against a carrier for injuries received while attempting to board defendant's car *held* sufficient to carry the case to the jury.—*Joyce v. Metropolitan St. Ry. Co. (Mo.) 21.*

§ 320. Evidence in an action against a carrier for injuries to a passenger while attempting to board a street car by the sudden starting of the car *held* to require the submission of the case to the jury.—*Wellman v. Metropolitan St. Ry. Co. (Mo.) 31.*

§ 320. In an action for the death of a street railway passenger, whether decedent's death was proximately caused by the injuries sustained, *held* for the jury.—*MacDonald v. Metropolitan St. Ry. Co. (Mo.) 78.*

§ 320. In an action for injuries sustained while plaintiff was getting off a moving train, which he entered to assist his sister on board, by stumbling against a footstool claimed to have been negligently left upon the platform or car step, whether the company was negligent *held* a jury question.—*Huchingson v. Texas Cent. R. Co. (Tex. Civ. App.) 1123.*

§ 321. An instruction in an action against a carrier for injuries to a passenger *held* not misleading.—*Joyce v. Metropolitan St. Ry. Co. (Mo.) 21.*

§ 321. It is usual to use the word "highest" in instructions upon the decree of care required by carriers toward passengers, instead of the word "utmost," and the former word should be used.—*Quinn v. Metropolitan St. Ry. Co. (Mo.) 46.*

§ 321. In an action against a railroad for injuries to a passenger, an instruction *held* not erroneous as permitting a recovery on a matter not alleged in the petition.—*Van Cleve v. St. Louis, M. & S. E. Ry. Co. (Mo. App.) 116.*

§ 321. An instruction, in an action against a carrier for injuries to a passenger received while alighting from a car, *held* not erroneous as failing to submit the question whether the car was stopped a reasonable time, and as ignoring the question of knowledge on the part of defendant that plaintiff was alighting.—*Jones v. Springfield Traction Co. (Mo. App.) 675.*

§ 321. In an action for injuries to a passenger while alighting from a car, an instruction *held* not misleading in view of the petition and evidence.—*Dallas Consol. Electric St. Ry. Co. v. Chase (Tex. Civ. App.) 783.*

§ 321. In an action for injuries to a passenger while alighting from a car, an instruction *held* not erroneous as submitting two issues, and thereby making it impossible to tell from the verdict on which issue the jury found.—*Dallas Consol. Electric St. Ry. Co. v. Chase (Tex. Civ. App.) 783.*

§ 321. In an action against a carrier for injuries to an alighting passenger, a charge *held* not misleading.—*Southworth v. Pecos & N. T. Ry. Co. (Tex. Civ. App.) 861.*

§ 321. In an action for injuries to a passenger, the use of the conjunctive in an instruction *held* not erroneous, in view of another instruction given.—*International & G. N. R. Co. v. Ford (Tex. Civ. App.) 1137.*

(E) CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

§ 328. Where a street car has stopped for a reasonable time for passengers and gives the signal to start before one attempts to enter, the invitation to enter is withdrawn, and one attempting to enter the car thereafter would be negligent, especially if he heard and understood the signal.—*Quinn v. Metropolitan St. Ry. Co. (Mo.) 46.*

§ 338. A passenger injured in jumping from a train when she saw a collision was imminent

held entitled to recover, though, if she had remained, she might not have been injured.—*Big Sandy & C. R. Co. v. Blankenship (Ky.) 315.*

§ 346. In a passenger's action for injuries sustained in falling off a street car, plaintiff's evidence *held* to show that the accident resulted from plaintiff's voluntary act in letting go his hold on the car.—*Quinn v. Metropolitan St. Ry. Co. (Mo.) 46.*

§ 347. It is not negligence as matter of law for a railway passenger to stand on the platform or steps of a car while it is approaching a station.—*Southworth v. Pecos & N. T. Ry. Co. (Tex. Civ. App.) 861.*

§ 347. In an action for injuries sustained while plaintiff was getting off a moving train which he entered to assist his sister on board, by stumbling against a footstool left upon the platform or car step, whether plaintiff was negligent *held* a jury question.—*Huchingson v. Texas Cent. R. Co. (Tex. Civ. App.) 1122.*

§ 348. In an action against a carrier for injuries to a passenger, a requested instruction *held* properly refused.—*Joyce v. Metropolitan St. Ry. Co. (Mo.) 21.*

§ 348. In an action against a carrier, an instruction requested by defendant *held* improperly refused.—*Joyce v. Metropolitan St. Ry. Co. (Mo.) 21.*

§ 348. In a street car passenger's action for injuries claimed to have been caused by the premature starting of the car, an instruction that if the car stopped at the usual place for a reasonable length of time to enable plaintiff to safely board it, etc., he could not recover, *held* proper under the evidence.—*Quinn v. Metropolitan St. Ry. Co. (Mo.) 46.*

§ 348. In a passenger's action for injuries sustained in falling off a street car, an instruction that if plaintiff was in a safe position and thereafter let go of the guard rail and fell off, to find for defendant, *held* proper under the evidence.—*Quinn v. Metropolitan St. Ry. Co. (Mo.) 46.*

(F) EJECTION OF PASSENGERS AND INTRUDERS.

§ 363. Women who had bought tickets, but innocently left them at the station, were not strictly trespassers, and the conductor should not have ejected them at a distance from the station in a deep ditch if he could have put them off at a more suitable place.—*International & G. N. R. Co. v. Hood (Tex. Civ. App.) 1119.*

§ 364. One boarding a street car and refusing to pay fare *held* a trespasser.—*Garrett v. St. Louis Transit Co. (Mo.) 68.*

§ 370. A carrier *held* not liable for the acts of the conductor in a fight with a passenger resulting in the passenger being thrown or falling from the car and injured so that he died.—*Garrett v. St. Louis Transit Co. (Mo.) 68.*

§ 380. Allegations that plaintiff was humiliated, mortified, and shamed by being put off a train at a certain place *held* to show "mental distress," though that was not alleged in terms.—*International & G. N. R. Co. v. Hood (Tex. Civ. App.) 1119.*

§ 381. One suing a street railway company for the death of a passenger ejected from a car by the conductor thereof *held* required to show that the conductor killed decedent and that deceased was a passenger.—*Garrett v. St. Louis Transit Co. (Mo.) 68.*

§ 382. In an action by an ejected passenger, *held*, that punitive damages were not allowable under the evidence.—*Louisville & N. R. Co. v. Summers (Ky.) 926.*

§ 382. In an action for damages for the ejectment of plaintiff's wife from a passenger train, a verdict for plaintiff for \$150 *held* excessive, \$100 being proper.—International & G. N. Ry. Co. v. Williams (Tex. Civ. App.) 758.

§ 382. In an action for damages for ejecting plaintiff's wife and daughter from defendant's passenger train at an improper place, because they had left their tickets at the station, a verdict for \$1,000 *held* not excessive.—International & G. N. R. Co. v. Hood (Tex. Civ. App.) 1119.

§ 384. In an action for damages for putting plaintiff's wife off the train at an improper place, an instruction *held* not to make defendant's liability depend on whether the train was stopped pursuant to her request, and not conflicting with another instruction.—International & G. N. R. Co. v. Hood (Tex. Civ. App.) 1119.

CARRYING WEAPONS.

See Weapons.

CASE ON APPEAL.

Making and settlement, see Appeal and Error, §§ 564, 572.

Necessity for purpose of review, see Appeal and Error, §§ 544-549.

CATTLE PENS.

Care required of carrier in furnishing, see Carriers, § 210.

Liability of carrier for placing stock in infected pen, see Carriers, §§ 215, 217, 228.

CAUSE OF ACTION.

See Action; Malicious Prosecution, § 23.

CERTIFICATE.

By county commissioners designating center of county in proceedings for removal of county seat, see Counties, § 34.

Certified copies, see Evidence, § 342.

Of secretary of state as to contents of legislative journals, conclusiveness, see Statutes, § 60.

CHALLENGE.

To juror, see Jury, §§ 88-142.

CHAMPERTY AND MAINTENANCE.

§ 7. A champertous deed is not void, but only voidable at the instance of parties in adverse possession.—Meade v. Ratliff (Ky.) 271.

§ 7. A deed of land held adversely is champertous, though made in good faith and for a valuable consideration; but the parties may rescind it, and this right is not affected by St. 1909, § 216 (Russell's St. § 1783).—Meade v. Ratliff (Ky.) 271.

§ 7. The sufficiency of evidence introduced by the plaintiff in ejectment to show that a champertous deed by his ancestor was rescinded by the parties is a question for the jury.—Meade v. Ratliff (Ky.) 271.

CHANCERY.

See Equity.

CHANGE OF VENUE.

Of civil action, see Venue, §§ 32, 71.

CHARACTER.

Of accused in criminal prosecutions, see Criminal Law, § 369.

Of witness, see Witnesses, §§ 355-358.

CHARGE.

By carrier, see Carriers, § 193.

To jury in civil actions, see Trial, §§ 191-296.

To jury in criminal prosecutions, see Criminal Law, §§ 780-822.

CHattel MORTGAGES.

See Pledges.

III. CONSTRUCTION AND OPERATION.

(D) LIEN AND PRIORITY.

§ 150. A mortgage or other conveyance signed in a wrong name, or a name by which the grantor is not customarily known, imparts no notice.—Bradford v. Lembke (Tex. Civ. App.) 159.

§ 150. If a person took a mortgage on chattels executed under a name other than the mortgagor's, who afterwards sold them under his customary name to a purchaser in good faith without notice of the mortgage, *held*, that the mortgagee, having made the loss possible, should stand it, and not the purchaser.—Bradford v. Lembke (Tex. Civ. App.) 159.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 177. In an action by a mortgagee for conversion of chattels by purchase from the mortgagor under a name different from that under which he had executed the mortgage, the burden *held* upon the purchaser to show that the name under which the mortgage was given was an assumed name.—Bradford v. Lembke (Tex. Civ. App.) 159.

VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 235. Evidence *held* not to show a payment of a chattel mortgage debt.—Priest v. Hodges (Ark.) 253.

IX. FORECLOSURE.

§ 261. Effect of sale by trustee of property under a trust deed stated where the property was at the time of sale in a sheriff's hands.—Brant v. Lane (Tex. Civ. App.) 229.

CHECKS.

See Bills and Notes.

Pay checks, see Master and Servant, § 79.

CHILDBEARING.

Loss of ability as element of damages resulting from injury to female, see Damages, § 32.

CHILDREN.

See Guardian and Ward; Infants; Parent and Child.

CHOSE IN ACTION.

Assignment, see Assignments.

CHURCHES.

See Religious Societies.

CITIES.

See Municipal Corporations.

CLERICAL ERRORS.

Variance between indictment and proof in prosecution for forgery, see Forgery, § 34.

CLERKS OF COURTS.

Authority as to taking proceedings on appeal in forma pauperis, see Appeal and Error, § 332.

CLOUD ON TITLE.

See Quieting Title.

COLLATERAL AGREEMENT.

Parol evidence, see Evidence, §§ 441, 442.

COLLATERAL ATTACK.

On incorporation of religious society, see Religious Societies, § 4.

On judgment, see Judgment, §§ 470-521.

On order confirming judicial sale, see Judicial Sales, § 81.

COLLATERAL SECURITY.

See Pledges.

COLLATERAL UNDERTAKING.

See Frauds, Statute of, § 23.

COLLECTION.

Of estate of decedent, see Executors and Administrators, § 115.

COLOR OF TITLE.

To sustain adverse possession, see Adverse Possession.

COMBINATIONS.

See Conspiracy.

COMITY.

Between courts, see Courts, § 439.

COMMERCE.

Carriage of goods and passengers, see Carriers.

III. MEANS AND METHODS OF REGULATION.

§ 80. Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1907, p. 909), held valid.—Louisville & N. R. Co. v. Scott (Ky.) 990.

IV. INTERSTATE COMMERCE COMMISSION.

§ 85. The Interstate Commerce Commission held not to have jurisdiction over actions for damages to interstate shipments.—Louisville & N. R. Co. v. Scott (Ky.) 990.

COMMERCIAL PAPER.

See Bills and Notes.

§ 85. To take testimony, see Depositions.

COMMISSIONS.

Of broker, see Brokers, §§ 44-64.

Of executor or administrator, see Executors and Administrators, § 496.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

§ 11. The territory which now composes the state of Kansas, having been acquired by the United States under a treaty with France, was never subject to the common law of England.—Mathieson v. St. Louis & S. F. Ry. Co. (Mo.) 9.

COMMON SCHOOLS.

See Schools and School Districts, §§ 13-103.

COMMUNITY PROPERTY.

See Husband and Wife, §§ 262-276.

COMPENSATION.

For performance of contract, see Contracts, §§ 228, 231.

For property taken for public use, see Eminent Domain, § 84.

Of particular classes of officers or other persons.

See Brokers, §§ 44-64; Executors and Administrators, § 496.

Agent, see Principal and Agent, § 82.

Attorney, see Attorney and Client, § 143.

Prosecuting attorney, see District and Prosecuting Attorneys, § 5.

Servant, see Master and Servant, §§ 79, 82.

COMPETENCY.

Of experts as witnesses, see Evidence, § 543.

Of jurors, see Jury, §§ 88-142.

Of witnesses in general, see Witnesses, §§ 37-176.

COMPLAINT.

In civil actions, see Pleading, § 49.

In criminal prosecutions, see Indictment and Information.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Payment; Release.

Offer of as evidence, see Evidence, § 213.

§ 23. On an issue as to a compromise and settlement, a receipt executed by defendant to plaintiff held admissible.—Cranor Smith Lumber Co. v. Frith (Ky.) 307.

§ 25. In an action for breach of a logging contract where defendant offered in evidence a settlement, instructions held objectionable.—Cranor Smith Lumber Co. v. Frith (Ky.) 307.

COMPUTATION.

Of period of limitation, see Limitation of Actions, §§ 55-127.

Of time, see Time.

CONCEALED WEAPONS.

See Weapons.

CONCLUSION.

Of witness, see Evidence, §§ 471-501.

CONCLUSIVENESS.

Of certificate of Secretary of State as to contents of legislative journals, see Statutes, § 60.

CONCURRENT JURISDICTION.

Of courts, see Courts, § 489.

CONDEMNATION.

Taking property for public use, see Eminent Domain.

CONDITIONS.

Conditional delivery of deed, see Escrows.

In contracts and conveyances.

See Chattel Mortgages, § 235; Wills, §§ 651-665.

Insurance policies, see Insurance, §§ 255-282, 330, 335.

CONFESSION.

Admissibility in evidence, see Criminal Law, § 534.

CONFIRMATION.

Of judicial sale, see Judicial Sales, § 31.

CONFLICT OF LAWS.

Conflicting jurisdiction of courts, see Courts, § 489.

CONNECTING CARRIERS.

See Carriers, §§ 169-185.

CONSIDERATION.

Of contract in general, see Contracts, §§ 108-136.

Of particular classes of contracts.

See Bills and Notes, §§ 92, 493; Deeds, §§ 15-17, 195; Fraudulent Conveyances, § 74.

CONSOLIDATION.

Of corporations, see Corporations, § 581.

Of corporations of different states, see Corporations, § 690.

Of insurance associations, see Insurance, §§ 694, 696.

CONSPIRACY.

Evidence of acts and declarations of conspirators, see Criminal Law, §§ 423, 424.

II. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

§ 41. When defendant's guilty connection is established, he is chargeable with all acts and declarations of co-conspirators made during the conspiracy's existence and in carrying it forward.—Commonwealth v. Ellis (Ky.) 973.

(B) PROSECUTION AND PUNISHMENT.

§ 43. Under a charge limited to a single act of the conspirators to intimidate a certain per-

son, the court properly excluded evidence of illegal or wrongful acts done subsequently by a band with whom defendant was not charged to be in concert or collusion.—Commonwealth v. Ellis (Ky.) 973.

§ 45. Where, on a trial for conspiracy to intimidate, a witness for the commonwealth was asked whether or not a person, who came to see him at the time defendant said he would have a person there, told him to turn off the switch, and answered in the affirmative, held that the question and answer were competent.—Commonwealth v. Ellis (Ky.) 973.

§ 45. On trial for conspiracy to intimidate, held that the court properly excluded a part of an answer of a witness for the commonwealth as to what was told him by a certain person.—Commonwealth v. Ellis (Ky.) 973.

§ 47. In a prosecution for conspiracy, the state must first prove defendant's connection with the alleged conspiracy.—Commonwealth v. Ellis (Ky.) 973.

§ 48. Instructions in a prosecution for conspiracy held correct.—Commonwealth v. Ellis (Ky.) 973.

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See Carriers, § 2; Jury, § 14; Taxation, § 47. Enactment and validity of statutes, see Statutes, §§ 18-60.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 48. The federal Constitution does not inhibit Congress from impairing the obligation of contracts, but the same moral obligation not to enact such unjust laws rests upon it as upon the states, and it will be presumed that Congress did not intend to impair contract obligations, unless a clear intent to do so appears.—Louisville & N. R. Co. v. Mottley (Ky.) 982.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) LEGISLATIVE POWERS AND DELEGATION THEREOF.

§ 52. Rev. St. 1899, § 1617 (Ann. St. 1906, p. 1199), limiting the power of courts to punish for contempt, held, as applied to the circuit courts created by Const. art. 6, § 22 (Ann. St. 1906, p. 234), violative of Const. 1875, art. 3 (Ann. St. 1906, p. 172).—Chicago, B. & Q. Ry. Co. v. Gildersleeve (Mo.) 86, 97; Chicago & A. Ry. Co. v. Same (Mo.) 96.

§ 52. Courts cannot be shorn of the power to punish for contempt by the legislative branch of the state government.—Chicago, B. & Q. Ry. Co. v. Gildersleeve (Mo.) 86, 97; Chicago & A. Ry. Co. v. Same (Mo.) 96.

VII. OBLIGATION OF CONTRACTS.

(B) CONTRACTS OF STATES AND MUNICIPALITIES.

§ 137. A city may, in the absence of provision to the contrary, tax its bonds in the hands of another.—Bank of Russellville v. City of Russellville (Ky.) 921.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

§ 191. The retrospective laws forbidden by Const. art. 2, § 15 (Ann. St. 1906, p. 137), are laws impairing existing vested civil rights, and the prohibition does not apply to a statute limiting the time within which actions may be brought and embracing actions already institut-

failure to furnish cars (Rev. St. 1895, arts. 4497-4502), *held* not contrary to Const. U. S. Amend. 14, as amounting to a taking of the carrier's property without due process of law.—Texas & P. Ry. Co. v. Taylor (Tex. Civ. App.) 1097.

§ 303. The statute authorizing penalties for failure to furnish cars (Rev. St. 1895, arts. 4497-4502) *held* not to violate Const. U. S. Amend. 14, by depriving a railroad company of property without due process of law.—Texas & P. Ry. Co. v. Andrews, Reynolds & Co. (Tex. Civ. App.) 1101.

CONSTRUCTION.

Of contracts, instruments, or judicial acts and proceedings.

See Chattel Mortgages, § 150; Contracts, §§ 143-231; Deeds, §§ 96-99; Sales, § 85; Statutes, §§ 181-267; Wills, §§ 439-707.

Bill of lading, see Carriers, § 51.

Instructions, see Trial, §§ 295-296.

Insurance policy, see Insurance, §§ 168, 726.

Limitation laws in general, see Limitation of Actions, § 5.

Mining lease, see Mines and Minerals, §§ 62-68.

CONTAGIOUS DISEASES.

Of animals, liability of carrier for infection, see Carriers, §§ 215, 217, 228.

CONTEMPT.

Laws restricting power to punish as encroachment on judiciary, see Constitutional Law, § 52.

Violation of injunction, see Injunction, § 219.

CONTEST.

Of election, see Elections, §§ 291, 298.

Of local option election, see Intoxicating Liquors, § 37.

CONTINGENT REMAINDERS.

Creation, see Wills, § 629.

CONTINUANCE.

In criminal prosecutions, see Criminal Law, §§ 589-608.

CONTRACTS.

Agreements within statute of frauds, see Frauds, Statute of.

Alteration, see Alteration of Instruments.

Assignment, see Assignments.

Cancellation, see Cancellation of Instruments.

Impairing obligation, see Constitutional Law, § 137.

Liquidated damages or penalties, see Damages, § 80.

Operation and effect of champerty, see Champerty and Maintenance.

Operation and effect of usury laws, see Usury, §§ 26-117.

Parol or extrinsic evidence, see Evidence, §§ 400-442.

Specific performance, see Specific Performance.

Contracts of particular classes of persons.

See Attorney and Client, § 143; Carriers, §§ 51, 253½; Counties, § 121; Master and Servant; Municipal Corporations, §§ 243, 247, 330, 362; Schools and School Districts, § 86.

Transportation of passengers, see Carriers, § 253½.

Particular classes of express contracts.

See Bills and Notes; Chattel Mortgages; Covenants; Insurance; Liens; Partnership; Sales.

Agency, see Principal and Agent.

Bills of lading, see Carriers, § 51.

Employment, see Master and Servant.

Leases, see Landlord and Tenant.

Mutual benefit insurance, see Insurance, §§ 723-726.

Sales of realty, see Vendor and Purchaser.

Stipulations in actions, see Stipulations.

Suretyship, see Principal and Surety.

Particular classes of implied contracts.

See Covenants, § 20; Money Received; Work and Labor.

Particular modes of discharging contracts.

See Compromise and Settlement; Payment; Release.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS IN GENERAL.

§ 10. A contract between a manufacturer and a selling agent *held* not void for want of mutuality.—Peck-Williamson Heating & Ventilating Co. v. Miller & Harris (Ky.) 376.

(B) VALIDITY OF ASSENT.

§ 93. Defendant *held* entitled to a cancellation of a contract for the sale of gravel, etc., on the ground of a mistake of fact.—Edwards v. Trinity & B. V. Ry. Co. (Tex. Civ. App.) 572.

(F) LEGALITY OF OBJECT AND OF CONSIDERATION.

§ 108. A contract between the owner of goods and another, whereby such other person was to deal with the goods for one year and then turn them back to the owner, *held* not void as against public policy.—Holder v. Shelby (Tex. Civ. App.) 590.

§ 108. A contract by a railroad section foreman to procure a switch track at a specified place in consideration for a conveyance of land *held* not to be void as against public policy.—Wright v. Riley (Tex. Civ. App.) 1134.

§ 131. A contract for the services of an attorney to use his personal influence to secure a contract from the county for the erection of bridges is void as against public policy.—Flynn v. Bank of Mineral Wells (Tex. Civ. App.) 848.

§ 136. One employing an agent to purchase real estate *held* entitled to recover from the agent a secret commission received from the vendor, though the purchaser after the purchase and before the payment by the vendor of the commission formed an unlawful purpose to dispose of the property through a lottery.—Commercial Club of Joplin v. Davis (Mo. App.) 668.

§ 136. One employing an agent to purchase real estate *held* entitled to recover from him the commission received from the vendor pursuant to a secret agreement, though the purchaser, vendor, and agent each knew that the property was purchased for an unlawful purpose.—Commercial Club of Joplin v. Davis (Mo. App.) 668.

II. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

§ 143. The courts cannot make a contract to suit one of the parties, but must take the con-

tract as they find it and determine the rights of the parties from it as they themselves make or leave it.—*Garnes v. Frazier & Foster* (Ky.) 998.

§ 147. The dominant purpose in construing a contract is to ascertain the real intent of the parties.—*Mitchell v. Rushing* (Tex. Civ. App.) 582.

§ 153. A contract should be construed so as to give effect to the intention of the parties.—*Frisbie v. Bigham Masonic Lodge No. 256* (Ky.) 859.

§ 169. The circumstances under which a contract is made, the situation of the parties, and the facts of which they were cognizant at the time may be resorted to if the writing is ambiguous.—*Kellerman Contracting Co. v. Chicago House Wrecking Co.* (Mo. App.) 99.

(C) SUBJECT-MATTER.

§ 202. A contract for the selling of furnaces held not breached by the sale of airtight stoves.—*Peck-Williamson Heating & Ventilating Co. v. Miller & Harris* (Ky.) 376.

(F) COMPENSATION.

§ 228. Where parties to a contract accept the benefit of another party's services under the contract, and pay him a portion of the consideration, they cannot withhold the remainder of the consideration, unless the contract gives them the right to do so.—*Mitchell v. Rushing* (Tex. Civ. App.) 582.

§ 231. Under a building contract, the total amount of the original price and the costs of extras and changes held controlling under a clause permitting retention by the owner of a certain per cent. of the contract price until completion of the building.—*Illinois Surety Co. v. Garrard Hotel Co.* (Ky.) 967.

III. MODIFICATION AND MERGER.

§ 247. The burden is on the party asserting the modification of a contract to show the assent of the other party thereto.—*A. G. Brown & Co. v. McKnight* (Ark.) 406.

§ 247. One asserting a subsequent modification of the contract must prove it by a preponderance of the evidence.—*A. G. Brown & Co. v. McKnight* (Ark.) 409.

V. PERFORMANCE OR BREACH.

§ 280. Defendants, having agreed to employ plaintiff to do all their hauling for certain stores for a year, held not to have performed after having sold out the stores within three months by employing plaintiff to do such hauling as they might have for him.—*Smith v. J. H. Carter & Co.* (Mo. App.) 527.

§ 322. In an action for breach of a teaming contract, whether defendants owned the teams sold to plaintiff, or whether they were owned by a third person for whom defendants acted, held immaterial.—*Smith v. J. H. Carter & Co.* (Mo. App.) 527.

VI. ACTIONS FOR BREACH.

§ 324. Where the measure of damages for the breach of a contract is the amount of profits to which plaintiffs would be entitled, it is immaterial whether they sue for damages or for an accounting of profits.—*Peck-Williamson Heating & Ventilating Co. v. Miller & Harris* (Ky.) 376.

§ 326. The violation by a manufacturer of a valid contract with a selling agent renders the manufacturer liable in damages.—*Peck-Williamson Heating & Ventilating Co. v. Miller & Harris* (Ky.) 376.

§ 326. Even if defendant was not liable under the contract for work done by plaintiff, or on the quantum meruit, it was liable for a sum which plaintiff paid to his laborers, which sum defendant's agent expressly agreed to pay.—*Suderman-Dolson Co. v. Hope* (Tex. Civ. App.) 218.

§ 338. In an action on a contract, allegations in the answer as to defendant's financial condition held immaterial.—*Hall v. Parry* (Tex. Civ. App.) 561.

§ 346. In an action on a contract, evidence of defendant's financial condition held inadmissible.—*Hall v. Parry* (Tex. Civ. App.) 561.

§ 349. Testimony as to what stipulations it was customary to insert in contracts for hauling logs held inadmissible to prove that such stipulation was also embraced in the contract in question.—*Dayton Lumber Co. v. Stockdale* (Tex. Civ. App.) 806.

§ 353. An instruction in an action to recover for architect's plans held not supported by the evidence.—*Hall v. Parry* (Tex. Civ. App.) 561.

§ 358. Instruction in an action on a contract to furnish architect's plans held not erroneous.—*Hall v. Parry* (Tex. Civ. App.) 561.

CONTRADICTION.

Of record, see Appeal and Error, § 664.
Of witness, see Witnesses, § 405.

CONTRIBUTION.

Among heirs, see Descent and Distribution, § 152.

CONTRIBUTORY NEGLIGENCE.

See Negligence, § 83.

CONVERSION.

Wrongful conversion of personal property, see Trover and Conversion.

CONVEYANCES.

In fraud of creditors, see Fraudulent Conveyances.

In trust, see Trusts, §§ 1-18.

Of property to evade taxation, see Taxation, § 108.

Under judicial sale, see Judicial Sales, § 61.

Conveyances by or to particular classes of persons.

See Corporations, § 439.

Married women, see Husband and Wife, § 69½.

Conveyances of particular species of, or estates or interests in, property.

See Easements, §§ 5-42; Homestead, §§ 118-128; Mines and Minerals, § 55.

Timber, see Logs and Logging, § 3.

Particular classes of conveyances.

See Assignments; Chattel Mortgages; Deeds; Mortgages.

CORONERS.

Impeachment of witness by evidence of statements at inquest, see Witnesses, § 393.

Waiver of privilege of witness at inquest, see Witnesses, § 305.

CORPORATIONS.

Mandamus, see Mandamus, § 133.

Taxation of corporations and corporate property, see Taxation, § 122.

Particular classes of corporations.

See Municipal Corporations; Railroads; Religious Societies; Street Railroads.
Insurance companies, see Insurance.
Mercantile agencies, see Mercantile Agencies.
Telegraph and telephone companies, see Telegraphs and Telephones.
Water companies, see Waters and Water Courses, §§ 183-206.

I. INCORPORATION AND ORGANIZATION.

Of religious society, see Religious Societies, § 4.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

§ 49. A corporation, chartered under the name of "Benevolent and Protective Order of Elks of the United States of America," held entitled to an injunction restraining a similar organization, composed of colored people, from using the name "Improved Benevolent and Protective Order of Elks of the World."—*Benevolent and Protective Order of Elks v. Improved Benevolent and Protective Order of Elks* (Tenn.) 389.

§ 56. The by-laws of a corporation must be adopted by the members of the corporate body, and cannot be by the directors unless the charter or fundamental law so provides.—*Klix v. Polish Roman Catholic St. Stanislaus Parish* (Mo. App.) 1171.

IV. CAPITAL, STOCK, AND DIVIDENDS.**(B) SUBSCRIPTION TO STOCK.**

§ 76. That persons signing a written contract of subscription failed to read or understand it before signing would not relieve them from liability thereon in the absence of fraud.—*Chicago Bldg. & Mfg. Co. v. Peterson* (Ky.) 384; *Same v. Beaven, Id.*; *Same v. Mahon, Id.*

§ 77. A subscription paper of four pages construed to be a single contract.—*Chicago Bldg. & Mfg. Co. v. Peterson* (Ky.) 384; *Same v. Beaven, Id.*; *Same v. Mahon, Id.*

§ 78. A contract between a building company and subscribers to a fund for building a butter factory construed.—*Chicago Bldg. & Mfg. Co. v. Peterson* (Ky.) 384; *Same v. Beaven, Id.*; *Same v. Mahon, Id.*

§ 78. The liability of subscribers to stock under a contract held to be several, unless they elected to make it joint by becoming delinquent in payment.—*Chicago Bldg. & Mfg. Co. v. Peterson* (Ky.) 384; *Same v. Beaven, Id.*; *Same v. Mahon, Id.*

§ 83. Power of subscribers to an enterprise to withdraw and avoid liability on their subscriptions stated.—*Chicago Bldg. & Mfg. Co. v. Peterson* (Ky.) 384; *Same v. Beaven, Id.*; *Same v. Mahon, Id.*

V. MEMBERS AND STOCKHOLDERS.**(C) SUING OR DEFENDING ON BEHALF OF CORPORATION.**

§ 206. Minority stockholders of a corporation may maintain suits to declare corporate action ultra vires and void after having first demanded action by the corporation and been refused.—*Knapp v. Supreme Commandery, United Order of the Golden Cross of the World* (Tenn.) 390.

VI. OFFICERS AND AGENTS.**(A) ELECTION OR APPOINTMENT, QUALIFICATION, AND TENURE.**

§ 281. The directors of a corporation must be chosen by the members—that is, by the corpora-

tors—unless the latter have authorized some other mode of choice which the law will tolerate.—*Klix v. Polish Roman Catholic St. Stanislaus Parish* (Mo. App.) 1171.

VII. CORPORATE POWERS AND LIABILITIES.**(A) EXTENT AND EXERCISE OF POWERS IN GENERAL.**

§ 370. Corporations have only such powers as are expressly granted or necessarily implied from the powers expressly given.—*Knapp v. Supreme Commandery, United Order of the Golden Cross of the World* (Tenn.) 390.

§ 372. All statutes under which a corporate power is asserted must be construed favorably to the state from which the power emanated.—*Knapp v. Supreme Commandery, United Order of the Golden Cross of the World* (Tenn.) 390.

§ 393. Equity has jurisdiction to define the powers of corporations and to declare threatened or consummated corporate acts invalid.—*Knapp v. Supreme Commandery, United Order of the Golden Cross of the World* (Tenn.) 390.

(B) REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS.

§ 432. From the facts, held that it could be inferred that the slander of plaintiff by defendant corporation's agent was an act within the general scope of his employment, making defendant liable therefor.—*Payton v. People's Credit Clothing Co.* (Mo. App.) 631.

(C) PROPERTY AND CONVEYANCES.

§ 439. Acts 1887, p. 329, c. 198, providing for the leasing and disposition of the property of a corporation, applies only to quasi public, and not to private, corporations.—*Knapp v. Supreme Commandery, United Order of the Golden Cross of the World* (Tenn.) 390.

(F) CIVIL ACTIONS.

Waiver of defects in process in general by appearance, see Appearance, § 24.

§ 503. A plea of privilege to be sued in the county of defendant's residence held overruled in view of Rev. St. 1895, art. 1194, exception 23.—*Floresville Oil & Mfg. Co. v. Texas Refining Co.* (Tex. Civ. App.) 194.

X. CONSOLIDATION.

Of insurance associations, see Insurance, §§ 694, 696.

§ 581. Corporations have no general power to consolidate or merge with another corporation, unless express power so to do is found in their charters or the statutes of the state which created them.—*Knapp v. Supreme Commandery, United Order of the Golden Cross of the World* (Tenn.) 390.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 592½. Act April 23, 1907 (Laws 1907, p. 311, c. 164) § 4, subd. 5, providing that, where a corporation created under title 21 of a general law of the state shall fail to commence active operations within three years after filing its charter, the charter is hereby forfeited, and it is dissolved, held not a basis for forfeiture for past omissions on the part of the company.—*Reed v. Sampson* (Tex. Civ. App.) 749.

§ 596. Under Rev. St. 1895, tit. 21, arts. 680, 681, construed in connection with Act April 23, 1907 (Laws 1907, p. 311, c. 164) § 4, subd. 5, the failure of a corporation to commence active operations within three years after filing its charter held not to ipso facto dissolve it.

article 681 not being self-executing.—Reed v. Sampson (Tex. Civ. App.) 749.

XII. FOREIGN CORPORATIONS.

§ 690. Acts 1887, p. 329, c. 198, *held* not to authorize a consolidation and union of a domestic with a foreign corporation.—Knapp v. Supreme Commandery, United Order of the Golden Cross of the World (Tenn.) 890.

CORRECTION.

Of assessment of taxes, see Taxation, § 453.
Of irregularities and errors at trial, see Trial, § 412.

Of judgment, see Judgment, § 334.

Of record on appeal or writ of error, see Appeal and Error, §§ 635-655.

CORROBORATION.

Of witness in general, see Witnesses, § 831½.

COSTS.

In action for construction of will, see Wills, § 707.

Questions presented for review as to rulings on taxation of, see Appeal and Error, § 709.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 232. One appealing from a judgment of the circuit court rendered on appeal from the county court is entitled to the costs of the appeal on the appellate court dismissing the cause because the county court was without jurisdiction.—Price v. Madison County Bank (Ark.) 706.

§ 234. Where there was error requiring a remittitur to cure, costs of the appeal should be taxed against the appellee.—Weatherford, M. W. & N. W. Ry. Co. v. White (Tex. Civ. App.) 739.

§ 238. In trespass to try title, where the court, on rendering judgment for defendant, awarded him a writ of possession which was not justified by the pleadings, and plaintiff did not call the error to the attention of the court, the reformation of the judgment in that respect on appeal will not relieve plaintiff from the costs of appeal.—McKee v. West (Tex. Civ. App.) 1185.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTERFEITING.

See Forgery.

COUNTIES.

See Municipal Corporations.

County attorneys, see District and Prosecuting Attorneys.

Validity of contract by attorney to secure contract from county, see Contracts, § 131.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

Judicial notice, see Criminal Law, § 304.

II. GOVERNMENT AND OFFICERS.

(B) COUNTY SEAT.

Judgment on election contest as bar to proceeding to enjoin issue of bond relating to county seat removal, see Judgment, § 739.

Presumption as to performance of official duty, see Evidence, § 83.

Right of dower in land dedicated for county seat before conveyance to husband of claimant, see Dower, § 12.

§ 34. Under Const. art. 9, § 2, and Rev. St. 1895, art. 813, a certificate of the county commissioners designating the geographical center of the county *held* sufficient.—Kilgore v. Jackson (Tex. Civ. App.) 819.

§ 34. Under Const. art. 9, § 2, and Rev. St. 1895, arts. 813, 815, county commissioners, in designating the center of a county, *held* not authorized to exclude from consideration that part of the county covered by waters, navigable or otherwise.—Kilgore v. Jackson (Tex. Civ. App.) 819.

§ 34. Under Rev. St. 1895, art. 813, a certificate of the land commissioners designating the geographical center of a county *held* conclusive.—Kilgore v. Jackson (Tex. Civ. App.) 819.

§ 35. Under Const. art. 9, § 2, and under Rev. St. 1895, arts. 813, 815, the failure of the records of a judge to show that, in the determination of the result of an election to remove a county seat, the place to which the county seat was to be removed was within five miles of the geographical center, *held* not to render his order declaring the result of the election void.—Kilgore v. Jackson (Tex. Civ. App.) 819.

§ 35. An order of a judge in a county seat removal election *held* to include a determination that the place to which the county seat was removed was within five miles of the center of the county.—Kilgore v. Jackson (Tex. Civ. App.) 819.

§ 35. Under Const. art. 9, § 2, and Rev. St. 1895, arts. 813, 815, an order of a county judge declaring the result of a county seat removal election *held* not to be attacked.—Kilgore v. Jackson (Tex. Civ. App.) 819.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(A) PUBLIC BUILDINGS AND OTHER PROPERTY.

§ 104. Effect of a deed executed to take the place of a former destroyed one donating land for a county seat stated.—Van Pelt v. Parry (Mo.) 425.

§ 108. Under Rev. St. 1855, c. 44, §§ 6, 8, and chapter 45, *held*, that a county could establish a permanent county seat on land already owned by it, and a subsequent sale as swamp land of a tract containing the town would not pass uncoveyed lots, county buildings etc.—Van Pelt v. Parry (Mo.) 425.

(B) CONTRACTS.

§ 121. The fiscal court of a county cannot bind itself by parol.—Fiscal Court of Breckenridge County v. Board of Trustees of Town of Hardinsburg (Ky.) 298.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

Attorney's lien in action by tax payer on behalf of tax payers of county, see Attorney and Client, § 182.

Jurisdiction of action to compel depository of county fund to pay interest in United States currency, see Courts, § 124.

Mandamus at instance of county taxpayer, see Mandamus, § 23.

§ 196. An attorney employed by a taxpayer to prevent the illegal expenditure of county money, or to recover county money illegally expended, must look alone to the taxpayer for

see Appeal and Error, § 373.

§ 208. A county cannot be sued except on an express contract.—Marion County v. Rives & McChord (Ky.) 309.

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To jurisdiction of state court in action against trustee in bankruptcy, see Bankruptcy, § 295.

§ 35. The presumption is that a court of record, while sitting and performing its functions, is lawfully assembled.—State v. Bush (Mo. App.) 670.

§ 35. The fact that the several judges of the county court met at adjourned sessions is conclusive evidence that the regular term of court had not expired, and the presumption is that they would not have assembled as a court unless there had been an adjourned session, or on statutory notice.—State v. Bush (Mo. App.) 670.

§ 37. Since consent cannot give jurisdiction of the subject-matter where none exists, the question of jurisdiction of the subject-matter may be raised at any time.—Price v. Madison County Bank (Ark.) 706.

§ 37. Rule governing attack on jurisdictional defects stated.—Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co. (Mo. App.) 500.

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(C) RULES OF COURT AND CONDUCT OF BUSINESS.

§ 82. Rules as to presenting assignments of error, being for the convenience of appellate courts to aid in the orderly dispatch of business, held directory only, and waivable by the courts.—Mitchell v. Rushing (Tex. Civ. App.) 582.

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§ 89. As far as statutes affect a contest of a local option election, held, the Supreme Court will put its own construction thereon, instead of following that of the Court of Criminal Appeals.—Griffin v. Tucker (Tex.) 635.

will be followed by the Court of Civil Appeals.—Atchison, T. & S. F. Ry. Co. v. Pickens (Tex. Civ. App.) 1133.

§ 92. Inference from remarks of the Court of Appeals outside the point of decision should not be drawn against express decisions of the Supreme Court.—Crohn v. Clay County State Bank (Mo. App.) 498.

§ 104. The Court of Civil Appeals is not required by the statute to render written opinions in affirmed cases which cannot be taken to the Supreme Court by writ of error.—Wright v. Hooker (Tex. Civ. App.) 765.

§ 114. The entry of nunc pro tunc orders of adjournment on each day the court was in session during the term to correct the records held proper.—State v. Bush (Mo. App.) 670.

§ 116. Papers filed in a criminal case become a part of the record and cannot be changed, except by order of the court after full hearing and as authorized by law.—Carroll v. State (Tex. Cr. App.) 1031.

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§ 121. In an action for damages, the interest forms a part of the damages, and if the amount of the damages and interest exceed the jurisdictional amount the court has no jurisdiction of the action.—International & G. N. R. Co. v. Flory (Tex. Civ. App.) 1116.

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§ 124. An action to compel a depository of county funds selected under Acts 1907, p. 113, to pay interest, held within the jurisdiction of the circuit court under Const. art. 7, § 11, and not within the jurisdiction of the county court under section 28.—Price v. Madison County Bank (Ark.) 706.

§ 142. The circuit court of the city of St. Louis, like all other circuit courts in the state, is, to all intents and purposes, a court of general jurisdiction.—Chicago, B. & Q. Ry. Co. v. Gildersleeve (Mo.) 86, 97; Chicago & A. Ry. Co. v. Same (Mo.) 96.

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§ 122. In an action for breach of warranty of title, evidence *held* to show that a prior unsuccessful suit by plaintiffs against third parties claiming ground covered by the deed on which action was based was instituted by defendant's authority.—*Landes v. Matthews* (Mo. App.) 1185.

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§ 36. The lien obtained on the equitable assets of a debtor by a creditor's suit attaches thereto from the time of service of process, or on the filing of the bill and suing out of process.—*Plummer & Davis v. School Dist. No. 1 of Marianna* (Ark.) 1011.

§ 36. Creditors of a contractor, constructing a building for a school district instituting a suit against the district and the contractor to apply the funds in the hands of the directors to the payment of their debts against the contractor, *held* entitled to a preference over other creditors subsequently instituting such a suit.—*Plummer & Davis v. School Dist. No. 1 of Marianna* (Ark.) 1011.

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IV. JURISDICTION.

§ 90. In view of the meaning of "accused" and "defendant," under Pen. Code 1895, art. 25, *held* that a justice of the peace does not act as a magistrate in a court of inquiry, under Code Cr. Proc. 1895, art. 941.—*Brown v. State* (Tex. Cr. App.) 139.

§ 90. One justice of the peace as such cannot sit in the precinct of another justice, and take jurisdiction of matters arising therein, under Rev. St. 1895, arts. 1564, 1566, and hence cannot hold a court of inquiry under Code Cr. Proc. 1895, art. 941, in another justice's precinct.—*Brown v. State* (Tex. Cr. App.) 139.

§ 90. Ordinarily one justice of the peace has no authority to take cognizance of proceedings within the limits of the jurisdiction of another justice, and statutes permitting it are to be strictly construed; and, where by statute certain proceedings must be had before a proper justice, no other justice can take jurisdiction.—*Brown v. State* (Tex. Cr. App.) 139.

§ 90. A justice of the peace has authority to sit as a magistrate under the express provisions of Code Cr. Proc. 1895, art. 41; but in view of article 62, providing that when a magistrate sits to inquire into a criminal accusation, his court is called an examining court, but his authority as a magistrate is entirely distinct from his jurisdiction as a justice of the peace.—*Brown v. State* (Tex. Cr. App.) 139.

§ 90. The jurisdiction of a justice of the peace is only that fixed by the Constitution and statutes; and, as a general rule, any exercise of jurisdiction by him beyond his prescribed power is void.—*Brown v. State* (Tex. Cr. App.) 139.

§ 101. Under Rev. St. 1899, art. 18, §§ 13, 18, 19 (Ann. St. 1906, pp. 4900-4911), the St.

Louis Court of Criminal Correction *held* to have no jurisdiction of a misdemeanor committed in St. Louis by the transfer of an information filed in the circuit court of the city, as such proceedings can only be instituted in the Court of Criminal Correction.—*State v. Cariot* (Mo. App.) 512, 513.

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(A) JUDICIAL NOTICE, PRESUMPTIONS, AND BURDEN OF PROOF.

Evidence of confession for purpose of impeachment, see Witnesses, § 390.

In prosecution for offense against liquor law, see Intoxicating Liquors, § 233.

In prosecution for seduction, see Seduction, § 39.

§ 304. Though the court takes judicial notice of the boundaries of a county in the state, it does not take judicial notice of the county in which an unincorporated town is situated.—*State v. Bush* (Mo. App.) 670.

(B) FACTS IN ISSUE AND RELEVANT TO ISSUES, AND RES GESTÆ.

§ 349. The state may prove, as a circumstance to show flight of accused, that he was incarcerated in the general jail in a distant city, charged with the crime.—*Cabrera v. State* (Tex. Cr. App.) 1054.

§ 361. Under Code Cr. Proc. 1895, art. 791, where the explanatory matter offered in evidence is not a part of a conversation already inquired about, it must be necessary to explain the acts or statements introduced by the adverse party.—*Potts v. State* (Tex. Cr. App.) 535.

§ 366. Statements made by decedent almost immediately after the firing of the fatal shot *held* admissible as a part of the res gestæ.—*Puryear v. State* (Tex. Cr. App.) 1042.

(C) OTHER OFFENSES, AND CHARACTER OF ACCUSED.

§ 369. All of the transaction in which the offense was committed may be given in evidence, though it shows another crime.—*Bennett v. Commonwealth* (Ky.) 332.

(F) ADMISSIONS, DECLARATIONS, AND HEARSAY.

§ 412. Notes found on accused while in jail with other prisoners, and which he attempted to pass to a visitor, and which showed the writers were preparing to arrange for alibis, *held* competent evidence against him.—*Commonwealth v. Ellis* (Ky.) 973.

§ 419. Evidence in a prosecution for violation of the local option law *held* inadmissible as hearsay.—*Ross v. State* (Tex. Cr. App.) 1034.

(G) ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS.

§ 423. Where two or more persons act together, any acts or declarations, prior to the commission of the crime, illustrating the purpose and animus or probable co-operation of the parties in the commission of the crime, are admissible.—*Cabrera v. State* (Tex. Cr. App.) 1054.

§ 423. On a trial for homicide, alleged to have been committed by accused and a codefendant acting together, evidence that the codefendant was, prior to the homicide, seen going to the place of the homicide, *held* admissible.—*Cabrera v. State* (Tex. Cr. App.) 1054.

§ 424. After the consummation of the conspiracy, the acts and declarations of the co-conspirators do not bind each other.—*Commonwealth v. Ellis* (Ky.) 973.

§ 427. It cannot be shown that defendant belonged to a band of conspirators, by hearsay declarations of the conspirators themselves.—*Commonwealth v. Ellis* (Ky.) 973.

(H) DOCUMENTARY EVIDENCE AND EXCLUSION OF PAROL EVIDENCE THEREBY.

§ 429. A marriage license and return *held* admissible in evidence, without proof that the person signing the return as justice of the peace was such in fact.—*Baker v. State* (Tex. Cr. App.) 542.

(I) OPINION EVIDENCE.

§ 478. An expert on gunshot wounds is competent to testify that the bullet which killed decedent entered in the back near the right shoulder blade, and that the point of exit was the wound in front of the body on the left breast.—*Cabrera v. State* (Tex. Cr. App.) 1054.

(K) CONFESSIONS.

§ 534. A confession, standing alone, *held* not to justify a conviction.—*Brown v. Commonwealth* (Ky.) 945.

(M) WEIGHT AND SUFFICIENCY.

In particular criminal prosecutions.

See Burglary, § 41; Conspiracy, § 47; Homicide, §§ 252-254; Incest, § 14; Larceny, §§ 56, 59; Robbery, § 24.

For carrying weapons, see Weapons, § 17.

§ 564. In a prosecution for violation of the local option law, evidence of a sale of liquor at a certain unincorporated town, without showing in what county such town is located, is insufficient to fix the venue, and therefore fails to show any offense.—*State v. Bush* (Mo. App.) 670.

XI. TIME OF TRIAL AND CONTINUANCE.

§ 589. Where the facts which accused expected to show by a witness, in order to procure whom he asked a continuance, were not material or probably true, and the evidence tended to show collusion between accused and the absent witness, a continuance was properly denied.—*Myers v. State* (Tex. Cr. App.) 1032.

§ 590. The court *held* to have abused its discretion in denying accused a continuance.—*Smith v. Commonwealth* (Ky.) 368.

§ 590. The refusal to postpone a case for 24 hours to enable accused to file a plea of former jeopardy *held* not erroneous.—*Robinson v. State* (Tex. Cr. App.) 1037.

§ 594. Application for continuance for absence of witness *held* insufficient, where, on motion for new trial, the witness makes affidavit he would not have testified as claimed.—*Smith v. State* (Tex. Cr. App.) 145.

§ 598. Defendant *held* not entitled to continuance for absent witness, who, as known to defendant at the preceding term, was not subpoenaed.—*Smith v. State* (Tex. Cr. App.) 145.

§ 598. A postponement of a criminal case to procure testimony of witnesses *held* properly refused.—*Ross v. State* (Tex. Cr. App.) 1034.

§ 600. Denial of an application for a continuance for absence of certain witnesses for accused *held* not prejudicial.—*Freeman v. Commonwealth* (Ky.) 917.

§ 603. An affidavit *held* insufficient to authorize a third continuance.—*Freeman v. Commonwealth* (Ky.) 917.

§ 603. An application for continuance for the absence of a witness, which did not show whether the witness had permanently left the state, and did not show any probability that

the witness would ever return to the state was defective.—*Ross v. State* (Tex. Cr. App.) 1034.

XII. TRIAL.

(A) PRELIMINARY PROCEEDINGS.

§ 621. The refusal to require the state to try accused on a prior indictment *held* not erroneous.—*Robinson v. State* (Tex. Cr. App.) 1037.

(C) RECEPTION OF EVIDENCE.

§ 665. The exclusion of witnesses from the courtroom is largely discretionary, and parties not desiring to suffer by the rule for the separation of witnesses should exercise diligence to see that their witnesses obey it.—*Commonwealth v. Ellis* (Ky.) 973.

(E) ARGUMENTS AND CONDUCT OF COUNSEL.

§ 714. Under Code Cr. Proc. 1895, art. 823, the action of the district attorney, on a trial for murder, in referring on cross-examination to accused's former conviction, and in commenting thereon in his argument, *held* reversible error.—*Benson v. State* (Tex. Cr. App.) 1049.

§ 720. Statement of commonwealth attorney *held* an inference not unauthorized by the evidence.—*Cox v. Commonwealth* (Ky.) 282.

§ 720. Much latitude is allowed a commonwealth attorney in the prosecution of his case; the only limitation being that he must confine himself to the facts in evidence and the fair and reasonable deductions and conclusions to be drawn therefrom.—*Cox v. Commonwealth* (Ky.) 282.

§ 721. Under Code Cr. Proc. 1895, art. 770, *held* reversible error for the state's attorney to state in argument that accused's failure to testify for himself on his former trial showed that his present testimony was false.—*Ilare v. State* (Tex. Cr. App.) 544.

§ 721. A remark of the prosecuting attorney *held* not a comment on accused's failure to testify.—*Cabrera v. State* (Tex. Cr. App.) 1054.

§ 723. Argument of commonwealth's attorney *held* not improper.—*Gipson v. Commonwealth* (Ky.) 334.

§ 726. The prosecuting attorney's statements in argument as to why a witness was absent *held* a proper reply to the statements of accused's counsel as to his credibility.—*Myers v. State* (Tex. Cr. App.) 1032.

(F) PROVINCE OF COURT AND JURY IN GENERAL.

§ 753. Where there is any evidence tending to show guilt, *held*, a peremptory instruction may not be given.—*Bennett v. Commonwealth* (Ky.) 332.

§ 762. An instruction in a homicide case *held* not misleading.—*Cabrera v. State* (Tex. Cr. App.) 1054.

§ 763. Instructions *held* not erroneous as directing the jury to find accused guilty of either murder in the second degree or manslaughter.—*Benson v. State* (Tex. Cr. App.) 1049.

§ 763. An instruction on impeaching testimony *held* erroneous, as on the weight to be given testimony.—*Benson v. State* (Tex. Cr. App.) 1049.

(G) NECESSITY, REQUISITES, AND SUFFICIENCY OF INSTRUCTIONS.

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See Conspiracy, § 48; Libel and Slander, § 159.

§ 780. In a prosecution for robbery, a charge on accomplice testimony and its corroboration

held improper.—*Early v. State* (Tex. Cr. App.) 1036.

§ 780. An instruction on the testimony of an accomplice *held* sufficiently favorable to accused.—*Puryear v. State* (Tex. Cr. App.) 1042.

§ 784. *Held* unnecessary under the evidence in a homicide case to charge on circumstantial evidence.—*Potts v. State* (Tex. Cr. App.) 535.

§ 784. The refusal to charge on circumstantial evidence in a homicide case *held* proper under the evidence.—*Cabrera v. State* (Tex. Cr. App.) 1054.

§ 814. Where on the trial of a Mexican for murder, there was nothing suggesting the necessity of a charge that the jury must not allow the fact that accused was a Mexican to influence them, the refusal to so charge was not erroneous.—*Cabrera v. State* (Tex. Cr. App.) 1054.

§ 814. Where, on the trial for the murder of the district judge, there was nothing suggesting the necessity of a charge that the jury must not consider the bare fact that decedent was a district judge, the refusal to so charge was not erroneous.—*Cabrera v. State* (Tex. Cr. App.) 1054.

§ 822. When the instructions as a whole present the entire law of the case, they are sufficient.—*Wheat v. Commonwealth* (Ky.) 264.

§ 822. The court, in testing the sufficiency of a charge, must consider the instructions as a whole.—*Puryear v. State* (Tex. Cr. App.) 1042.

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§ 824. The failure to limit the use of impeaching testimony *held* not erroneous under the evidence.—*Puryear v. State* (Tex. Cr. App.) 1042.

§ 829. On a trial for homicide, the refusal to give an instruction *held* not erroneous, in view of the evidence and the instructions given.—*Cabrera v. State* (Tex. Cr. App.) 1054.

(J) CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 855. The practice of writing out the testimony of witnesses by the jury after retirement and using the writing in arriving at a verdict is not to be commended.—*Gipson v. Commonwealth* (Ky.) 334.

§ 864. The trial court's action in a murder prosecution in permitting the jury to inspect the fatal bullets in the courtroom *held* proper.—*Potts v. State* (Tex. Cr. App.) 535.

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§ 913. Where there was an agreed statement of facts filed, the death of the presiding judge, after the trial and before the statement of facts was made up, was no ground for a new trial.—*Ellis v. State* (Tex. Cr. App.) 543.

§ 941. A new trial on the ground of newly discovered evidence *held* properly refused in a murder case.—*Cox v. Commonwealth* (Ky.) 282.

§ 946. A motion for a new trial and in arrest of judgment cannot be made together and at the same time, for a motion in arrest is a waiver of a motion for new trial.—*Palmer v. State* (Tenn.) 1022.

§ 956. On motion for new trial in a homicide case on the ground that a juror had stated in the jury room that accused was guilty, etc., affidavits *held* to sustain a finding that the jury did not make the alleged improper statements.—*Potts v. State* (Tex. Cr. App.) 535.

§ 956. Under Code Cr. Proc. 1895, art. 821, counter affidavits are receivable on a motion

for a new trial, and the court may receive oral proof on the issue.—*Pickett v. State* (Tex. Cr. App.) 1039.

§ 972. A motion in arrest must rest on matter of record.—*Palmer v. State* (Tenn.) 1022.

§ 974. A motion in arrest must state specifically the grounds on which it is based.—*Palmer v. State* (Tenn.) 1022.

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§ 1020. A judgment of the county court in a criminal case appealed from a justice court is not appealable when the fine is under \$100.—*Cassens v. State* (Tex. Cr. App.) 546.

§ 1024. A writ of error will not lie from an order quashing an information.—*State v. Wilkison* (Mo. App.) 659.

(B) PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

§ 1030. Objections going to such irregularities as could have been corrected on the attention of the trial court having been called there-to held waived.—*Hobbs v. State* (Tenn.) 262.

§ 1032. Objections to the indictment must be made in the trial court.—*Palmer v. State* (Tenn.) 1022.

§ 1035. An objection to the failure to swear the jury must be presented to the trial court, or it is waived.—*Hobbs v. State* (Tenn.) 262.

§ 1036. To take advantage of the admission of improper evidence, accused must object to its introduction and reserve his exceptions to the overruling of his objection.—*Cabrera v. State* (Tex. Cr. App.) 1054.

§ 1032. A denial of a continuance is not reviewable, where no exception was reserved to the ruling.—*Crowson v. State* (Tex. Cr. App.) 1036.

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§ 1090. Error assigned in the motion for a new trial in refusing to grant a continuance cannot be considered on a criminal appeal, where the record contains no bill of exceptions preserving the point.—*Potts v. State* (Tex. Cr. App.) 535.

§ 1090. Where the record contained no statement of facts or bill of exceptions, and the indictment was sufficient, the judgment must be affirmed.—*Mallory v. State* (Tex. Cr. App.) 1031.

§ 1090. A ruling permitting a witness to be impeached cannot be reviewed, in absence of a bill of exceptions.—*Crowson v. State* (Tex. Cr. App.) 1036.

§ 1091. The court on appeal, in reviewing an assignment complaining of the failure of the court to limit impeaching testimony, held not required to examine a voluminous statement of facts to learn of the nature and character of the impeaching testimony and whether in fact it should have been limited.—*Puryear v. State* (Tex. Cr. App.) 1042.

§ 1094. Where the record contains neither statement of facts nor bill of exceptions, the judgment will be affirmed.—*Miller v. State* (Tex. Cr. App.) 534.

§ 1097. If the bill of exceptions on accused's appeal did not fairly or fully state the matters necessary to review errors in admitting evidence or permitting improper argument, so that a statement of facts was essential to review the case, it became the state attorney's duty to bring up the statement of facts.—*Hare v. State* (Tex. Cr. App.) 544.

§ 1097. Though the record contained no statement of facts, accused held entitled to avail himself on appeal of errors in requiring him to state whether he testified on a former trial, and in permitting comments in argument on his failure to so testify, in violation of Code Cr. Proc. 1895, art. 770.—*Hare v. State* (Tex. Cr. App.) 544.

(G) REVIEW.

§ 1137. Where accused presented a special charge similar to that prepared by the court, after its charge was framed, but before it was read to the jury, any error in the court's charge was invited, and accused cannot complain thereof.—*Myers v. State* (Tex. Cr. App.) 1032.

§ 1144. The Supreme Court, on appeal, will, as against objection made for the first time on appeal, presume that the jury were sworn.—*Hobbs v. State* (Tenn.) 262.

§ 1144. Under Code Cr. Proc. 1895, art. 821, the court, on appeal from the denial of a new trial for misconduct of the jury, held required to assume, in the absence of a bill of exceptions or anything to the contrary, that the matter alleged in the motion was found untrue.—*Pickett v. State* (Tex. Cr. App.) 1039.

§ 1156. Under Cr. Code Prac. § 281, providing that the decision on motion for a new trial shall not be subject to exception, the matter of misconduct of the jury, first brought to the attention of the court on application for a new trial, cannot be considered on appeal.—*Gipson v. Commonwealth* (Ky.) 334.

§ 1158. The appellate court will not disturb the trial court's findings upon affidavits relative to the misconduct of a juror in the jury room unless his decision is clearly wrong.—*Potts v. State* (Tex. Cr. App.) 535.

§ 1159. The verdict of a jury upon the facts in a criminal case will not be disturbed on appeal except in the absence of proof to support it.—*Cox v. Commonwealth* (Ky.) 282.

§ 1159. The credibility of a witness is a question for the jury in the trial court.—*Gipson v. Commonwealth* (Ky.) 334.

§ 1169. Admission of improper evidence held reversible error.—*Ross v. State* (Tex. Cr. App.) 1034.

§ 1169. The error in admitting certain evidence held not prejudicial to accused.—*Cabrera v. State* (Tex. Cr. App.) 1054.

§ 1172. Whether the court correctly defined carnal knowledge in a prosecution for incest held immaterial.—*Baker v. State* (Tex. Cr. App.) 542.

§ 1173. On a trial for horse stealing, failure to give certain charge held prejudicially erroneous.—*Walklate v. Commonwealth* (Ky.) 314.

§ 1174. Certain occurrences in the presence of the jury held harmless.—*Cabrera v. State* (Tex. Cr. App.) 1054.

§ 1177. The error in assessing punishment at "seven years in the penitentiary," instead of "seven years' confinement in the penitentiary," is harmless.—*Baker v. State* (Tex. Cr. App.) 542.

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DAMAGES.

Damages for particular injuries.

See Death, § 99; Libel and Slander, § 120; Malicious Prosecution, §§ 67-68; Trespass, § 52.
Breach by buyer of contract for sale of goods, see Sales, §§ 369, 413.
Breach by vendor of contract for sale of land, see Vendor and Purchaser, §§ 342-352.
Breach of contract to convey land, see Vendor and Purchaser, § 351.
Breach of contract to sublease land for mining, see Mines and Minerals, § 62.
Delay in shipment, see Carriers, § 105.
Failure to deliver telegram, see Telegraphs and Telephones, §§ 68, 71.
For injuries to shipment of live stock, see Carriers, § 229.
Malpractice, see Physicians and Surgeons, § 18.
Wrongful attachment, see Attachment, §§ 375-377.
Wrongful execution, see Execution, § 472.
Wrongful injunction, see Injunction, § 261.
Wrongful sequestration, see Sequestration, § 21.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) DIRECT OR REMOTE, CONTINGENT, OR PROSPECTIVE, CONSEQUENCES OR LOSSES.

For assault and battery, see Assault and Battery, § 38.
In actions for malicious prosecutions, see Malicious Prosecution, § 67.
§ 20. In an action for damages for a wrongful act, it is not material whether it was in the contemplation of the wrongdoer that loss of business or profit would result to the injured person.—Kentucky Heating Co. v. Hood (Ky.) 337.
§ 32. Where plaintiff, a woman *en ciende*, was injured by defendant's actionable negligence, and suffered an abortion, she could recover for her injury, including mental and physical suffering, the natural and proximate result of the injury.—Big Sandy & C. R. Co. v. Blankenship (Ky.) 316.

§ 38. In an action for injuries, evidence that plaintiff's mind was not as accurate as it was before he was hurt was admissible as bearing on the question of damages.—Houston & T. C. R. Co. v. Shapard (Tex. Civ. App.) 596.

§ 48. The subjects of recovery for mental anguish caused by negligent injuries stated.—Gulf, C. & S. F. Ry. Co. v. Dickens (Tex. Civ. App.) 612, 618.

§ 53. In an action for personal injuries, it was not error to permit plaintiff to testify that he suffered mental anguish by fear that blood poisoning might set in and prove fatal.—Southern Kansas Ry. Co. of Texas v. McSwain (Tex. Civ. App.) 874.

§ 54. Mental anguish caused an injured person by his being an object of pity, sympathy, or curiosity to the public or to his friends *held* not a subject of compensation.—Gulf, C. & S. F. Ry. Co. v. Dickens (Tex. Civ. App.) 612, 618.

(B) AGGRAVATION, MITIGATION, AND REDUCTION OF LOSS.

§ 62. Where defendant's fences were knocked down by plaintiff in lumbering operations, defendant was only bound to exercise reasonable care for the protection of his crops and grass.—Cranor Smith Lumber Co. v. Frith (Ky.) 307.

§ 62. In an action for breach of a hauling contract, defendant *held* not to have waived his right of action against defendants by having accepted employment from the buyer of defendants' business.—Smith v. J. H. Carter & Co. (Mo. App.) 527.

§ 64. A railroad company destroying buildings by fire cannot reduce the owner's recovery therefor by showing that he received insurance.—Erhart v. Wabash Ry. Co. (Mo. App.) 657.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 80. Three dollars per day *held* a reasonable sum to be agreed on as liquidated damages to be paid by the contractor to the owner for failure to complete a \$13,000 hotel within the time specified in the contract.—Illinois Surety Co. v. Garrard Hotel Co. (Ky.) 967.

V. EXEMPLARY DAMAGES.

For particular injuries.

Ejection of passenger, see Carriers, § 382.
Injuries caused by operation of railroad, see Railroads, § 282.
Libel, see Libel and Slander, § 120.
Wrongful sequestration, see Sequestration, § 21.
§ 91. When exemplary damages may be awarded stated.—Greer v. White (Ark.) 258.

VI. MEASURE OF DAMAGES.

For particular injuries.

Wrongful injunction, see Injunction, § 261.

(A) INJURIES TO THE PERSON.

§ 95. In an action for injuries, damages are confined to expense of cure, value of time lost, compensation for suffering, and permanent reduction of earning power.—Louisville & N. R. Co. v. Crow (Ky.) 365.

(B) INJURIES TO PROPERTY.

Injuries caused by overflow, see Waters and Water Courses, §§ 125, 178.

§ 112. The measure of damages for the destruction by fire of timber and grass is the difference between the value of the land just before and just after the fire.—Missouri, K. & T. Ry. Co. of Texas v. Neiser (Tex. Civ. App.) 166.

§ 112. Where peach trees and grapevines are entirely destroyed by fire set by a locomotive, the measure of damages is the difference in value of the land just before and after the burning.—*Texas & P. Ry. Co. v. Graffeo* (Tex. Civ. App.) 873.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

For particular injuries.

Ejection of passengers, see Carriers, § 332.

Malpractice, see Physicians and Surgeons, § 18.

§ 130. In an action for injuries, a verdict for plaintiff *held* not excessive.—*Big Sandy & O. R. Co. v. Blankenship* (Ky.) 316.

§ 130. \$10,000 recovered for personal injuries *held* excessive by \$4,000.—*Texas & N. O. R. Co. v. Geiger* (Tex. Civ. App.) 179.

§ 131. In an action for injuries, a verdict for plaintiff for \$700 *held* not so excessive as to indicate passion or prejudice.—*Illinois Cent. R. Co. v. Smith* (Ky.) 933.

§ 131. A verdict in a personal injury action *held* not excessive.—*Dahmer v. Metropolitan St. Ry. Co.* (Mo. App.) 406.

§ 132. In an action for injuries, a verdict for \$5,000 *held* not excessive.—*Eilerman v. Farmer* (Ky.) 289.

§ 132. A verdict in a personal injury action *held* excessive, requiring a reduction of a specified amount.—*Wellman v. Metropolitan St. Ry. Co.* (Mo.) 31.

§ 132. In an action for personal injuries, a verdict for \$4,500 *held* not excessive.—*Van Cleve v. St. Louis, M. & S. E. Ry. Co.* (Mo. App.) 116.

§ 132. A verdict in a personal injury action *held* not excessive.—*Missouri, K. & T. Ry. Co. of Texas v. Redus* (Tex. Civ. App.) 208.

§ 132. A verdict of \$1,500 in an action for personal injuries to a servant *held* not excessive.—*St. Louis Southwestern Ry. Co. of Texas v. Browning* (Tex. Civ. App.) 245.

§ 132. A verdict allowing an injured plaintiff \$25,000 *held* excessive and to be reduced to \$17,500.—*Houston & T. C. R. Co. v. Shapard* (Tex. Civ. App.) 596.

§ 132. In an action for injuries to a servant, a verdict for \$10,000 *held* not excessive.—*Waggoner v. Porterfield* (Tex. Civ. App.) 1004.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) PLEADING.

Assessment on overruling demurrer to complaint; see Pleading, § 218.

§ 143. In personal injury cases, plaintiff should so describe his injuries that defendant from an inspection of the pleading may have reasonable notice of the injuries for which a recovery will be sought.—*Louisville Ry. Co. v. Gaugh* (Ky.) 276.

§ 158. Under a complaint alleging injury to the head, evidence as to injury to the hearing *held* inadmissible as a distinct ground for compensation.—*Louisville Ry. Co. v. Gaugh* (Ky.) 276.

§ 158. In an action for injuries to the hip and spine, testimony that one of plaintiff's legs below the knee was smaller than the other *held* admissible.—*Lexington Ry. Co. v. Woodward* (Ky.) 965.

(B) EVIDENCE.

§ 174. In an action for injury to land by overflow in May, 1905, testimony as to its value on March 14, 1906, *held* properly excluded on

question of damages.—*Missouri, K. & T. Ry. Co. of Texas v. Chilton* (Tex. Civ. App.) 779.

§ 184. In an action for injuries to plaintiffs' business, caused by false statements by defendant to plaintiffs' customers, evidence *held* to justify a verdict of \$4,000 actual damage, and \$10,000 exemplary damages, to plaintiffs.—*American Freehold Land Mortgage Co. of London v. Brown* (Tex. Civ. App.) 1106.

§ 185. Evidence *held* to warrant a verdict finding that plaintiff's condition resulted from the injury sued for.—*Board of Councilmen of City of Frankfort v. Downey* (Ky.) 284.

§ 185. Where the record discloses the fact that the jury misunderstood the evidence bearing on the question of damages in a personal injury action, or ignored the same or returned a verdict for an excessive amount, the court must correct the error.—*Wellman v. Metropolitan St. Ry. Co.* (Mo.) 31.

(C) PROCEEDINGS FOR ASSESSMENT.

Assessment on overruling demurrer to complaint, see Pleading, § 218.

Assumptions by judge as to facts, see Trial, § 191.

§ 208. In an action for injuries by fire set by a locomotive, evidence *held* sufficient to take to the jury the question of damages.—*Texas & P. Ry. Co. v. Graffeo* (Tex. Civ. App.) 873.

§ 208. Evidence *held* sufficient to take to the jury the issue of depreciation in value of land by reason of the destruction of peach trees.—*Texas & P. Ry. Co. v. Graffeo* (Tex. Civ. App.) 873.

§ 210. An instruction authorizing a recovery for more than amount claimed in the petition *held* erroneous.—*Texas & P. Ry. Co. v. Graffeo* (Tex. Civ. App.) 873.

§ 216. A charge, in an action against a city for injuries from a defective street, *held* erroneous.—*Town of Belleview v. England* (Ky.) 994.

§ 216. An instruction in a personal injury action *held* not erroneous as authorizing the jury in assessing damages to consider plaintiff's prior diseased physical condition.—*Wellman v. Metropolitan St. Ry. Co.* (Mo.) 31.

§ 216. An instruction limiting damages for future suffering to such as plaintiff "would undergo" *held* too favorable to defendant.—*Weatherford, M. W. & N. W. Ry. Co.* (Tex. Civ. App.) 799.

§ 216. An instruction, in an action for personal injuries, *held* to correctly charge on the measure of damages, in the absence of a requested instruction thereon.—*Northern Texas Traction Co. v. Hunt* (Tex. Civ. App.) 827.

§ 216. An instruction permitting a recovery for "any pain of body, any mental distress, any humiliation or shame," etc., suffered by plaintiff did not permit the jury to award double damages for mental distress.—*International & G. N. R. Co. v. Hood* (Tex. Civ. App.) 1119.

(D) COMPUTATION AND AMOUNT, DOUBLE AND TREBLE DAMAGES, AND REMISSION.

§ 228. A remittitur of the amount claimed for medical attendance and medicine obviated any error in the submission of such elements of damage.—*Weatherford, M. W. & N. W. Ry. Co. v. White* (Tex. Civ. App.) 799.

DAYS.

Excluding or including in computation of time, see Time, § 9.

DEATH.

Of client as terminating relation of attorney and client, see *Attorney and Client*, § 76.
 Of party to action before entry of judgment against him as ground for collateral attack on judgment, see *Judgment*, § 486.
 Of party to action before entry of judgment against him as ground for vacating judgment, see *Judgment*, § 336.
 Of party to action ground for abatement, see *Abatement and Revival*, § 58.
 Of principal and terminating agency, see *Principal and Agent*, § 43.
 Of trial judge prior to making up statement of facts for appeal as ground for new trial in criminal prosecution, see *Criminal Law*, § 913.

II. ACTIONS FOR CAUSING DEATH.**(A) RIGHT OF ACTION AND DEFENSES.**

§ 9. Statutes giving a right of action for a wrongful death, being in derogation of the common law, must be construed with reasonable strictness.—*Clark v. Kansas City, St. L. & C. R. Co. (Mo.)* 40.

§ 14. To authorize a recovery under Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637), for the death of a person, a criminal intent of the wrongdoer, followed by criminal conduct, resulting in fatal injury, must be shown.—*Garrett v. St. Louis Transit Co. (Mo.)* 68.

§ 31. The action for wrongful death being purely statutory, only such persons can bring it as are designated in the statute.—*Clark v. Kansas City, St. L. & C. R. Co. (Mo.)* 40.

(C) PARTIES AND PROCESS.

§ 42. Under Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637), giving a cause of action for a wrongful death of an unmarried minor to be recovered by the father and mother, *held*, that both must join in the action before judgment, and, if the father refuses to join, the mother cannot recover by making him a coplaintiff against his consent.—*Clark v. Kansas City, St. L. & O. R. Co. (Mo.)* 40.

(D) PLEADING AND EVIDENCE.

§ 76. Where the evidence in an action for negligent death did not show the proximate cause of the accident, but left the same open to conjecture, there could be no recovery.—*Mt. Marion Coal Mining Co. v. Holt (Tex. Civ. App.)* 825.

(E) DAMAGES, FORFEITURE, OR FINE.

§ 99. Verdict of \$1,000 in favor of the estate of a passenger killed in alighting from a train *held* not excessive.—*St. Louis, I. M. & S. Ry. Co. v. Pate (Ark.)* 260.

DEBTOR AND CREDITOR.

See *Bankruptcy*; *Creditors' Suit*; *Fraudulent Conveyances*.

DECEDENTS.

Estates, see *Descent and Distribution*; *Executors and Administrators*.
Testimony as to transactions with persons since deceased, see *Witnesses*, §§ 144-176.

DECLARATION.

In pleading, see *Pleading*, § 49.

DECLARATIONS.

As evidence in civil actions, see *Evidence*, §§ 271-313.

As evidence in criminal prosecutions, see *Criminal Law*, §§ 412, 419.

DEDICATION.

Dedication as extinguishment of dower, see *Dower*, § 47.

I. NATURE AND REQUISITES.

§ 1. Elements of dedication stated.—*McKinney v. Duncan (Tenn.)* 683.

§ 13. Any acts of a life tenant of land respecting a dedication thereof would not affect the remaindermen, as the life tenant could not dedicate any interest in the fee.—*McKinney v. Duncan (Tenn.)* 683.

§ 15. Proof necessary to establish dedication by implication stated.—*McKinney v. Duncan (Tenn.)* 683.

§ 15. The mere fact that persons living in the neighborhood of a tract of uninclosed and unimproved woodland had been allowed to use a passway across it, repairing it from time to time, without interruption for 30 years, does not show an intention to dedicate the way to the public use.—*McKinney v. Duncan (Tenn.)* 683.

§ 16. The assent and intent of the owner to appropriate land to a public use is sufficient to constitute a dedication; no writing being necessary.—*Menczer v. Poage (Tex. Civ. App.)* 863.

§ 31. Mere dedication is not enough to constitute a street a public street, so as to impose on a city the duty to keep it clear of defects, nuisances, and obstructions by third persons or by the city itself, but there must be an acceptance of the dedication by the city.—*Benton v. City of St. Louis (Mo.)* 418.

§ 35. An acceptance of a dedicated street may be either express or implied.—*Benton v. City of St. Louis (Mo.)* 418.

§ 43. An instrument acknowledging receipt of a sum of money for an alley between certain streets, as well as parol testimony to locate and identify the strip, was admissible to show an intention to dedicate the strip as a public alley.—*Menczer v. Poage (Tex. Civ. App.)* 863.

§ 44. Evidence *held* to show that a strip of land 50 feet wide, including a strip upon which a defective sidewalk and sink hole were situated, was dedicated to a city for a public street.—*Benton v. City of St. Louis (Mo.)* 418.

§ 45. Whether the dedication of land for a street was accepted by a city, *held*, under the evidence, to be for the jury.—*Benton v. City of St. Louis (Mo.)* 418.

II. OPERATION AND EFFECT.

Evidence of similar facts in order to show purposes of dedication, see *Evidence*, § 129.

§ 51. Fact that public did not use full width of dedicated street *held* not to affect the effect of dedication and acceptance.—*Brunner Fire Co. v. Payne (Tex. Civ. App.)* 602.

DEEDS.

Acknowledgment of execution, see *Acknowledgment*.

Admissions by grantor, see *Evidence*, § 230.

Cancellation, see *Cancellation of Instruments*.
 Champertous deeds, see *Champerty and Maintenance*, § 7.

Covenants in deeds, see *Covenants*.

Deeds used at exhibits as part of record on appeal and error, see *Appeal and Error*, § 510.

Estoppel by deed, see *Estoppel*, §§ 12-47.

In fraud of creditors, see *Fraudulent Conveyances*.

In trust, see *Trusts*, §§ 1-18.

Parol or extrinsic evidence, see *Evidence*, §§ 400-442.

Deeds by or to particular classes of persons.
 Married women, see Husband and Wife, § 60½.
Deeds of particular species of, or estates or interest in, property.
 See Mines and Minerals, § 55.
 Creating easement, see Easements, §§ 5-42.
 Of homestead, see Homestead, §§ 118-128.
 Of trust, see Mortgages.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF CONVEYANCES IN GENERAL.

§ 15. A consideration is not necessary to support a deed or conveyance that is fully executed and delivered.—Robertson v. Hefley (Tex. Civ. App.) 1159.

§ 17. Love and affection is a sufficient consideration of a deed between husband and wife.—Robertson v. Hefley (Tex. Civ. App.) 1159.

(D) DELIVERY.

§ 56. Where a deed was never delivered to the grantees, but they surreptitiously took it from the grantor and paid nothing for it, no interest passed to them thereunder.—White v. Holder (Ky.) 993.

§ 56. Facts held to show that a deed was sufficiently delivered to authorize the foreclosure of a vendor's lien to secure the payment of certain reserved rents.—Tipton v. Tipton (Tex. Civ. App.) 842.

(E) VALIDITY.

§ 70. Fraudulent representations of a third person will not warrant rescission of a deed and recovery of the purchase money paid, unless they were authorized, or vendor knew or approved thereof.—Travis v. Taylor (Ky.) 988.

II. RECORDING AND REGISTRATION.

Presumptions as to correctness of record, see Evidence, § 83.

III. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

§ 96. Recital in deed as to consideration held evidence thereof.—Robertson v. Hefley (Tex. Civ. App.) 1159.

§ 97. Where, in the caption of a deed, T. and his wife were named as parties of the second part, but in the granting clause only T. was named, there was a conveyance to T. alone.—Loughridge v. Ball (Ky.) 321.

§ 99. A deed and a contract, executed at the same time, as part consideration of the deed, are to be considered as though the contract were part of the deed.—Uecker v. Zuercher (Tex. Civ. App.) 149.

(E) CONDITIONS AND RESTRICTIONS.

Evidence of restriction in order to show purposes of dedication of other property near by, see Evidence, § 129.

IV. PLEADING AND EVIDENCE.

§ 195. In determining the legal effect of an executed conveyance in the absence of evidence to the contrary, the law will imply a consideration.—Robertson v. Hefley (Tex. Civ. App.) 1159.

§ 211. Evidence held to show that the grantor knew what land was described in the deed and was not mistaken in its identity.—McMillan v. Morgan (Ark.) 407.

DEFACING BRANDS.

On lumber, see Logs and Logging, § 37.

DEFAMATION.

See Libel and Slander.

DEFAULT.

Judgment by, see Judgment, §§ 118-170.

DEGREES.

Of murder, see Homicide, §§ 23, 255.

DELAY.

In delivery of telegram, see Telegraphs and Telephones, § 38.

In prosecution of appeal as ground for dismissal, see Appeal and Error, § 787.

In transportation or delivery of goods by carrier, see Carriers, §§ 104-108.

Laches, see Equity, § 67.

DELIVERY.

Of deed, see Deeds, § 56; Escrows.

Of gift, see Gifts, § 19.

Of goods by carrier, see Carriers, §§ 79, 84.

Of goods sold, see Sales, §§ 150-181.

Of instrument as element of forgery, see Forgery, § 4.

DEMONSTRATIVE EVIDENCE.

In civil actions, see Evidence, § 178.

DEMURRER.

In pleading, see Pleading, §§ 192-218.

To evidence, see Trial, § 156.

DENIALS.

In pleading, see Pleading, § 121.

DEPARTURE.

In pleading, see Pleading, § 180.

DEPOSITARIES.

Of deeds delivered as escrow, see Escrows.

DEPOSITIONS.

See Witnesses.

§ 84. Where a deposition was suppressed because of irregularities, held improper to retake the deposition on the same direct and cross-interrogatories on file, without further notice.—First Nat. Bank v. Thomas (Tex. Civ. App.) 221.

§ 107. Under Rev. St. 1895, art. 2289, held, that objections to the form and manner of taking a deposition, made when it was offered in evidence, were properly overruled.—St. Louis, S. F. & T. Ry. Co. v. Adams (Tex. Civ. App.) 1155.

DEPOSITS.

As security to performance of land contract, rights of parties on abandonment of contract, see Vendor and Purchaser, § 87.

DEPOTS.

Railroad stations, care required of carrier as to condition, see Carriers, § 238.

DESCENT AND DISTRIBUTION.

See Dower; Executors and Administrators; Homestead, §§ 145, 146; Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.**(A) NATURE AND ESTABLISHMENT OF RIGHTS IN GENERAL.**

Covenant of warranty on assignment of expectancy, see Assignments, § 8.

(C) DEBTS OF INTESTATE AND INCUMBRANCES ON PROPERTY.

§ 152. Since the redemption of mortgaged property by the mortgagor's widow to satisfy her dower right would inure to the benefit of the mortgagor's infant children and heirs, she was entitled to contribution from them, and that the purchaser claimed to have purchased on foreclosure for the benefit of the children did not affect her right to contribution.—Hiller v. Nelson (Ky.) 292.

DESCRIPTION.

Of property conveyed, see Boundaries, §§ 8-10.
Of property devised or bequeathed, see Wills, § 560.

DEVISES.

See Wills.

ILATORY PLEAS.

See Pleading, § 106.

DILIGENCE.

Affecting right to continuance in criminal prosecution, see Criminal Law, § 594.
Affecting right to new trial, see New Trial, § 102.
Of party asking relief, see Specific Performance, § 97.

DISABILITIES.

Of married women, see Husband and Wife, § 69½.

DISCHARGE.

From indebtedness, obligation, or liability.
See Bankruptcy, § 391; Compromise and Settlement; Release.
Liability as surety, see Principal and Surety, §§ 100, 117.

DISCONTINUANCE.

Of action, see Dismissal and Nonsuit, § 7.

DISCRETION OF COURT.

Exclusion from courtroom of witnesses not under examination, see Trial, § 41.
Opening default judgment, see Judgment, § 143.
Review in civil actions, see Appeal and Error, §§ 945, 959.

DISCRIMINATION.

By carrier, see Carriers, §§ 13, 32.

DISEASES.

Of animals, liability of carrier for infection, see Carriers, §§ 215, 217, 228.

DISINFECTION.

Of cars used in transportation of livestock, see Carriers, § 228.

DISMISSAL AND NONSUIT.

Construction of limitation laws as to bringing new action, see Limitation of Actions, §§ 5, 6.
Costs on dismissal of appeal, see Costs, § 232.
Dismissal of appeal or writ of error, see Appeal and Error, § 787.
Review of decision as dependent on finality of determination, see Appeal and Error, § 78.
Setting aside judgment of dismissal, see Judgment, § 382.

I. VOLUNTARY.

§ 7. A cause held not finally submitted with in Rev. St. 1899, § 639 (Ann. St. 1906, p. 658), notwithstanding section 714 (page 711).—State ex rel. Potter v. Riley (Mo.) 647.

§ 7. Under Rev. St. 1899, § 639 (Ann. St. 1906, p. 658), an order dismissing a cause while the whole case was under submission held void on the face of the record.—State ex rel. Potter v. Riley (Mo.) 647.

II. INVOLUNTARY.

§ 48. An order of dismissal entered at a term subsequent to the rendition of a final judgment in the cause is void.—State ex rel. Potter v. Riley (Mo.) 647.

DISSOLUTION.

Of attachment, see Attachment, §§ 228, 232.
Of corporation, see Corporations, §§ 592½, 596.
Of injunction, see Injunction, §§ 171, 172.
Of partnership, see Partnership, §§ 273-325.

DISTRIBUTION.

Of estate of decedent, see Descent and Distribution.

DISTRICT AND PROSECUTING ATTORNEYS.

Right to purchase land at tax sale, see Taxation, § 674.

§ 5. The anti-trust law of 1903 (Gen. Laws, p. 119, c. 94), which expressly repealed the anti-trust law of 1899 (Laws 26th Leg. p. 246, c. 146), approved May 25th, 1899, but contained a proviso that it should not affect any rights of the state to recover penalties, etc., for acts committed before it took effect, held to repeal a provision of the law of 1899, giving the prosecuting attorney one-fourth of the penalties collected as compensation.—State v. Brady (Tex.) 128.

§ 5. The provision of the anti-trust law of 1903 (Gen. Laws, p. 119, c. 94), relating to the fees of prosecuting attorneys for representing the state in prosecutions under the act, held to apply to the collection of penalties for violations of the anti-trust law of 1899 (Laws 26th Leg. p. 246, c. 146), approved May 25, 1899, the provision of which relating to the fees of prosecuting attorneys was repealed by the law of 1903.—State v. Brady (Tex.) 128.

DITCHES.

See Drains.

DIVORCE.**II. GROUNDS.**

§ 27. Under Sayles' Ann. Civ. St. art. 2977, the act of a husband in stealthily abandoning the wife and taking with him an infant held not cruel treatment, justifying a divorce.—Slaughter v. Slaughter (Tex. Civ. App.) 193.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(C) PLEADING.

§ 104. A husband's misconduct toward his wife after the filing of her suit for divorce is properly assigned in an amended petition as grounds for divorce.—*Hicks v. Stewart & Templeton* (Tex. Civ. App.) 206.

(H) FEES AND COSTS.

§ 197. The husband and wife are both liable for reasonable counsel fees of attorneys prosecuting her suit for divorce, when it appears that the facts alleged were probably true and constituted such cruelty as rendered cohabitation insupportable.—*Hicks v. Stewart & Templeton* (Tex. Civ. App.) 206.

§ 197. The husband and wife are liable for reasonable attorneys' fees necessarily incurred in her suit for divorce, regardless of her mental capacity to contract.—*Hicks v. Stewart & Templeton* (Tex. Civ. App.) 206.

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

Effect on right to sue for death of child, see Death, § 42.

DOCKETS.

Of causes for trial, see Trial, § 11.

DOCUMENTS.

As evidence in civil actions, see Evidence, §§ 342-363.

As evidence in criminal prosecutions, see Criminal Law, § 429.

DOMICILE.

Of parties as affecting venue, see Venue, §§ 21-26.

DONATIONS.

See Gifts.

DOWER.

Right of widow of defendant in mortgage foreclosure proceedings claiming right of dower to redeem, see Mortgages, § 594.

I. NATURE AND REQUISITES.

§ 12. Where a person who, with full notice that swamp land had been permanently dedicated as a county seat, took a deed to it from the county, thus acquiring at most only a seisin to the use of the county, his widow was not entitled to dower therein, under Rev. St. 1890, §§ 2933, 2956 (Ann. St. 1906, pp. 1690, 1704).—*Van Pelt v. Parry* (Mo.) 425.

§ 13. A wife held entitled to dower in her husband's defeasible fee which her issue would have inherited as his heir.—*Rice v. Rice* (Ky.) 270.

II. INCHOATE INTEREST.

(B) BAR, RELEASE, OR FORFEITURE.

§ 46. Under Ky. St. 1909, § 2135 (Russell's St. § 4645), a widow who joined her husband in a mortgage of the homestead held entitled to dower in the surplus of the proceeds of the sale.—*Hiller v. Nelson* (Ky.) 292.

§ 46. A married woman's inchoate right of dower in land held not affected by a judgment foreclosing a mortgage on the land.—*Eversole v. First Nat. Bank* (Ky.) 961.

§ 47. If the fee of land held by a husband passed during his lifetime to a city for public use as a street either by prescription, by express dedication by deed, or by acts in pais coupled with acceptance, or by condemnation, the wife's inchoate right of dower was extinguished.—*Benton v. City of St. Louis* (Mo.) 418.

III. RIGHTS AND REMEDIES OF WIDOW.

Redemption from mortgage in order to protect dower of rights, right to contribution against heir of mortgagor, see Descent and Distribution, § 152.

§ 59. A widow is entitled to either dower or homestead in the lands of her deceased husband, at her election, which she has a reasonable time to make after her husband's death; but she can elect at once, and, having elected to take a homestead, she cannot thereafter surrender the homestead right and take a dower interest.—*White v. Holder* (Ky.) 995.

§ 59. Evidence held to show that a widow elected to take a homestead in her deceased husband's land.—*White v. Holder* (Ky.) 995.

DRAINS.

In cities, see Municipal Corporation, § 827.

I. ESTABLISHMENT AND MAINTENANCE.

§ 36. Under Const. art. 7, §§ 14, 83, held, that the right of appeal from an order of allowance of fees to attorneys for a drainage district existed though it was not conferred by Kirby's Dig. § 1428, and it could be exercised under sections 1487-1493.—*Huddleston & Taylor v. Coffman* (Ark.) 1010.

§ 36. A citizen of a county owning land in a drainage district held entitled under Const. art. 13, § 16, to appeal from an order allowing fees to attorneys.—*Huddleston & Taylor v. Coffman* (Ark.) 1010.

DRUNKARDS.

Care required as to intoxicated licensee on premises, see Negligence, § 32.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 297, 303.

DURESS.

In securing note, see Bills and Notes, § 520.

EARNINGS.

Right of parent to earnings of child, see Parent and Child, § 5.

EASEMENTS.

Public easements, see Dedication; Highways.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 5. Essentials of an easement by prescription stated.—*McKinney v. Duncan* (Tenn.) 683.

§ 8. Under St. 1909, § 2546 (Russell's St. § 221), one maintaining without authority water pipes in the streets of a city to deliver water to customers held not to acquire the right by adverse possession to maintain the pipes, where no notice was given the city.—*Kevil v. City of Princeton* (Ky.) 863.

§ 10. A person held not to have acquired a right of way over land by prescription.—*McKinney v. Duncan* (Tenn.) 683.

§ 18. The fact that the only means of exit from a person's land to a public highway is over the land of another gives him no right to use the other's land.—*McKinney v. Duncan* (Tenn.) 683.

§ 18. A grantee of minerals has no way of necessity over land of a stranger to remove such minerals.—*McBurney v. Glenmary Coal & Coke Co.* (Tenn.) 694.

§ 42. An ambiguous grant of an easement will be construed in favor of the claimant of the easement.—*Frisbie v. Bigham Masonic Lodge No. 256* (Ky.) 359.

EJECTION.

Of passenger, see *Carriers*, §§ 863-884.

EJECTMENT.

See *Trespass to Try Title*.

ELECTION.

Between counts in indictment, see *Indictment and Information*, § 132.

ELECTIONS.

Of corporate officers, see *Corporations*, § 281.
To determine establishment of graded school, see *Schools and School Districts*, § 42.
To determine issue of school district bonds, see *Schools and School Districts*, § 97.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

§ 1. The exercise of the elective franchise held a right conferred by the state or body politic.—*Savage v. Umphries* (Tex. Civ. App.) 893.

II. ORDERING OR CALLING ELECTION, AND NOTICE.

Election on question of issuing school district bond, see *Schools and School Districts*, § 97.

III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS.

§ 51. Under Election Law (Acts 29th Leg. 1905, p. 535, c. 11), § 60, that a city alderman unlawfully acted as judge of an election held not to vitiate the election; there being another judge.—*Savage v. Umphries* (Tex. Civ. App.) 893.

IV. QUALIFICATIONS OF VOTERS.

Election to determine question of levying school taxes, see *Schools and School Districts*, § 103.

§ 60. Const. 1875, art. 6, § 2, as amended by Acts 1901, p. 322, providing that any voter subject to pay a poll tax must pay the same before he offers to vote, does not render unconstitutional Acts 29th Leg. 1905, p. 527, c. 11, § 23, providing a method for determining how and where a voter shall or shall not be declared subject to a poll tax.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 60. The statutory requirement that a voter pay a city poll tax held not unconstitutional, as imposing a burden additional to that imposed by Const. 1875, art. 6, § 2, as amended by Acts 1901, p. 322, requiring the payment of poll taxes imposed by the laws of the state.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 72. A citizen of the United States, who had actually resided in the state 12 months and in the county 6 months prior to casting his

vote, held qualified.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 72. Under Election Law (Acts 29th Leg. 1905, p. 521, c. 11) § 4, the residence of a voter held to have been in a certain town.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 72. A minor, residing for 12 months in the state with his father's consent, became a resident and entitled to vote on attaining his majority, though the father was absent from the state part of the time.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 74. A member of the National Guards employed in the service of the army of the United States, is not, under the state Constitution, entitled to vote.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 83. One owing a state and county poll tax to F. county for 1906, which he had not paid prior to February 1, 1907, held not entitled to vote at an election in P. county in December, 1907.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 83. Where one paid his state poll tax within the time required by law, it was immaterial, so far as it affected his qualification as an elector in P. county, whether he paid the tax there or in another county.—*Savage v. Umphries* (Tex. Civ. App.) 893.

VII. BALLOTS.

§ 180. A mutilated ballot must be construed so as to give effect to the voter's intent, if it can be ascertained from the face of the ballot.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 190. A torn ballot, which can be so placed together as to show beyond doubt its number and for what it was voted, is valid.—*Savage v. Umphries* (Tex. Civ. App.) 893.

VIII. CONDUCT OF ELECTION.

§ 198. The general rule is that statutory provisions as to elections, if not made expressly mandatory, will be construed as so far directory that the election will not be nullified by mere irregularities, not fraudulently brought about, when the departure from the prescribed method throws a substantial doubt on the result.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 208. The provision of a statute as to the time of opening and closing the polls is so far directory that an irregularity in this respect, which does not deprive a legal voter of his vote or admit a disqualified person to vote, will not vitiate the election.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 227. Elections for advancement of educational interests of children of the state held to be construed in favor of validity.—*Taylor v. Sparks* (Ky.) 970.

§ 229. An election is not rendered invalid because certain persons not qualified were permitted to vote, where the result of the election would not be affected if all of the objectionable votes were deducted from those received on the prevailing side.—*Taylor v. Sparks* (Ky.) 970.

X. CONTESTS.

§ 291. A mutilated ballot will be presumed to have been mutilated after it was counted by the election officers.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 291. It will be presumed, in the absence of evidence to the contrary, that a voter produced the proper evidence that he had paid his poll tax as required by law.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 293. Where the ballots have been tampered with, and the identical ballots voted are not before the court, parol evidence of the contents is not admissible.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 293. Testimony of voters that they voted for a certain candidate or measure, and that their ballots have been changed, is admissible.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 295. It was not essential to prove that a voter owed a poll tax to both the state and the county, and failed to pay the same, in order to render his vote illegal; proof that he owed it to the state, and failed to pay it, sufficing.—*Savage v. Umphries* (Tex. Civ. App.) 893.

§ 298. Where election officers had reasonable ground to find that certain persons had no right to vote, the findings would not be reversed in a contest.—*Nichols v. Pennington* (Ky.) 382.

§ 298. In a school district trustee election contest, under St. 1909, § 1590a (Russell's St. § 4046), the court had no jurisdiction to determine the alleged ineligibility of the contestee.—*Nichols v. Pennington* (Ky.) 382.

§ 298. In an election contest the court could not consider votes of legal voters, who were refused the right to vote as cast.—*Nichols v. Pennington* (Ky.) 382.

ELKS.

Restraining wrongful use of name of order of, see Corporations, § 49.

EMANCIPATION.

Of child, see Parent and Child, § 16.

EMINENT DOMAIN.

Public improvements by municipalities, see Municipal Corporations, §§ 330-567.

II. COMPENSATION.

(B) TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION.

§ 84. Under Const. § 242, a city cannot take a subterranean stream for a public sewer without compensating the owner for the resulting injury.—*Kevil v. City of Princeton* (Ky.) 363.

EMPLOYÉS.

See Master and Servant.

EQUITABLE ESTOPPEL.

See Estoppel, § 75.

EQUITY.

Equitable estoppel, see Estoppel, § 75.
Equitable jurisdiction of justice of the peace, see Justices of the Peace, § 47.

Particular subjects of equitable jurisdiction and equitable remedies.

See Cancellation of Instruments; Creditors' Suit; Fraudulent Conveyances; Injunction; Nuisance, § 23; Partition, §§ 13-95; Quieting Title; Specific Performance; Trusts.

Relief against judgment, see Judgment, §§ 443, 455.

§ 4. Accident or surprise, as used in equity, embraces not only various forfeitures due to accidents in the popular sense, but unforeseen events, misfortunes, losses, acts, or omissions not the result of negligence or misconduct.—*State ex rel. Hartley v. Innes* (Mo. App.) 1168.

§ 4. "Accident" defined.—*State ex rel. Hartley v. Innes* (Mo. App.) 1168.

§ 4. The word "surprise" is used interchangeably with "accident" to designate emergencies giving rise to accidents, both words signifying a detrimental situation wherein a party is placed unexpectedly and against which ordinary prudence would not have guarded.—*State ex rel. Hartley v. Innes* (Mo. App.) 1168.

II. LACHES AND STALE DEMANDS.

In proceeding to restrain operation of railroad, see Railroads, § 222.

§ 67. "Laches" defined.—*Hughes v. Wallace* (Ky.) 324.

ERROR, WRIT OF.

See Appeal and Error.

ESCROWS.

§ 12. A note placed in escrow becomes binding on the maker and indorser on the fulfillment of the conditions, though there is no delivery.—*Ketterson v. Inscho* (Tex. Civ. App.) 626.

§ 12. A deed or bill of sale placed in escrow, to be delivered on compliance with specified conditions, becomes effective on the fulfillment of the conditions, though there is no actual delivery.—*Ketterson v. Inscho* (Tex. Civ. App.) 626.

§ 12. A buyer and a third person indorsing a note for the price held liable thereon, though the bill of sale delivered in escrow had not been actually delivered to the buyer.—*Ketterson v. Inscho* (Tex. Civ. App.) 626.

ESTABLISHMENT.

Of boundaries, see Boundaries, §§ 40, 55.

Of courts, see Courts, §§ 82-116.

Of drains, see Drains, § 36.

Of highways, see Highways, § 68.

Of lost instruments, see Lost Instruments.

Of public schools, see Schools and School Districts, § 13.

Of telegraphs or telephones, see Telegraphs and Telephones, § 15.

Of will, see Wills, §§ 300-354.

ESTATES.

Created by will, see Wills, §§ 601-616.

Decedents' estates, see Descent and Distribution; Executors and Administrators.

Particular estates.

See Dower; Life Estates.

Estates for years, see Landlord and Tenant.

ESTOPPEL.

By judgment, see Judgment, §§ 570-622, 651-739.

II. BY DEED.

(A) CREATION AND OPERATION IN GENERAL.

§ 12. A deed will not be construed to operate by way of estoppel beyond the clear meaning of

the words used.—*Newell v. Burnside Banking Co. (Ky.)* 267.

§ 29. Recitals in deed to a third person through whom both parties claimed *held* binding on both parties.—*Colville v. Colville (Tex. Civ. App.)* 870.

§ 32. Where deeds establishing a dividing line were exchanged between adjoining owners in order, the acceptance by one of the parties of the deed to him *held* not a waiver of such title as he already had to the land on his side of the agreed line.—*Loughridge v. Ball (Ky.)* 321.

(B) ESTATES AND RIGHTS SUBSEQUENTLY ACQUIRED.

§ 38. Land which the grantor does not own, conveyed with general warranty, passes by estoppel, on the grantor subsequently acquiring title.—*Newell v. Burnside Banking Co. (Ky.)* 267.

§ 47. A mortgage construed, and *held* to convey only the mortgagor's interest in the land described which he owned at the time of its execution.—*Newell v. Burnside Banking Co. (Ky.)* 267.

III. EQUITABLE ESTOPPEL.

To assert or deny particular facts, rights, claims, or liabilities.

To allege error, see Appeal and Error, § 882; Criminal Law, § 1137.

To avoid or forfeit insurance policy, see Insurance, § 888.

To object to proof of loss, see Insurance, § 561.

(B) GROUNDS OF ESTOPPEL.

Claim of homestead, see Homestead, § 191.

Delivery of bill or note, see Bills and Notes, § 369.

§ 75. The owner of a stock of goods intrusting it to a firm, and allowing it to deal with the goods as its own, *held* estopped as to creditors of the firm from claiming the goods.—*Holder v. Shelby (Tex. Civ. App.)* 590.

(C) PERSONS AFFECTED.

Partner, see Partnership, § 34.

Tenant, see Landlord and Tenant, § 63.

EVICITION.

Of tenant of demised premises, see Landlord and Tenant, § 173.

EVIDENCE.

See Depositions; Witnesses.

Admissibility of evidence under pleading, see Pleading, §§ 376, 380.

Applicability of instructions to evidence, see Trial, §§ 251-253.

Conformity of judgment to proofs, see Judgment, §§ 249-251.

Questions of fact for jury, see Trial, §§ 139-143.

Receipt as evidence on issue of compromise, see Compromise and Settlement, § 23.

Reception at trial, see Criminal Law, § 665; Trial, §§ 41-105.

As to particular facts or issues.

See Adverse Possession, §§ 114, 116; Damages, §§ 174-185; Deeds, §§ 195-211; Fraudulent Conveyances, §§ 271-301; Gifts, § 49; Marriage, §§ 48-50; Partnership, §§ 48, 56; Release, §§ 55, 56; Statutes, § 283.

Assumption of risk by servant injured, see Master and Servant, § 280.

Consideration for bill or note, see Bills and Notes, § 493.

Contributory negligence of passenger, see Carriers, § 346.

Contributory negligence of servant injured, see Master and Servant, §§ 274, 281.

Defense of statute of frauds, see Frauds, Statute of, § 150.

Defense of statute of limitations, see Limitation of Actions, § 195.

Election between homestead and dower, see Dower, § 59.

Intention to dedicate, see Dedication, § 43.

Negligence of master, see Master and Servant, §§ 270, 278.

Payment of note, see Bills and Notes, § 527.

Relation of carrier and passenger, see Carriers, § 246.

In actions by or against particular classes of persons.

See Carriers, §§ 133-134, 228, 276, 316, 317, 381; Innkeepers, § 11; Master and Servant, §§ 265-281; Municipal Corporations, §§ 818-819.

Connecting carriers, see Carriers, § 85.

Trustee in bankruptcy, see Bankruptcy, § 303.

In particular civil actions or proceedings.

See Libel and Slander, § 103; Negligence, § 121; Quieting Title, § 44; Trespass, §§ 44, 46; Trespass to Try Title, §§ 38-41; Trover and Conversion, §§ 36, 40.

Contest of local option election, see Intoxicating Liquors, § 37.

Election contest, see Elections, § 293.

For breach of contract, see Contracts, § 349.

For breach of contract of carriage, see Carriers, § 276.

For breach of contract to convey land, see Vendor and Purchaser, § 350.

For breach of covenant, see Covenants, § 121.

For causing death, see Death, § 76.

For ejection of passenger, see Carriers, § 381.

For failure to deliver telegram, see Telegraphs and Telephones, § 66.

For injuries caused by operation of railroad, see Railroads, §§ 347, 396, 397.

For injuries caused by operation of street railroad, see Street Railroads, § 113.

For injuries from fire caused by operation of railroad, see Railroads, § 481.

For injuries to passenger, see Carriers, §§ 316-317.

For injuries to servant, see Master and Servant, §§ 265-281.

For injuries to traveler on street, see Municipal Corporations, §§ 818-819.

For loss of or injury to shipment, see Carriers, §§ 133-134.

For loss of or injury to shipment of live stock, see Carriers, § 228.

For rent, see Landlord and Tenant, § 231.

On bill or note, see Bills and Notes, §§ 493-527.

Probate proceedings, see Wills, § 300.

To restore lost deed, see Lost Instruments, § 8.

In criminal prosecutions.

See Conspiracy, § 45; Criminal Law, §§ 304-564; Homicide, §§ 146-255; Larceny, §§ 55, 59.

Review and procedure thereon in appellate courts.

Harmless error in rulings on, see Appeal and Error, §§ 1050-1053.

Presumptions as to rulings on, see Appeal and Error, § 916.

Review of rulings on as dependent on presentation in lower court of grounds of review, see Appeal and Error, § 204.

Review of rulings on as dependent on record on appeal or writ of error, see Appeal and Error, § 548.

Review on appeal or writ of error, see Appeal and Error, §§ 1001-1024.

I. JUDICIAL NOTICE.

In criminal prosecutions, see Criminal Law, § 304.

§ 9. Courts will take judicial notice of the accuracy of X-ray photographic views of the bones of a living body, when properly taken.—Houston & T. C. R. Co. v. Shapard (Tex. Civ. App.) 596.

§ 34. The state courts will take judicial notice of federal statutes.—Louisville & N. R. Co. v. Scott (Ky.) 990.

§ 35. The courts do not take judicial notice of a statute of another state.—Mathieson v. St. Louis & S. F. Ry. Co. (Mo.) 9.

II. PRESUMPTIONS.

As to particular facts or issues.

See Negligence, § 121.

Authority of agent, see Principal and Agent, § 119.

Consideration for bill or note, see Bills and Notes, § 493.

Mutilation of ballot, see Elections, § 291.

Resulting trust, see Trusts, § 86.

Undue influence in execution of will, see Wills, § 163.

In particular civil actions or proceedings.

See Trespass to Try Title, § 38.

For injuries caused by operation of railroad, see Railroads, § 396.

For injuries to passenger, see Carriers, § 316.

On bill or note, see Bills and Notes, § 493.

§ 66. It is presumed that a vendor knew the boundaries of the land which he sold.—Gaffney v. Clark (Tex. Civ. App.) 606.

§ 67. Normal conditions will be presumed to exist in every instance until the contrary is shown, and presumptions arising from proof of a given status operate prospectively, and not retrospectively.—Western Union Telegraph Co. v. Hughey (Tex. Civ. App.) 1130.

§ 77. No presumption of fact arises from defendant's failure to call witnesses, where plaintiff fails to make out a case.—St. Louis & S. F. R. Co. v. Finley (Tenn.) 692.

§ 80. The presumption that the common law is in force in another state applies only to those states which were carved out of English territory.—Mathieson v. St. Louis & S. F. Ry. Co. (Mo.) 9.

§ 80. The laws of a sister state will be presumed to be similar to the law of the forum unless the contrary is shown.—Green v. Hewett (Tex. Civ. App.) 170.

§ 82. The presumption is that a warrant issued by the judge of the county court was regular, and that the judge discharged his duty with reference thereto.—Schooler v. Yancey (Ky.) 940.

§ 83. As to ancient official acts of county officers, it will be presumed that they performed the duty imposed on them as the law commanded or contemplated.—Van Felt v. Parry (Mo.) 425.

§ 83. Under the rule that the law presumes that an officer properly performs his duty, it is presumed that a deed is correctly recorded.—Childers v. Pickenpaugh (Mo.) 453.

III. BURDEN OF PROOF.

As to particular facts or issues.

See Fraudulent Conveyances, §§ 271-273; Limitation of Actions, § 195.

Modification of contract, see Contracts, § 247.

Undue influence in execution of will, see Wills, § 163.

In particular civil actions or proceedings.

See Trespass, § 44.

For assault, see Assault and Battery, § 26.

For injuries to servant, see Master and Servant, § 265.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(B) RES GESTÆ.

§ 121. In trover for cattle, in which plaintiff claimed exemplary damages, testimony by plaintiff as to a difficulty which occurred at the time the cattle were taken was admissible as part of the res gestæ.—Boardman v. Woodward (Tex. Civ. App.) 550.

(C) SIMILAR FACTS AND TRANSACTIONS.

In action for injuries from fire caused by operation of railroad, see Railroads, § 481.

In action for pollution of water, see Waters and Water Courses, § 107.

§ 129. In a suit to enjoin the use of lots as a feed and wagon yard, deeds to neighboring lots held admissible, as tending to show dedication of the block involved to residence purposes exclusively.—Lowrance v. Woods (Tex. Civ. App.) 551.

(E) COMPETENCY.

Testimony by claimants of homestead as to intent to return thereto after removal, see Homestead, § 181.

V. BEST AND SECONDARY EVIDENCE.

§ 158. In an action against a railroad company for destruction of a building by fire, plaintiff's testimony held competent evidence of title.—Erhart v. Wabash Ry. Co. (Mo. App.) 657.

§ 178. In an action to establish interests in land involving ancient transactions, the primary evidence of which has been lost, where secondary evidence is necessary to establish lost records, deeds, plats, etc., to reconstruct for judicial purposes facts and a situation dimmed by time, rules of evidence will be much relaxed.—Van Felt v. Parry (Mo.) 425.

VII. ADMISSIONS.

(A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§ 213. Evidence held improperly admitted as evidence of an offer to compromise a controversy.—Floresville Oil & Mfg. Co. v. Texas Refining Co. (Tex. Civ. App.) 194.

§ 219. That a party induced a witness by threats of a criminal prosecution to return to the state and testify is not admissible in evidence as an admission of such party, since it does not show an attempt to improperly influence the witness or his testimony, in the absence of any proof indicating an evil purpose on the part of the party.—Garrett v. St. Louis Transit Co. (Mo.) 68.

(C) BY GRANTORS, FORMER OWNERS, OR PRIVIES.

§ 230. Evidence of statements of an alleged grantor held inadmissible to impeach a deed.—Hughes Bros. v. Redus (Ark.) 414.

§ 230. Where a person, alleged to have sold land, has given up possession, his declarations, showing the character of his claim thereto, held self-serving, and inadmissible in evidence.—Hughes Bros. v. Redus (Ark.) 414.

(D) BY AGENTS OR OTHER REPRESENTATIVES.

§ 241. Expressions made by an agent indicating malice, in the absence of the principal, are inadmissible to show motive of the principal.—Little v. Rich (Tex. Civ. App.) 1077.

§ 244. In an action against a carrier for damages to cattle, evidence of certain declarations of the carrier's agent held admissible.—St.

Louis, S. F. & T. Ry. Co. v. Adams (Tex. Civ. App.) 1155.

§ 244. In an action against a carrier for damages to cattle, evidence of certain declarations of the carrier's servant *held* not admissible.—St. Louis, S. F. & T. Ry. Co. v. Adams (Tex. Civ. App.) 1155.

§ 253. In an action for false imprisonment and malicious prosecution, a letter written by a third person inclosing a capias to the sheriff of another county, and asking for plaintiff's arrest, *held* inadmissible.—Little v. Rich (Tex. Civ. App.) 1077.

VIII. DECLARATIONS.

By claimants of homestead on question of abandonment, see Homestead, § 181.

(A) NATURE, FORM, AND INCIDENTS IN GENERAL.

Declarations by claimants of homestead as to intent to return thereto after removal, see Homestead, § 181.

§ 271. Evidence of a conversation between plaintiff and one of the defendants after the accident *held* inadmissible as self-serving declarations.—Eilerman v. Farmer (Ky.) 289.

(C) AS TO PEDIGREE, BIRTH, AND RELATIONSHIP.

§ 285. Matters of pedigree such as family history may be proved by hearsay testimony, and other facts, not entirely matters of pedigree, may be so intimately connected with pedigree as to permit their proof by the same character of testimony.—Wall v. Lubbock (Tex. Civ. App.) 886.

§ 288. Where a witness was the husband of the granddaughter of a person, he could testify as a member of the family to the family history, including the death and time of death of that person, though he did not state that he obtained his information from deceased members of the family.—Wall v. Lubbock (Tex. Civ. App.) 886.

§ 288. Where a witness testified that he first became acquainted with the family of a person about sixty years ago, and that the family consisted of a woman, son, and daughter, he could testify that it was generally understood at the time in that community that the person was dead, and that the woman was recognized as a widow.—Wall v. Lubbock (Tex. Civ. App.) 886.

(E) PROOF AND EFFECT.

§ 313. Evidence of declarations of a decedent, though admissible, *held* not to amount to direct proof, and, when unsupported, entitled to but little weight.—Collins v. Harrell (Mo.) 432.

IX. HEARSAY.

§ 317. Evidence in an action on a health and accident policy *held* inadmissible as hearsay.—United States Health & Accident Ins. Co. v. Jolly (Ky.) 281.

§ 323. A witness was properly allowed to testify as to the state of the cattle market on certain days, and state that he gained his information from market reports.—St. Louis & S. F. R. Co. v. Lane (Tex. Civ. App.) 847.

§ 323. In a suit for the negligent handling of a shipment of cattle, accounts of sale thereof *held* not hearsay, and properly admitted to show the correct weights and prices at their destination.—St. Louis & S. F. R. Co. v. Lane (Tex. Civ. App.) 847.

X. DOCUMENTARY EVIDENCE.

(B) EXEMPLIFICATIONS, TRANSCRIPTS, AND CERTIFIED COPIES.

§ 342. Certified copies of transfers of leases in the land office *held* admissible as prima facie evidence in an action to try title under Sayles' Ann. Civ. St. 1897, art. 2306.—McKee v. West (Tex. Civ. App.) 1135.

§ 342. Copies of letters of the land commissioner, preserved in the ordinary way, are copies of records of the land office.—McKee v. West (Tex. Civ. App.) 1135.

(C) PRIVATE WRITINGS AND PUBLICATIONS.

§ 354. Original entries in account books made in the course of business are competent evidence in themselves.—Avery v. Tucker (Mo. App.) 672.

§ 359. X-ray photographs properly taken *held* not objectionable on the ground that without cutting away the intervening tissue, it was impossible to tell whether the pictures correctly represented plaintiff's injured bones.—Houston & T. C. R. Co. v. Shapard (Tex. Civ. App.) 596.

§ 363. Medical books may not be read to the jury as independent evidence.—MacDonald v. Metropolitan St. Ry. Co. (Mo.) 78.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.

§ 400. A contract of sale of a farm, showing on its face the number of acres sold, cannot be controlled or altered by oral statements, made before its consummation, as to the number of acres it contained.—Travis v. Taylor (Ky.) 988.

§ 417. Where an entire contract was not placed in writing, the whole contract could be proved by parol testimony.—Allen v. Herrick Hardware Co. (Tex. Civ. App.) 1157.

§ 419. Under Ky. St. § 470 (Russell's St. § 1775), the vendor of land under a contract cannot show by parol that the amount recited as having been paid was not paid, but in lieu thereof there was an oral promise to convey certain other land on demand.—Richardson v. Isaacs (Ky.) 1003.

§ 419. The consideration of a deed, in suit to set it aside for inadequacy of consideration, may be shown by matters outside the deed.—Uecker v. Zuercher (Tex. Civ. App.) 149.

§ 419. It is permissible to show that, as an additional consideration for a deed reciting a money consideration only, grantor was to receive rents for her life.—Tipton v. Tipton (Tex. Civ. App.) 842.

(B) INVALIDATING WRITTEN INSTRUMENT.

§ 431. In an action by a buyer on a contract of sale exclusion of certain evidence *held* error.—Floresville Oil & Mfg. Co. v. Texas Refining Co. (Tex. Civ. App.) 194.

§ 433. Parol evidence to show facts relieving a party from the obligations of a written contract on the ground of mistake is not objectionable as varying the terms of the contract.—Edwards v. Trinity & B. V. Ry. Co. (Tex. Civ. App.) 572.

§ 434. The rule excluding parol evidence to contradict, vary, or modify written instruments is much relaxed, when fraud is alleged.—Savage v. Umphries (Tex. Civ. App.) 893.

tracking Co. v. Chicago House Wrecking Co. (Mo. App.) 99.

§ 441. In an action by a payee against a maker on a note, *held* that equity would allow the maker to show that the note was not intended as a full settlement between the parties, but that it was agreed that there should be a further settlement, in which the maker should have the benefit of certain credits.—Allen v. Herrick Hardware Co. (Tex. Civ. App.) 1157.

§ 441. Evidence of a contemporaneous oral agreement between the payee and maker of a note *held* not to vary the terms of the contract embodied in the note.—Allen v. Herrick Hardware Co. (Tex. Civ. App.) 1157.

§ 442. Application stated of rule that, where parties reduce their contracts to writing, the writing is to be taken as embodying all previous negotiations about its terms, which cannot be varied by parol.—Allen v. Herrick Hardware Co. (Tex. Civ. App.) 1157.

XII. OPINION EVIDENCE.

(A) CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL.

§ 471. The action of the court in a personal injury action to permit witnesses to express their opinions as to the effect of blows, without confining the same to the case under consideration, *held* not erroneous.—Wellman v. Metropolitan St. Ry. Co. (Mo.) 31.

§ 471. Witness' statement that he was using a revolving saw in "the usual and customary manner" was a statement of fact and not of opinion.—Texas & N. O. R. Co. v. Geiger (Tex. Civ. App.) 179.

§ 471. Plaintiff's statement that she believed she was injured for life *held* not objectionable as an opinion.—Weatherford, M. W. & N. W. Ry. Co. v. White (Tex. Civ. App.) 799.

§ 471. In an action for delay in transporting cattle, the shipper was incompetent to testify as to what would be a reasonable run with cattle from one point to another.—Texas & P. Ry. Co. v. Goldsmith & Garrett (Tex. Civ. App.) 1146.

§ 471. Evidence, in an action for injuries to an employé, *held* not inadmissible as being expert testimony.—Houston & T. C. R. Co. v. Johnson (Tex. Civ. App.) 1150.

§ 471. Question to witness *held* objectionable as calling for conclusion.—Houston & T. C. R. Co. v. Johnson (Tex. Civ. App.) 1150.

§ 472. Certain testimony as to market value *held* not objectionable as invading the province of the jury.—Chicago, R. I. & G. Ry. Co. v. Jones (Tex. Civ. App.) 759.

§ 472. In an action by an engine watcher for personal injuries, testimony of a witness as to plaintiff's duties before going under the engine at the time of his injury *held* objectionable, on the ground that it was a conclusion for the jury's determination.—Southern Kansas Ry. Co. of Texas v. McSwain (Tex. Civ. App.) 874.

§ 473. A nonexpert witness should state the facts and leave conclusions to the jury.—Bond v. International & G. N. R. Co. (Tex. Civ. App.) 867.

§ 474. A witness *held* competent to testify as to the reasonable market value of land immediately before and after a fire destroying the timber and grass.—Missouri, K. & T. Ry. Co. of Texas v. Neiser (Tex. Civ. App.) 166.

drunkenness or insanity can only be proved by opinion of witnesses, and their opinion is not admissible unless they are experts or have had an opportunity to form an opinion from observation.—Daniel v. Modern Woodmen of America (Tex. Civ. App.) 211.

§ 474. A shipper of cattle from the North through Texas to Mexico *held* competent to testify that the cars had the appearance of having been disinfected before the cattle were placed in them.—International & G. N. R. Co. v. McCullough (Tex. Civ. App.) 558.

§ 474. A witness *held* incompetent to testify as to the market value of certain mules at a specified time and place.—Gulf, C. & S. F. Ry. Co. v. Gillespie & Carlton (Tex. Civ. App.) 628.

§ 474. Market value is largely a matter of opinion; and a witness acquainted with the market value of property at a particular place is competent to state his opinion.—Chicago, R. I. & G. Ry. Co. v. Jones (Tex. Civ. App.) 759.

§ 474. The opinion of a witness as to the market value of horses *held* proper.—Chicago, R. I. & G. Ry. Co. v. Jones (Tex. Civ. App.) 759.

§ 501. A witness cannot testify as to the value of an article, based on information derived from an unidentified and undescribed catalogue.—Galveston, H. & S. A. Ry. Co. v. Hillman (Tex. Civ. App.) 158.

§ 501. A question *held* not objectionable on the ground that the hypothesis on which it was based was not supported by the evidence.—Missouri, K. & T. Ry. Co. of Texas v. Chilton (Tex. Civ. App.) 779.

(B) SUBJECTS OF EXPERT TESTIMONY.

§ 506. In an action for malpractice in the performance of an operation, physicians *held* not entitled to give their opinion as to whether an operation performed in the manner described was performed in an ordinarily careful manner.—Sameuls v. Willis (Ky.) 339.

§ 509. Testimony by an expert *held* admissible.—United States Health & Accident Ins. Co. v. Jolly (Ky.) 281.

§ 509. In a personal injury action against a street railroad, a duly qualified expert, who had examined plaintiff, *held* entitled to testify to any physical fact he found to exist, if evidence thereof was admissible under the pleadings.—Lexington Ry. Co. v. Woodward (Ky.) 965.

§ 529. An expert may testify that cattle suffering from splenetic fever were infected by having been placed in infected pens and there kept over night, on it appearing that the fever developed a few days later.—International & G. N. R. Co. v. McCullough (Tex. Civ. App.) 558.

(C) COMPETENCY OF EXPERTS.

§ 543. A witness otherwise qualified may testify as to the value of mules described to him which he had never seen.—Gulf, C. & S. F. Ry. Co. v. Gillespie & Carlton (Tex. Civ. App.) 628.

(D) EXAMINATION OF EXPERTS.

§ 549. Evidence of an expert *held* not inadmissible because of his testimony as to the condition of the person injured, where his opinion as an expert is based on a hypothetical question.—Jones v. Springfield Traction Co. (Mo. App.) 675.

§ 553. A question to an expert witness *held* to be argumentative.—Houston & T. C. R. Co. v. Johnson (Tex. Civ. App.) 1150.

§ 558. Counsel on cross-examination of medical witnesses *held* entitled to read from medical authorities in framing their questions.—*MacDonald v. Metropolitan St. Ry. Co. (Mo.)* 78.

(F) EFFECT OF OPINION EVIDENCE.

§ 570. The testimony of physicians is merely advisory, and the jury can give it credence or not as seems reasonable.—*MacDonald v. Metropolitan St. Ry. Co. (Mo.)* 78.

XIV. WEIGHT AND SUFFICIENCY.

As to particular facts or issues.

See Dedication, § 44; Fraudulent Conveyances, §§ 295-301; Gifts, § 49; Marriage, § 50; Usury, § 117.

Agency, see Principal and Agent, § 23.

Alteration of deed, see Alteration of Instruments, § 29.

Assumption of risk by servant injured, see Master and Servant, § 280.

Contributory negligence of servant injured, see Master and Servant, § 281.

Duress in obtaining note, see Bills and Notes, § 500.

Election between homestead and dower, see Dower, § 59.

Fraud in sale, see Sales, § 52.

Incapacity to execute will, see Wills, § 55.

Negligence of master, see Master and Servant, § 278.

Payment of note, see Bills and Notes, § 527.

Relation of master and servant, see Master and Servant, § 277.

Resulting trust, see Trusts, § 89.

Undue influence in execution of will, see Wills, § 166.

In particular civil actions or proceedings.

See Malicious Prosecution, § 64; Specific Performance, § 121; Trespass, § 46; Trespass to Try Title, § 41.

Election contest, see Elections, § 295.

For breach of covenant of warranty, see Covenants, § 122.

For conversion, see Trover and Conversion, § 40.

For injuries caused by operation of railroad, see Railroads, § 282.

For injuries to servant, see Master and Servant, §§ 276-281.

For loss of or injury to shipment, see Carriers, § 134.

For price of goods sold, see Sales, § 359.

On bill or note, see Bills and Notes, §§ 520-527.

On foreign judgment, see Judgment, § 944.

On insurance policy, see Insurance, § 665.

§ 590. The court, in weighing the testimony of a witness, must consider his relationship to the parties to the litigation, and his personal interest in the case, and his conduct and connection with the transaction involved.—*Childers v. Pickenpauh (Mo.)* 453.

§ 593. Hearsay testimony, though not objected to, has no weight or probative force.—*Childers v. Pickenpauh (Mo.)* 453.

§ 594. The undisputed testimony of an employé of one of the parties, consisting largely of opinions and conclusions, would not necessarily be binding on the jury.—*Texas & P. Ry. Co. v. Taylor (Tex. Civ. App.)* 1097.

EXAMINATION.

Of expert witnesses, see Evidence, §§ 549-558.
Of witnesses in general, see Witnesses, §§ 236-306.

EXCEPTIONS.

Necessity for purpose of review, see Appeal and Error, §§ 253-266.

Taking exceptions at trial, see Trial, §§ 103-105.

To pleading, see Pleading, §§ 192-218.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see Appeal and Error, §§ 544-549; Criminal Law, § 1090.
Taking exceptions at trial, see Trial, § 278.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 7. Bills of exceptions should only show what actually occurred in court, and what the court stenographer told the court as to what happened in the jury room, where he had been sent to read testimony, should not have been embodied in the bills of exceptions.—*Quinn v. Metropolitan St. Ry. Co. (Mo.)* 46.

§ 9. The office of a bill of exceptions is to show the proceedings of the court which do not otherwise appear of record under rule 53 for the government of district and county courts (67 S. W. xxiv).—*Alvord Nat. Bank v. Waples-Platter Grocer Co. (Tex. Civ. App.)* 232.

II. SETTLEMENT, SIGNING, AND FILING.

Presumptions on appeal as to qualification, see Appeal and Error, § 938.

§ 39. Bills of exception filed more than 20 days after the adjournment of court cannot be considered.—*Dobson v. Zimmerman (Tex. Civ. App.)* 236.

§ 59. Duty of court under Sayles' Ann. Civ. St. 1897, arts. 1367-1369, as to allowance or qualification of bill of exceptions, stated.—*Brunner Fire Co. v. Payne (Tex. Civ. App.)* 602.

EXCESSIVE DAMAGES.

See Damages, §§ 130-132.

For causing death, see Death, § 99.

EXCISE.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

EXECUTION.

See Attachment; Garnishment; Judicial Sales.
Exemptions, see Exemptions; Homestead.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 171. Defendant in execution *held* entitled to enjoin plaintiff in execution from further enforcing execution, where the latter had wrongfully recovered from a defaulting bidder the difference between his bid and the amount received on a resale, which, under the statute, belonged to defendant in execution.—*Shanley v. York (Tex. Civ. App.)* 146.

§ 171. The failure of the advertisement of sale to state that the execution provided for collection of interest affords no ground for injunction.—*Lee v. Broocks (Tex. Civ. App.)* 164.

§ 171. Where the amount of an execution as stated in the advertisement of sale exceeds the judgment by only 20 cents, the difference, on an application for injunction against the sale, should be disregarded as too trivial to be considered.—*Lee v. Broocks (Tex. Civ. App.)* 164.

VII. SALE.

(A) MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING.

Action by defendant against plaintiff for money recovered from bidder failing to complete purchase, see Money Received, § 7.

§ 238. Under the express provisions of Rev. St. 1895, art. 2381, where property is resold

on a bidder's failure to comply with the terms of the first sale, the difference between the amounts for which the property sold on the two sales belongs to defendant in execution.—*Shanley v. York* (Tex. Civ. App.) 146.

§ 247. Execution sales may be set aside on motion for about the same reason as judicial sales in the strict meaning of the words may be.—*State ex rel. Hartley v. Innes* (Mo. App.) 1168.

§ 256. In an action between a landowner and the purchaser at execution sale, considering the value of the land and the amount of the judgment to be satisfied, together with the facts that the judgment was one which the purchaser should himself have paid, and that he was attempting to defraud the landowner, who was his aunt, *held*, that title should be quieted in the landowner.—*Bowling v. Bowling* (Ky.) 923.

X. SUPPLEMENTARY PROCEEDINGS.

Review of refusal of stay as dependent on prejudicial nature of error, see Appeal and Error, § 1074.

XII. WRONGFUL EXECUTION.

Assumption by judge as to facts in instruction in action for wrongful execution, see Trial, § 191.

Impeachment of witness in action for wrongful execution, see Witnesses, § 331½.
In justices' courts, see Justices of the Peace, § 135.

§ 465. A wife *held* entitled to sue for the conversion of corporate stock by a sale thereof, under execution against the husband, without paying a note held by the husband's judgment creditor and secured by stock pledged by the husband.—*First Nat. Bank v. Thomas* (Tex. Civ. App.) 221.

§ 472. Certain damages resulting from a wrongful levy under an execution *held* not too remote.—*First Nat. Bank v. Thomas* (Tex. Civ. App.) 221.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

Testamentary trustees, see Trusts.

Testimony as to transactions with decedents, see Witnesses, §§ 144-176.

I. ADMINISTRATION IN GENERAL.

§ 3. Under Rev. St. 1890, c. 52, § 4346 (Ann. St. 1906, p. 2392), *held* unnecessary to appoint an administrator for the estate of the mortgagor of a homestead, and to join him in an action to foreclose the mortgage.—*Hardy v. Atkinson* (Mo. App.) 516.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 19. Under Rev. St. 1890, §§ 7, 8 (Ann. St. 1906, p. 340), the renunciation of the right of administration cannot be made conditionally upon the appointment of one selected by the persons renouncing their right to administer, and, when once made, cannot be recalled.—*State ex rel. Burns v. Romjue* (Mo. App.) 1188.

§ 20. Where the appointment of an administrator by the probate court, upon the renunciation by heirs of their right to administer, was made in the exercise of sound judgment and not an arbitrary abuse of power, it will not be disturbed by the appellate court.—*State ex rel. Burns v. Romjue* (Mo. App.) 1188.

§ 21. Where the probate of a will nominating no executor is set aside on appeal after the appointment of an administrator with will an-

nexed, letters of administration to him may be revoked, and an administrator may be appointed under Ky. St. 1909, § 3897 (Russell's St. § 3920).—*Hamilton v. Williams* (Ky.) 358.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 43. The title to personality at the owner's death vests in the administrator.—*Crohn v. Clay County State Bank* (Mo. App.) 498.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) IN GENERAL.

§ 115. Neither the administrator nor his attorney can purchase property in the course of litigation, of which property they have the management, or in which litigation they are interested.—*Bank of Pine Bluff v. Levi* (Ark.) 250.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(B) APPLICATION AND ORDER.

§ 348. The proper course for a mortgagee to pursue, on sale of decedent's property to pay the mortgage debt under a void judgment, stated.—*Roy v. Allen's Adm'r* (Ky.) 981.

§ 349. Mortgagee, who was a party to proceedings for sale of a decedent's land to pay the mortgage debt, *held* entitled to assert the invalidity of the judgment rendered in the proceedings for failure to summon infant defendants.—*Roy v. Allen's Adm'r* (Ky.) 981.

(C) SALE.

Validity of sale as to infant where appointment of guardian ad litem was invalid, see Infants, § 80.

§ 365. An administrator, who purchased decedent's land at a sale ordered by the court, *held* required to prove facts necessary to estop the adult heirs from contesting the validity of his purchase.—*Baker v. Lane* (Ky.) 963.

§ 389. An administrator *held* entitled to a lien on his decedent's real estate, subject to the homestead right of an infant child of decedent.—*Baker v. Lane* (Ky.) 963.

§ 389. An administrator, purchasing his decedent's real estate and making improvements thereon payable out of the rents, *held* not entitled to an allowance on account of the improvements as against the heirs.—*Baker v. Lane* (Ky.) 963.

X. ACTIONS.

Joinder of executrix of indorser with maker in action on note, see Bills and Notes, § 460.

Venue of action against maker of note and executrix of indorser as dependent on residence of parties, see Venue, § 22.

XI. ACCOUNTING AND SETTLEMENT.

(D) COMPENSATION.

§ 496. Under Ky. St. 1909, § 3883 (Russell's St. § 3914), allowances to administrator *held* excessive.—*Nickell v. Nickell* (Ky.) 966.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

§ 517. Where a court of a sister state had the power, on the discharge of a public administrator, to substitute another as public administrator, an order of substitution was conclusive on the courts of Arkansas in an action by the substituted administrator.—*McCarthy v. Troll* (Ark.) 416.

foreign domiciliary administrator would not be protected as against the resident administrator on certain grounds.—*Crohn v. Clay County State Bank* (Mo. App.) 498.

§ 519. The payment of a debt to the foreign domiciliary administrator *held* no defense as against the resident administrator, though the payment was made before the latter's appointment.—*Crohn v. Clay County State Bank* (Mo. App.) 498.

§ 524. Where an administrator has recovered a judgment in an action in the jurisdiction of his appointment, he may sue thereon in his own name in another jurisdiction without taking out ancillary letters.—*McCarthy v. Troll* (Ark.) 418.

EXEMPLARY DAMAGES.

See Damages, § 91.

EXEMPLIFICATIONS.

As evidence, see Evidence, § 342.

EXEMPTIONS.

See Homestead.

From taxation, see Taxation, §§ 217, 251.

IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 141. Where the debtor and creditor are residents of the same state, an attempt by the creditor to evade the exemption law of the state by bringing suit in a sister state may be enjoined by a chancery court.—*Greer v. Strozier* (Ark.) 400.

§ 147. A complaint in a suit to restrain the prosecution of an action in a sister state *held* to state a cause of action as against a demurrer.—*Greer v. Strozier* (Ark.) 400.

EXHIBITS.

As part of record on appeal or writ of error, see Appeal and Error, §§ 510, 597, 655.

EXPERT TESTIMONY.

In civil actions, see Evidence, §§ 471-570.
In criminal prosecutions, see Criminal Law, §§ 478, 534.

EX POST FACTO LAWS.

Constitutional restrictions, see Constitutional Law, § 191.
Retroactive operation of statutes, see Statutes, §§ 263, 267.

FACTORS.

See Brokers; Principal and Agent.

FALSE IMPRISONMENT.

See Malicious Prosecution.

I. CIVIL LIABILITY.

(B) ACTIONS.

Declarations by conspirators, see Evidence, § 253.
Pleading matters of fact or conclusions, see Pleading, § 8.

FEDERAL QUESTIONS.

Ground for removal of cause, see Removal of Causes, § 19.

FEES.

Attorney's fees in garnishment, see Garnishment, § 191.
Of attorney, see Attorney and Client, § 143.

FELLOW SERVANTS.

See Master and Servant, §§ 177-202.

FICTITIOUS NAMES.

Chattel mortgage executed under, see Chattel Mortgages, § 150.

FILING.

Assignment of errors, see Appeal and Error, § 744.
Bill of exceptions, see Exceptions, Bill of, §§ 39, 59.
Criminal information or complaint, see Indictment and Information, §§ 52, 54.
Indictment or presentment, see Indictment and Information, § 15.
Record on appeal or writ of error, see Appeal and Error, § 622.

FINAL JUDGMENT.

Appealability, see Appeal and Error, §§ 78, 82.

FINDINGS.

Conformity of judgment, see Judgment, § 256.
Review on appeal or writ of error, see Appeal and Error, §§ 1008-1013.
Special findings by jury, see Trial, § 352.

FINES.

Jurisdiction of circuit court to enjoin judgment for, see Courts, § 120.

FIRE INSURANCE.

See Insurance.

FIRES.

Caused by operation of railroad, see Railroads, §§ 454-485.

FLOWAGE.

See Waters and Water Courses, §§ 168, 178.

FOOD.

For live stock in transportation, see Carriers, § 211.

FORCIBLE DEFILEMENT.

See Rape.

FORCIBLE ENTRY AND DETAINER.

Recovery of possession of land from vendee and their contracts of sale, see Vendor and Purchaser, § 298.

I. CIVIL LIABILITY.

Judgment in action for forcible entry as no bar to action for forcible detainer, see Judgment, § 585.

§ 5. Under Civ. Code Prac. § 452, subsec. 4, one entering premises with or without the consent of the tenant and refusing to vacate on demand of the landlord after the tenant's term expires is guilty of forcible detainer.—Johnson v. Gordon (Ky.) 872.

§ 32. Under the express provisions of Sayles' Ann. Civ. St. 1897, art. 2529, the question of title cannot be adjudicated in an action of forcible detainer.—Francis v. Holmes (Tex. Civ. App.) 881.

FORECLOSURE.

Of mortgage, see Chattel Mortgages, § 261; Mortgages, §§ 420-534.

FOREIGN ADMINISTRATION.

See Executors and Administrators, §§ 517-524.

FOREIGN CORPORATIONS.

See Corporations, § 690.

FOREIGN JUDGMENTS.

See Judgment, § 944.

FORFEITURES.

For nonpayment of tax, see Taxation, § 848.
Of franchise, see Corporations, §§ 592½, 596.
Of homestead, see Homestead, §§ 161-181.
Of insurance, see Insurance, §§ 330, 335, 388, 750, 755.

FORGERY.

§ 4. Essentials to forgery stated, and that a forged bond to stay judgment was not filed held immaterial.—Holloway v. State (Ark.) 256.

§ 7. Under Kirby's Dig. § 1714, held an offense to forge a bond to stay judgment.—Holloway v. State (Ark.) 256.

§ 16. "Uttering forged instrument" defined.—Holloway v. State (Ark.) 256.

§ 34. Variance between a bond pleaded in an indictment for forgery and a bond proven held immaterial, being manifestly a clerical error.—Holloway v. State (Ark.) 256.

§ 44. Evidence held insufficient to connect accused with forgery of a bond staying judgment.—Holloway v. State (Ark.) 256.

§ 44. Where forgery is established, accused may be connected therewith by circumstances.—Holloway v. State (Ark.) 256.

FORMER ADJUDICATION.

See Judgment, §§ 570-622, 651-739.

FORMS OF ACTION.

See Trespass, §§ 44-52; Trover and Conversion.

FORNICATION.

See Incest; Seduction, §§ 36, 39.

FRANCHISES.

Forfeiture, see Corporations, §§ 592½, 596.

FRAUD.

See Fraudulent Conveyances.

Effect on limitation, see Limitation of Actions, § 100.

Parol or extrinsic evidence, see Evidence, § 434.

By particular classes of persons, or persons in particular relations.

Agent, see Principal and Agent, § 71.

In particular classes of conveyances, contracts, transactions, or proceedings.

See Deeds, § 70; Insurance, §§ 255-282, 723; Release, § 55.

Contract of sale, see Vendor and Purchaser, §§ 33-34.

Particular remedies.

See Cancellation of Instruments, § 52.

Equitable relief against judgment, see Judgment, § 443.

FRAUDS, STATUTE OF.**III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCAR-RIAGE OF ANOTHER.**

§ 23. An oral promise to pay for hauling timber held one to answer for another's debt, and unenforceable under Ky. St. 1909, § 470 (Russell's St. § 1775).—Sealey v. Combs (Ky.) 972.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 44. A verbal contract for hire for a term of four years held unenforceable under St. 1909, § 470, subsec. 7 (Russell's St. § 1775, subsec. 7).—Garnes v. Frazier & Foster (Ky.) 998.

§ 50. An oral agreement for the payment of rents as a portion of the consideration for the conveyance of land held impossible of performance within a year, and hence not within the statute of frauds.—Tipton v. Tipton (Tex. Civ. App.) 842.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 56. Contract of sale of standing timber held required to be in writing.—Childers v. Wm. H. Coleman Co. (Tenn.) 1018.

§ 58. A conveyance extending time to remove timber, if considered a lease, held good only for a year, unless in writing.—Childers v. Wm. H. Coleman Co. (Tenn.) 1018.

§ 60. An irrevocable license to enter land held to be in the nature of an easement, and so required to be in writing.—Childers v. Wm. H. Coleman Co. (Tenn.) 1018.

§ 60. Under Rev. St. 1895, art. 624, a permanent right to use another's lands for a particular purpose can only be conveyed by writing.—Menczer v. Poage (Tex. Civ. App.) 863.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 100. In order to pass a permanent right to use another's lands for a particular purpose, the writing must show with reasonable certainty, either in itself or by reference to other writing, the parties, consideration, and subject-matter of the contract.—Menczer v. Poage (Tex. Civ. App.) 863.

§ 103. A memorandum is sufficient if it relieves the court of the necessity of relying on parol evidence to ascertain the subject of the contract.—Campbell v. Preece (Ky.) 373.

§ 103. A contract for the sale of land held sufficient if there is a written memorandum

signed by the party to be charged.—Campbell v. Preece (Ky.) 373.

§ 103. The execution of a deed to land and a tender thereof to the grantee as a compromise of a dispute between the parties, which the grantee refused, *held* not sufficient to take from the operation of the statute of frauds an alleged oral contract to convey land so as to entitle such grantee to a specific performance.—Richardson v. Isaacs (Ky.) 1003.

§ 104. A memorandum of a contract for the sale of land, to satisfy the statute of frauds, need not be contemporaneous.—Campbell v. Preece (Ky.) 373.

§ 108. Terms of a contract, so far as they constitute part of the consideration, need not be stated in the memorandum to satisfy the statute of frauds.—Campbell v. Preece (Ky.) 373.

§ 118. A memorandum of a contract, within the statute of frauds, may be contained in more than one instrument.—Campbell v. Preece (Ky.) 373.

§ 118. Certain writings, construed together, *held* a sufficient memorandum of a contract for the sale of land.—Campbell v. Preece (Ky.) 373.

IX. OPERATION AND EFFECT OF STATUTE.

§ 119. The statute of frauds pertains only to the evidence of a contract, and not to its validity.—Campbell v. Preece (Ky.) 373.

§ 120. The statute of frauds of Kentucky applies to a contract made in another state to be performed in Kentucky.—Garnes v. Frazier & Foster (Ky.) 998.

§ 126. The fact that one party to an oral contract unenforceable under the statute of frauds promised the other to reduce the contract to writing, and did not do so, would not change the rights of the parties.—Garnes v. Frazier & Foster (Ky.) 998.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 150. The defect in a petition in an action on a contract from a failure to allege that it is in writing may be raised by demurrer.—Fiscal Court of Breckenridge County v. Board of Trustees of Town of Hardinsburg (Ky.) 298.

FRAUDULENT CONVEYANCES.

By bankrupt, see Bankruptcy, § 188.

I. TRANSFERS AND TRANSACTIONS INVALID.

(C) PROPERTY AND RIGHTS TRANSFERRED.

§ 46. Ky. St. 1909, § 1907 (Russell's St. § 2100), providing that every gift, conveyance, etc., by a debtor of his estate without valuable consideration shall be void as to creditors, etc., does not apply to real estate alone; the word "estate" including personalty.—Patton v. Walker's Trustees (Ky.) 312.

(D) INDEBTEDNESS, INSOLVENCY, AND INTENT OF GRANTOR.

§ 61. Under Ky. St. 1909, § 1907 (Russell's St. § 2100), the setting aside by an insolvent of the greater part of his estate and income to his daughters *held* a fraud on his creditors, though there was no actual intention to defraud.—Patton v. Walker's Trustees (Ky.) 312.

(E) CONSIDERATION.

§ 74. A gift by an insolvent is a fraud in law on his creditors.—Childers v. Pickenpaugh (Mo.) 453.

§ 74. A gift by a debtor to defraud his creditors is a fraudulent disposition of his property.—Childers v. Pickenpaugh (Mo.) 453.

(J) KNOWLEDGE AND INTENT OF GRANTEE.

§ 159. A bill of sale of corporate stock by a husband to his wife, made to defraud his creditors, and not in satisfaction of a valid debt, does not pass the title to the wife if she knew of his fraudulent purpose.—First Nat. Bank v. Thomas (Tex. Civ. App.) 221.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

(A) ORIGINAL PARTIES.

§ 172. Conveyance by debtor to defraud creditors *held* binding between the parties.—Robertson v. Hefey (Tex. Civ. App.) 1159.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(A) PERSONS ENTITLED TO ASSERT INVALIDITY.

§ 216. One having a claim for unliquidated damages, as for slander, *held* entitled to protection against fraudulent conveyances.—Robertson v. Hefey (Tex. Civ. App.) 1159.

(F) PLEADING.

§ 263. The allegation that certain property was given by an insolvent to his children "free of charge as advancements" sufficiently charged that the gifts were voluntary.—Patton v. Walker's Trustees (Ky.) 312.

§ 269. A general denial to the petition seeking to set aside a conveyance as fraudulent against creditors *held* to authorize proof of the fact that the land conveyed was a homestead.—Childers v. Pickenpaugh (Mo.) 478.

(G) EVIDENCE.

§ 271. Representatives of grantor asserting that deed was simulated transaction *held* to have the burden of proof.—Robertson v. Hefey (Tex. Civ. App.) 1159.

§ 273. The presumption was that advancements by an insolvent to his child to whom he was indebted were made to liquidate the debt, whether such was his actual intention or not.—Patton v. Walker's Trustees (Ky.) 312.

§ 295. Evidence *held* to warrant a finding that a debtor conveyed property with intent to defraud his creditors.—Childers v. Pickenpaugh (Mo.) 453.

§ 295. Evidence *held* to show that a conveyance by a father to his son was fraudulent as against creditors.—Childers v. Pickenpaugh (Mo.) 453.

§ 298. Certain testimony of grantor *held* insufficient to show that the transaction was simulated, or that vendee should hold legal title in trust.—Robertson v. Hefey (Tex. Civ. App.) 1159.

§ 299. Where a husband and wife lived together, the fact that he retained possession of land which he conveyed to her is of little force in determining whether the transaction was simulated.—Robertson v. Hefey (Tex. Civ. App.) 1159.

§ 301. Evidence *held* to show that a grantee participated in the fraud of the grantor in conveying land to defraud creditors.—Childers v. Pickenpaugh (Mo.) 453.

FREIGHT.

See Carriers, § 193.

FRUIT.

Duties and liabilities of carriers, see Carriers, §§ 110, 134.

GAMING.

Amendment of complaint setting up different cause of action, see Pleading, § 248.

GARNISHMENT.

See Attachment; Execution.

Procedure in justices' courts, see Justices of the Peace, §§ 128, 174.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 38. A draft, while retained by a garnishee pending delivery and indorsement to defendants pursuant to a contract to lend them the money called for, *held* not "effects" of the defendants subject to a garnishment previously served.—Maury v. McDonald (Tex. Civ. App.) 812.

V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

§ 118. Garnishees *held* not indebted in any amount to defendants under a contract for the sale of an interest in timber land.—Maury v. McDonald (Tex. Civ. App.) 812.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 191. Under Rev. St. 1895, art. 253, on the dismissal of a garnishment, the garnishee may recover reasonable attorneys' fees for preparing and defending the answer after it is controverted.—Maury v. McDonald (Tex. Civ. App.) 812.

§ 191. Seven hundred fifty dollars *held* a reasonable fee to be awarded garnishees on the dismissal of a garnishment for the services of their attorney in filing and defending their answer.—Maury v. McDonald (Tex. Civ. App.) 812.

GAS.

§ 21. Measure of recovery for the wrongful removal and destruction of the fixtures and connections with plaintiff's house of a rival gas company, stated.—Kentucky Heating Co. v. Hood (Ky.) 337.

§ 21. Exemplary damages *held* properly allowed, in an action against a gas company for wrongfully removing and destroying the fixtures and connections with plaintiff's house of a rival gas company.—Kentucky Heating Co. v. Hood (Ky.) 337.

GIFTS.**I. INTER VIVOS.**

§ 19. A daughter of the donor, having possession of notes, cannot defeat a gift of such notes to a son by refusing to surrender possession.—Simmonds v. Simmonds' Adm'r (Ky.) 304.

§ 49. Evidence *held* to show a gift of personality by a mother to her son and a delivery in her lifetime.—Simmonds v. Simmonds' Adm'r (Ky.) 304.

GOOD FAITH.

Of party asking equitable relief, see Specific Performance, § 97.

Of purchaser, see Bills and Notes, §§ 333-370; Vendor and Purchaser, §§ 229-245.

GRAND JURY.

See Indictment and Information.

GRANTS.

Of public lands, see Public Lands.

GROWING TREES.

Application of statute of frauds to contract for sale of growing trees, see Frauds, Statute of, § 56.

GUARANTY.

See Principal and Surety.

Damages for negligence of carrier in placing cattle in quarantine pens, see Carriers, § 229. Requirements of statute of frauds, see Frauds, Statute of, § 23.

GUARANTY INSURANCE.

See Insurance, §§ 432, 511.

GUARDIAN AND WARD.**III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.**

§ 54. Under Rev. St. 1895, arts. 2639, 2648, a guardian who invested the ward's funds for his own personal use *held* liable for the highest legal rate of interest from the time he could have properly invested them by exercising reasonable diligence.—Whitfield v. Burrell (Tex. Civ. App.) 153.

§ 58. Under Ky. St. 1909, § 2034 (Russell's St. § 4151), a guardian *held* not entitled to charge his ward's interest in the land of the deceased ancestor with any amount expended as guardian for the ward's benefit.—Baker v. Lane (Ky.) 963.

§ 58. Under Rev. St. 1895, art. 2630, amounts expended for a ward's education and maintenance *held* properly allowed the guardian on accounting, though not expended under order of court.—Whitfield v. Burrell (Tex. Civ. App.) 153.

VI. ACCOUNTING AND SETTLEMENT.

Limitation of action in action for accounting, see Limitation of Actions, § 39.

§ 137. The purpose of a final settlement of a guardian, stated.—Whitfield v. Burrell (Tex. Civ. App.) 153.

§ 137. Under the statute, a guardian must render final settlement when the ward becomes 21 years old, and until he submits the same, is not entitled to an absolute discharge.—Whitfield v. Burrell (Tex. Civ. App.) 153.

§ 144. The probate court retains jurisdiction to require final settlement though the ward has become of age.—Whitfield v. Burrell (Tex. Civ. App.) 153.

§ 145. Rev. St. 1895, art. 3357, does not limit the time for bringing proceedings under article 2766 to compel a guardian to file a final account.—Whitfield v. Burrell (Tex. Civ. App.) 153.

§ 148. Where intestate, on being displaced as plaintiff's guardian, did not validly surrender the estate to the new guardian, intestate's estate, on being required to account, could not have credit for payments for plaintiff by the new guardian's surety without the guardian's direction, authority, or consent.—Burton's Adm'r v. Selph (Ky.) 286.

§ 158. When a guardian renders his final account, the probate court can inquire into it to determine whether it is fair and correct.—Whitfield v. Burrell (Tex. Civ. App.) 153.

§ 159. In proceedings against a guardian for a final accounting, in which the bondsmen made

§ 161. A finding in proceedings to compel a guardianship accounting, which was supported by the evidence, will not be disturbed on appeal.—*Whitfield v. Burrell* (Tex. Civ. App.) 153.

§ 162. Under Rev. St. 1895, art. 2785, a guardian's sureties who voluntarily become parties in opposition to proceedings for an accounting may be taxed with the costs of appeal.—*Whitfield v. Burrell* (Tex. Civ. App.) 153.

§ 163. The decree of the probate court upon final accounting of a guardian, operates as an account stated between the guardian and ward, as well as the formal discharge of the trust relationship.—*Whitfield v. Burrell* (Tex. Civ. App.) 153.

HABEAS CORPUS.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 113. On habeas corpus to be admitted to bail, the judgment denying the application should not be set aside, where the proof shows guilt to be evident.—*Ex parte King* (Tex. Cr. App.) 1032.

HAND CARS.

Liability of master for injuries to servant caused by defects, see *Master and Servant*, § 112.

HARMLESS ERROR.

In civil actions, see *Appeal and Error*, §§ 1027-1074.

In criminal prosecutions, see *Homicide*, § 340.

HAWKERS AND PEDDLERS.

Peddling on street as a nuisance, see *Nuisance*, § 61.

§ 3. "Peddler" defined.—*City of Conway v. Waddell* (Ark.) 398.

§ 3. That defendant sold his own book made him no less a peddler within Kirby's Dig. § 5438.—*City of Conway v. Waddell* (Ark.) 398.

§ 3. The words "peddler" and "hawker," within Kirby's Dig. § 5438, authorizing cities to license, etc., hawkers and peddlers, are used in the ordinary and common-law acceptance of the term and the sense in which the words are used in Const. art. 16, § 5.—*City of Conway v. Waddell* (Ark.) 398.

§ 4. Kirby's Dig. § 5438, held to authorize cities and towns to tax hawkers and peddlers for revenue.—*City of Conway v. Waddell* (Ark.) 398.

§ 4. A city ordinance taxing hawkers and peddlers held void as being unreasonable.—*City of Conway v. Waddell* (Ark.) 398.

HEARING.

In probate proceedings, see *Wills*, § 321.

HEARSAY EVIDENCE.

In civil actions, see *Evidence*, §§ 317, 323.

In criminal prosecutions, see *Criminal Law*, §§ 412, 418.

HEIRS.

See *Descent and Distribution*.

Accidents at railroad crossings, see *Railroads*, §§ 305-351.

Mandatory injunction to compel landowner to open highway across his property, see *Injunction*, §§ 5, 130, 189.

Mandatory injunction to compel property owner to open highway across his property, right to jury trial, see *Jury*, § 14.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(B) ESTABLISHMENT BY STATUTE OR STATUTORY PROCEEDINGS.

§ 68. Where the existence of a highway is established, its width may be proved by the record, or in its absence by the testimony of witnesses or by the extent of travel.—*Illinois Cent. R. Co. v. Smith* (Ky.) 933.

II. HIGHWAY DISTRICTS AND OFFICERS.

Mandamus to highway officers, see *Mandamus*, §§ 23, 154.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

Mandamus to compel letting of contract at competitive bidding, see *Mandamus*, §§ 23, 154.

§ 113. Ky. St. 1894, § 4315, as amended by Acts 1906, p. 431, c. 118, and Acts 1908, p. 107, c. 42, does not authorize the supervisor of roads of a county, with the consent of the county judge, to exempt all the roads of the county from the provisions in the statute concerning the letting of work at competitive bidding.—*Gay v. Haggard* (Ky.) 299.

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

§ 151. A complaint under Pen. Code 1895, art. 491, for failure to work on the public roads, held insufficient.—*Goodrich v. State* (Tex. Cr. App.) 1042.

V. REGULATION AND USE FOR TRAVEL.

(B) USE OF HIGHWAY AND LAW OF THE ROAD.

§ 184. Under Civ. Code Prac. §§ 129, 130, evidence that an accident alleged to have occurred in a public county highway in fact took place in a village street did not constitute a material variance.—*Illinois Cent. R. Co. v. Smith* (Ky.) 933.

§ 184. In an action for injuries by an alleged obstruction of a highway, the circumstances under which the highway was created held not in issue.—*Illinois Cent. R. Co. v. Smith* (Ky.) 933.

HOLIDAYS.

See *Sunday*.

HOMESTEAD.

Fraudulent conveyance of, pleading, see *Fraudulent Conveyances*, § 269.

I. NATURE, ACQUISITION, AND EXTENT.

(C) ACQUISITION AND ESTABLISHMENT.

§ 51. Under St. 1909, § 1702 (Russell's St. § 4661), an owner held not entitled to a homestead unless he occupies the property, unless

he is temporarily absent from it.—*Eversole v. First Nat. Bank (Ky.)* 981.

(E) LIABILITIES ENFORCEABLE AGAINST HOMESTEAD.

§ 103. A judgment against one occupying land in excess of his homestead exemption becomes a lien on the surplus from the rendition of the judgment.—*Childers v. Pickenpaugh (Mo.)* 478.

II. TRANSFER OR INCUMBRANCE.

§ 118. Mortgage *held* sufficient under Kirby's Dig. § 3901, avoiding a mortgage of the homestead of a married man, unless his wife joins therein.—*Gantt v. Hildreth (Ark.)* 255.

§ 121. Where property held as a homestead is of greater value than the homestead and the mortgage combined, the widow is entitled to the surplus on the foreclosure sale of the property after the death of her husband.—*Hardy v. Atkinson (Mo. App.)* 516.

§ 128. A warranty deed of a homestead executed by a husband only *held* not to convey the wife's interest and to operate only by virtue of the covenant of warranty.—*Vickers v. Peddy (Tex. Civ. App.)* 1110.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 145. An infant cannot abandon his homestead rights to the use and enjoyment of the land of the deceased ancestor, worth less than \$1,000.—*Baker v. Lane (Ky.)* 983.

§ 145. Where a surviving wife executes a deed of the homestead under an agreement allowing her to return and use the property as her home, such agreement is not a substitute for the homestead user after it becomes evident that she will not return.—*Vickers v. Peddy (Tex. Civ. App.)* 1110.

§ 146. The conveyance by a widow of her homestead to the remainderman *held* to merge the entire fee in the remainderman.—*Hardy v. Atkinson (Mo. App.)* 516.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

Declarations by claimants as to intent, see Evidence, § 271.

§ 161. Where a husband and wife abandoned a homestead, a husband's conveyance, *held* valid without wife joining therein.—*Robertson v. Hefley (Tex. Civ. App.)* 1159.

§ 162. The abandonment of a homestead by removal therefrom depends on whether the removal was with the fixed intention of not returning to the place as a home.—*Thigpen v. Russell (Tex. Civ. App.)* 1080.

§ 162. That the claimants of homestead received a deed of other property *held* not to show abandonment, if they at all times intended to return to the homestead.—*Thigpen v. Russell (Tex. Civ. App.)* 1080.

§ 162. An offer to sell a homestead was not necessarily inconsistent with the claimants' intention to return thereto and reoccupy it as a home, if they did not sell.—*Thigpen v. Russell (Tex. Civ. App.)* 1080.

§ 170. A contract respecting a homestead *held* not void because not joined in by the wife under St. 1909, § 1706 (Russell's St. § 4665), providing that no release or waiver of the homestead shall be valid unless in writing and subscribed by the husband and his wife.—*Meadows v. Bryant (Ky.)* 306.

§ 181. Declarations of claimants of homestead, as to their intention to return thereto,

are admissible on the question of abandonment, though they may be self-serving.—*Thigpen v. Russell (Tex. Civ. App.)* 1080.

§ 181. The testimony of claimants of a homestead, from which they had removed, as to their intention to return thereto, is admissible.—*Thigpen v. Russell (Tex. Civ. App.)* 1080.

§ 181. On an issue as to the abandonment of a homestead, evidence *held* to show that a deed of other property upon which the claimants lived was intended to give them a life interest therein.—*Thigpen v. Russell (Tex. Civ. App.)* 1080.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 191. Mortgagors submitting to a judgment foreclosing the mortgage lien could not thereafter claim that the mortgage was void because of the homestead character of the property.—*Blair v. Guaranty Savings, Loan & Investment Co. (Tex. Civ. App.)* 608.

§ 200. A judgment debtor *held* entitled to relieve himself of the preliminary act of appraisers in setting out to him a homestead by appealing to the court.—*Childers v. Pickenpaugh (Mo.)* 478.

§ 201. The assignment of homestead to a judgment debtor *held* complete on the filing of the execution with report of appraisers and report of sale.—*Childers v. Pickenpaugh (Mo.)* 478.

§ 201. A judgment debtor paying the execution before sale and return *held* to relieve his land from the levy and from all the incidents thereof, including the act of the appraisers in setting out to him a homestead.—*Childers v. Pickenpaugh (Mo.)* 478.

§ 201. An execution debtor who takes no steps to set aside the setting off to him of a homestead by the officer holding an execution against him and the appraisers cannot collaterally attack the setting aside of the homestead.—*Childers v. Pickenpaugh (Mo.)* 478.

HOMICIDE.

II. MURDER.

§ 7. "Murder" defined.—*Commonwealth v. Mosser (Ky.)* 915.

§ 7. It is always unlawful for one to intentionally kill another, unless the act is in self-defense or is justified in law, such as in case of a legal execution.—*Puryear v. State (Tex. Cr. App.)* 1042.

§ 13. The law implies malice from the unlawful killing, where there is nothing to reduce the homicide to manslaughter or to some lesser degree.—*Potts v. State (Tex. Cr. App.)* 535.

§ 14. "Aforethought" defined.—*Freeman v. Commonwealth (Ky.)* 917.

§ 23. If accused did not shoot decedent in self-defense, and there was no provocation to reduce the killing to manslaughter, and the evidence did not make out murder in the first degree, the killing was murder in the second degree.—*Potts v. State (Tex. Cr. App.)* 535.

§ 23. Statement of what constitutes murder in the second degree.—*Puryear v. State (Tex. Cr. App.)* 1042.

III. MANSLAUGHTER.

§ 33. Facts *held* to justify a conviction of voluntary manslaughter.—*Smith v. Commonwealth (Ky.)* 368.

§ 34. Facts *held* to justify a conviction of involuntary manslaughter.—*Smith v. Commonwealth (Ky.)* 368.

§ 43. Every killing upon a rash and inconsiderate impulse is not manslaughter, an adequate cause which renders the mind incapable of cool reflection being essential to reduce an unlawful killing to manslaughter.—Potts v. State (Tex. Cr. App.) 535.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 122. A person attempting to excuse his killing as done in the defense of a third person must show that the third person was without blame and entitled to rely on self-defense.—Wheat v. Commonwealth (Ky.) 264.

VI. INDICTMENT AND INFORMATION.

§ 127. The form of indictment for manslaughter prepared by the Code commissioners held not to conform to Cr. Code Prac. §§ 122-124.—Commonwealth v. Mosser (Ky.) 915.

§ 189. An indictment held not to charge involuntary manslaughter.—Commonwealth v. Mosser (Ky.) 915.

§ 189. Under Cr. Code Prac. § 122, subsec. 2, and section 124, an indictment held not to charge the offense of voluntary manslaughter punished as provided by Ky. St. § 1150 (Russell's St. § 3628).—Commonwealth v. Mosser (Ky.) 915.

VII. EVIDENCE.

(A) PRESUMPTIONS AND BURDEN OF PROOF.

§ 146. Implied malice may be presumed, where there is an intentional killing without just cause or excuse.—Puryear v. State (Tex. Cr. App.) 1042.

(B) ADMISSIBILITY IN GENERAL.

Acts and declarations of conspirators and co-defendants, see Criminal Law, § 423.
Expert testimony, see Criminal Law, § 478.
Res gestæ, see Criminal Law, § 366.

§ 169. On a trial for homicide, certain conduct of accused prior to the difficulty resulting in the killing held competent to explain the conduct of decedent.—Wheat v. Commonwealth (Ky.) 264.

§ 174. A witness held entitled to testify as to the results of an experiment as to the position of the body of decedent.—Cabrera v. State (Tex. Cr. App.) 1054.

§ 183. On a trial for homicide, the refusal to permit accused to show that a third person had authority to commission men to carry arms, and that he had deputized accused to carry arms on the day after the homicide, held not erroneous.—Cabrera v. State (Tex. Cr. App.) 1054.

§ 190. Under Pen. Code 1895, art. 713, held that, on prosecution for assault with intent to murder, the state could prove reputation of the person assaulted, where defendant gave evidence of such person's threats to kill defendant.—Smith v. State (Tex. Cr. App.) 145.

(C) DYING DECLARATIONS.

Declarations by decedent as part of res gestæ, see Criminal Law, § 366.

(E) WEIGHT AND SUFFICIENCY.

§ 252. Evidence held to sustain a conviction of willful murder.—Freeman v. Commonwealth (Ky.) 917.

§ 253. Evidence held to justify a conviction of murder in the first degree, on the theory that accused was a guilty participant in the assassination of decedent.—Cabrera v. State (Tex. Cr. App.) 1054.

§ 254. Evidence in a murder case held to sustain a verdict of murder in the second degree.—Potts v. State (Tex. Cr. App.) 535.

§ 255. Evidence held to justify a conviction for voluntary manslaughter.—Wheat v. Commonwealth (Ky.) 264; Cox v. Commonwealth (Ky.) 282.

VIII. TRIAL.

(B) QUESTIONS FOR JURY.

§ 268. In a murder case, evidence held sufficient to go to the jury.—Gipson v. Commonwealth (Ky.) 834.

(C) INSTRUCTIONS.

Instructions as to circumstantial evidence, see Criminal Law, § 784.

Instructions on weight of evidence, see Criminal Law, § 763.

Requests for instructions, see Criminal Law, § 829.

§ 286. An instruction in a homicide case held not erroneous, as presenting a phase of the law not raised by the evidence.—Cabrera v. State (Tex. Cr. App.) 1054.

§ 295. In a homicide case, the court held authorized to charge on provoking the difficulty.—Puryear v. State (Tex. Cr. App.) 1042.

§ 300. On a trial for homicide, a requested charge on self-defense held properly refused.—Puryear v. State (Tex. Cr. App.) 1042.

§ 300. An instruction held to sufficiently submit the issue of self-defense.—Puryear v. State (Tex. Cr. App.) 1042.

§ 300. The court, in charging on murder in the second degree and on manslaughter, held required to charge as to an attack about to be made by decedent, and thereby give accused the benefit of reasonable apprehension of danger.—Benson v. State (Tex. Cr. App.) 1049.

§ 301. Evidence held to require an instruction upon the issue of homicide in another's defense.—Potts v. State (Tex. Cr. App.) 535.

§ 301. A charge held to have correctly and sufficiently submitted the issue of homicide in another's defense.—Potts v. State (Tex. Cr. App.) 535.

§ 308. In a murder prosecution, evidence held not to raise the issue of murder in the first degree as to require a charge thereon.—Potts v. State (Tex. Cr. App.) 535.

§ 308. An instruction on second degree murder held not reversible error.—Puryear v. State (Tex. Cr. App.) 1042.

§ 308. An instruction on second degree murder held sufficient, in view of the other instructions on the subject.—Puryear v. State (Tex. Cr. App.) 1042.

§ 309. The court was not required to instruct upon manslaughter where that issue was not raised by the evidence.—Potts v. State (Tex. Cr. App.) 535.

X. APPEAL AND ERROR.

§ 340. Where accused was acquitted of murder in the first degree, he cannot complain of error in submitting that issue or of errors committed in connection with its submission.—Potts v. State (Tex. Cr. App.) 535.

HORSE THEFT.

See Larceny, §§ 3, 70.

HOUSEBREAKING.

See Burglary.

HUSBAND AND WIFE.

See Divorce; Dower; Marriage.

Competency as witnesses, see Witnesses, §§ 52, 61.

Rights of survivor, see Homestead, §§ 145, 146.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

Deed by wife defectively acknowledged as evidence, see Acknowledgment, § 6.

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

(B) PROPERTY AND CONVEYANCES.

§ 69½. Coverture subsequent to the beginning of adverse possession does not interrupt it.—*Hoencke v. Lomax* (Tex. Civ. App.) 817.

(C) CONTRACTS.

Action by wife for wrongful levy of execution on separate property pledged for debt of husband, see Execution, § 465.

V. WIFE'S SEPARATE ESTATE.

(A) WHAT CONSTITUTES.

§ 133. Evidence held to show that money lent a husband and wife was not used for the improvement or benefit of the wife's separate property.—*Stroter v. Brackenridge* (Tex. Civ. App.) 632.

(B) RIGHTS AND LIABILITIES OF HUSBAND.

§ 138. To render a wife personally liable for money lent, under Rev. St. 1895, art. 2970, she must herself have contracted the debt for which suit is brought.—*Stroter v. Brackenridge* (Tex.) 634.

(C) LIABILITIES AND CHARGES.

§ 150. To hold a married woman liable upon a contract under Rev. St. 1895, art. 2970, etc., it must be shown that some improvement has been made upon or labor furnished to utilize her separate property.—*Stroter v. Brackenridge* (Tex. Civ. App.) 632.

VI. ACTIONS.

Action by wife for wrongful levy of execution on separate property for debts of husband, see Execution, § 465.

VII. COMMUNITY PROPERTY.

Partition of community property by heirs, see Partition, § 13.

§ 262. A wife, whose separate property, acquired during marriage by gift, has undergone various changes, must, in a controversy as to whether the property last acquired is separate or community property, trace the property all the changes made, and clearly show that the last-acquired property is her separate property.—*First Nat. Bank v. Thomas* (Tex. Civ. App.) 221.

§ 266. A pretended sale of a stock of merchandise by one to his wife held ineffectual.—*Dawson v. Baldrige* (Tex. Civ. App.) 593.

§ 274. In view of conveyances of land to a married man, a child on the death of the wife inherited an undivided one-half of the property conveyed.—*Colville v. Colville* (Tex. Civ. App.) 870.

§ 276. A circumstance held no defense to liability on the bond of a deceased husband as administrator of the community estate.—*Belt v. Cetti* (Tex. Civ. App.) 241.

§ 276. Evidence held insufficient to sustain a finding that an administrator paid specified sums for releases of specified vendor's lien notes.—*Belt v. Cetti* (Tex. Civ. App.) 241.

HYPOTHETICAL QUESTIONS.

To expert witness, see Evidence, § 553.

ICE.

Duty of carrier as to icing cars on shipment of perishable freight, see Carriers, §§ 110, 117, 184.

IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, § 187.

IMPANELING JURY.

See Jury, § 149.

IMPEACHMENT.

Of record, see Appeal and Error, § 664.
Of witness, see Witnesses, §§ 331½-405.

IMPLIED CONTRACTS.

See Covenants, § 20; Money Received; Work and Labor.

IMPRISONMENT.

See Arrest; Bail; False Imprisonment.
Habeas corpus, see Habeas Corpus.

IMPROVEMENTS.

Liens, see Mechanics' Liens.
Public improvements, see Municipal Corporations, §§ 330-567.

INADEQUACY OF PRICE.

Ground for setting aside tax sale, see Taxation, § 689.

INCEST.

§ 14. Evidence in a prosecution for incest held to sustain a conviction.—*Baker v. State* (Tex. Cr. App.) 542.

INCOMPETENT PERSONS.

See Insane Persons.

INCUMBRANCES.

On homestead, see Homestead, §§ 118-128.
On property of intestate, see Descent and Distribution, § 152.

INDEBTEDNESS.

Of fraudulent grantor, see Fraudulent Conveyances, § 61.

INDEMNITY.

See Principal and Surety.

For particular offenses.

See Conspiracy, § 43; Homicide, §§ 127, 139; Rape, § 25; Robbery, § 20.
Against Sunday law, see Sunday, § 29.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 15. It is a sufficient defense in a criminal prosecution that an appeal from a conviction under a prior information is pending.—State v. Biesemeyer (Mo. App.) 1197.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

§ 52. An affidavit, that the facts stated in an information are true according to the best "knowledge, information, and belief" of affiant, held insufficient as a basis for the information.—State v. Simpson (Mo. App.) 1187.

§ 52. Accused could not be convicted of wife abandonment, where the information was not accompanied by an affidavit.—Mendez v. State (Tex. Cr. App.) 1031.

§ 54. The jurat of the swearing officer is essential to a complaint.—Carroll v. State (Tex. Cr. App.) 1031.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 110. An indictment for defacing a recorded brand from railroad ties in violation of St. 1909, § 1409, subsec. 11 (Russell's St. § 5867), held sufficient.—Bennett v. Commonwealth (Ky.) 332.

§ 111. Under Cr. Code Prac. §§ 122, 136, an indictment charging seduction in the language of Ky. St. 1909, § 1214 (Russell's St. § 3790), held sufficient.—Commonwealth v. McNutt (Ky.) 978.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 132. An indictment for theft held to state but one offense.—Robinson v. State (Tex. Cr. App.) 1037.

§ 132. The state held not required to elect between counts, where the same transaction is embraced in any number of distinct counts.—Robinson v. State (Tex. Cr. App.) 1037.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

Writ of error to review order, see Criminal Law, § 1024.

§ 140. The trial judge is not bound to quash an indictment because of defects therein, even on motion of accused.—Palmer v. State (Tenn.) 1022.

VIII. AMENDMENT.

§ 162. The signing of the jurat to a complaint by the county attorney the day after he administered the oath to affiant, without the knowledge or consent of the court or accused, held to make the complaint insufficient to sustain a conviction.—Carroll v. State (Tex. Cr. App.) 1031.

IX. ISSUES, PROOF, AND VARIANCE.

§ 169. The evidence must be limited to establishing the charge made in the indictment.—Commonwealth v. Ellis (Ky.) 973.

ment are generally waived by going without calling the attention of the trial judge to them.—Palmer v. State (Tenn.) 1022.

INDORSEMENT.

Of bill of exchange or promissory note, see Bills and Notes, § 299.

INFANTS.

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§ 68. Acts 30th Leg. 1907, p. 138, c. 65, § 4, relating to the control of delinquent children, held not to oust the courts of their power to confine prisoners under 16 years of age in a jail to await trial.—Ex parte Thomas (Tex. Cr. App.) 1053.

§ 68. Acts 30th Leg. 1907, p. 140, c. 65, § 9, held to confer on the district court discretion to require the dismissal of a prosecution of a child under 16 years of age charged with a felony.—Ex parte Thomas (Tex. Cr. App.) 1053.

§ 68. The action of the district court held to show that it exercised its discretion, conferred by Acts 30th Leg. 1907, p. 137, c. 65, regulating the control of delinquent children, not to order a dismissal of the case.—Ex parte Thomas (Tex. Cr. App.) 1053.

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§ 28. Negligent failure to interpose defenses in an action *held* not ground for restraining the prosecution of the action.—*Turner v. Patterson* (Tex. Civ. App.) 565.

§ 26. That a note executed by plaintiff was obtained through the fraudulent representations of defendant is available as a defense in an action on the note, and therefore is not ground for the issuance of a writ of injunction restraining the enforcement of the note.—*Turner v. Patterson* (Tex. Civ. App.) 565.

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§ 171. On motion to dissolve a temporary injunction, the bill must be taken as true, in the absence of a sworn answer traversing the equity of the bill.—*Dawson v. Baldrige* (Tex. Civ. App.) 593.

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§ 261. In an action for wrongful injunction restraining plaintiff from removing a building, plaintiff *held* entitled to recover damages from the date of defendant's refusal to surrender, and not from the date of the writ.—*Hermann v. Allen* (Tex. Civ. App.) 794.

§ 261. That the submission of an appeal from a judgment perpetuating an injunction was postponed by stipulation *held* not to restrict defendant therein in an action for wrongful injunction to damages for the detention of his property which accrued subsequent to the final judgment of reversal on the appeal.—*Hermann v. Allen* (Tex. Civ. App.) 794.

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§ 11. It is immaterial as affecting an innkeeper's liability for loss of a guest's property whether the guest was such upon the American or European plan.—*De Lapp v. Van Closter* (Mo. App.) 120.

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§ 282. A fire policy stipulating that it shall be void on the interest of insured becoming other than unincumbered *held* void because of a vendor's lien on the property.—*Wright v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 191.

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§ 330. A policy of insurance, which is to be void if the "subject of insurance" be mortgaged, *held* not rendered void by a mortgage on a part of the property.—*Mecca Fire Ins. Co. of Waco v. Wilderspin* (Tex. Civ. App.) 1131.

§ 335. The inventory of goods on hand taken two or three days before the fire cannot take the place of the accounts of cash sales kept by insured, as required by the policy.—*Scottish Union & National Ins. Co. v. Weeks Drug Co.* (Tex. Civ. App.) 1086.

§ 335. The provision that insured shall keep books of account *held* material, so that Sayles' Ann. Civ. St. Supp. 1897-1904, art. 3096aa, as to the materiality of misrepresentations, does not apply.—*Scottish Union & National Ins. Co. v. Weeks Drug Co.* (Tex. Civ. App.) 1086.

§ 335. The failure of insured to keep an account of his cash sales of goods, as required by his policy, is a forfeiture of the insurance as a matter of law.—*Scottish Union & National Ins. Co. v. Weeks Drug Co.* (Tex. Civ. App.) 1086.

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§ 432. Whether return of goods by customer affects experience which would justify the indemnified in again extending credit to an old customer, within the policy of credit insurance, *held* to depend upon the circumstances surrounding the return.—*Philadelphia Casualty Co. v. Cannon & Byers Millinery Co.* (Ky.) 1004.

§ 432. The execution of a note in payment for goods sold on credit did not, until payment of the note, close the transaction, so as to render it an "experience" which would justify the creditor in again extending credit to an old customer.—*Philadelphia Casualty Co. v. Cannon & Byers Millinery Co.* (Ky.) 1004.

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§ 511. "First bill," within policy of credit insurance, construed.—Philadelphia Casualty Co. v. Cannon & Byers Millinery Co. (Ky.) 1004.

§ 511. Person insured by policy of credit insurance *held* entitled to make such application of salvage as is beneficial to his interests, where policy makes no provision as to the application to be made.—Philadelphia Casualty Co. v. Cannon & Byers Millinery Co. (Ky.) 1004.

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§ 538. Proof of loss, executed by insured in a fire policy and delivered to an agent of insurer, *held* received by insurer within the policy.—Johnson v. Lumber Ins. Co. of New York (Mo. App.) 112.

§ 539. A provision in an accident policy *held* not to necessarily mean that affirmative proof of loss of time cannot be given till after recovery of insured.—Mossop v. Continental Casualty Co. (Mo. App.) 680.

§ 548. Where a fire insurance policy is an Illinois contract Rev. St. 1890, § 7976 (Ann. St. 1906, p. 3792), requiring the examination of insured for the adjustment of a loss to be conducted where the loss occurred, will not be applied.—Johnson v. Lumber Ins. Co. of New York (Mo. App.) 112.

§ 560. An insurer, dissatisfied with the proof of loss furnished by insured, must notify insured of the objections, and afford him an opportunity to make corrections, provided enough time is left in which proof is to be furnished for notice to be given.—Johnson v. Lumber Ins. Co. of New York (Mo. App.) 112.

§ 561. Insurer in a fire policy *held* estopped from asserting that the proof of loss furnished is unsatisfactory.—Johnson v. Lumber Ins. Co. of New York (Mo. App.) 112.

§ 561. Insurer in a fire policy *held* deprived of the right to complain of the proof of loss furnished by insured, in view of its conduct.—Johnson v. Lumber Ins. Co. of New York (Mo. App.) 112.

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—Philadelphia Casualty Co. v. Cannon & Byers Millinery Co. (Ky.) 1004.

§ 665. Plaintiff, in action on policy of credit insurance, *held* to have established a prima facie case.—Philadelphia Casualty Co. v. Cannon & Byers Millinery Co. (Ky.) 1004.

§ 668. Whether the risk was increased by the fact that some one undertook to burn the property *held* a question for the jury.—Scottish Union & National Ins. Co. v. Weeks Drug Co. (Tex. Civ. App.) 1086.

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§ 694. Members of a mutual beneficial association *held* entitled to sue to set aside an ultra vires merger of another association, and as incidental relief to have an account taken and the merged society's assets returned to it.—Knapp v. Supreme Commandery, United Order of the Golden Cross of the World (Tenn.) 390.

§ 696. Acts 1887, p. 329, c. 198, *held* not to authorize the consolidation of a fraternal beneficiary association, organized under Shannon's Code, § 2524, with another similar society.—Knapp v. Supreme Commandery, United Order of the Golden Cross of the World (Tenn.) 390.

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§ 723. Statements of the applicant in an application for insurance *held* statements of opinion merely, and, where the applicant in good faith believed them to be true, their falsity did not vitiate the policy notwithstanding its stipulations.—Daniel v. Modern Woodmen of America (Tex. Civ. App.) 211.

§ 726. Language of an insurance policy fairly susceptible of an interpretation which will prevent a forfeiture will be so construed.—Daniel v. Modern Woodmen of America (Tex. Civ. App.) 211.

§ 726. The language of an insurance policy must be construed according to the intent of the parties, derived from the words used, the subject-matter to which they relate, and the matters naturally incident thereto.—Daniel v. Modern Woodmen of America (Tex. Civ. App.) 211.

§ 726. An insurance policy will be strictly construed against insurer and liberally in favor of insured, and, where the words thereof admit of two constructions, the one most favorable to insured will be adopted.—Daniel v. Modern Woodmen of America (Tex. Civ. App.) 211.

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§ 755. A custom of a subordinate lodge, without the knowledge of the officers of the grand lodge, permitting members to remain delinquent, and advancing from the lodge treasury the amount of their dues, does not operate as a waiver of a forfeiture of membership for non-payment of dues.—Burke v. Grand Lodge, A. O. U. W., Missouri (Mo. App.) 493.

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§ 30. Even if Const. art. 16, § 20, does not authorize the commissioners' court to combine arbitrarily subdivisions of a county for a local option election, this does not prevent its ordering one in a commissioners' precinct embracing several justices' precincts.—Griffin v. Tucker (Tex.) 635.

commissioners' precinct, though local option is in force in a justice's precinct therein, and not in the rest of it.—Griffin v. Tucker (Tex.) 635.

§ 34. Statement of how ballots shall read in a local option election.—Griffin v. Tucker (Tex.) 635.

§ 36. Under Rev. St. 1899, § 3031 (Ann. St. 1906, p. 1737), the record of the county court relating to the adoption of the local option law, need not show a return of the publication of the result.—State v. Bush (Mo. App.) 670.

§ 36. The order of the commissioners' court held a sufficient performance of its sole duty in a local option election to declare the result of a local option election.—Griffin v. Tucker (Tex.) 635.

§ 37. In a local option election contest, that only one of two tickets bearing the same number was counted for prohibition did not show any injury, in the absence of an allegation that the other ticket was voted against prohibition.—Savage v. Umphries (Tex. Civ. App.) 893.

§ 37. In a local option election contest, allegations of the complaint held sufficient to admit proof that contestants were prejudiced by a violation of Acts 29th Leg. 1905, p. 535, c. 11, § 64, requiring the polls to be open during certain hours.—Savage v. Umphries (Tex. Civ. App.) 893.

§ 37. One may contest a local option election where a temporary injunction restraining the publication of the result has been dissolved.—Savage v. Umphries (Tex. Civ. App.) 893.

§ 37. In the absence of statute, the court was not bound, in a local option election contest, to have certain challenged ballots removed from the boxes, and then direct the clerk to recount the remaining ballots and announce the result to the court.—Savage v. Umphries (Tex. Civ. App.) 893.

§ 37. In an election contest, the action of the commissioners' court in counting the ballots may not be impeached by the testimony of one present at the count as to how the duty was performed.—Savage v. Umphries (Tex. Civ. App.) 893.

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§ 217. "Final judgment" defined.—*State ex rel. Potter v. Riley* (Mo.) 647.

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§ 250. Plaintiff must recover, if at all, on the contract alleged.—*Kellerman Contracting Co. v. Chicago House Wrecking Co.* (Mo. App.) 99.

§ 251. In partition and for the removal of a cloud on the title, the court *held* without authority to render judgment for plaintiffs for the part of the land disclaimed by defendants filing a cross-petition for the balance.—*Gray v. Tribue* (Tex. Civ. App.) 808.

§ 251. In partition and for the removal of a cloud on the title, the court *held* authorized to enter judgment for defendants on their cross-petition.—*Gray v. Tribue* (Tex. Civ. App.) 808.

§ 251. In trespass to try title, where defendant simply pleads not guilty, the appropriate judgment for defendant is that plaintiff take nothing by his suit, but a further adjudication of title and right of possession would add nothing thereto.—*McKee v. West* (Tex. Civ. App.) 1135.

§ 251. In trespass to try title, where defendant simply pleaded not guilty, an award to de-

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IX. OPENING OR VACATING.

Remedy by a motion to vacate as affecting right to mandamus to compel a setting aside judgment, see *Mandamus*, § 3.

§ 336. A motion to vacate a judgment on the ground that it was rendered after the death of the party against whom it was rendered *held* to take the place of the common-law writ of error coram nobis.—*State ex rel. Potter v. Riley* (Mo.) 647.

§ 354. A motion to set aside a judgment under Rev. St. 1899, § 795 (Ann. St. 1903, p. 758), must be based on an irregularity patent on the record.—*State ex rel. Potter v. Riley* (Mo.) 647.

§ 382. A motion to set aside a judgment dismissing a cause rendered after the death of plaintiff suing to have a deed adjudged a mortgage, and after he had obtained a judgment granting the relief, *held* properly filed by his heirs at law.—*State ex rel. Potter v. Riley* (Mo.) 647.

X. EQUITABLE RELIEF.

(A) NATURE OF REMEDY AND GROUNDS.

§ 443. The fraud which entitles a party to impeach a judgment must be fraud practiced on the court in the procurement thereof.—*Bank of Pine Bluff v. Levi* (Ark.) 250.

§ 443. Certain acts *held* not to constitute a fraud on the court in the procurement of decrees foreclosing a mortgage, and confirming the sale under the foreclosure.—*Bank of Pine Bluff v. Levi* (Ark.) 250.

(B) JURISDICTION AND PROCEEDINGS.

§ 455. County court has jurisdiction to enjoin the enforcement of a void judgment recovered therein, regardless of the amount of damages sought to be recovered.—*Womble v. Harsey* (Tex. Civ. App.) 764.

XI. COLLATERAL ATTACK.

(A) JUDGMENTS IMPEACHABLE COLLATERALLY.

§ 470. Where a court had jurisdiction of the parties and subject-matter, its judgment was not subject to collateral attack.—*Feltner v. Huff* (Ky.) 936.

(B) GROUNDS.

§ 486. A judgment rendered against a party after his death *held* voidable only, and not subject to collateral attack.—*State ex rel. Potter v. Riley* (Mo.) 647.

§ 486. A judgment against a party who is dead at the time of the institution of the suit

attack for lack of proper service.—*Gibbs v. Scales* (Tex. Civ. App.) 188.

(C) PROCEEDINGS.

§ 518. A motion to vacate a judgment in lieu of the common-law writ of error coram nobis is in the nature of an independent and direct attack on the judgment.—*State ex rel. Potter v. Riley* (Mo.) 647.

§ 521. A suit to enjoin the further enforcement of an execution, on the ground that the execution plaintiff had recovered sufficient from a defaulting bidder to satisfy his judgment which the execution defendant should have recovered, *held* not a collateral attack on the judgment, in the action against the bidder.—*Shanley v. York* (Tex. Civ. App.) 146.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) JUDGMENTS OPERATIVE AS BAR.

§ 570. A judgment dismissing a petition because not stating a cause of action is no bar to a new action on a good petition.—*Standard Lumber Co. v. Coldwell* (Ky.) 990.

(B) CAUSES OF ACTION AND DEFENSES MERGED, BARRED, OR CONCLUDED.

§ 585. A judgment for defendant in forcible entry proceedings *held* not a bar to a forcible detainer proceeding.—*Johnson v. Gordon* (Ky.) 372.

§ 622. A prior judgment in an action by defendant to recover damages from plaintiff for breach of contract *held* not res judicata against plaintiffs' right to sue defendant on an account.—*Kerr v. Blair* (Tex. Civ. App.) 791.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) JUDGMENTS CONCLUSIVE IN GENERAL.

§ 651. A judgment by agreement, under which land in controversy was conveyed to plaintiff, *held* conclusive on defendant until opened or modified.—*Howard v. Howard* (Ky.) 367.

§ 655. An investigation of the matter of rent and the tenant's liability on a plea in abatement in an attachment suit *held* not res judicata on a subsequent trial of the principal cause on the merits.—*Sessinghaus v. Knoche* (Mo. App.) 104.

§ 664. A judgment perpetuating an injunction reversed on appeal *held* not res judicata against a claim for damages because of the wrongful suing out of the injunction.—*Hermann v. Allen* (Tex. Civ. App.) 794.

(C) MATTERS CONCLUDED.

§ 717. "Matter in issue" defined.—*Kerr v. Blair* (Tex. Civ. App.) 791.

§ 720. Where a jury improperly considered an account by plaintiffs against defendant which was not pleaded as an offset to defendant's claim against plaintiffs in a prior action, the verdict *held* not res judicata of plaintiffs' right of action on the account.—*Kerr v. Blair* (Tex. Civ. App.) 791.

§ 720. Judgment in an injunction suit *held* res judicata of a claim that defendant was required to make certain repairs to plaintiff's property under a contract for the erection of a building on plaintiff's land in case of removal.—*Hermann v. Allen* (Tex. Civ. App.) 794.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

Forgery of bond to stay judgment, see Forgery, §§ 4, 7, 34, 44.

XXI. ACTIONS ON JUDGMENTS.

(B) FOREIGN JUDGMENTS.

§ 944. To maintain an action on a foreign judgment against a plea of *nul tiel record*, a certified copy of the judgment, together with the pleadings and proceedings in which the judgment was founded, *held necessary*.—*McCarthy v. Troll* (Ark.) 416.

§ 944. In an action on a foreign judgment, evidence *held* to show that the judgment sued on was rendered in the action in which the complaint, answer, and summons introduced in evidence were filed.—*McCarthy v. Troll* (Ark.) 416.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

Judgment as evidence in action for breach of covenant, see Covenants, § 121.

§ 949. The question of *res judicata* *held* not raised under the circumstances.—*Holland v. Western Bank & Trust Co.* (Tex. Civ. App.) 218.

JUDICIAL NOTICE.

In civil actions, see Evidence, §§ 9-35.

In criminal prosecutions, see Criminal Law, § 304.

JUDICIAL SALES.

Appealability of order of confirmation, see Appeal and Error, § 115.

Of property of decedent, see Executors and Administrators, §§ 348-389.

On execution, see Execution, §§ 238-256.

§ 31. Irregularities and misconduct and unfairness in a judicial sale may be shown before the confirmation to set aside the sale, but after confirmation irregularities in the conduct of the sale are cured.—*Bank of Pine Bluff v. Levi* (Ark.) 250.

§ 31. An order confirming a judicial sale *held* to have the force of a final judgment, and not to be collaterally attacked except for fraud.—*Bank of Pine Bluff v. Levi* (Ark.) 250.

§ 61. Confirmation of a judicial sale without conveyance *held* to vest title in the purchaser.—*Feltner v. Huff* (Ky.) 936.

JURAT.

Of county attorney to criminal complaint, see Indictment and Information, §§ 54, 162.

JURISDICTION.

Amount in controversy, see Appeal and Error, §§ 61, 64.

Effect of appearance, see Appearance.

Objections to jurisdiction as ground for abatement, see Abatement and Revival, § 3.

Of interstate commerce commission, see Commerce, § 85.

Jurisdiction of particular actions or proceedings.

See Divorce, §§ 104, 197; Mandamus, §§ 153-164.

Foreclosure, see Mortgages, § 420.

Relief against judgment, see Judgment, § 455.

Jurisdiction of particular classes of persons.

See Guardian and Ward, § 144.

Special jurisdictions and jurisdiction of particular classes of courts.

See Courts.

Appellate jurisdiction, see Appeal and Error, §§ 19, 20; Criminal Law, §§ 1020, 1024.

Justices' courts in civil cases, see Justices of the Peace, § 47.

JURY.

Custody and conduct, see Criminal Law, §§ 853, 864.

Disqualification or misconduct ground for new trial, see New Trial, § 42.

Grounds for reference instead of trial by jury, see Reference, § 8.

Instructions in civil actions, see Trial, §§ 191-206.

Instructions in criminal prosecutions, see Criminal Law, §§ 780-822.

Questions for jury in civil actions, see Trial, §§ 139-143.

Questions for jury in criminal prosecutions, see Criminal Law, §§ 753-763.

Taking case or question from jury at trial, see Trial, §§ 139-156.

Verdict in civil actions, see Trial, § 352.

I. NATURE AND CONSTITUTION OF JURIES.

§ 2. Acts 30th Leg. 1907, p. 269, c. 139, providing for a particular jury system for all counties having a city containing a population of 20,000 or more according to a census, is not unconstitutional.—*Dallas Consol. Electric St. Ry. Co. v. Chase* (Tex. Civ. App.) 783.

II. RIGHT TO TRIAL BY JURY.

§ 14. Where an interplea and answer stated a cause of action for specific performance, a jury trial *held* properly refused.—*Collins v. Harrell* (Mo.) 432.

§ 14. In a suit for a mandatory injunction to compel obedience to a decree that defendant open a public highway across its property, it was not error to grant a jury trial.—*Sante F6 Townsite Co. v. Norvell* (Tex. Civ. App.) 762.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 58. Acts 30th Leg. 1907, p. 269, c. 139, relating to the selection of a jury in counties with cities having a certain population, is constitutional.—*Dallas Consol. Electric St. Ry. Co. v. Chambers* (Tex. Civ. App.) 851.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

Review of questions of fact, see Appeal and Error, § 1024.

§ 88. Stockholders in a bank are not disqualified to sit as jurors in a case in which the bank's teller alone is interested.—*Stevenson v. Moore* (Ky.) 951.

§ 92. The rejection of a juror because of business connections with defendant *held* an abuse of judicial discretion.—*Joyce v. Metropolitan St. Ry. Co.* (Mo.) 21.

leged sales in the two cases were made to different persons and the state relied on different witnesses.—*Ross v. State* (Tex. Cr. App.) 1034.

§ 97. Bias or prejudice by a juror in favor of or preconceived ideas of the rights of one of the parties, are incompatible with a fair trial by an impartial jury.—*Gulf, C. & S. F. Ry. Co. v. Dickens* (Tex. Civ. App.) 612, 618.

§ 100. Under Acts 1899, p. 891, c. 883, newspaper statements, to disqualify a juror, must be such as purport to detail the facts by those professing to know them.—*Palmer v. State* (Tenn.) 1022.

§ 100. Nature of opinions disqualifying a juror determined.—*Palmer v. State* (Tenn.) 1022.

§ 100. A juror, who on his *voire dire* states that he has read the accounts of the crime in newspapers, but has not formed nor expressed any opinion, is not disqualified.—*Palmer v. State* (Tenn.) 1022.

§ 103. A juror *held* not disqualified because he had formed an opinion on mere rumor.—*Palmer v. State* (Tenn.) 1022.

§ 116. A challenge to the entire panel will lie for bias or partiality on the part of the officer who summoned the jury.—*Jones v. Springfield Traction Co.* (Mo. App.) 675.

§ 116. Under Code Cr. Proc. 1895, art. 662, providing that article 661, allowing a challenge to the array, shall not apply where the jury is selected by jury commissioners, *held* that, in the absence of a showing as to how the jury was selected, it will be presumed that it was selected by the commissioners, so that a challenge to the array will not be allowed.—*Ross v. State* (Tex. Cr. App.) 1034.

§ 126. Under Rev. St. 1895, arts. 3208, 3209, a challenge for cause is proper upon any ground which unfits one to act as a juror.—*Gulf, C. & S. F. Ry. Co. v. Dickens* (Tex. Civ. App.) 612, 618.

§ 132. In the examination of a juror as to his competency, the refusal to permit accused's counsel to exhibit to the juror newspaper articles referring to the offense was proper.—*Palmer v. State* (Tenn.) 1022.

§ 132. The burden is on the challenger of a juror to show the actual existence of a disqualifying opinion.—*Palmer v. State* (Tenn.) 1022.

§ 136. Each defendant is entitled to six peremptory challenges when there is a controversy between them.—*Hogsett v. Northern Texas Traction Co.* (Tex. Civ. App.) 807.

§ 142. An objection that a juror is disqualified because he had served more than six days within the six months preceding the trial comes too late after verdict.—*Waggoner v. Porterfield* (Tex. Civ. App.) 1094.

VI. IMPANELING FOR TRIAL AND OATH.

In criminal prosecutions, necessity of objection for purpose of review, see Criminal Law, § 1035.

In criminal prosecutions, presumptions on appeal, see Criminal Law, § 1144.

§ 149. Under Rev. St. 1895, arts. 3221, 3224, 3229, *held*, that filling a jury by calling talesmen, where pending a trial a juror was incapacitated by sickness, was error.—*Waggoner v. Sneed* (Tex. Civ. App.) 547.

THORITY.

§ 47. A justice of the peace has no jurisdiction of a suit for the cancellation of notes and for an order for their surrender.—*Snyder v. Crutcher* (Mo. App.) 489.

IV. PROCEDURE IN CIVIL CASES.

Mandamus to compel entry of judgment, see Mandamus, § 51.

§ 73. Under Rev. St. 1895, art. 1585, subds. 4, 8, and article 1677, and Acts 1907, 30th Leg., p. 249, c. 133, arts. 1194b, 1194c, *held*, that a suit before a justice on a contract for the payment of money which did not specify a place of payment brought against a nonresident, should be transferred to the county and precinct in which plaintiff is a resident.—*Kramer v. Lilley* (Tex. Civ. App.) 735.

§ 86. In an action for wrongful attachment, the intentions of the officer making the levy *held* immaterial.—*Rainey v. Kemp* (Tex. Civ. App.) 630.

§ 86. In an action for wrongful attachment, plaintiff *held* entitled to show the falsity of the grounds stated in the affidavit of attachment.—*Rainey v. Kemp* (Tex. Civ. App.) 630.

§ 124. Where a verdict in a justice's court was for plaintiff without assessing any amount of recovery, *held*, that entry of a judgment for the sum demanded in plaintiff's statement was void.—*State ex rel. Vanderburg v. Bidwell* (Mo. App.) 122.

§ 124. Under Rev. St. 1899, § 4008 (Ann. St. 1906, p. 2189), *held*, that a judgment for defendant must be entered on a verdict for plaintiff without assessing any amount of recovery.—*State ex rel. Vanderburg v. Bidwell* (Mo. App.) 122.

§ 124. Justice's duty to enter judgment on a verdict *held* ministerial, and his failure to enter the right judgment does not deprive the verdict of any of its force.—*State ex rel. Vanderburg v. Bidwell* (Mo. App.) 122.

§ 128. In an action to set aside a justice's judgment in garnishment proceedings for fraud, the question of the validity of the affidavit for garnishment could not be raised after judgment finding the judgment based on the affidavit to be valid.—*Alvord Nat. Bank v. Waples-Platter Grocer Co.* (Tex. Civ. App.) 232.

§ 128. A justice of the peace *held* to have jurisdiction of a petition in the nature of a bill of review to set aside a former judgment by default and hear the case on the merits, where the judgment debtor was prevented by fraud from defending; Rev. St. 1895, art. 1651, not applying to a proceeding in the nature of a new suit.—*Alvord Nat. Bank v. Waples-Platter Grocer Co.* (Tex. Civ. App.) 232.

§ 130. A judgment quashing an attachment on specified grounds *held* conclusive as against plaintiff therein when sued for wrongful attachment.—*Rainey v. Kemp* (Tex. Civ. App.) 630.

§ 135. In an action for wrongful levy of execution, the intentions of the officer making the levy *held* immaterial.—*Rainey v. Kemp* (Tex. Civ. App.) 630.

V. REVIEW OF PROCEEDINGS.

(A) APPEAL AND ERROR.

§ 141. A controversy beyond the jurisdiction of a justice of the peace is beyond the

JUSTIFICATION.

Of homicide, see Homicide, § 122.

KNOWLEDGE.

By grantee of fraud in conveyance, see Fraudulent Conveyances, § 159.

By servant of danger, see Master and Servant, § 217.

LACHES.

Affecting right to restrain operation of railroad, see Railroads, § 222.

Effect in equity, see Equity, § 67.

LANDLORD AND TENANT.

Lease of public lands, see Public Lands, § 178.

Mining leases, see Mines and Minerals, §§ 62, 66.

Application of statute of frauds to leases, see Frauds, Statute of, § 44.

I. CREATION AND EXISTENCE OF THE RELATION.

§ 1. "Tenant" defined.—*Francis v. Holmes* (Tex. Civ. App.) 881.

II. LEASES AND AGREEMENTS IN GENERAL.

Application of statute of frauds to leases, see Frauds, Statute of, § 44.

III. LANDLORD'S TITLE AND REVERSION.

§ 63. Neither a tenant nor one entering under him can deny the landlord's title in a proceeding by the latter to recover possession.—*Johnson v. Gordon* (Ky.) 372.

V. TENANCIES FROM YEAR TO YEAR AND MONTH TO MONTH.

§ 116. Under Rev. St. 1899, § 4110 (Ann. St. 1906, p. 2234), a tenant from month to month who vacates without giving one month's notice held liable for rent for the succeeding month.—*Sessinghaus v. Knoche* (Mo. App.) 104.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(F) EVICTION.

§ 173. In an action for rent, a defense that the tenant had been evicted held not sustained.—*Pearce v. Hoyt* (Mo. App.) 656.

VIII. RENT AND ADVANCES.

(B) ACTIONS.

§ 229. Under Rev. St. 1899, § 4123 (Ann. St. 1906, p. 2239), the fact that the landlord called at the premises with the intention of demanding the rent and found the same wholly unoccupied held not equivalent to a demand on the tenant for the rent, or, in his absence, on the person occupying the premises, and insufficient to render the mere default in payment a ground for attachment.—*Sessinghaus v. Knoche* (Mo. App.) 104.

§ 231. In an action for rent, an admission by defendant held to cast on him the burden of

§ 233. In an action for land occupied by a canal across plaintiff's land, instructions held not to make defendant liable for the rental value of the canal, in addition to the land on which it was situated.—*Houston Land & Irrigation Co. v. Bradford* (Tex. Civ. App.) 158.

LANDS.

See Public Lands.

LARCENY.

See Robbery.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 3. Facts held to constitute horse stealing.—*Walklate v. Commonwealth* (Ky.) 314.

§ 36. An indictment held sufficient to sustain a conviction of theft as a bailee.—*Collins v. State* (Tex. Cr. App.) 1038.

II. PROSECUTION AND PUNISHMENT.

(A) INDICTMENT AND INFORMATION.

Election between counts, see Indictment and Information, § 132.

(B) EVIDENCE.

Admissibility of confessions, see Criminal Law, § 534.

§ 55. Evidence in a prosecution for stealing chickens held not sufficient to authorize a conviction.—*Brown v. Commonwealth* (Ky.) 945.

§ 59. Circumstantial evidence that defendant as bailee sold property for \$5 and converted the same to his own use is sufficient to sustain a conviction of theft by the bailee.—*Collins v. State* (Tex. Cr. App.) 1038.

(C) TRIAL AND REVIEW.

§ 70. Held, that the words "with force and arms" in an instruction on a trial for horse stealing ought to have been omitted.—*Walklate v. Commonwealth* (Ky.) 314.

LAW OF THE CASE.

Decision on appeal, see Appeal and Error, §§ 1097, 1099.

LAW OF THE ROAD.

See Highways, § 184.

LEASES.

See Landlord and Tenant.

LEGACIES.

See Wills.

LEGISLATIVE POWER.

See Constitutional Law, § 52.

LETTERS PATENT.

For public lands, see Mines and Minerals, § 49.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 2. It is immaterial to one's liability for slander what meaning he intended to convey by the language used if it is, in fact, slanderous.—Greer v. White (Ark.) 258.

§ 7. A charge that plaintiff had burnt defendant's house charged the crime of arson, and was slanderous per se.—Greer v. White (Ark.) 258.

§ 7. A newspaper article, charging a county judge with grafting, *held* libelous per se.—Dixon v. Chappell (Ky.) 929.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

§ 45. A statement confidentially and in good faith, by a person whose property has been burned, of whom he suspects as the incendiary, *held* privileged.—Edwards v. Kevil (Ky.) 273.

IV. ACTIONS.

(A) RIGHT OF ACTION AND DEFENSES.

Right of one holding unliquidated claim for damages to protection against fraudulent conveyance by wrongdoer, see *Fraudulent Conveyances*, § 218.

(B) PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

§ 93. Answer in slander *held* good within the rule that a defendant pleading that the words spoken were privileged must admit that he spoke the words charged, or words of similar import in themselves actionable.—Edwards v. Kevil (Ky.) 273.

(C) EVIDENCE.

§ 108. In slander wherein the defense of privileged communication was made, evidence by plaintiff that he had not, in fact, made the threats to burn the building testified to by witnesses for defendant as having been made and communicated to defendant *held* properly excluded as immaterial.—Edwards v. Kevil (Ky.) 273.

(D) DAMAGES.

§ 120. In circumstances stated, exemplary damages *held* not recoverable for slander.—Greer v. White (Ark.) 258.

(E) TRIAL, JUDGMENT, AND REVIEW.

§ 123. Whether a charge of having set fire to a building was made under such circumstances as to constitute it a privileged communication *held* for the jury.—Edwards v. Kevil (Ky.) 273.

VI. CRIMINAL RESPONSIBILITY.

(B) PROSECUTION AND PUNISHMENT.

§ 159. Under Rev. St. 1899, § 2262 (Ann. St. 1906, p. 1426), an instruction, in a prosecution for criminal slander, that certain words constituted a charge of fornication, and that if they were spoken by accused the jury should convict, *held* erroneous.—State v. Simpson (Mo. App.) 1187.

LICENSES.

For mining, see *Mines and Minerals*, §§ 62, 66.
For sale of intoxicating liquors, see *Intoxicating Liquors*, §§ 49-75.
Injuries to licensees, see *Railroads*, §§ 273½-282.

I. FOR OCCUPATIONS AND PRIVILEGES.

Liability of street railroad for occupation taxes, see *Street Railroads*, § 81.

§ 7. The exaction of occupation taxes on street railway companies as levied by Sayles' Ann. Civ. St. 1897, art. 5049, subd. 54, and Acts 30th Leg. (Gen. Laws 1907, c. 18) pp. 479-489, *held* not double taxation.—Dallas Consol. Electric St. Ry. Co. v. State (Tex. Civ. App.) 879.

§ 42. In the prosecution of a corporation for engaging in a specified business without an occupation license, it is no defense that in engaging in such business defendant exceeded its corporate powers.—United States Fidelity & Guaranty Co. v. Commonwealth (Ky.) 1000.

LIENS.

Effect of proceedings in bankruptcy, see *Bankruptcy*, §§ 188, 195.

Liens acquired by particular remedies or proceedings.

See *Garnishment*, § 113.

Particular classes of liens.

See *Mechanics' Liens*.

Attorney's lien, see *Attorney and Client*, § 182.
Conclusions in pleading in action to enforce, see *Pleading*, § 8.

Mortgage, see *Chattel Mortgages*, § 150.

Pledge, see *Pledges*.

Vendor's lien on lands sold, see *Vendor and Purchaser*, §§ 284, 298.

§ 8. An agreement between a bank and a borrower, by which the bank was to have a lien on cattle purchased by the borrower for its advances, *held* valid as to the parties and volunteers and persons having notice thereof.—Gardner v. Planters' Nat. Bank of Honey Grove (Tex. Civ. App.) 1146.

LIFE ESTATES.

See *Dower*.

Authority of life tenant to dedicate land, see *Dedication*, § 13.

Life estate of bankrupt acquired by will after adjudication as not passing to trustee, see *Bankruptcy*, § 148.

§ 11. A life tenant *held* a trustee for the remaindermen as to all that part of the estate which such life tenant did not require for her support.—Emert v. Blair (Tenn.) 685.

LIMITATION OF ACTIONS.

See *Adverse Possession*.

In trespass to try title, see *Trespass to Try Title*, § 25.

Laches, see *Equity*, § 67.

I. STATUTES OF LIMITATION.

(A) NATURE, VALIDITY, AND CONSTRUCTION IN GENERAL.

Validity of retrospective laws, see *Constitutional Law*, § 191.

§ 5. Rev. St. 1899, § 4285 (Ann. St. 1906, p. 2357), relating to limitations in personal actions, *held*, in view of section 4292 (page 2360), not to apply to actions for torts under chapter 17 (pages 1637-1658).—Clark v. Kansas City, St. L. & C. R. Co. (Mo.) 40.

(B) LIMITATIONS APPLICABLE TO PARTICULAR ACTIONS.

§ 18. The words "action" and "suit," as used in statutes of limitation requiring every action or suit to be brought within a stated time, are generally synonymous.—Whitfield v. Burrell (Tex. Civ. App.) 153.

§ 36. The statutes of limitation are available as a bar in suits in equity the same as at law.—Hughes v. Wallace (Ky.) 324.

§ 39. Rev. St. 1895, art. 3358, held not to apply to proceedings under articles 2766, 2770, to compel a guardianship accounting.—Whitfield v. Burrell (Tex. Civ. App.) 153.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) ACCRUAL OF RIGHT OF ACTION OR DEFENSE.

§ 55. The right of action for damages to land by overflow of water through ditches dug on a right of way held to accrue when land was overflowed, and not when the ditches were dug.—St. Louis Southwestern Ry. Co. of Texas v. Clayton (Tex. Civ. App.) 248.

(F) IGNORANCE, MISTAKE, TRUST, FRAUD, AND CONCEALMENT OF CAUSE OF ACTION.

§ 100. Where fraud sued for was not secret, and could have been discovered by an examination of the public records, an action therefor, not brought within five years, was barred.—Scott v. Boswell (Mo. App.) 521.

(H) COMMENCEMENT OF ACTION OR OTHER PROCEEDING.

§ 127. If an amended petition be filed after the period of limitations, changing the cause of action, it will be barred.—Wasson v. Boland (Mo. App.) 663.

§ 127. Failure to object to amendment of a petition is a waiver only of the question of plaintiff's right to amend and does not affect the running of the statute of limitations.—Wasson v. Boland (Mo. App.) 663.

§ 127. An amendment held to state a new cause of action within the statute of limitations, though both pleadings sought to hold defendant as a partner on a certificate of deposit.—Wasson v. Boland (Mo. App.) 663.

§ 127. A test as to whether an amendment states a new cause of action within the statute of limitations is whether evidence to prove the one will support the other.—Wasson v. Boland (Mo. App.) 663.

§ 127. That a cause of action set up in an amendment might have been joined as a separate count in the petition does not determine that the cause of action is not new within the statute of limitations.—Wasson v. Boland (Mo. App.) 663.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

§ 167. Two-year limitation bars an action on a constable's official bond.—Phillips v. Hail (Tex. Civ. App.) 190.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

Review of sufficiency of pleading on appeal or writ of error as dependent on objections raised in lower court, see Appeal and Error, § 194.

LIMITATION OF LIABILITY.

Of carrier, see Carriers, § 150.

LIQUIDATED DAMAGES.

See Damages, § 80.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

Pendency of other action ground for abatement, see Abatement and Revival, § 14.

LIVE STOCK.

Carriage of, see Carriers, §§ 207-230. Injuries from operation of railroads, see Railroads, §§ 411-446.

LOCAL ACTIONS.

See Venue, § 7.

LOCAL OPTION.

Traffic in intoxicating liquors, see Intoxicating Liquors, §§ 30-40.

LOGGING RAILROADS.

Application of fellow servant laws, see Master and Servant, § 180.

LOGS AND LOGGING.

Application of statute of frauds to sale of timber, see Frauds, Statute of, § 56.

Assignment of conveyance of timber, acknowledgment as prerequisite to registration, see Acknowledgment, § 53.

Cutting timber as trespass, see Trespass, § 52. Evidence of other offenses in prosecution for defacing brand, see Criminal Law, § 369.

Indictment in language of statute for defacing brand, see Indictment and Information, § 110.

§ 3. Where plaintiff purchased trees 12 inches in diameter at the stump where cut it was not liable for trees cut at a point where their diameter was less than 12 inches, if their diameter was sufficient at the point where trees are usually cut.—Cranor Smith Lumber Co. v. Frith (Ky.) 307.

§ 3. Instruments held to transfer interest in land, and so required to be registered.—Childers v. Wm. H. Coleman Co. (Tenn.) 1018.

§ 9. The paper for adoption of a brand by a timber dealer according to St. 1909, § 1409, subsec. 7 (Russell's St. § 5863), may be executed by the manager of a company.—Bennett v. Commonwealth (Ky.) 332.

§ 35. Where a third person bought a certain number of trees of plaintiff and sold them to defendant, who hired the third person and others to cut the trees, and they cut in addition other trees belonging to plaintiff, defendant was liable to plaintiff for the other trees, though plaintiff did not own the land upon which some of them stood.—Ford Lumber & Mfg. Co. v. Griggs (Ky.) 920.

§ 35. A verdict of \$725 held not excessive in an action for cutting and removing trees.—Ford Lumber & Mfg. Co. v. Griggs (Ky.) 920.

§ 51. Sawing off the end of a railroad tie containing the owner's brand held to constitute the offense denounced by St. 1909, § 1409, subsec. 11 (Russell's St. § 5867).—Bennett v. Commonwealth (Ky.) 332.

LOOKOUT.

On trains, duty as to trespassers, see Railroads, § 369.

LOST INSTRUMENTS.

§ 3. Equity will not establish a lost deed where it would convey no estate, but merely tend to show that the grantor thereby removed an apparent claim on the land under an entry afterwards canceled by the United States.—*Morris v. Parry* (Mo.) 430.

§ 7. In an action to restore a lost deed, it was sufficient to allege that defendant executed and delivered the alleged lost deed to plaintiff, without specifying the manner of the delivery.—*Stevens v. Fitzpatrick* (Mo.) 51.

§ 8. In an action to restore a lost deed claimed to have been executed by defendants' ancestor to plaintiff's husband, to land which the former held in trust for the latter, evidence held to prove plaintiff's case beyond a reasonable doubt.—*Stevens v. Fitzpatrick* (Mo.) 51.

§ 8. One seeking to restore an alleged lost deed must prove his case by a high standard of evidence.—*Stevens v. Fitzpatrick* (Mo.) 51.

LUMBER.

See Logs and Logging.

LUNATICS.

See Insane Persons.

MACHINERY.

Liability of employer for defects, see Master and Servant, §§ 101-129, 234-236.

MAINTENANCE.

See Champerty and Maintenance.

MALICE.

See Malicious Prosecution, § 32.

Element of liability for libel or slander, see Libel and Slander, § 45.

Element of murder, see Homicide, § 13.

MALICIOUS PROSECUTION.

See False Imprisonment.

I. NATURE AND COMMENCEMENT OF PROSECUTION.

§ 10. An action for damages will lie where one has been compelled to defend himself against a civil action of a defamatory nature, maliciously brought and maintained without probable cause.—*Bosch v. Miller* (Mo. App.) 506.

II. WANT OF PROBABLE CAUSE.

§ 25. "Probable cause" defined as used in connection with "malicious prosecution."—*Bosch v. Miller* (Mo. App.) 506.

V. ACTIONS.

Declarations by conspirators, see Evidence, § 253.

§ 64. Evidence held to show that defendant instituted and prosecuted suits against plaintiff without probable cause.—*Bosch v. Miller* (Mo. App.) 506.

§ 64. In an action for malicious prosecution, that defendant did not believe plaintiff guilty, or that defendant sought false evidence against plaintiff, need not be established by direct testimony.—*Cramer v. Barmon* (Mo. App.) 1179.

§ 67. One suing for malicious prosecution may recover for the mental distress suffered during the continuance of the criminal case obtained at his request to enable him to prepare his defense.—*Cramer v. Barmon* (Mo. App.) 1179.

§ 68. The awarding of exemplary damages in an action for malicious prosecution lies within the discretion of the jury.—*Bosch v. Miller* (Mo. App.) 506.

§ 71. In an action for malicious prosecution, where the facts are not in dispute, the question of a want of probable cause is one of law for the court; otherwise it is a mixed question of law and fact.—*Bosch v. Miller* (Mo. App.) 506.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

§ 1. The writ of mandamus is a statutory writ, and is granted as a matter of right in a proper case.—*Gay v. Haggard* (Ky.) 299.

§ 3. Mandamus held not to lie to compel the court to set aside a judgment dismissing a cause entered after the death of plaintiff.—*State ex rel Potter v. Riley* (Mo.) 647.

§ 12. Mandamus lies only to compel the performance of an existing legal duty and cannot be the means of imposing that duty.—*Missouri, K. & T. Ry. Co. of Texas v. Thompson* (Tex. Civ. App.) 618.

§ 19. On the retirement from office of the defendant in a mandamus proceeding, the writ must abate in the absence of statute permitting a substitution of his successor.—*Carpenter v. Kone* (Tex. Civ. App.) 203.

§ 23. A citizen may sue out a writ of mandamus when the right or duty in question affects the general public, as distinguished from the state.—*Gay v. Haggard* (Ky.) 299.

§ 23. A citizen may sue out a writ of mandamus to compel a road supervisor to let work on public roads at competitive bidding, and it is not necessary that plaintiff show a special interest or that the public will sustain damage if the act is not done.—*Gay v. Haggard* (Ky.) 299.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) ACTS AND PROCEEDINGS OF COURTS, JUDGES, AND JUDICIAL OFFICERS.

§ 51. Mandamus held a proper remedy to compel a justice to enter judgment on a verdict.—*State ex rel. Vanderburg v. Bidwell* (Mo. App.) 122.

(C) ACTS AND PROCEEDINGS OF PRIVATE CORPORATIONS AND INDIVIDUALS.

§ 133. As Rev. St. 1895, art. 322, providing for the issuance of a written receipt or bill of lading by a carrier when demanded, does not require it to specify the route desired by the shipper, there is no legal duty to incorporate the route in a bill of lading, and mandamus will not lie to compel it.—Missouri, K. & T. Ry. Co. of Texas v. Thompson (Tex. Civ. App.) 618.

§ 133. There being no statutory requirement imposing on a carrier the duty of delivering to a connecting carrier the routing instructions of the shipper, and the common-law duty, when delivering a through shipment to a connecting carrier, to also deliver a waybill or the routing instructions under which the shipment is to be made, not requiring such act, mandamus will not lie to enforce performance of such an act.—Missouri, K. & T. Ry. Co. v. Thompson (Tex. Civ. App.) 618.

§ 133. Mandamus *held* not to lie to enforce an abstract right of which the person asking it intended in the future to avail himself.—Missouri, K. & T. Ry. Co. of Texas v. Thompson (Tex. Civ. App.) 618.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

Review of ruling on demurrer to petition as dependent on finality of determination, see Appeal and Error, § 78.

§ 153. There is no statute in Texas permitting a successor in office to be substituted for his predecessor in a mandamus proceeding against the latter to compel the performance of an official duty, such as ordering an election under Acts 1903, p. 118, c. 93, art. 812, to determine the location of a county seat.—Carpenter v. Kone (Tex. Civ. App.) 203.

§ 154. A petition for a writ of mandamus need not expressly ask for the issuance of the writ.—Gay v. Haggard (Ky.) 299.

§ 154. A petition for a writ of mandamus to compel a road supervisor to let work on public roads at competitive bidding *held* to charge that the county worked its roads by taxation.—Gay v. Haggard (Ky.) 299.

§ 157. The notice of motion for the writ of mandamus, as provided by Civ. Code Prac. § 474, is unnecessary when the defendant voluntarily appears and demurs to the petition.—Gay v. Haggard (Ky.) 299.

§ 164. The matters well pleaded by relator in mandamus and not denied by respondent in express terms are admitted as true.—State ex rel. Potter v. Riley (Mo.) 647.

MANDATE.

See Mandamus.

To lower court or decision on appeal or writ of error, see Appeal and Error, § 1195.

MANSLAUGHTER.

See Homicide, §§ 33-43.

MARKET VALUE.

Of property, opinion evidence, see Evidence, §§ 472, 474.

MARRIAGE.

See Divorce; Husband and Wife.

License and return as documentary evidence in criminal prosecution, see Criminal Law, § 429.

§ 48. Marriage is a fact that may be proved by reputation, as well as by record, or by the testimony of those who saw the rites performed.—Caldwell v. Williams (Ky.) 932.

§ 50. Reputation of a marriage coupled with a man holding himself out as the husband and father of the family, is sufficient.—Caldwell v. Williams (Ky.) 932.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

See Work and Labor.

I. THE RELATION.

(A) CREATION AND EXISTENCE.

§ 1. Where a master gives the labor of his servant to a third person without losing the control of him, the servant does not become a servant of the third person.—Walker v. El Paso Electric Ry. Co. (Tex. Civ. App.) 554.

§ 1. An agreement between two employers *held* not to make an employé of one of them an employé of the other.—Walker v. El Paso Electric Ry. Co. (Tex. Civ. App.) 554.

§ 3. A contract of employment *held* to bind the employé to return advancements made by the employer.—Chicago Crayon Co. v. McNamara (Mo. App.) 118.

II. SERVICES AND COMPENSATION.

(B) WAGES AND OTHER REMUNERATION.

Jurisdiction of particular courts of action for conversion of property of employer thereby defeating lien for wages, see Courts, § 121.

§ 79. The redemption by the employer at bi-monthly pay days of checks issued to employes for services at a reduction of 10 per cent. of their face value is a violation of Const. § 244.—Kentucky Coal Mining Co. v. Mattingly (Ky.) 350.

§ 82. Under Sayles' Ann. Civ. St. 1897, art. 3339a, a superintendent of a brick company *held* not to have a lien for his wages.—Lindale Brick Co. v. Smith (Tex. Civ. App.) 568.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) NATURE AND EXTENT IN GENERAL.

Release after accrual of liability, evidence of fraud, see Release, §§ 55, 56.

§ 85. An employé suing his employer for negligence must show that the employer failed in the performance of some duty owing him as his employer.—Courter v. Tootle, Wheeler & Motter Mercantile Co. (Mo. App.) 506.

§ 88. A decedent *held* not to be an employé of an independent contractor but of defendant.—Keen's Adm'r v. Keystone Crescent Lumber Co. (Ky.) 356.

(B) TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK.

Power of Congress to legislate as to liability of employers in territories, see Territories, § 11.

§ 101. A master *held* required to exercise ordinary care in the selection of reasonably safe machinery and in keeping it in proper condition.—Wilcox v. Hebert (Ark.) 402.

§ 101. The liability of a master furnishing unsafe machinery, proximately causing an injury to a servant, *held* to depend on the care a man of ordinary prudence would exercise un-

§ 101. The master must use ordinary care to furnish the servant a reasonably safe place in which to work.—*Bruton's Adm'r v. Eddington-Griffiths Const. Co. (Ky.)* 1001.

§ 101. A master is not an insurer of the servant, nor is he required to exercise more than ordinary care to guard the servant against risk of injury.—*Reickert v. Hammond Packing Co. (Mo. App.)* 525.

§ 102. A master held required to exercise ordinary care in the selection of reasonably safe machinery and in keeping it in proper condition.—*Wilcox v. Hebert (Ark.)* 402.

§ 102. The liability of a master furnishing unsafe machinery, proximately causing an injury to a servant, held to depend on the care a man of ordinary prudence would exercise under similar circumstances.—*Wilcox v. Hebert (Ark.)* 402.

§ 102. Statement of master's duty as to furnishing safe appliances.—*Williams Coal Co. v. Jones (Ky.)* 342.

§ 102. The master must use ordinary care to furnish the servant a reasonably safe place in which to work.—*Bruton's Adm'r v. Eddington-Griffiths Const. Co. (Ky.)* 1001.

§ 107. In an action for injuries to a servant in a packing plant, by caustic soda solution burning his foot, defendant held negligent in permitting the floor of the room to fall into disrepair.—*Reickert v. Hammond Packing Co. (Mo. App.)* 525.

§ 108. The right of an employé to recover for damages arising from defective machinery stated.—*Texas & N. O. R. Co. v. Geiger (Tex. Civ. App.)* 179.

§ 111. Duty of railroad company to keep in repair oil boxes on freight cars, so that they may be safely used as a step in mounting the car, stated.—*Ft. Worth & R. G. Ry. Co. v. Day (Tex. Civ. App.)* 739.

§ 112. The furnishing of a defective hand car to sectionmen held negligence.—*St. Louis Southwestern Ry. Co. of Texas v. Browning (Tex. Civ. App.)* 245.

§ 112. A street car company's duty to exercise care to have its track in proper condition for use by its employes, and make necessary inspection thereof, stated.—*Rapid Transit Ry. Co. v. Edwards (Tex. Civ. App.)* 838.

§ 113. A railroad company must use reasonable care to have its roadbed free of obstructions calculated to injure its employes.—*Ft. Worth & D. O. Ry. Co. v. Anderson (Tex. Civ. App.)* 1113.

§ 125. It was a street car company's duty to exercise ordinary care to discover a railroad car dangerously near its track, and remove it, and it could not escape liability for injuries to employes caused by the proximity of the car, on the ground that it had no actual notice thereof, and could not control the movement of the railroad car.—*Rapid Transit Ry. Co. v. Edwards (Tex. Civ. App.)* 838.

§ 128. Negligence in permitting the drawhead of a flat car to become out of repair held not ground for recovery by an employé whose foot was caught between the drawheads.—*McGrory v. Ultima Thule, A. & M. Ry. Co. (Ark.)* 710.

§ 129. A railroad company held not liable for injuries to a brakeman after his fall from the top of a moving car, where he ran along the track until he stepped into a hole and was run over.—*At-*

§ 131. In an action for injuries to an employé, evidence held, as a matter of law, to show that the employer was not guilty of actionable negligence.—*Courter v. Tootle, Wheeler & Motter Mercantile Co. (Mo. App.)* 505.

§ 137. Trainmen held to have right to assume that brakeman, sent to flag train, will be watchful.—*St. Louis & S. F. R. Co. v. Finley (Tenn.)* 692.

(D) WARNING AND INSTRUCTING SERVANT.

§ 150. In an action for injuries to a servant, defendant held negligent in failing to warn plaintiff of danger of his work.—*Houston & T. C. R. Co. v. Malloy (Tex. Civ. App.)* 721.

§ 153. In an action for injuries to a servant in a packing plant by caustic soda solution burning his foot, defendant held negligent in failing to warn plaintiff of the danger.—*Reickert v. Hammond Packing Co. (Mo. App.)* 525.

§ 157. Timely warning of danger is a defense to action for injury to an employé.—*Wagoner v. Sneed (Tex. Civ. App.)* 547.

(E) FELLOW SERVANTS.

§ 177. Master held not responsible to a vice principal for the negligence of another servant who is the latter's subordinate.—*McGrory v. Ultima Thule, A. & M. Ry. Co. (Ark.)* 710.

§ 180. A sectionman, while using a push car, held not engaged in the work of operating a car, within the exception of the fellow servant rule of *Batts' Ann. Civ. St. art. 4560ea*.—*Texarkana & Ft. S. Ry. Co. v. Anderson (Tex.)* 127.

§ 180. The word "railroad" as used in *Sayles' Ann. Civ. St. 1897, art. 4560h*, held, to include a logging railroad.—*Keystone Mills Co. v. Chambers (Tex. Civ. App.)* 178.

§ 180. The statute on the subject of fellow servants, relating to railway employes, held not applicable to the case of an injury to a sawmill employé by a co-employé.—*Quinn v. Glenn Lumber Co. (Tex. Civ. App.)* 733.

§ 180. Fellow servants held to be operating cars within *Rev. St. 1895, art. 4560f*, exempting persons engaged in operating the cars from the fellow-servant rule.—*Texas & P. Ry. Co. v. Johnson (Tex. Civ. App.)* 1117.

§ 181. One employed by a lumber company to cut and scale timber was not a fellow servant of employes operating a logging train.—*Keystone Mills Co. v. Chambers (Tex. Civ. App.)* 178.

§ 189. Certain proof held not to show that an employé was a vice principal of the employer.—*Quinn v. Glenn Lumber Co. (Tex. Civ. App.)* 733.

§ 201. An act of an employé held not the direct and proximate cause of an injury to a co-employé.—*Quinn v. Glenn Lumber Co. (Tex. Civ. App.)* 733.

§ 202. Duty of trainmen, on discovery of fellow servant on track, stated.—*St. Louis & S. F. R. Co. v. Finley (Tenn.)* 692.

(F) RISKS ASSUMED BY SERVANT.

§ 203. Where the manner of doing the work is ordinarily a reasonably safe one, the risks of danger attending the work are assumed by the employé.—*Courter v. Tootle, Wheeler & Motter Mercantile Co. (Mo. App.)* 505.

§ 204. Act April 24, 1905 (*Laws 1905, p. 386, c. 163*), relating to assumption of risk, held

not limited to cases of defective machinery, but applicable to a brakeman's action for injuries caused by slipping in a hole in the track while coupling cars.—*Gulf, C. & S. F. Ry. Co. v. Dickens* (Tex. Civ. App.) 612, 618.

§ 205. Where a servant, who was firing a defective boiler, called the foreman's attention to escaping steam and was assured that there was no danger, he had a right to rely upon the assurance.—*Keen's Adm'r v. Keystone Crescent Lumber Co.* (Ky.) 355.

§ 210. A section hand held not to assume the risk of injury from a defective hand car.—*St. Louis Southwestern Ry. Co. of Texas v. Brown* (Tex. Civ. App.) 245.

§ 213. In an action for injuries to a servant, plaintiff held not to have assumed the risk.—*Houston & T. C. R. Co. v. Malloy* (Tex. Civ. App.) 721.

§ 217. Where a master knows that machinery is defective, the servant continuing to work with knowledge of the defect held not precluded from recovery for injuries sustained.—*Keen's Adm'r v. Keystone Crescent Lumber Co.* (Ky.) 355.

§ 217. Servant held to have assumed risk of his injury.—*Wallace v. South Covington & C. St. Ry. Co.* (Ky.) 962.

§ 217. An employé in a sawmill, injured while adjusting a guide pin of a circular saw, held to have assumed the risk as a matter of law.—*Quinn v. Glenn Lumber Co.* (Tex. Civ. App.) 733.

§ 217. An employé, voluntarily and knowingly attempting to use defective appliances, assumes the risk of injury.—*Quinn v. Glenn Lumber Co.* (Tex. Civ. App.) 733.

§ 217. An employé who knows of the negligent act of his employer, and who appreciates the danger arising therefrom, assumes the risks of the situation.—*Mt. Marion Coal Mining Co. v. Holt* (Tex. Civ. App.) 825.

§ 217. An employé in a mine killed by falling into a shaft held to have assumed the risk as a matter of law.—*Mt. Marion Coal Mining Co. v. Holt* (Tex. Civ. App.) 825.

§ 217. A lineman of a telephone company, shocked, while climbing a telephone pole, by a city wire coming in contact with an iron on the pole, and the wire of another company being in contact with the city wire, held to have assumed the risk.—*Ft. Worth Light & Power Co. v. Moore* (Tex. Civ. App.) 831.

§ 217. A servant held not to have assumed the risk of the danger he was subjected to by a set screw projecting from a revolving shaft.—*Waggoner v. Porterfield* (Tex. Civ. App.) 1094.

§ 219. A switchman held not to have assumed the risk of injury from the use of a defective oil box as a step in mounting a freight car.—*Ft. Worth & R. G. Ry. Co. v. Day* (Tex. Civ. App.) 739.

§ 219. Where a street car conductor did not have actual knowledge of the dangerous proximity of a railroad car, which struck him as his street car passed it, he did not assume the risk of injury, unless its nearness to the street car track was so obvious that he could have seen it by reasonable observation.—*Rapid Transit Ry. Co. v. Edwards* (Tex. Civ. App.) 838.

(G) CONTRIBUTORY NEGLIGENCE OF SERVANT.

§ 229. It is the duty of a switchman to exercise ordinary care to avoid injury to himself.—*Ft. Worth & D. C. Ry. Co. v. Anderson* (Tex. Civ. App.) 1113.

§ 234. An employé is not charged with knowledge of defects in machinery because the

use of ordinary care would disclose them.—*Texas & N. O. R. Co. v. Geiger* (Tex. Civ. App.) 179.

§ 234. A street car conductor must use that care for his safety while engaged in his work which a person of ordinary prudence would use under similar circumstances, and is chargeable with knowledge of what he could have learned by such care.—*Rapid Transit Ry. Co. v. Edwards* (Tex. Civ. App.) 838.

§ 235. A servant held not required to exercise diligence to discover defects in appliances furnished by the master.—*Waggoner v. Sneed* (Tex. Civ. App.) 547.

§ 236. A servant must use reasonable care to avoid danger to be apprehended from defects which are open to observation, and which can by the use of ordinary care be avoided by him, as well as by his master.—*Courter v. Tootle, Wheeler & Motter Mercantile Co.* (Mo. App.) 505.

§ 236. Duty of brakeman, ordered to flag train, stated.—*St. Louis & S. F. R. Co. v. Finley* (Tenn.) 692.

§ 236. That a conductor could have discovered by investigation the dangerous proximity of a coal car to the street car track held not to prevent his recovery for injuries sustained from coming in contact with it, unless the danger was obvious.—*Rapid Transit Ry. Co. v. Edwards* (Tex. Civ. App.) 838.

§ 240. It is negligence for a switchman to attempt to ride on the break beam of an approaching car, instead of using the steps on the side.—*Ft. Worth & D. C. Ry. Co. v. Anderson* (Tex. Civ. App.) 1113.

§ 245. The act of a servant in obeying the command of his superior held not negligence per se where the danger is not patent.—*Houston & T. C. R. Co. v. Malloy* (Tex. Civ. App.) 721.

§ 245. An employé held not guilty of contributory negligence in tying a rope to a brace for the purpose of moving it in the manner directed by the master's foreman.—*Houston & T. C. R. Co. v. Johnson* (Tex. Civ. App.) 1150.

§ 248. Brakeman sent forward to flag train, on going to sleep on track, cannot complain that crew of such train were negligent in failing to keep lookout.—*St. Louis & S. F. R. Co. v. Finley* (Tenn.) 692.

(H) ACTIONS.

Application of instruction to case, see Trial, § 253.

Assumption by judge as to facts and instructions, see Trial, § 191.

Instructions excluding or ignoring issues or evidence, see Trial, § 253.

Instructions on weight of evidence, see Trial, § 194.

Opinion evidence, see Evidence, § 472.

Pleading foreign statutes, see Statutes, § 281.

Removal of cause from state to federal court, see Removal of Causes, § 19.

§ 256. A petition against a railroad company for injuries to a railroad employé, if he gives "notice in writing of the injury so sustained," is insufficient if it fails to allege the giving of such notice.—*Mathieson v. St. Louis & S. F. Ry. Co.* (Mo.) 9.

§ 257. A petition, in an action for personal injuries, held not to show that plaintiff at the time of the accident was an employé of defendant.—*Walker v. El Paso Electric Ry. Co.* (Tex. Civ. App.) 554.

§ 264. In an action by an engine watcher for personal injuries, held, that the rejected rules of defendant included in his application for employment were relevant, and should have been admitted.—*Southern Kansas Ry. Co. of Texas v. McSwain* (Tex. Civ. App.) 874.

—Southern Kansas Ry. Co. of Texas v. McSwain (Tex. Civ. App.) 874.

§ 285. The fact that a switchman is injured by having his foot caught in a wire on the track is not sufficient evidence of negligence on the part of the railroad company.—Ft. Worth & D. C. Ry. Co. v. Anderson (Tex. Civ. App.) 1113.

§ 287. Evidence, in an action by a railroad employe for injuries of the amount for which he had settled a similar claim against another railroad company, *held* inadmissible.—Houston & T. C. R. Co. v. Johnson (Tex. Civ. App.) 1150.

§ 270. Where a servant was injured from a projecting set screw on a shaft, the exclusion of evidence to show whether the screw could be produced in court *held* not error.—Waggoner v. Porterfield (Tex. Civ. App.) 1094.

§ 274. Evidence of a servant's knowledge, or means of knowledge, of the presence of a set screw by which he was injured *held* admissible.—Waggoner v. Porterfield (Tex. Civ. App.) 1094.

§ 276. The furnishing of a defective hand car *held* to be the proximate cause of defendant's injury.—St. Louis Southwestern Ry. Co. of Texas v. Browning (Tex. Civ. App.) 245.

§ 276. Evidence *held* insufficient to justify a finding that a switch was closed by a brakeman and afterwards forcibly opened by an unauthorized person.—Houston & T. C. R. Co. v. Shapard (Tex. Civ. App.) 696.

§ 276. In a conductor's action against a street car company for injuries by being struck by a coal car on a railroad switch near the street car track, evidence *held* to show that defendant's negligence in not discovering the proximity of the car and having it removed, concurring with the negligence of the railroad company, proximately caused plaintiff's injury.—Rapid Transit Ry. Co. v. Edwards (Tex. Civ. App.) 838.

§ 277. In an action for personal injuries, evidence *held* to warrant a verdict for defendant, on the theory that plaintiff was defendant's servant and a fellow servant of the one guilty of the negligence resulting in the injury.—Walker v. El Paso Electric Ry. Co. (Tex. Civ. App.) 554.

§ 278. In a conductor's action against a street car company for injuries by being struck by a coal car on a railroad switch near the street car track, evidence *held* to show negligence of defendant in not discovering the proximity of the railroad car to its tracks, and having it removed.—Rapid Transit Ry. Co. v. Edwards (Tex. Civ. App.) 838.

§ 290. In a conductor's action for injuries sustained by striking a railroad car on a switch near the street car track, evidence *held* to show that plaintiff did not assume the risk of injury.—Rapid Transit Ry. Co. v. Edwards (Tex. Civ. App.) 838.

§ 281. Evidence *held* insufficient to show that plaintiff, a switchman, was guilty of contributory negligence.—Ft. Worth & R. G. Ry. Co. v. Day (Tex. Civ. App.) 739.

§ 281. In a conductor's action for injuries by striking a railroad car on a switch near the street car track, evidence *held* to show that plaintiff was not negligent in not discovering the dangerous proximity of the car.—Rapid Transit Ry. Co. v. Edwards (Tex. Civ. App.) 838.

§ 281. Evidence, in an action for injury to an employe, *held* sufficient to justify a finding that plaintiff was not negligent.—Houston & T. C. R. Co. v. Johnson (Tex. Civ. App.) 1150.

—Southern Kansas Ry. Co. of Texas v. McSwain (Tex. Civ. App.) 874.

§ 286. In an action for the death of a servant, whether the master used ordinary care to furnish a reasonably safe place to work, *held*, under the evidence, to be for the jury.—Bruton's Adm'r v. Eddington-Griffiths Const. Co. (Ky.) 1001.

§ 286. Evidence in an action by a servant for personal injuries *held* to require a directed verdict for defendant.—St. Louis & S. F. R. Co. v. Finley (Tenn.) 692.

§ 286. Evidence, in an action for the death of a trapper by the derailment of coal cars in defendant's mine, *held* sufficient to go to the jury as to defendant's negligence.—Texas & Pacific Coal Co. v. Kowsikowski (Tex. Civ. App.) 829.

§ 286. Whether a master was negligent in permitting a set screw to project from a revolving shaft, resulting in the servant's injury, *held* for the jury.—Waggoner v. Porterfield (Tex. Civ. App.) 1094.

§ 289. Under the evidence in an action for injury to an employe, *held*, there should have been a peremptory instruction for defendant for insufficient evidence.—Williams Coal Co. v. Jones (Ky.) 342.

§ 289. Whether one employed by a lumber company was guilty of contributory negligence in being on the engine of a logging train *held* a jury question.—Keystone Mills Co. v. Chambers (Tex. Civ. App.) 178.

§ 289. A street car conductor was not negligent as a matter of law by stepping down onto the running board without looking to see whether he was in danger from a railroad car standing on a switch within 12 inches of the perpendicular handles of the street car.—Rapid Transit Ry. Co. v. Edwards (Tex. Civ. App.) 838.

§ 289. Evidence as to a servant's contributory negligence *held* for the jury.—Waggoner v. Porterfield (Tex. Civ. App.) 1094.

§ 291. Under the facts, *held*, an instruction as to duty of master to furnish safe appliances should have been omitted as not within the case made by the pleadings and evidence.—Williams Coal Co. v. Jones (Ky.) 342.

§ 291. An instruction in an action for a servant's injuries *held* not objectionable as placing the burden of proving absence of negligence on defendant.—Houston & T. C. R. Co. v. Shapard (Tex. Civ. App.) 596.

§ 291. In an action for injuries to an employe, an instruction as to negligence *held* authorized by the pleadings.—Houston & T. C. R. Co. v. Johnson (Tex. Civ. App.) 1150.

§ 291. An instruction, in an action for injuries to an employe, as to the burden of proof as to contributory negligence, *held* not erroneous.—Houston & T. C. R. Co. v. Johnson (Tex. Civ. App.) 1150.

§ 293. In an action for injury to a minor employe while operating a revolving saw, allegations *held* to justify an instruction.—Texas & N. O. R. Co. v. Geiger (Tex. Civ. App.) 179.

§ 293. An instruction, in an action for injury to a minor employe while operating a revolving saw, *held* not erroneous as disregarding the employer's knowledge or means of knowledge of a danger.—Texas & N. O. R. Co. v. Geiger (Tex. Civ. App.) 179.

to a minor employee *held* properly refused as ignoring his youth and inexperience.—*Texas & N. O. R. Co. v. Geiger* (Tex. Civ. App.) 179.

§ 293. In an action for injuries to a servant, an instruction *held* not objectionable as presenting the issue of defendant's negligence in not "properly" closing a switch.—*Houston & T. C. R. Co. v. Shapard* (Tex. Civ. App.) 596.

§ 293. In a brakeman's action for injuries by stepping in a hole in the track while coupling cars, an instruction that the company must keep its "approaches" in a safe condition *held* to mean those places where employes must approach the track to work, and not such approaches as crossings.—*Gulf, C. & S. F. Ry. Co. v. Dickens* (Tex. Civ. App.) 612, 618.

§ 293. In a street car conductor's action against the company for injuries caused by coming in contact with a coal car on a railroad switch near the street car track, a requested instruction *held* properly refused as tending to mislead the jury.—*Rapid Transit Ry. Co. v. Edwards* (Tex. Civ. App.) 838.

§ 293. In an action for injuries to a servant, an instruction *held* not to be erroneous.—*Houston & T. C. R. Co. v. Johnson* (Tex. Civ. App.) 1150.

§ 295. An instruction in an action for injuries to a servant *held* objectionable as imposing on the master too high a degree of care.—*Reickert v. Hammond Packing Co.* (Mo. App.) 525.

§ 295. Rights of an employer sued for injury to an employe on the theory that the injury was caused by dangers arising from defects in a machine, stated.—*Texas & N. O. R. Co. v. Geiger* (Tex. Civ. App.) 179.

§ 295. The defense that a servant knew or should have known of defects in an appliance by which he was injured cannot be more fairly presented than by the ordinary charge of assumed risk.—*Waggoner v. Sneed* (Tex. Civ. App.) 547.

§ 296. In an action for death of a servant, an instruction requiring that the engineer should have used all the means at his command to have stopped the engine after being notified of deceased's perilous situation *held* not objectionable as imposing too high a degree of care.—*San Antonio & A. P. Ry. Co. v. Hodges* (Tex. Civ. App.) 767.

§ 296. An instruction as to contributory negligence of an employe *held* not erroneous.—*Houston & T. C. R. Co. v. Johnson* (Tex. Civ. App.) 1150.

MATERIALITY.

Of alteration of written instrument, see *Alteration of Instruments*.

MEASURE OF DAMAGES.

See *Damages*, §§ 95, 112.

MECHANICS' LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§ 5. The rule calling for a strict construction of statutes in derogation of the common law does not apply to mechanic's lien statutes.—*Braeckel v. Shade* (Mo. App.) 1196.

§ 13. Creditors of a contractor constructing a public building *held* not entitled to a lien un-

§ 124. Under Rev. St. 1899, §§ 4207, 4221 (Ann. St. 1906, pp. 2290, 2311), a mechanic's lien is not lost by a mistake in the first name of the owner in the notices of lien, where the owner was not misled, and no rights of third persons intervened.—*Braeckel v. Shade* (Mo. App.) 1196.

MEDICAL BOOKS.

As documentary evidence, see *Evidence*, § 363.

MEMORANDA.

Required by statute of frauds, see *Frauds, Statute of*, §§ 100-118.

MENTAL SUFFERING.

Element of damages, see *Damages*, §§ 48-54.

Element of damages for malicious prosecution, see *Malicious Prosecution*, § 67.

MERCANTILE AGENCIES.

§ 1. A corporation *held* engaged in reporting on the credit of persons engaged in business within Ky. St. 1906, § 4224 (Russell's St. § 6157), requiring persons or concerns so engaged to secure a license.—*United States Fidelity & Guaranty Co. v. Commonwealth* (Ky.) 1000.

MERGER.

Of beneficial associations, sufficiency of service of process by publication in action to restrain, see *Process*, § 87.

Of cause of action in judgment, see *Judgment*, §§ 570-622.

Of insurance associations, see *Insurance*, §§ 694, 696.

MILITIA.

Right of member of national guards employed in service of United States Army to vote, see *Elections*, § 74.

MINES AND MINERALS.

Presumptions as to laws of other states, see *Evidence*, § 80.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(A) RIGHTS AND REMEDIES OF OWNERS.

§ 49. The possession, by a grantor of a mineral interest and mining rights in property, of the surface, inures to the benefit of the grantee of such rights as against third parties.—*McBurney v. Glenmary Coal & Coke Co.* (Tenn.) 694.

(B) CONVEYANCES IN GENERAL.

Right of grantee of minerals to way of necessity over land of stranger, see *Easements*, § 18.

§ 55. Conveyance of minerals *held* not to create a distinct estate.—*McBurney v. Glenmary Coal & Coke Co.* (Tenn.) 694.

§ 55. Conveyance of particular mineral by specific term *held* to pass only that mineral.—*McBurney v. Glenmary Coal & Coke Co.* (Tenn.) 694.

§ 55. Where a mineral which has been conveyed is removed from the land, the owner of

such mineral ceases to have any other rights in the land.—*McBurney v. Glenmary Coal & Coke Co. (Tenn.)* 694.

(C) LEASES, LICENSES, AND CONTRACTS.

§ 62. Plaintiffs, suing on a contract to sublease land to them for mining, *held* entitled to recover for defendants' failure to comply with the contract caused by the subsequent forfeiture of their lease, though at the date of the contract they had a good and sufficient lease.—*Ragland v. Conqueror Zinc Cos. (Mo. App.)* 1194.

§ 62. A covenant for quiet enjoyment *held* to be inferable from a contract to sublease land for mining.—*Ragland v. Conqueror Zinc Cos. (Mo. App.)* 1194.

§ 62. For breach of contract to sublease on the contingency that sublessees found paying ores, *held*, that they might recover for expenditures.—*Ragland v. Conqueror Zinc Cos. (Mo. App.)* 1194.

§ 62. In an action for breach of contract to sublease for mining on the contingency of finding paying ores, an instruction that the measure of damages was plaintiffs' actual expense incurred for work *held* proper.—*Ragland v. Conqueror Zinc Cos. (Mo. App.)* 1194.

§ 63. Where a lease of mineral rights contained a provision for forfeiture, lessors were entitled to sue for possession on breach of such condition.—*Trumbo v. Persons (Ky.)* 916.

MINORS.

See Infants.

MISCARRIAGE

As element of damage resulting from injuries to female, see Damages, § 32.
Excessive damages for injuries, see Damages, § 130.

MISJOINDER.

Of parties, see Parties, § 92.

MISREPRESENTATION.

By insured, see Insurance, §§ 255-282.

MISTAKE.

In contract, see Contracts, § 93.
In contract of sale, see Sales, § 36.
Parol or extrinsic evidence, see Evidence, § 433.

MITIGATION.

Of damages, see Damages, §§ 62, 64.

MIXED TRAIN.

Care required of carrier, see Carriers, § 280.

MODIFICATION.

Of contract, see Contracts, § 247; Vendor and Purchaser, §§ 84-87.
Of judgment or order on appeal, see Appeal and Error, §§ 1151, 1152.

MONEY RECEIVED.

Recovery of tax paid, see Taxation, § 529.

§ 7. Where plaintiff in execution recovered from a defaulting bidder the difference between his bid and the price obtained on resale, which, under the statute, belonged to defendant in execution, the execution defendant, not being a party to the action against the defaulting bidder, could recover from plaintiff in execution,

in a proper proceeding, the amount wrongfully recovered by him.—*Shanley v. York (Tex. Civ. App.)* 146.

§ 19. Instructions as to defendant's liability for money retained out of the proceeds of a loan made to plaintiff *held* sufficient.—*Stevenson v. Moore (Ky.)* 951.

MONOPOLIES.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

Fees of prosecuting attorneys in action for penalties, see District and Prosecuting Attorneys, § 5.

MONTH.

Tenancy from month to month, see Landlord and Tenant, § 116.

MORTGAGES.

Of homestead, see Homestead, §§ 118, 191.

Of personal property, see Chattel Mortgages.

Sale of decedent's land to pay mortgage debt, right of mortgagee to assert invalidity of judgment, see Executors and Administrators, § 349.

Sale of decedent's land to pay mortgage debt, setting aside invalid judgment, see Executors and Administrators, § 348.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF CONVEYANCES AS SECURITY.

Finality of decree adjudging deeds to be mortgages, see Judgment, § 217.

§ 27. The provision in a deed charging the grantee with the support of a person named as a part of the consideration for the deed creates a lien on the land for the payment of such support.—*Webster v. Cadwallader (Ky.)* 327.

§ 27. Under the provision in a deed, *held*, that the obligation to furnish support therein provided for does not exist and become a lien on the premises conveyed until the support is asked for.—*Webster v. Cadwallader (Ky.)* 327.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 298. A mortgage creditor, who collected on insurance on the improvements more than enough to extinguish the principal of the debt, *held* not entitled to collect more interest than that which had accrued at the collection of the policy.—*Dallas Trust & Savings Bank v. Story (Tex. Civ. App.)* 781.

X. FORECLOSURE BY ACTION.

(C) JURISDICTION AND VENUE.

§ 420. A decree foreclosing a real estate mortgage in the county court *held* void.—*Womble v. Harsey (Tex. Civ. App.)* 764.

(E) PARTIES AND PROCESS.

Necessity of appointment of administrator to represent deceased mortgagor, see Executors and Administrators, § 3.

§ 427. The widow of a mortgagor is a necessary party in foreclosure.—*Hardy v. Atkinson (Mo. App.)* 516.

(F) PLEADING AND EVIDENCE.

§ 445. That a petition to foreclose a mortgage failed to set up an assignment to the mortgagee of certain vendor's lien notes, of the

(I) JUDGMENT OR DECREE AND EXECUTION.

§ 497. A mortgage foreclosure judgment establishes conclusively both the debt and the lien.—*Blair v. Guaranty Savings, Loan & Investment Co.* (Tex. Civ. App.) 608.

(J) SALE.

§ 516. The heirs of a deceased mortgagor held entitled to purchase the mortgaged premises at a foreclosure sale.—*Bank of Pine Bluff v. Levi* (Ark.) 250.

§ 518. Where there is an error in the apportionment of a walk improvement, the property owner is not liable for interest until the error has been corrected.—*Jackson's Adm'rs v. McHargue* (Ky.) 944.

§ 529. The price paid by the purchaser at a mortgage foreclosure sale held not sufficiently inadequate to justify setting aside the sale on the original hearing of the report of the commissioner.—*Bank of Pine Bluff v. Levi* (Ark.) 250.

§ 534. A mortgage foreclosure held to pass the fee to the purchaser.—*Hardy v. Atkinson* (Mo. App.) 516.

(L) DISPOSITION OF PROCEEDS AND SURPLUS.

Homestead right of widow of mortgagor, see Homestead, § 121.

Right of widow of mortgagor to dower in surplus proceeds, see Dower, § 48.

XL REDEMPTION.

Right to contribution as against heirs of mortgagor on redemption by widow to satisfy dower, see Descent and Distribution, § 152.

§ 504. Under Ky. St. 1909, § 2364 (Russell's St. § 80), a mortgagor's widow who joined in the mortgage and was entitled to dower in the surplus proceeds of the sale of mortgaged property held entitled to redeem from the foreclosure sale.—*Hiller v. Nelson* (Ky.) 292.

§ 605. Where one entitled to redeem mortgaged property has paid over to the county clerk the full amount of the redemption money, it is the purchaser's duty to accept it, and the court should require her to do so if she refuses.—*Hiller v. Nelson* (Ky.) 292.

MOTIONS.

Relating to pleadings, see Pleading, § 364.

For particular purposes or relief.

Arrest of judgment in criminal prosecutions, see Criminal Law, §§ 972, 974.

Change of venue in civil actions, see Venue, §§ 32, 71.

Dissolution of injunction, see Injunction, §§ 171, 172.

New trial in civil actions, see New Trial, §§ 119-151.

New trial in criminal prosecutions, see Criminal Law, §§ 905-974.

Opening or setting aside default judgment, see Judgment, §§ 143, 170.

Presentation of objections for review, see Appeal and Error, §§ 193-237.

Quashing indictment or information, see Indictment and Information, § 140.

Quashing or vacating execution, see Execution, § 171.

Intersecting tracks.
Street railroads, see Street Railroads.
Water supply, see Waters and Water Courses, §§ 183-206.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(B) TERRITORIAL EXTENT AND SUBDIVISIONS, ANNEXATION, CONSOLIDATION, AND DIVISION.

§ 35. In action for death at railroad crossing, evidence tending to show ordinance including territory within city limits and exercise of municipal functions over the territory held admissible.—*Missouri, K. & T. Ry. Co. of Texas v. Bratcher* (Tex. Civ. App.) 1091.

§ 35. In action for death at railroad crossing, evidence held to show exercise of jurisdiction over place of accident by municipal corporation under color of law.—*Missouri, K. & T. Ry. Co. of Texas v. Bratcher* (Tex. Civ. App.) 1091.

§ 35. Right of municipal corporation to exercise functions of government over certain territory held not subject to collateral attack.—*Missouri, K. & T. Ry. Co. of Texas v. Bratcher* (Tex. Civ. App.) 1091.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 57. A municipal corporation held authorized to exercise only such powers as are granted in express words, or are necessarily fairly implied in or incident to such as are expressly granted.—*City of Chillicothe ex rel. Meek v. Henry* (Mo. App.) 486.

V. OFFICERS, AGENTS, AND EMPLOYÉS.

Right of alderman to act as election judge, see Elections, § 51.

VII. CONTRACTS IN GENERAL.

§ 243. The board of trustees of a town cannot bind itself by parol.—*Fiscal Court of Breckenridge County v. Board of Trustees of Town of Hardinsburg* (Ky.) 298.

§ 247. An obligation in excess of \$50, incurred by a town without complying with St. 1909, § 3699 (Russell's St. § 1698), held invalid and nonenforceable.—*Fiscal Court of Breckenridge County v. Board of Trustees of Town of Hardinsburg* (Ky.) 298.

IX. PUBLIC IMPROVEMENTS.

(C) CONTRACTS.

§ 330. The selection by the board of public works of bricks of a particular manufacturer, to the exclusion of all others, held illegal.—*Glennon v. Gates* (Mo. App.) 98.

§ 362. The time stated in a contract for street improvements held to be of the essence of the contract, but that the city council may extend the time.—*Jones v. Paul* (Mo. App.) 521.

(E) ASSESSMENTS FOR BENEFITS, AND SPECIAL TAXES.

Priority of lien as against bona fide purchaser, see Vendor and Purchaser, § 233.

§ 414. The macadamizing on a street held under the evidence, reconstructed, and not merely repaired, rendering a division of the street into sections for assessment purpose, as re-

1900, pp. 8133, 8184), construed, and held to contemplate that the property to be charged with a street improvement is the property with its frontage on the street improved.—City of Chillicothe ex rel. Meek v. Henry (Mo. App.) 486.

§ 444. Under Ann. St. 1906, § 5859, it is an essential to the power to assess for street paving that plans and specifications for the work be on file with the city clerk when the contract is let.—Jones v. Plummer (Mo. App.) 109.

§ 450. Statement of what, under Ky. St. 1909, § 2833 (Russell's St. § 895), should be the assessment district for a street improvement.—Bullitt v. Gosnell (Ky.) 329.

§ 506. Under Ky. St. 1909, § 2984 (Russell's St. § 897), held, that error of the general council in laying off an assessment district for a street improvement could be corrected.—Bullitt v. Gosnell (Ky.) 329.

§ 511. Error in making an assessment district, under Ky. St. 1909, § 2833 (Russell's St. § 895), for a street improvement, held prejudicial.—Bullitt v. Gosnell (Ky.) 329.

§ 519. The court held without authority to postpone the lien of a contractor for a street improvement in favor of a subsequent purchaser, but the older equity must prevail.—Hughes v. Wallace (Ky.) 324.

(F) ENFORCEMENT OF ASSESSMENTS AND SPECIAL TAXES.

§ 538. The presumption being that plans and specifications for street paving, etc., were on file with the city clerk when the contract was let, as required by Ann. St. 1906, § 5859, the burden is on one seeking to restrain the enforcement of tax bills issued in payment for the work to remove the presumption.—Jones v. Plummer (Mo. App.) 109.

§ 538. In an action to restrain the enforcement of tax bills issued in payment for street paving, certain testimony held insufficient to show that plans and specifications for the work were not on file with the city clerk when the contract was let as required by Ann. St. 1906, § 5859.—Jones v. Plummer (Mo. App.) 109.

§ 564. Laches held not to bar the right to enforce a lien for a street improvement as against a subsequent purchaser of the property.—Hughes v. Wallace (Ky.) 324.

§ 567. The defense to an action to enforce the lien of a special tax bill for a street improvement that the power to impose a tax never existed is available under the general denial.—City of Chillicothe ex rel. Meek v. Henry (Mo. App.) 486.

§ 567. Under Rev. St. 1899, § 5986 (Ann. St. 1906, p. 3022), a petition on a special tax bill held not defective for failure to state facts showing the city's authority to pass the ordinance providing for the improvement in question.—Barber Asphalt Pav. Co. v. Kihlberg Karlsbad Bath Co. (Mo. App.) 519.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) STREETS AND OTHER PUBLIC WAYS.

Acquisition of rights by prescription, see Easements, § 8.

§ 668. The rights of an abutting owner as to use of street stated.—Button v. City of Louisville (Ky.) 977.

§ 669. The court, in determining whether the obstruction of a street by an abutting owner improving his property is unreasonable, will give weight to the judgment of the city authorities and to the universal custom in the erection of buildings in cities.—Button v. City of Louisville (Ky.) 977.

§ 671. Evidence held to show title in plaintiff, entitling him to maintain action to remove building in street obstructing entrance to his premises.—Brunner Fire Co. v. Payne (Tex. Civ. App.) 602.

XII. TORTS.

(A) EXERCISE OF GOVERNMENTAL AND CORPORATE POWERS IN GENERAL.

§ 739. A city owning its own waterworks held not liable for failure to furnish sufficient water supply to extinguish a fire.—Greenville Water Co. v. Beckham (Tex. Civ. App.) 889.

(C) DEFECTS OR OBSTRUCTIONS IN STREETS AND OTHER PUBLIC WAYS.

§ 755. Duty of city stated as to keeping streets free from defects caused by itself or third persons.—Benton v. City of St. Louis (Mo.) 418.

§ 759. While the existence of sewer or water mains, a curb line established, or paving are evidence which may conclusively show acceptance of a dedication for street purposes, their absence or presence does not affect the city's liability for defects in the premises if they are shown to be a public street.—Benton v. City of St. Louis (Mo.) 418.

§ 762. Where street lamps and poles of public service corporations had been in existence for a long time on a strip of land claimed to be a public street, the city will be held to have acquiesced in such public use of the strip, whether they were so placed in strict accordance with city charter regulations or not.—Benton v. City of St. Louis (Mo.) 418.

§ 770. If a city negligently allowed water from a broken main to escape into the street, forming ice, which remained so long that the city had sufficient notice to have repaired the condition, it would be liable for an injury therefrom.—Town of Belleview v. England (Ky.) 994.

§ 803. A person using a city street must exercise such care for his own safety as an ordinarily prudent person would exercise under the same or similar circumstances.—Town of Belleview v. England (Ky.) 994.

§ 807. If there are other ways safer than the one plaintiff travels, he will be negligent if, with knowledge of the conditions, he voluntarily assumes the more hazardous.—Town of Belleview v. England (Ky.) 994.

§ 818. In an action against a city for the death of a child caused by a defect in a street, evidence of subsequent repairs by the city held admissible as tending to show that the city recognized the locus as being in a public street.—Benton v. City of St. Louis (Mo.) 418.

§ 819. In an action for the death of a child drowned in a hole near a defective sidewalk, evidence held to show the city's negligence in maintaining the sidewalk, and that the negligence was the proximate cause of the death, if the sidewalk was in a public street.—Benton v. City of St. Louis (Mo.) 418.

§ 822. Evidence, in an action against a city for injuries from falling into a hole in a public street, *held* to make the question whether the street was reasonably safe for travel by persons using ordinary care one for the jury.—City of Latonia v. Ebenschweiger (Ky.) 946.

§ 822. In an action for injuries by a defect in a city street, the city *held* not prejudiced by the court's failure to charge that it was entitled to reasonable time to make needed repairs after knowledge of the defect.—Board of Councilmen of City of Frankfort v. Downey (Ky.) 284.

(D) DEFECTS OR OBSTRUCTIONS IN SEWERS, DRAINS, AND WATER COURSES.

§ 827. To hold a city liable for grading a street with insufficient culverts, obstructing the surface water, it is necessary to show that the work was directed by ordinance.—Gleason v. City of Kirksville (Mo. App.) 120.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(D) TAXES AND OTHER REVENUE, AND APPLICATION THEREOF.

§ 978. A mortgage *held* not a sale or alienation within Ky. St. § 4021 (Russell's St. § 5913), relating to the right to enforce a lien on land for taxes notwithstanding a sale or alienation thereof.—Rissberger v. City of Louisville (Ky.) 319.

§ 978. Where a city's right to enforce a lien for taxes was barred under Ky. St. § 2515 (Russell's St. § 224), the mortgagee of the land could defeat an action by the city.—Rissberger v. City of Louisville (Ky.) 319.

§ 981. Under Houston City Charter (Sp. Acts 29th Leg. 1905, p. 147, c. 17), art. 3, § 8, an incumbrancer not made a party to a tax suit *held* to have the same right to redeem from the tax lien as he had before the tax sale.—Blair v. Guaranty Savings, Loan & Investment Co. (Tex. Civ. App.) 608.

§ 981. Houston City Charter (Sp. Acts 29th Leg. 1905, p. 149, c. 17) art. 3, § 11, requiring an owner redeeming from a tax sale to pay double the amount paid by the purchaser, *held* applicable solely to summary sales by the tax collector, and to have no application to a sale under a judgment of foreclosure of the tax lien, the procedure for which is prescribed by section 8.—Blair v. Guaranty Savings, Loan & Investment Co. (Tex. Civ. App.) 608.

§ 981. A purchaser at a tax sale made under certain provisions of a city charter *held* not liable to account for rents while in the possession to one subsequently *held* entitled to redeem from the tax lien.—Blair v. Guaranty Savings, Loan & Investment Co. (Tex. Civ. App.) 608.

MURDER.

See Homicide, §§ 7-23.

MUTILATION.

Of ballots, see Elections, § 190.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 694-755.

Execution of chattel mortgage under assumed name, see Chattel Mortgages, § 150.
Of corporations, see Corporations, §§ 49, 56.

NAVIGABLE WATERS.

See Waters and Water Courses.

NEGLIGENCE.

Causing death, see Death, §§ 9-99.

Measure of damages, see Damages, § 95.

By particular classes of persons.

See Carriers, §§ 104-106, 110-137, 150, 169-185, 280-321; Municipal Corporations, §§ 739-827; Railroads, §§ 222-485.

Employers, see Master and Servant, §§ 85-296.
Telegraph or telephone companies, see Telegraphs and Telephones, §§ 31-74.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Railroads, §§ 222-485; Street Railroads, §§ 69-118.

Production, supply, and use of gas, see Gas.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) PERSONAL CONDUCT IN GENERAL.

§ 2. The rule that if defendant knew, or by ordinary care might have known, of plaintiff's peril in time to avoid the accident by ordinary care, only applies where defendant has reason to expect persons to be in danger.—Hall v. Missouri Pac. Ry. Co. (Mo.) 56.

§ 3. "Utmost care" defined.—Weatherford, M. W. & N. W. Ry. Co. v. White (Tex. Civ. App.) 799.

§ 4. An instruction, in an action for injuries to a passenger, defining "ordinary care," *held* not erroneous.—International & G. N. R. Co. v. Ford (Tex. Civ. App.) 1137.

§ 6. The failure to perform a plain statutory duty resulting in injury to another is negligence.—Ft. Worth & D. C. Ry. Co. v. Suter (Tex. Civ. App.) 215.

§ 15. If the concurrent negligence of different persons is the efficient cause of an injury, each of them is liable.—Rapid Transit Ry. Co. v. Edwards (Tex. Civ. App.) 838.

(C) CONDITION AND USE OF LAND, BUILDINGS, AND OTHER STRUCTURES.

§ 32. Owners of a steamboat moored to a bank *held* not liable for death of a person boarding the boat to obtain employment, where he was not employed, and fell overboard and was drowned.—Cunningham v. Ayer & Lord Tie Co. (Ky.) 948.

II. PROXIMATE CAUSE OF INJURY.

§ 58. When a negligent act or omission is the proximate cause of an injury, stated.—MacDonald v. Metropolitan St. Ry. Co. (Mo.) 78.

§ 58. An injury is not actionable unless it is the natural, ordinary, and reasonable result of defendant's conduct.—Atchison, T. & S. F. Ry. Co. v. Wiley (Tex. Civ. App.) 1127.

§ 60. A prior and remote cause doing nothing more than furnishing the condition or oc-

Appeal and Error, § 1199.
Of passenger, see Carriers, §§ 328-348.
Of servant, see Master and Servant, §§ 229-248, 274, 281, 296.
Of owner of live stock shipped, see Carriers, § 217.
Of person injured by operation of railroad, see Railroads, §§ 282, 327, 330, 351, 381, 385.
Of person injured in operation of street railroad, see Street Railroads, § 98.
Of sender of telegram, see Telegraphs and Telephones, § 74.

(A) PERSONS INJURED IN GENERAL

§ 83. "Humanitarian doctrine" defined.—Hall v. Missouri Pac. Ry. Co. (Mo.) 56.

IV. ACTIONS.

(B) EVIDENCE

§ 121. The rule of evidence as to the shifting of the burden of proof *held* not to create a presumption of negligence as against defendant.—Texas & P. Ry. Co. v. Rankin (Tex. Civ. App.) 823.

(C) TRIAL, JUDGMENT, AND REVIEW.

Instructions on contributory negligence, in action for injuries from failure to deliver telegram, see Telegraphs and Telephones, § 74.

§ 136. The question of negligence should be submitted to the jury, where the thing causing the injury is under defendant's management, and the accident is such as in the ordinary course of things does not happen if proper care is used.—Texas & Pacific Coal Co. v. Kowalski (Tex. Civ. App.) 829.

§ 136. Where duties are prescribed by statute, whether the question of negligence is one of law or of fact, stated.—Dallas Consol. Electric St. Ry. Co. v. Chambers (Tex. Civ. App.) 851.

§ 138. In an action for injuries to plaintiff by falling down an elevator shaft, an instruction *held* not misleading as authorizing a recovery, even if the only invitation given plaintiff to enter the shaft was that given when he entered the store.—Eilerman v. Farmer (Ky.) 289.

§ 138. In an action for injuries, the refusal of an instruction as to plaintiff's defective eyesight *held* proper.—Eilerman v. Farmer (Ky.) 289.

§ 139. In an action for injuries to plaintiff by falling down an elevator shaft, the refusal of an instruction distinguishing between the care required in the operation of freight and passenger elevators *held* not error.—Eilerman v. Farmer (Ky.) 289.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see New Trial, §§ 102-108.

Ground for new trial in criminal prosecutions, see Criminal Law, § 941.

NEW TRIAL.

Costs, see Costs, §§ 232-238.

In criminal prosecutions, see Criminal Law, §§ 905-974.

II. GROUNDS.

(D) DISQUALIFICATION OR MISCONDUCT OF OR AFFECTING JURY.

§ 42. Where a juror had stated before trial that plaintiff ought to recover the full amount of his demand, but stated on his voir dire that he had formed or expressed no opinion on the merits, *held* reversible error to deny defendant's motion for a new trial.—Gulf, C. & S. F. Ry. Co. v. Dickens (Tex. Civ. App.) 612, 618.

(G) SURPRISE, ACCIDENT, INADVERTENCE, OR MISTAKE.

§ 86. The denial of a new trial for unavoidable absence of defendant and his counsel *held* erroneous on the showing made.—Hargrove v. Cothran (Tex. Civ. App.) 177.

§ 97. A motion for a new trial on the ground of surprise *held* properly overruled.—Bond v. International & G. N. R. Co. (Tex. Civ. App.) 867.

(H) NEWLY DISCOVERED EVIDENCE

§ 102. A motion for a new trial on the ground of newly discovered evidence is properly overruled where no excuse for not knowing of the witness sooner is shown.—Bond v. International & G. N. R. Co. (Tex. Civ. App.) 867.

§ 103. Newly discovered evidence as to immaterial testimony in a former suit, *held* not ground for new trial.—Hermann v. Allen (Tex. Civ. App.) 794.

§ 108. Newly discovered evidence which could have been given by numerous other persons *held* not ground for new trial.—Bond v. International & G. N. R. Co. (Tex. Civ. App.) 867.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 119. Notwithstanding the statute, the judge trying the cause has the discretion to consider a motion for new trial filed more than two days after judgment.—Hargrove v. Cothran (Tex. Civ. App.) 177.

§ 140. Evidence on motion for new trial on the ground of prejudice by a juror *held* to show that the juror was prejudiced, so that defendant had not had a trial before a fair and impartial jury.—Gulf, C. & S. F. Ry. Co. v. Dickens (Tex. Civ. App.) 612, 618.

§ 150. A refusal of a new trial for lack of diligence in procuring the evidence on which the motion was based *held* not error.—Bond v. International & G. N. R. Co. (Tex. Civ. App.) 867.

§ 151. A motion for a new trial *held* properly refused where the newly discovered witness give a counter affidavit qualifying the original so as to leave it of no probable importance, and the excuse for not sooner discovering the evidence is incredible.—Bond v. International & G. N. R. Co. (Tex. Civ. App.) 867.

NEXT OF KIN.

See Descent and Distribution.

NONSUIT.

Before trial, see Dismissal and Nonsuit.

NOTES.

Promissory notes, see Bills and Notes.

Bona fide purchaser, see Vendor and Purchaser, §§ 229-232.
Surety, see Principal and Surety, § 139.

Of particular facts, acts, or proceedings not judicial.

See Mechanics' Liens, § 124.

Chattel mortgage, see Chattel Mortgages, § 150.
Election on question of issuing school district bond, see Schools and School Districts, § 97.
Loss insured against, see Insurance, §§ 538-561.
Special damages to shipper from loss of or injury to goods, see Carriers, § 135.
Termination of tenancy, see Landlord and Tenant, § 116.

To refuse payment of check, see Banks and Banking, § 333.

Of particular judicial proceedings.

Action or process, see Process, § 87.
Appeal, see Appeal and Error, § 401.

NUISANCE

Wrongful operation of railroad, see Railroads, § 222.

I. PRIVATE NUISANCES.

(A) NATURE OF INJURY, AND LIABILITY THEREFOR.

§ 10. One not originally responsible for the erection of a nuisance is not liable for its continuance, in the absence of notice or request to abate it.—Gleason v. City of Kirksville (Mo. App.) 120.

(C) ABATEMENT AND INJUNCTION.

§ 23. Injury to the business of keeping a hotel occasioned by a nuisance held susceptible to ascertainment and satisfaction in money so that an injunction would not lie to restrain the nuisance.—Galveston, H. & S. A. Ry. Co. v. De Groff (Tex.) 134.

II. PUBLIC NUISANCES.

(A) NATURE OF INJURY, AND LIABILITY THEREFOR.

§ 61. Peddling on the streets is not necessarily a nuisance in itself.—City of Conway v. Waddell (Ark.) 398.

OATH.

Of juror, see Jury, § 149.

Of jurors in criminal prosecutions, necessity of objection for purpose of review, see Criminal Law, § 1035.

Of jurors in criminal prosecutions, presumptions on appeal, see Criminal Law, § 1144.

OBLIGATION OF CONTRACT.

Laws impairing, see Constitutional Law, § 137.

OFFER.

Of proof, see Trial, §§ 41-105.

OFFICERS.

Particular classes of officers.

See District and Prosecuting Attorneys; Justices of the Peace.

Bank officers, see Banks and Banking, § 102.
Corporate officers, see Corporations, §§ 281, 432.
Election officers, see Elections, § 51.

In civil actions, see Evidence, §§ 471-570.
In criminal prosecutions, see Criminal Law, §§ 478, 534.

OPINIONS.

Of courts, see Courts, §§ 89-116.

ORAL CONTRACTS.

Authority of board of trustees of municipality to make, see Municipal Corporations, § 243.
By fiscal court, validity, see Counties, § 121.

ORDER OF PROOF.

At trial, see Trial, § 61.

ORDERS.

Review of appealable orders, see Appeal and Error.

Declaring result of election on question of removing county seat, see Counties, § 35.

Election to determine question of establishment of graded school, see Schools and School Districts, § 42.

PARENT AND CHILD.

See Guardian and Ward; Infants.

Declarations as to birth or pedigree, see Evidence, §§ 285, 288.

§ 3. A parent is bound by positive law to protect, educate, and support the child.—Rounds Bros. v. McDaniel (Ky.) 956.

§ 5. A parent is entitled to the earnings of the child during minority.—Rounds Bros. v. McDaniel (Ky.) 956.

§ 5. A father's right to a child's earnings may be surrendered by a failure to provide the child a home, by ill treatment, neglect, or cruel conduct, by becoming dissolute and degraded, or by emancipation.—Rounds Bros. v. McDaniel (Ky.) 956.

§ 6. An employer of a nonemancipated minor, when sued by the father for the minor's wages, is entitled to have deducted the amount paid by the minor for board and clothes not furnished by the father.—Rounds Bros. v. McDaniel (Ky.) 956.

§ 16. "Emancipation" defined.—Rounds Bros. v. McDaniel (Ky.) 956.

§ 16. Delay of a parent held so great as to bar his right to revoke an implied emancipation of his minor son.—Rounds Bros. v. McDaniel (Ky.) 956.

PAROL AGREEMENTS.

Authority of board of trustees of municipality to make, see Municipal Corporations, § 243.
By fiscal court, validity, see Counties, § 121.

PAROL EVIDENCE.

In civil actions, see Evidence, §§ 400-442.
In criminal prosecutions, see Criminal Law, § 429.

PARTIES.

Death ground for abatement, see Abatement and Revival, § 58.

Domicile or residence as affecting venue, see Venue, §§ 21-26.

New parties in mandamus, see Mandamus, § 153.

In actions by or against particular classes of persons.

See Partnership, § 199.

Trustee in bankruptcy, see Bankruptcy, § 299.

In particular actions or proceedings.

For causing death, see Death, § 42.

Foreclosure, see Mortgages, § 427.

Intervention by trustee in bankruptcy, see Bankruptcy, § 156.

On bill or note, see Bills and Notes, § 460.

Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.

See Judgment, § 235.

Collateral attack on judgment, see Judgment, §§ 518, 521.

Persons concluded by judgment, see Judgment, § 675.

Review as to parties, and parties to proceedings in appellate courts.

Parties entitled to allege error, see Appeal and Error, § 382.

To conveyances, contracts, or other transactions.

See Fraudulent Conveyances, § 172; Usury, §§ 100-117.

I. PLAINTIFFS.

(A) PERSONS WHO MAY OR MUST SUE.

Attorney's lien in action by taxpayer on behalf of taxpayers of county, see Attorney and Client, § 182.

§ 6. Plaintiff *held* the real party in interest so as to entitle her to bring an action to quiet title, etc.—Stevens v. Fitzpatrick (Mo.) 51.

II. DEFENDANTS.

(B) JOINDER.

In action to quiet title, see Quieting Title, § 30.
On intervention by trustee in bankruptcy, see Bankruptcy, § 156.

III. NEW PARTIES AND CHANGE OF PARTIES.

In action for dissolution and accounting of partnership, see Partnership, § 322.

Intervention by trustee in bankruptcy in action involving property or right of bankrupt, see Bankruptcy, § 156.

Review of rulings as dependent on presentation of questions in record, see Appeal and Error, § 500.

§ 52. A pleading asking that defendant's agent be made a party *held* too late.—Dayton Lumber Co. v. Stockdale (Tex. Civ. App.) 805.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 92. An objection to two counts for misjoinder of parties defendant should be made by special demurrer, as authorized by Rev. St. 1899, § 598 (Ann. St. 1906, p. 624), and not by motion to elect.—Stevens v. Fitzpatrick (Mo.) 51.

PARTITION.

II. ACTIONS FOR PARTITION.

(A) RIGHT OF ACTION AND DEFENSES.

§ 13. On the death of a wife, her children are entitled to a partition of community land.—Massie v. Massie (Tex. Civ. App.) 219.

§ 21. An equitable proceeding by partition of land devised by a will *held* governed by Rev.

St. 1899, §§ 4383, 4650 (Ann. St. 1906, pp. 2415, 2418).—Stewart v. Jones (Mo.) 1.

(B) PROCEEDINGS AND RELIEF.

Right to jury trial, see Jury, § 14.

§ 53. On an intervening petition in partition to enforce a charge on land for support, a decree *held* to have properly appointed a receiver to rent the land, and, after paying charges and providing for petitioner's support, to pay the remainder to parties interested, with an alternative provision for a sale.—Webster v. Cadwallader (Ky.) 327.

§ 55. A proceeding *held* to be in effect a proceeding for equitable partition.—Stewart v. Jones (Mo.) 1.

§ 95. A judgment in partition should be so specific as to show on its face without the aid of the pleadings the land intended to be partitioned.—Massie v. Massie (Tex. Civ. App.) 219.

PARTNERSHIP.

I. THE RELATION.

(B) AS TO THIRD PERSONS.

§ 34. Liability as a partner, by holding out as such to third persons where no partnership in fact exists, is imposed, on the theory that by his conduct persons dealing with the purported partner were led to believe that a partnership existed.—Bowen v. Epperson (Mo. App.) 528.

§ 34. Matters leading one to believe that a partnership existed must have occurred before such belief was formed and acted upon, in order to create a partnership liability by estoppel.—Bowen v. Epperson (Mo. App.) 528.

§ 41. By the laws of Iowa the stockholders of a corporation which continues to do business after its charter has expired cannot be held as partners in the absence of a statute imposing such liability.—Wasson v. Boland (Mo. App.) 663.

(C) EVIDENCE.

§ 48. In an action against defendants for work claimed to have been done for them as partners, a contract by one of them with the others *held* admissible to explain his connection with them and show that he was not a partner.—Bowen v. Epperson (Mo. App.) 528.

§ 56. Evidence *held* not to show a defendant a partner of codefendants, or that he held himself out to plaintiff to be such.—Gillespie v. Beedy (Mo. App.) 513.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) REPRESENTATION OF FIRM BY PARTNER.

Notice of defenses to check, see Bills and Notes, § 333.

§ 157. A partner who has given the firm's note to pay his individual debt cannot alone ratify it so as to make it binding on the firm.—Blake v. Third Nat. Bank (Mo.) 641.

§ 157. The manager of a private bank conducted by a partnership cannot ratify a note given by a partner in the firm name to pay his individual debt.—Blake v. Third Nat. Bank (Mo.) 641.

(C) APPLICATION OF ASSETS TO LIABILITIES.

§ 181. A partner cannot apply assets of the firm to his individual debt, irrespective of

charge thereof out of firm assets was a fraud upon the firm, rendering the person receiving payment liable to return the amount thereof.—*Blake v. Third Nat. Bank (Mo.)* 641.

§ 186. The claim of the owner of goods transferred to a person subsequently entering a partnership *held* not to be a partnership liability.—*Holder v. Shelby (Tex. Civ. App.)* 590.

(D) ACTIONS BY OR AGAINST FIRMS OR PARTNERS.

§ 199. In a suit to collect a debt due to a firm, all partners in interest, except dormant partners, are necessary parties plaintiff.—*Allen v. Fleck (Tex. Civ. App.)* 176.

§ 216. A partner suing on a firm claim, and alleging that his copartner had transferred his interest in the claim to him, must prove such transfer.—*Allen v. Fleck (Tex. Civ. App.)* 176.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(A) CAUSES OF DISSOLUTION.

§ 273. Exclusion of a partner from participation in the management and profits of a partnership *held* ground for dissolution.—*Holder v. Shelby (Tex. Civ. App.)* 590.

(B) RIGHTS, POWERS, AND LIABILITIES AFTER DISSOLUTION.

§ 279. The dissolution of a partnership *held* not available as a defense in an action by the partnership.—*Peck-Williamson Heating & Ventilating Co. v. Miller & Harris (Ky.)* 376.

§ 279. Where both partners are liable on a contract, the dissolution of the firm will not terminate the contract.—*Peck-Williamson Heating & Ventilating Co. v. Miller & Harris (Ky.)* 376.

(D) ACTIONS FOR DISSOLUTION AND ACCOUNTING.

§ 322. In an action to dissolve a partnership and to appoint a receiver, intervention by partnership creditors *held* authorized.—*Holder v. Shelby (Tex. Civ. App.)* 590.

§ 325. A partner excluded from participation in the management of the partnership affairs *held* entitled to have a receiver appointed.—*Holder v. Shelby (Tex. Civ. App.)* 590.

PARTY WALLS.

§ 5. A deed construed to confer on the grantor a perpetual easement in a party wall, erected by the grantee.—*Frisbie v. Bigham Masonic Lodge No. 256 (Ky.)* 359.

§ 5. Evidence *held* to show that parties to a party wall contract believed that the contract was not terminated by the destruction of the original buildings.—*Frisbie v. Bigham Masonic Lodge No. 256 (Ky.)* 359.

PASSENGERS.

See Carriers, §§ 246-384.

PASSES.

Act forbidding carriers to give interstate free transportation for passengers, see Carriers, § 23.

PATENTS.

For public lands, see Mines and Minerals, § 49.

Of particular classes of obligations or liabilities. See Bills and Notes, § 527; Chattel Mortgages, § 235; Insurance, § 598; Mortgages, § 298. Price of land sold, see Vendor and Purchaser, §§ 168-184. Taxes, see Taxation, § 529.

I. REQUISITES AND SUFFICIENCY.

Medium of payment of wages, see Master and Servant, § 79.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 59. Payment cannot be shown in defense of an action unless pleaded by defendant.—*Rutherford v. Gaines (Tex. Civ. App.)* 866.

PEDDLERS.

See Hawkers and Peddlers.

PEDIGREE.

Declarations as evidence, see Evidence, §§ 285, 288.

PENAL STATUTES.

Construction in general, see Statutes, § 241.

PENALTIES.

Under contracts, see Damages, § 80.

For particular acts or omissions.

Failure of railroad company to furnish information required by railroad commission, see Railroads, §§ 6, 9.

Failure or refusal of carrier to furnish shipping facilities or means of transportation, see Carriers, § 20.

Nonpayment of tax, see Taxation, § 848.

Violation of regulations by carrier, see Carriers, § 2.

Violations of usury laws, see Usury, §§ 138-146.

PENS.

Care required of carrier as to furnishing of cattle pens, see Carriers, § 210.

Liability of carrier for placing stock in infected pen, see Carriers, §§ 215, 217, 228.

PERCOLATING WATERS.

See Waters and Water Courses, § 107.

PERFORMANCE.

Of contract, see Contracts, § 280.

Of contract of sale, see Sales, §§ 150-181; Vendor and Purchaser, §§ 129-184.

PERISHABLE PROPERTY.

Care required of carrier, see Carriers, §§ 117, 134.

Contributory negligence of shipper, see Carriers, § 121.

Duties and liabilities of carriers, see Carriers, §§ 110, 134.

PERSONAL INJURIES.

Particular causes or means of injury.

See Assault and Battery, §§ 3-43; Negligence.

Failure to deliver telegram, see Telegraphs and

Telephones, § 67.

Particular classes of persons injured.

Employé, see Master and Servant, §§ 85-296.
Passenger, see Carriers, §§ 280-321.
Person on or near railroad tracks, see Railroads, §§ 355-401.
Traveler on highway, see Municipal Corporations, §§ 755-822.

Remedies.

Measure of damages, see Damages, § 95.

PETITION.

In pleading, see Pleading, § 49.

PHOTOGRAPHS.

As evidence, see Evidence, § 359.
Judicial notice of correctness of X-ray photographs, see Evidence, § 9.
Photographs used as exhibits as part of record, on appeal or writ of error, see Appeal and Error, §§ 597, 655.

PHYSICIANS AND SURGEONS.

Expert testimony in action for malpractice, see Evidence, § 506.

§ 18. Plaintiff, in an action for malpractice, held entitled to recover on proving one of the acts of negligence alleged, though failing to prove another act of negligence alleged.—*Sameuls v. Willis* (Ky.) 339.

§ 18. In an action for malpractice, the court properly submitted the case on the issue of negligence, alleged in the original petition, notwithstanding the allegations in an amended petition.—*Sameuls v. Willis* (Ky.) 339.

§ 18. In an action for malpractice, the question whether defendant exercised proper care held for the jury.—*Sameuls v. Willis* (Ky.) 339.

§ 18. A verdict for plaintiff in an action for malpractice held not excessive.—*Sameuls v. Willis* (Ky.) 339.

PICTURES.

As evidence, see Evidence, § 359.

PIPES.

Prescriptive right to maintain water pipes in street, see Easements, § 8.

PLACE.

Of delivery of shipment, see Carriers, § 84.

PLEA.

In civil actions, see Pleading, §§ 79-121.

PLEADING.

Amendment of pleadings, effect on limitations, see Limitation of Actions, § 127.
Applicability of instructions to pleadings, see Trial, §§ 251-253.
Conformity of judgment to pleadings, see Judgment, §§ 249-251.

Allegations as to particular facts, acts, or transactions.

See Damages, §§ 143, 158; Judgment, § 949; Payment, § 59; Statutes, §§ 279-281.
Statute of frauds, see Frauds, Statute of, § 150.

In particular actions or proceedings.

See Divorce, § 104; False Imprisonment, § 20; Libel and Slander, § 93; Partition, § 55; Quieting Title, §§ 39, 40; Trespass to Try Title, § 33; Trover and Conversion, § 32; Work and Labor, § 22.

For breach of contract, see Contracts, §§ 338, 346; Sales, § 413.

Foreclosure, see Mortgages, § 445.

For ejection of passenger as intruder, see Carriers, § 380.

For failure to deliver telegram, see Telegraphs and Telephones, § 65.

For injuries caused by obstruction of highway, see Highways, § 184.

For injuries caused by operation of railroad, see Railroads, §§ 344, 345.

For injuries caused by operation of street railroad, see Street Railroads, § 111.

For injuries to passenger, see Carriers, § 314.

For injuries to servant, see Master and Servant, §§ 256-264.

For loss of or injuries to live stock shipment, see Carriers, § 227.

For loss of or injuries to shipment, see Carriers, § 131.

For malpractice, see Physicians and Surgeons, § 18.

Indictment or criminal information or complaint, see Indictment and Information.

On bill or note, see Bills and Notes, § 489.

On injunction bond, see Injunction, § 250.

To cancel written instrument, see Cancellation of Instruments, §§ 39-43.

To establish lost instrument, see Lost Instruments, § 7.

To establish or enforce right of exemption, see Exemptions, § 147.

To recover taxes paid, see Taxation, § 643.

To set aside fraudulent conveyances, see Fraudulent Conveyances, §§ 263, 269.

Review of decisions and pleading in appellate courts.

Consideration of unsworn answer on appeal or writ of error, see Appeal and Error, § 837.

Harmless error in rulings on, see Appeal and Error, §§ 1039-1043.

Questions presented for review as to rulings on, see Appeal and Error, § 679.

Review of discretionary rulings on, see Appeal and Error, § 959.

Review of rulings on as dependent on presentation in lower court of grounds of review, see Appeal and Error, §§ 193-197.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 8. A petition in an action for false imprisonment held not to show that the warrant under which plaintiff was arrested was illegally issued.—*Schooler v. Yancey* (Ky.) 940.

§ 8. A petition in an action for false imprisonment held insufficient.—*Schooler v. Yancey* (Ky.) 940.

§ 8. Allegation of a complaint in an action for conversion of property held merely a conclusion of the pleader.—*Lindale Brick Co. v. Smith* (Tex. Civ. App.) 568.

§ 32. Date of a contract held to be pleaded.—*Uecker v. Zuercher* (Tex. Civ. App.) 149.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

Complaint in foreclosure, see Mortgages, § 445.
Petition in action for injuries to servant, see Master and Servant, §§ 256-257.

§ 49. The character of an action is determined from the express averments of the petition.—*Kellerman Contracting Co. v. Chicago House Wrecking Co.* (Mo. App.) 99.

§ 49. A petition *held* to declare on a written contract of sale of buildings on the grounds of the Louisiana Purchase Exposition, and to adopt the theory that defendant thereby undertook to clear them away and bring the site back into a state of nature, as the German government and plaintiff had agreed to do.—*Kellerman Contracting Co. v. Chicago House Wrecking Co.* (Mo. App.) 99.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

Consideration of unsworn answer on appeal or writ of error, see Appeal and Error, § 837.
In suit to cancel written instruments, see Cancellation of Instruments, § 39.

(A) DEFENSES IN GENERAL.

§ 79. Under Rev. St. 1899, § 604 (Ann. St. 1906, p. 631), defendant is entitled to but one answer which must contain all his matter of defense and counterclaim.—*Stevens v. Fitzpatrick* (Mo.) 51.

(B) DILATORY PLEAS AND MATTER IN ABATEMENT.

§ 106. A plea in abatement *held* not to present the question of the pendency of another suit on the same cause of action.—*Holland v. Western Bank & Trust Co.* (Tex. Civ. App.) 218.

(C) TRAVERSES OR DENIALS AND ADMISSIONS.

§ 121. A denial of knowledge or information sufficient to form a belief is not a good plea as to the facts within defendant's knowledge.—*Kentucky Coal Mining Co. v. Mattingly* (Ky.) 350.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 180. Plaintiff must recover, if at all, on the cause of action stated in the petition, and not on one stated in the reply.—*Mathieson v. St. Louis & S. F. Ry. Co.* (Mo.) 9.

V. DEMURRER OR EXCEPTION.

§ 192. A defect in a pleading arising from its failure to contain a sufficiently definite statement of the cause of action relied on can only be reached by a motion to make more definite and certain, and not by demurrer.—*Greer v. Strozler* (Ark.) 400.

§ 205. A general demurrer to a petition in intervention filed by a trustee in bankruptcy, claiming an estate created by will, questions the sufficiency of the petition to show that testator died before the adjudication in bankruptcy.—*Hackett's Ex'rs v. Hackett's Trustee* (Ky.) 377.

§ 214. The allegations of the complaint must be taken as true on a demurrer thereto.—*Greer v. Strozler* (Ark.) 400.

§ 218. Under Kirby's Dig. § 6137, a court rendering a decree granting the relief prayed for on overruling a demurrer to the complaint cannot award damages without proof thereof.—*Greer v. Strozler* (Ark.) 400.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

Effect of abatement of original action on new cause of action set up by amendment, see Abatement and Revival, § 58.

§ 248. In an action under Rev. St. 1899, §§ 3431, 3432 (Ann. St. 1906, pp. 1969, 1970), an amended petition *held* to be a departure from the original petition, and that it was error to allow recovery under both petitions.—*Jones v. Whitney* (Mo. App.) 1180.

§ 258. Court *held* to have acted within its discretion in denying a trial amendment to an answer stating same defense.—*Freasier v. Harrison* (Mo. App.) 108.

§ 279. A supplemental petition filed in reply to the answer is a part of the pleadings, though a subsequent amendment to the original petition is presented.—*Hicks v. Stewart & Templeton* (Tex. Civ. App.) 206.

VII. SIGNATURE AND VERIFICATION.

Consideration of unsworn answer on appeal or writ of error, see Appeal and Error, § 837.

§ 291. Evidence tending to show that a broker signed a contract without authority may be introduced, though the execution of the contract is not denied under oath.—*Floresville Oil & Mfg. Co. v. Texas Refining Co.* (Tex. Civ. App.) 194.

VIII. PROPERT, OYER, AND EXHIBITS.

Exhibits as part of record on appeal or writ of error, see Appeal and Error, § 510.

XI. MOTIONS.

§ 364. Refusal to strike matter from an answer as immaterial *held* not error, where, in view of an issue of ratification raised by the answer, it did not then appear immaterial.—*Uecker v. Zuercher* (Tex. Civ. App.) 149.

XII. ISSUES, PROOF, AND VARIANCE.

In particular actions or proceedings.

For injuries to servant, see Master and Servant, § 264.

For malpractice, see Physicians and Surgeons, § 18.

On bill or note, see Bills and Notes, § 489.

To cancel written instrument, see Cancellation of Instruments, § 43.

§ 376 Where the answer pleads the entire statute on which the action is founded, and the reply admits the truthfulness of such plea, the entire statute is before the court.—*Mathieson v. St. Louis & S. F. Ry. Co.* (Mo.) 9.

§ 380. Evidence, in an action to recover possession of property, *held* admissible to show that defendants were not innocent purchasers.—*Parlin & Orendorff Co. v. Glover* (Tex. Civ. App.) 731.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 403. The defect in a pleading *held* cured by another pleading authorizing the relief awarded.—*Wright v. Hooker* (Tex. Civ. App.) 765.

§ 408. Under Civ. Code Prac. § 93, a defendant answering to the merits before having his general demurrer to the petition disposed of *held* not to waive the defects in the petition.—*Schooler v. Yancey* (Ky.) 940.

§ 409. A defendant going to trial on his cross-complaint without insisting on an answer, and treating the allegations thereof as having been made issues in the cause, waives the filing of an answer.—*West v. Burkes* (Ark.) 397.

§ 409. A failure to object to an immaterial allegation in an answer or the admission of

testimony in support thereof *held* not to render it material.—*Hall v. Parry* (Tex. Civ. App.) 561.

§ 420. An objection to a petition *held* waived by answering and proceeding to trial.—*Jones v. Springfield Traction Co.* (Mo. App.) 675.

§ 433. An objection that a petition fails to state a cause of action *held* to relate to its sufficiency after verdict, where defendant answers and goes to trial.—*Jones v. Springfield Traction Co.* (Mo. App.) 675.

§ 433. Petition, in an action against the carrier for injuries to a passenger, *held* to sufficiently allege knowledge of defendant's servants that plaintiff was in the act of alighting from the car when the car was started.—*Jones v. Springfield Traction Co.* (Mo. App.) 675.

PLEDGES.

§ 58. One *held* the legal owner of a note entitled to sue the maker and the independent executrix of the deceased payee on his indorsement of the note.—*Goodwin & McFarland v. Burton* (Tex. Civ. App.) 587.

POLICY.

Of insurance, see Insurance.

POLITICAL RIGHTS.

Suffrage, see Elections.

POLLUTION.

Of subterranean waters, see Waters and Water Courses, § 107.

POSSESSION.

See Adverse Possession.

POWERS.

Creation by will, see Wills, §§ 681, 693.
Of attorney, see Principal and Agent.

PRACTICE.

In particular civil actions or proceedings.
See Divorce, §§ 104, 197; Habeas Corpus, § 113; Mandamus, §§ 153-164; Trespass to Try Title, §§ 25-47; Trover and Conversion, § 32.

Particular proceedings in actions.

See Abatement and Revival; Appearance; Costs; Damages, §§ 143-228; Depositions; Dismissal and Nonsuit; Evidence; Execution; Judgment; Judicial Sales; Jury; Limitation of Actions; Parties; Pleading; Process; Reference; Removal of Causes; Stipulations; Trial; Venue.

Verdict, see Trial, § 352.

Particular remedies in or incident to actions.
See Attachment; Garnishment; Injunction; Sequestration; Tender.

Procedure in criminal prosecutions.

See Bail, §§ 56-77; Criminal Law.

For offenses against liquor laws, see Intoxicating Liquors, § 233.

Procedure in exercise of special or limited jurisdiction.

In equity, see Equity.

In justices' courts, see Justices of the Peace, §§ 73-135.

Procedure in or by particular courts or tribunals.
See Courts.

Procedure on review.

See Appeal and Error; Exceptions, Bill of; Justices of the Peace, §§ 141, 174; New Trial.

PREFERENCES.

Effect of proceedings in bankruptcy, see Bankruptcy, § 188.

Granted by carrier, see Carriers, §§ 13, 32.

PREJUDICE.

Ground for reversal in civil actions, see Appeal and Error, §§ 1027-1074.

PRELIMINARY INJUNCTION.

See Injunction, § 145.

PREMIUMS.

For insurance, see Insurance, § 183.

PRESCRIPTION.

Acquisition of easement, see Easements, § 5.

Acquisition of rights, see Adverse Possession, §§ 8, 13.

PRESUMPTIONS.

As to jurisdiction of court, see Courts, § 35.

In civil actions, see Evidence, §§ 66-83.

In criminal prosecutions, see Homicide, § 146.

In favor of constitutionality of statute, see Constitutional Law, § 48.

On appeal or error, see Appeal and Error, §§ 907-939.

PRINCIPAL AND AGENT.

See Mercantile Agencies, § 1.

Admissions by agent, see Evidence, §§ 241-253.

Agency in particular relations, offices, or occupations.

See Attorney and Client; Brokers.

Agency of partner for firm, see Partnership, § 157.

Corporate agents, see Corporations, §§ 281, 432.

I. THE RELATION.

(A) CREATION AND EXISTENCE.

§ 23. Evidence *held* to show that a person to whom plaintiffs had delivered an account against third persons, and who had promised to pay it, was not acting as agent of defendants.—*Mitchell v. Chick* (Mo. App.) 517.

§ 24. Evidence *held* to raise a presumption of fact that a power of attorney was executed, warranting the submission of the question to the jury.—*Loughridge v. Ball* (Ky.) 321.

(B) TERMINATION.

§ 43. If a person who had authorized another as his agent to convey land died before the agent executed a deed therefor, his death revoked the agent's authority, and his subsequent deed was void, and conveyed no title.—*Wall v. Lubbock* (Tex. Civ. App.) 886.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(A) EXECUTION OF AGENCY.

§ 69. An agent's contract *held* not a fraud on his principal because of the agent's interest in property used by the contractor.—*Dayton Lumber Co. v. Stockdale* (Tex. Civ. App.) 805.

§ 71. Where defendant, plaintiff's agent for the purchase of land, fraudulently induced plaintiff to pay a certain price therefor, defendant

§ 81. An action against an agent and damages through deceit, plaintiff *held* entitled to go to the jury on the questions of the existence of a confidential relation between him and defendant, and of the fraudulent breach of the duties of that relation.—*Clinkscales v. Clark* (Mo. App.) 1182.

(B) COMPENSATION AND LIEN OF AGENT.

§ 82. Compensation allowed to agent having care of realty *held* excessive.—*Nickell v. Nickell* (Ky.) 966.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) POWERS OF AGENT.

§ 119. Where a deed in person's chain of title to land was void because the authority of the agent of the owner, who executed it had been revoked by the owner's death, the agent's authority to convey could not be presumed from mere lapse of time.—*Wall v. Lubbock* (Tex. Civ. App.) 886.

§ 121. The testimony of an agent in an action by a third person against the principal as to the extent of his agency is admissible on such issue.—*Rainey v. Kemp* (Tex. Civ. App.) 630.

§ 136. Where agents contracted for the sale of property agreeing to accept as a first payment an assignment of an account against a third person, as cash, the contract to be subject to approval of their principal, and the principal refused to ratify it, the agents were not obliged to repay to the purchaser the face of the account, but only to return the account itself.—*Mitchell v. Chick* (Mo. App.) 517.

(C) UNAUTHORIZED AND WRONGFUL ACTS.

§ 159. A principal is not responsible for the personal malice of his agent.—*Little v. Rich* (Tex. Civ. App.) 1077.

(E) NOTICE TO AGENT.

§ 179. Where an agent of the payee of a note received a payment from the maker with knowledge of the insolvency of the maker, the payee was chargeable therewith, though the agent learned of the maker's insolvency prior to the beginning of his agency.—*Wright v. Hooker* (Tex. Civ. App.) 765.

§ 180. Rule that a principal is chargeable with notice of facts known to his agent *held* not to apply if an agent sold to his principal land in which he had an interest which would likely lead him to conceal his knowledge.—*La Brie v. Cartwright* (Tex. Civ. App.) 785.

(F) ACTIONS.

§ 195. Parties *held* not entitled as matter of law to a judgment upon facts found by the jury.—*Wall v. Lubbock* (Tex. Civ. App.) 886.

PRINCIPAL AND SURETY.

Liabilities of sureties on injunction bond, see Injunction, §§ 250, 252.
Liabilities of sureties on bail bond, see Bail.
Liabilities on bonds for performance of duties of trust or office, see Trusts, § 378.

I. CREATION AND EXISTENCE OF RELATION.

(A) BETWEEN INDIVIDUALS.

§ 26. A party who cashed a negotiable note for the maker *held* not entitled to recover against

§ 59. A contract of a surety must be construed, like any other contract, according to the intention of the parties.—*Chicago Crayon Co. v. McNamara* (Mo. App.) 118.

§ 59. Where a contract is susceptible of two constructions, the one most favorable to the secured party should be adopted, if consistent with the object for which the bond is given.—*Chicago Crayon Co. v. McNamara* (Mo. App.) 118.

III. DISCHARGE OF SURETY.

§ 100. Failure of parties to a building contract to sign agreed changes indorsed on the contract *held* not to release the surety on the contractor's bond.—*Illinois Surety Co. v. Garrard Hotel Co.* (Ky.) 967.

§ 117. Where a contractor's bond obligated the surety to protect the owner from liens, the owner was entitled, in good faith, to discharge debts that might have been asserted as liens against the property.—*Illinois Surety Co. v. Garrard Hotel Co.* (Ky.) 967.

IV. REMEDIES OF CREDITORS.

§ 139. Under a building contract and a contractor's bond, notice of default in the completion of the building *held* given the surety on the bond in time.—*Illinois Surety Co. v. Garrard Hotel Co.* (Ky.) 967.

PRIORITIES.

Of mortgages, see Chattel Mortgages, § 150.

PRIVATE NUISANCES.

See Nuisance, §§ 10, 23.

PRIVATE ROADS.

Rights of way, see Easements.

PRIVILEGE.

Of married women, see Husband and Wife, § 69½.
Of witness as to testimony, see Witnesses, §§ 301-309.

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see Libel and Slander, § 45.

PRIVITY.

Admissions by privies, see Evidence, § 230.

PROBABLE CAUSE.

For prosecution, see Malicious Prosecution, § 25.

PROBATE.

Of will, see Wills, §§ 300-354.

PROCEDURE.

See cross-references under Practice.

PROCESS.

Effect of appearance, see Appearance.
Necessity of summoning infant defendant before appointment of guardian ad litem, see Infants, § 80.
To sustain judgment, see Judgment, § 17.

In particular actions or proceedings.
On appeal, see Appeal and Error, § 401.
On insurance policy, see Insurance, § 620.

Particular forms of writs or other process.
See Arrest; Execution; Garnishment; Injunction; Mandamus; Sequestration.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

§ 1. The office of a summons is to bring the defendant to whom it is directed into court to answer plaintiff's petition.—*Pacific Mut. Life Ins. Co. of California v. Mansur* (Mo. App.) 1193.

§ 45. An alias summons is issued when the original summons has not produced its effect because defective in form or manner of service, and, when issued and served, the second writ supersedes the first, and defects in the first cannot be pleaded in abatement of the second.—*Pacific Mut. Life Ins. Co. of California v. Mansur* (Mo. App.) 1193.

§ 45. Where, after original summons was served, defendant did not appear, and the court made an order of record that an alias summons issue, and no alias summons was issued nor the order set aside, the court had no jurisdiction to hear the case on the original service.—*Pacific Mut. Life Ins. Co. of California v. Mansur* (Mo. App.) 1193.

II. SERVICE.

(C) PUBLICATION OR OTHER NOTICE.

§ 87. Personal service having been obtained on a resident beneficiary association in a suit to restrain a merger with a foreign association, and the resident society's assets being impounded by injunction, the court acquired jurisdiction, though the nonresident society was served by publication only.—*Knapp v. Supreme Commandery, United Order of the Golden Cross of the World* (Tenn.) 390.

PROFANE LANGUAGE.

See Blasphemy.

PROHIBITION.

Of traffic in intoxicating liquors, see Intoxicating Liquors.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

Of loss insured against, see Insurance, §§ 538-561.

PROPERTY.

Constitutional guaranties of rights of property, see Constitutional Law, §§ 297, 303.

Particular species of property.

See Mines and Minerals.

Logs or lumber, see Logs and Logging.

Transfers and other matters affecting title.

See Adverse Possession.

Best and secondary evidence as to title, see Evidence, § 158.

Dedication to public use, see Dedication.

Taking for public use, see Eminent Domain.

PROPOSITIONS.

In briefs under assignment of errors, see Appeal and Error, § 742.

PROSECUTING ATTORNEYS.

See District and Prosecuting Attorneys.

PROVINCE OF COURT AND JURY.

In civil action, see Trial, §§ 191-200.

In criminal prosecutions, see Criminal Law, §§ 753-763.

PROVOCATION.

For homicide, see Homicide, §§ 43, 295.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see Damages, §§ 20-54.

Of injury, see Negligence, §§ 58, 60.

Of injury from telephone pole on highway, see Telegraphs and Telephones, § 15.

Proximate or remote consequences of injury from failure to deliver telegram, see Telegraphs and Telephones, § 67.

PUBLICATION.

Service of process, see Process, § 87.

PUBLIC BUILDINGS.

See Counties, §§ 104, 108.

Liens for construction of, see Mechanics' Liens, § 13.

PUBLIC DEBT.

See Counties, § 196; Municipal Corporations, §§ 978, 981; Schools and School Districts, §§ 97-103.

PUBLIC IMPROVEMENTS.

By municipalities, see Municipal Corporations, §§ 330-567.

PUBLIC LANDS.

Mineral lands, see Mines and Minerals, § 49.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(F) SWAMP AND OVERFLOWED LANDS.

Right of dower in land dedicated for county seat before conveyance to husband of claimant, see Dower, § 12.

III. DISPOSAL OF LANDS OF THE STATES.

Certified copies of transfer of lease of school lands as evidence, see Evidence, § 342.

§ 173. Under Laws 1905, p. 160, c. 103, § 2, an application for the purchase of school land before the date fixed by the Land Commissioner for such sale is void.—*Fine v. Robison* (Tex.) 126.

§ 175. Rev. St. 1895, art. 4269, construed to mean that the calls in a survey of school lands will not be affected by mistakes of the surveyor as to distances.—*Lewright v. Travis County* (Tex. Civ. App.) 725.

§ 178. A transfer of a lease of public lands is authorized to be filed in the land office, without being acknowledged by the grantor or recorded in the county where the land is.—*McKee v. West* (Tex. Civ. App.) 1135.

PUBLIC NUISANCES.

See Nuisance, § 61.

PUBLIC SCHOOLS.

See Schools and School Districts, §§ 13-103.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

Gas companies, see Gas.

Water companies, see Waters and Water Courses, §§ 183-206.

PUBLIC USE.

Dedication of property, see Dedication.

Taking property for public use, see Eminent Domain.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, §§ 183-206.

PUNISHMENT.

For violation of injunction, see Injunction, § 219.

QUALIFICATION.

Of voters, see Elections, § 60.

QUANTUM MERUIT.

See Work and Labor.

QUARANTINE.

Regulations as to animals, effect on liability of carrier, see Carriers, § 215.

QUASHING.

Attachment, see Attachment, §§ 228, 232.

Execution, see Execution, § 171.

Indictment or information, see Indictment and Information, § 140

QUESTIONS FOR JURY.

In civil actions, see Trial, §§ 139-143.

In criminal prosecutions, see Criminal Law, §§ 753-763; Homicide § 268.

QUIETING TITLE.

I. RIGHT OF ACTION AND DEFENSES.

§ 7. Complainant in a suit to quiet title *held* entitled to question whether an extension of time to remove timber had been given.—Childers v. Wm. H. Coleman Co. (Tenn.) 1018.

§ 10. In an action to quiet title, plaintiff must succeed, if at all, on the strength of his own title, and not on the weakness of defendant's title.—McMillan v. Morgan (Ark.) 407.

II. PROCEEDINGS AND RELIEF.

Conformity of judgment to issues, see Judgment, § 251.

Real party in interest, see Parties, § 6.

§ 30. A corporation to whom plaintiff's husband had contracted to sell land *held* properly joined as a defendant in an action to quiet title and restore a lost deed to the land.—Stevens v. Fitzpatrick (Mo.) 51.

§ 39. In an action to quiet title, an allegation *held* not sufficient to support a judgment for defendant.—Stevens v. Fitzpatrick (Mo.) 51.

tiff to land claimed to have been purchased and paid for by plaintiff's husband, and title taken in the name of defendant's ancestor, proof of facts showing the resulting trust and that plaintiff's husband had been in possession for 21 years was sufficient, without showing that plaintiff was in possession when the action was begun.—Stevens v. Fitzpatrick (Mo.) 51.

§ 52. In an action to quiet title *held* not error not to mention defendant's cross-bill in the final decree.—Stevens v. Fitzpatrick (Mo.) 51.

RAILINGS.

Injuries to passenger caused by railing near track of street railroad, see Carriers, § 317.

RAILROADS.

See Street Railroads.

As employers, see Master and Servant.

Carriage of goods and passengers, see Carriers.

I. CONTROL AND REGULATION IN GENERAL.

§ 6. Rev. St. 1895, art. 4571, imposing a penalty for the failure of a railroad company or its officers to furnish information required by the Railroad Commission, is highly penal and must be strictly construed.—State v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.) 736.

§ 9. Rev. St. 1895, art. 4571, imposing a penalty for the failure of a railroad company or its officers to furnish information requested by the Railroad Commission, construed, and *held* that the commission must furnish blanks calling for the information desired.—State v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.) 736.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

Legality of contract by section foreman to procure switch track to be constructed at a specified place, see Contracts, § 108.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

Assumption by judge as to facts in instructions in action for injuries from failure to maintain proper culverts, see Trial, § 191.

Right of purchaser of land to sue for injuries caused by diversion of water by railroad prior to purchase, see Vendor and Purchaser, § 218.

§ 113. Under Rev. St. 1895, art. 4436, the duty of a railroad to maintain culverts necessary for proper drainage *held* absolute, and not merely to exercise ordinary care to maintain the same.—Ft. Worth & D. C. Ry. Co. v. Suter (Tex. Civ. App.) 215.

§ 114. In an action against a railroad for damages from an overflow resulting from defendant's failure to maintain proper culverts, as required by Rev. St. 1895, art. 4436, an instruction making defendant's duty to maintain the culverts absolute *held* not erroneous.—Ft. Worth & D. C. Ry. Co. v. Suter (Tex. Civ. App.) 215.

§ 114. In an action against a railroad for damages from an overflow alleged to have resulted from defendant's failure to maintain proper culverts, a special charge as to damages *held* properly refused; the damages being sufficiently limited by the charge given.—Ft. Worth & D. C. Ry. Co. v. Suter (Tex. Civ. App.) 215.

X. OPERATION.**(A) DUTY TO OPERATE**

§ 222. One entitled to an injunction restraining a railway company from continuing a nuisance by using streets for switching purposes *held* required to act within a reasonable time after the creation of the nuisance.—Galveston, H. & S. A. Ry. Co. v. De Groff (Tex.) 134.

§ 222. The delay in instituting a suit to restrain a railway company from using tracks in a street *held* unreasonable, requiring the court to deny an injunction.—Galveston, H. & S. A. Ry. Co. v. De Groff (Tex.) 134.

§ 222. The court, in determining the propriety of restraining a railway company from using its tracks in a street for railway purposes, on the ground that the same creates a nuisance to the injury of an individual, *held* required to consider the relative injury to the individual and that which would be inflicted on the company and the public by granting the injunction.—Galveston, H. & S. A. Ry. Co. v. De Groff (Tex.) 134.

§ 222. An individual *held* not entitled to maintain a suit for an injunction to restrain a railway company from using tracks in a street, but the individual should be remitted to his action for damages.—Galveston, H. & S. A. Ry. Co. v. De Groff (Tex.) 134.

(B) STATUTORY, MUNICIPAL, AND OFFICIAL REGULATIONS.

Actions for wrongful death, see Death, § 14.

(D) INJURIES TO LICENSEES OR TRESPASSERS IN GENERAL.

§ 273½. A railroad company's duty to a trespasser is only the use of reasonable care not to injure him after discovery that he is in imminent danger.—Hall v. Missouri Pac. Ry. Co. (Mo.) 56.

§ 275. Where third persons are permitted to load a railroad car, it is negligence for the railroad company to move the car without first notifying them.—Louisville & N. R. Co. v. Crow (Ky.) 365.

§ 275. The act of a brakeman in directing plaintiff to get upon a moving car and set the brakes *held* beyond his authority, and not to change the relation of plaintiff to defendant railroad company from trespasser to that of employé or licensee.—Hall v. Missouri Pac. Ry. Co. (Mo.) 56.

§ 275. Plaintiff *held* not entitled to recover for injuries sustained by jumping in front of a moving car which he knew could not be stopped by the brake, unless he did so to rescue his fellow servant on the car from a position of danger.—Texas & P. Ry. Co. v. Brooks (Tex. Civ. App.) 744.

§ 282. Instructions *held* erroneous as failing to present the issue raised.—Louisville & N. R. Co. v. Crow (Ky.) 365.

§ 282. Plaintiff *held* not entitled to recover exemplary damages in an action against a railroad company for injuries by its negligence.—Louisville & N. R. Co. v. Crow (Ky.) 365.

§ 282. In an action against a railroad company for injuries to a trespassing boy while setting the brakes on a car by direction of a brakeman, evidence of the brakeman's knowledge of plaintiff's peril and negligence in failing to avoid the accident by stopping another car *held* to raise a question for the jury.—Hall v. Missouri Pac. Ry. Co. (Mo.) 56.

§ 282. In an action against a railroad company for injuries to a trespasser, evidence *held* to raise a question for the jury whether plaintiff was guilty of such contributory negligence

as will bar his recovery.—Hall v. Missouri Pac. Ry. Co. (Mo.) 56.

§ 282. A petition in an action against a railroad company for personal injuries, *held* to sufficiently allege the negligence of the brakeman whose acts caused the injury.—Hall v. Missouri Pac. Ry. Co. (Mo.) 56.

§ 282. An instruction in an action against a railroad company for injuries to a trespasser *held* to cover the acts of the brakeman whose negligence caused the accident.—Hall v. Missouri Pac. Ry. Co. (Mo.) 56.

§ 282. In an action for injuries to plaintiff by jumping in front of a moving car, evidence *held* insufficient to warrant a recovery on the theory that plaintiff's act was to rescue his fellow servant.—Texas & P. Ry. Co. v. Brooks (Tex. Civ. App.) 744.

(F) ACCIDENTS AT CROSSINGS.

§ 305. A railroad company is liable for injuries at a crossing caused by negligently blowing the whistle so as to frighten plaintiff's mules and overturn his wagon.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 309. A railroad company is only required to use ordinary care to prevent crossing accidents.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 313. A railroad company is liable for injuries at a crossing caused by its violation of an ordinance requiring the engine bell to be rung continuously within the corporate limits.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 314. The maintenance of a cut and dump by a railroad 600 feet from a crossing was not negligence rendering it liable for death at the crossing.—Missouri, K. & T. Ry. Co. of Texas v. Bratcher (Tex. Civ. App.) 1091.

§ 314. Maintenance by railroad company of tower house of interlocking plant *held* not negligence constituting independent ground of recovery for death at crossing.—Missouri, K. & T. Ry. Co. of Texas v. Bratcher (Tex. Civ. App.) 1091.

§ 317. A railroad company is liable for injuries at a crossing caused by running its trains through the town at a speed greater than six miles an hour, in violation of an ordinance.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 317. That a speed ordinance was customarily violated, and the train operatives were not prosecuted therefor, was not a defense to an action for injuries at a crossing caused by running the train in violation of the ordinance.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 327. A traveler is not required to stop his team or get off his wagon unless he knows that a train is approaching.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 330. A traveler approaching a public crossing *held* entitled to presume, in the absence of signals, that he may proceed in safety.—Dunwoody v. Missouri, K. & T. Ry. Co. (Mo. App.) 503.

§ 344. Allegations, in an action for injuries at a crossing, that defendant's train failed to blow the whistle on approaching the crossing as required by ordinance, did not allege the violation of the statutory duty to sound the whistle within 80 rods of the crossing.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 345. Where a petition alleged three distinct acts of negligence, proof of either act entitled

the crossing *held* to raise no issue of negligence.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 347. That a traveler on a public street in crossing railroad tracks heard some one shout is immaterial on the issue of his contributory negligence, unless he understood the purport of the shouting.—Dunwoody v. Missouri, K. & T. Ry. Co. (Mo. App.) 503.

§ 347. In an action for injuries at a crossing caused by the violation of an ordinance limiting the speed of trains to six miles an hour, testimony that the city had never prosecuted violations of the ordinance *held* irrelevant and harmful.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 347. In an action for injuries at a crossing, testimony by one who was at a distance from the place of the accident that he heard a whistle blow in that neighborhood, but could not tell on what road the engine was, was immaterial.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 350. Whether a traveler on a public street was negligent in crossing railroad tracks within switchyards *held* for the jury.—Dunwoody v. Missouri, K. & T. Ry. Co. (Mo. App.) 503.

§ 350. In an action for death at a railroad crossing, it was proper to submit the question of negligence in failing to keep a flagman at the crossing.—Missouri, K. & T. Ry. Co. of Texas v. Bratcher (Tex. Civ. App.) 1091.

§ 351. In an action for injuries at a crossing, an instruction *held* too restricted.—Boesch v. Texas Cent. R. Co. (Tex. Civ. App.) 784.

§ 351. In an action for injuries at a railroad crossing caused by running the train in excess of the speed limit and in failing to ring the bell as required by ordinance, a charge that the company must use ordinary care to avoid accidents *held* misleading.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 351. In an action for injuries at a street crossing, *held* error to instruct that plaintiff could not recover if defendant's failure to ring the bell and the running of the train in excess of the six-mile speed limit were not the cause of the accident.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 351. In an action for injuries at a railroad crossing, an instruction *held* calculated to mislead the jury to believe that plaintiff could not recover if the speed of the train at the time did not exceed the usual speed, though it exceeded the speed of six miles an hour prescribed by ordinance.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

§ 351. In an action for injuries at a crossing caused by plaintiff's horses being frightened by the sudden blast of a whistle, an instruction as to contributory negligence *held* inapplicable under the evidence.—Garber v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 857.

(G) INJURIES TO PERSONS ON OR NEAR TRACKS.

§ 355. A pedestrian on a railroad track *held* a trespasser, and the company only bound to exercise ordinary care to prevent injuring him after actually discovering his peril.—Miller's Adm'r v. Illinois Cent. R. Co. (Ky.) 348.

§ 356. A person on a railroad right of way *held* a trespasser, to which the railroad only owed the duty of saving him from injury by or-

to exercise ordinary care to prevent injuring him after actually discovering his peril.—Miller's Adm'r v. Illinois Cent. R. Co. (Ky.) 348.

§ 369. A railroad reasonably chargeable with knowledge that persons are on the track must exercise ordinary care to discover their presence, and to avoid injuring them.—Ft. Worth & D. C. Ry. Co. v. Longino (Tex. Civ. App.) 198.

§ 370. The rule requiring a railroad company to give warning and keep a lookout for persons on the track where it is used commonly by the public *held* confined to cities, and thickly populated communities.—Miller's Adm'r v. Illinois Cent. R. Co. (Ky.) 348.

§ 376. In an action for the death of a person struck by a train, evidence *held* not to show actionable negligence.—Miller's Adm'r v. Illinois Cent. R. Co. (Ky.) 348.

§ 376. A pedestrian on a railroad track *held* a trespasser, and the company only bound to exercise ordinary care to prevent injuring him after actually discovering his peril.—Miller's Adm'r v. Illinois Cent. R. Co. (Ky.) 348.

§ 376. In determining whether trainmen used ordinary care to prevent injury to a trespasser, the jury should consider the time in which they had to act and all the circumstances.—Johnson's Adm'r v. Louisville & N. R. Co. (Ky.) 383.

§ 376. A person on a railroad right of way *held* a trespasser, to which the railroad only owed the duty of saving him from injury by ordinary care after discovery of his peril.—Johnson's Adm'r v. Louisville & N. R. Co. (Ky.) 383.

§ 377. Trainmen may presume that a trespasser on the track will hear the repeated whistles and will heed the same, and get off the track, until it becomes reasonably apparent that he is oblivious of the approach of the train.—Miller's Adm'r v. Illinois Cent. R. Co. (Ky.) 348.

§ 381. One using a railroad track either as a licensee or under a lawful claim of right must exercise ordinary care for his own safety, and one exercising no care whatever is guilty of contributory negligence.—Ft. Worth & D. C. Ry. Co. v. Longino (Tex. Civ. App.) 198.

§ 385. One on a railroad track may in some measure depend on the company operating its trains in the usual manner, and may rely on the exercise of the usual precautions for the safety of those whose presence on the track is to be anticipated.—Ft. Worth & D. C. Ry. Co. v. Longino (Tex. Civ. App.) 198.

§ 396. One struck by a train at a place long used as a footway by the public *held* to have presumptively looked and listened for the approach of trains.—Ft. Worth & D. C. Ry. Co. v. Longino (Tex. Civ. App.) 198.

§ 397. One using a railroad track as a footway may show the proximity of crossings, stations, and the like, and the custom of the company to give signals for such places on the issue of contributory negligence.—Ft. Worth & D. C. Ry. Co. v. Longino (Tex. Civ. App.) 198.

§ 400. Whether one struck by a train at a place used by the public as a footway was guilty of contributory negligence is for the jury, unless the undisputed evidence shows that he exercised no care for his own safety.—Ft. Worth & D. C. Ry. Co. v. Longino (Tex. Civ. App.) 198.

§ 401. In an action for the death of a trespasser struck by a train, the instructions *held*

to properly submit the issues.—Johnson's Adm'r v. Louisville & N. R. Co. (Ky.) 383.

(H) INJURIES TO ANIMALS ON OR NEAR TRACKS.

§ 411. A railway company fencing its track is not liable for killing stock, unless it is negligent.—Missouri, K. & T. Ry. Co. of Texas v. Davis (Tex. Civ. App.) 234.

§ 413. A railway company, placing a gate in its right of way fence for the accommodation of landowners, is not required to see that the gate is closed.—Missouri, K. & T. Ry. Co. of Texas v. Davis (Tex. Civ. App.) 234.

§ 425. A railroad company *held* not liable for injury to a horse getting its shoe hung on a spike standing above the flange of the rail.—Texas & P. Ry. Co. v. Dean (Tex. Civ. App.) 804.

§ 443. In an action against a railway company for killing stock, evidence *held* not to show that the fastening of the gate on the right of way was defective.—Missouri, K. & T. Ry. Co. of Texas v. Davis (Tex. Civ. App.) 234.

§ 446. In an action against a railroad company for killing a mule at a crossing, it could not be said as a matter of law that the failure of the company to signal was not the cause of the injury.—Texas & P. Ry. Co. v. Dean (Tex. Civ. App.) 804.

(I) FIRES.

Best and secondary evidence of plaintiff's title to buildings burned, see Evidence, § 158.

Instructions as to damages, see Damages, § 210. Instructions on weight and sufficiency of evidence, see Trial, § 194.

Measure of damages for injury to or loss of property in general, see Damages, § 112.

Question for jury as to damages, see Damages, § 208.

§ 454. A railroad company *held* required to equip its engines with the most approved spark arresters, and to exercise ordinary care to keep the same in repair.—Missouri, K. & T. Ry. Co. of Texas v. Neiser (Tex. Civ. App.) 166.

§ 481. In an action against a railroad company for the destruction of property by fire, the sustaining of an objection to a question asked a witness testifying as to the market value of the land before and after the fire *held* not erroneous.—Missouri, K. & T. Ry. Co. of Texas v. Neiser (Tex. Civ. App.) 166.

§ 481. In an action for the destruction of timber and grass for pasture and hay by fire set by a railroad engine, the fact of another fire on the same land is inadmissible.—Missouri, K. & T. Ry. Co. of Texas v. Neiser (Tex. Civ. App.) 166.

§ 481. In an action against a railroad for the destruction by fire of grass for pasturage, testimony of the real value of the grass used for pasturage *held* proper under the allegations of the complaint.—Missouri, K. & T. Ry. Co. of Texas v. Neiser (Tex. Civ. App.) 166.

§ 481. In an action against a railroad company for the destruction of property by fire set by an engine, evidence of the inspection of a particular engine with reference to its spark arrester *held* properly excluded in the absence of certain other evidence.—Missouri, K. & T. Ry. Co. of Texas v. Neiser (Tex. Civ. App.) 166.

§ 484. In an action against a railroad company, the question whether the fire was communicated by sparks from defendant's engines *held* for the jury.—Erhart v. Wabash Ry. Co. (Mo. App.) 657.

§ 485. In an action against a railroad company for the destruction of property by fire set by an engine, the refusal to charge on the issue of contributory negligence *held* proper un-

der the evidence.—Missouri, K. & T. Ry. Co. of Texas v. Neiser (Tex. Civ. App.) 166.

§ 485. In an action against a railroad company for the destruction of property by fire, an instruction as to the liability of a railroad company for negligently allowing grass to accumulate on the land inclosed in its right of way *held* proper under the evidence.—Missouri, K. & T. Ry. Co. of Texas v. Neiser (Tex. Civ. App.) 166.

RAPE.

II. PROSECUTION AND PUNISHMENT.

(A) INDICTMENT AND INFORMATION.

§ 25. Under Shannon's Code, §§ 7077, 7080, 7083, an indictment *held* to charge rape, defined by section 6451.—Palmer v. State (Tenn.) 1022.

(C) TRIAL AND REVIEW.

§ 59. The refusal to charge on the subject of assault with intent to commit rape *held* proper, in view of the evidence.—Palmer v. State (Tenn.) 1022.

RATIFICATION.

Of acts of partner, see Partnership, § 157.

REAL ACTIONS.

See Forcible Entry and Detainer, §§ 5, 32; Partition; Trespass to Try Title.

REAL ESTATE AGENTS.

See Brokers.

REBUTTAL

Evidence, see Trial, § 61.

RECEIPTS.

Tax receipts in the exhibits as part of record on appeal or writ of error, see Appeal and Error, § 510.

RECEIVERS.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

Appointment in partition, see Partition, § 53. Appointment in suit to dissolve partnership, see Partnership, § 325.

RECORDS.

Of particular facts, acts, instruments, or proceedings not judicial.

Assignment of contract for sale of standing timber, see Logs and Logging, § 3.

Of judicial proceedings.

See Courts, §§ 114-116.

Abstract for purpose of review, see Appeal and Error, §§ 585, 590.

Transcript on appeal or writ of error, see Appeal and Error, §§ 499-713; Criminal Law, §§ 1090-1097.

REDEMPTION.

From mortgage, see Mortgages, §§ 594, 605. From tax sale, see Municipal Corporations, § 981; Taxation, § 709.

REFERENCE.

Harmless error in directing reference, see Appeal and Error, § 1044.

St. 1906, § 3708) held not to involve a long account within the statute relating to reference, and the court cannot direct a compulsory reference.—Snyder v. Crutcher (Mo. App.) 489.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

REFRIGERATION.

Duty of carrier as to perishable freight, see Carriers, §§ 110, 117, 134.

REHEARING.

See New Trial.

RELEASE.

See Compromise and Settlement: Payment.

Of dower, see Dower, §§ 46, 47.

Of mortgage, see Mortgages, § 298.

II. CONSTRUCTION AND OPERATION.

§ 29. Where one having a cause of action against three defendants received from one of them as much money as the proof authorized him to recover in any view of the case, the court did not err in instructing the jury to find for the other defendants.—Button v. City of Louisville (Ky.) 977.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 55. In an action by an injured servant on a contract whereby defendant master agreed to pay a stated sum daily until defendant's physician certified that he was able to resume work, the burden of showing that a certificate given was fraudulently made was on plaintiff.—Camden Interstate Ry. Co. v. Lester (Ky.) 268.

§ 56. In an action by an injured servant on a contract whereby defendant agreed to pay a stated sum daily until defendant's physician certified that he was able to resume work, certain evidence held admissible on the issue as to whether the certificate was falsely made.—Camden Interstate Ry. Co. v. Lester (Ky.) 268.

RELEVANCY.

Of evidence in civil actions, see Evidence, §§ 121, 129.

Of evidence in criminal prosecutions, see Criminal Law, §§ 349-366.

RELIGIOUS SOCIETIES.

§ 1. Incorporated religious societies are, in this country, civil bodies politic, and are amenable to the ordinary courts of the state, and governed by the statute under which they are organized, so far as statutory regulations are prescribed.—Klix v. Polish Roman Catholic St. Stanislaus Parish (Mo. App.) 1171.

§ 4. While the establishment of religious corporations except to hold title to such real estate as may be prescribed for church edifices, etc., is forbidden by Const. 1875, art. 2, § 8 (Ann. St. 1906, p. 131), the validity of the incorporation of a religious society cannot be collaterally questioned by a private suitor; the appropriate remedy being by quo warranto at the suit of the Attorney General, or perhaps a prosecuting attorney.—Klix v. Polish Roman Catholic St. Stanislaus Parish (Mo. App.) 1171.

members of the congregation of a Roman Catholic Church held not members of a religious corporation organized by certain members, to which corporation property was conveyed by a trustee holding the same for the benefit of the congregation.—Klix v. Polish Roman Catholic St. Stanislaus Parish (Mo. App.) 1171.

§ 12. Where a schism occurs in a congregation of a tenet of faith, and two factions claim the church property, it will be awarded to the one adhering to the original doctrines of the church, and the decisions of the church judicatories as to what these doctrines are will be accepted by the civil courts, when such judicatories exist and have authority to decide.—Klix v. Polish Roman Catholic St. Stanislaus Parish (Mo. App.) 1171.

§ 12. When a church has been incorporated, if the mode of government in force in the denomination at large is not by congregations, but by superior clerical personages, assemblies, etc., the authority of these will be upheld if consistent with the laws of the sovereignty.—Klix v. Polish Roman Catholic St. Stanislaus Parish (Mo. App.) 1171.

§ 21. Lots conveyed to a Roman Catholic archbishop in trust for the congregation of a certain church or parish may not be diverted from the purposes of the trust, whether the title remains in the original trustee, or is conveyed by him to an incorporated society.—Klix v. Polish Roman Catholic St. Stanislaus Parish (Mo. App.) 1171.

§ 23. Where a schism occurs in a congregation of a tenet of faith, and two factions claim the church property, it will be awarded to the one adhering to the original doctrines of the church, and the decisions of the church judicatories as to what these doctrines are will be accepted by the civil courts, when such judicatories exist and have authority to decide.—Klix v. Polish Roman Catholic St. Stanislaus Parish (Mo. App.) 1171.

REMAINDERS.

See Life Estates.

REMAND.

Of cause on appeal or writ of error, see Appeal and Error, § 1195.

REMEDY AT LAW.

Effect on right to mandamus, see Mandamus, § 3.

REMITTITUR.

Of damages, see Damages, § 228.

REMOVAL.

Of county seat, see Counties, §§ 34, 35.

REMOVAL OF CAUSES.

Change of venue or place of trial, see Venue, §§ 32, 71.

II. ORIGIN, NATURE, AND SUBJECT OF CONTROVERSY.

§ 19. An action against a corporation created under an act of Congress and one of its employes for negligence, is as to the individual defendant a suit arising under the federal Constitution or laws, within the removal act (Act

Cong. Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508].—Texas & P. Ry. Co. v. Beckworth (Tex. Civ. App.) 729.

REMOVAL OF CLOUD.

See Quieting Title.

RENT.

See Landlord and Tenant, §§ 229-233.

RENUNCIATION.

Of right of administration, see Executors and Administrators, § 19.

REPAIRS.

Of highway, see Highways, § 113.

REPEAL.

Of statute, see Statutes, § 161.

REPLICATION.

See Pleading, § 180.

REPLY.

See Pleading, § 180

In suit to quiet title, see Quieting Title, § 40.

REPORT

As to credit of persons engaged in business, see Mercantile Agencies, § 1.

REQUESTS.

For instructions in civil actions, see Trial, §§ 256-266.

For instructions in criminal prosecutions, see Criminal Law, §§ 824, 829.

RESCISSION.

Cancellation of written instrument, see Cancellation of Instruments.

Of contract for sale of land, see Vendor and Purchaser, §§ 84-127.

RES GESTÆ.

In civil actions, see Evidence, § 121.

In criminal prosecutions, see Criminal Law, §§ 349-366.

RES JUDICATA.

See Judgment, §§ 570-622, 651-739.

RESTRICTIONS.

In wills, see Wills, §§ 651-665.

RESULTING TRUSTS.

See Trusts, §§ 62-89.

RETAINER.

Of attorney, see Attorney and Client, § 76.

RETROSPECTIVE LAWS.

See Statutes, §§ 263, 267.

Constitutional restrictions, see Constitutional Law, § 191.

RETURN.

Of attachment, see Attachment, § 324.

Of record of proceedings for purpose of review, see Appeal and Error, §§ 597, 601.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error; Criminal Law, §§ 1020-1177; Justices of the Peace, §§ 141, 174.

REVOCATION.

Of authority of broker, see Brokers, § 44.

Of emancipation of child, see Parent and Child, § 16.

RIGHT OF WAY.

See Easements.

RISKS.

Assumed by employé, see Master and Servant, §§ 203-219, 280, 295.

Within insurance policy, see Insurance, §§ 432, 460.

ROADS.

See Highways.

Streets in cities, see Municipal Corporations, §§ 665-671, 755-822.

ROBBERY.

Instructions as to corroboration of accomplice's testimony, see Criminal Law, § 780.

§ 20. In a prosecution for robbery, an allegation of the indictment that accused took one \$10 bill and one \$5 bill, current money of the United States, of the value of \$15, must be proved, and evidence merely that he took "a \$5 bill and a \$10 bill" is insufficient.—Early v. State (Tex. Cr. App.) 1036.

§ 24. Evidence held not to show an assault with intent to rob, within Pen. Code 1895, art. 611.—Walters v. State (Tex. Cr. App.) 543.

RULES OF COURT.

See Courts, § 82.

SALES.

Sales by or to particular classes of persons.

See Hawkers and Peddlers.

Sales of particular species of, or estates or interests in, property.

See Intoxicating Liquors.

Realty, see Vendor and Purchaser.

Timber, see Logs and Logging, § 3.

Sales on judicial or other proceedings.

See Execution, §§ 238-256; Judicial Sales.

Foreclosure of mortgage, see Mortgages, §§ 516-534.

Of property of decedent under order of court, see Executors and Administrators, §§ 348-389.

Tax sales, see Taxation, §§ 642-689.

Under power in mortgage, see Chattel Mortgages, § 261.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 1. To constitute a sale of a chattel, there must be an intention and an offer to sell, and an acceptance of the offer and an intention to buy.—Priest v. Hodges (Ark.) 253.

§ 52. Evidence *held* to sustain a finding that there were no misrepresentations by the seller's agent as to the value of the physical property of a printing plant sold or as to its earnings.—*Rathfon v. Gaines* (Ky.) 937.

II. CONSTRUCTION OF CONTRACT.

§ 85. Under a written contract of sale of buildings on the grounds of the Louisiana Purchase Exposition, *held*, that the buyer did not agree to clear the site of all material, as the seller was bound to do.—*Kellerman Contracting Co. v. Chicago House Wrecking Co.* (Mo. App.) 99.

§ 85. On a sale of buildings on the grounds of the Louisiana Purchase Exposition, *held*, that it was incumbent on the buyer to take the property away, but that this duty was a consequence of the contract imposed by law, and not a term of or undertaking in the contract.—*Kellerman Contracting Co. v. Chicago House Wrecking Co.* (Mo. App.) 99.

IV. PERFORMANCE OF CONTRACT.

(C) DELIVERY AND ACCEPTANCE OF GOODS.

§ 150. A bare contract of sale does not imply a promise by the buyer to remove the property from the seller's premises or other locality where it happens to be.—*Kellerman Contracting Co. v. Chicago House Wrecking Co.* (Mo. App.) 99.

§ 150. A sale binds the buyer to accept the property when tendered under the contract; and delivery and acceptance pass the title with the burden of ownership, which will include, under some circumstances, the removal of the property.—*Kellerman Contracting Co. v. Chicago House Wrecking Co.* (Mo. App.) 99.

§ 161. That a delivery of goods to a carrier may constitute delivery to the consignee so as to pass title, the goods must correspond with the consignee's order.—*Bray Clothing Co. v. McKinney* (Ark.) 406.

§ 168. Buyer of a horse *held* not deprived of his right to return a horse to the seller as unsatisfactory.—*Campbell v. Tinker* (Mo. App.) 660.

§ 178. Under sale of threshing machine, *held* that the buyer must be taken to have receded from her offer to return it and acceded to the refusal to allow her to do so, and that she was not relieved from paying for the machine and was precluded from claiming damages.—*Kempner v. Advance Thresher Co.* (Tex. Civ. App.) 714.

§ 179. Buyer of horses *held* precluded from any redress, except for fraud or breach of warranty.—*Campbell v. Tinker* (Mo. App.) 660.

§ 181. In an action for the price of goods alleged to have been shipped to defendant on his order, evidence *held* to support a verdict for defendant.—*Bray Clothing Co. v. McKinney* (Ark.) 406.

V. OPERATION AND EFFECT.

(A) TRANSFER OF TITLE AS BETWEEN PARTIES.

§ 208. Where, by the contract of sale, there remains something to be done as between the parties to ascertain the quantity or price of the chattel, the title does not pass, but otherwise it may pass pursuant to the intention of the parties.—*Priest v. Hodges* (Ark.) 253.

necessary to show that the buyer actually accepted the chattels.—*Priest v. Hodges* (Ark.) 253.

(B) RIGHTS AND LIABILITIES OF SELLER AS TO THIRD PERSONS.

§ 220. Where a buyer of an engine sold interests therein to other persons, who assumed as his partners to pay the seller for the engine, they were jointly and severally liable with the buyer for the amount due thereon.—*Detherage v. Hawn* (Ky.) 986; *Hawn v. Lunsford*, Id.

VII. REMEDIES OF SELLER.

(E) ACTIONS FOR PRICE OR VALUE.

§ 348. In an action on a contract of sale, right to counterclaim for certain damages, stated.—*Detherage v. Hawn* (Ky.) 986; *Hawn v. Lunsford*, Id.

§ 348. Right of buyer in an action for price of an engine to counterclaim for a defect and mortgage on the engine, stated.—*Detherage v. Hawn* (Ky.) 986; *Hawn v. Lunsford*, Id.

§ 339. In an action for the balance of the price, evidence *held* to sustain a verdict for plaintiff.—*Paducah Cooperage Co. v. Hazel Heading Co.* (Ky.) 931.

§ 364. Instructions, in an action on a contract of sale, *held* to properly present the issues raised by the pleadings.—*Paducah Cooperage Co. v. Hazel Heading Co.* (Ky.) 931.

§ 366. Scope of recovery stated under a petition in an action for price of an engine sold.—*Detherage v. Hawn* (Ky.) 986; *Hawn v. Lunsford*, Id.

(F) ACTIONS FOR DAMAGES.

§ 369. The remedy for a buyer's failure to remove the property sold sounds in tort in the nature of the common-law remedy of trespass on the case.—*Kellerman Contracting Co. v. Chicago House Wrecking Co.* (Mo. App.) 99.

VIII. REMEDIES OF BUYER.

(A) RECOVERY OF PRICE.

Action on purchase-money notes delivered in escrow, see *Escrows*, § 12.

(C) ACTIONS FOR BREACH OF CONTRACT.

Necessity of verified denial in action on written contract, see *Pleading*, § 291.

§ 413. In an action by a buyer against the seller for breach of a written contract of sale, defendant under a general denial may introduce evidence tending to show that a broker by whom the contract was signed failed to report the sale to defendant for its confirmation, as required by the rules of an association to which the parties to the contract belonged as members.—*Floresville Oil & Mfg. Co. v. Texas Refining Co.* (Tex. Civ. App.) 194.

SALVAGE.

Application of salvage by insured under policy of credit insurance, see *Insurance*, § 511.

SATISFACTION.

See *Compromise and Settlement*; *Payment*; *Release*.

Of mortgage, see *Chattel Mortgages*, § 235; *Mortgages*, § 293.

SCHISM.

See Religious Societies, § 23.

SCHOOLS AND SCHOOL DISTRICTS.**II. PUBLIC SCHOOLS.****(B) CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION OF DISTRICTS.**

§ 24. Where there is a city or town in any county which maintains a separate system of public schools, the balance of the county outside of such city or town, by the express provisions of Ky. St. 1909, § 4428a (Russell's St. § 5610a) becomes a school district.—Taylor v. Sparks (Ky.) 970.

§ 24. A certain irregularity in proceedings to change the boundaries of a school district held not available to invalidate the proceedings, in a collateral proceeding to contest an election of trustee for the district.—Gabbart v. Johnson (Tex. Civ. App.) 883.

§ 37. Under Rev. St. 1895, art. 3938, as amended by Act June 6, 1899 (Gen. Laws 1899, p. 321, c. 183), held that a county commissioners' court, having changed the boundaries of a school district, could not subsequently revoke the order of change without observing the prescribed procedure, in the absence of any error or defect in the lines as formerly fixed.—Gabbart v. Johnson (Tex. Civ. App.) 883.

§ 37. Acquiescence of portion of the people in territory added to a school district, under Rev. St. 1895, art. 3938, as amended by Act June 6, 1899 (Gen. Laws 1899, p. 321, c. 183), in a void order of the county commissioners' court, withdrawing the territory from the district, held not to validate the order.—Gabbart v. Johnson (Tex. Civ. App.) 883.

§ 42. An order of the county court under St. 1909, § 4464 (Russell's St. § 5736), for election on question of creation of a school district, held to sufficiently locate the site of the school.—Taylor v. Cundiff (Ky.) 379.

§ 42. An order of a county court held to sufficiently show that an election on the question of creation of a school district was held at the place ordered.—Taylor v. Cundiff (Ky.) 379.

(D) DISTRICT PROPERTY, CONTRACTS, AND LIABILITIES.

Lien on school buildings for labor and materials furnished in construction thereof, see Mechanics' Liens, § 13.

Priorities of claims for labor and materials furnished to contractor for construction of school building, see Creditors' Suit, § 36.

School lands, see Public Lands, §§ 173, 175.

§ 86. Creditors of a contractor of a school district held without remedy at law and in equity to have the funds of the district applied to the payment of their debts against the contractor, where funds must be diverted from their purpose thereby.—Plummer & Davis v. School Dist. No. 1 of Marianna (Ark.) 1011.

(E) DISTRICT DEBT, SECURITIES, AND TAXATION.

§ 97. Fact that notice of election in white graded school district did not state that only white voters were to participate in the election held not to render the election held pursuant thereto invalid.—Taylor v. Sparks (Ky.) 970.

§ 97. Provisions of Ky. St. 1909, § 4458 (Russell's St. § 5672), held not to affect provisions of section 4481 (section 5758) so as to require the notice of an election held under the latter section to be signed by the county superintendent.—Taylor v. Sparks (Ky.) 970.

§ 97. Provisions of Ky. St. 1909, § 4458 (Russell's St. § 5672), held not to affect provisions of section 4481 (section 5758) so as to render an election held under the latter statute invalid because held in the courthouse.—Taylor v. Sparks (Ky.) 970.

§ 97. Fact that order for an election in a white graded school district to determine matter of issuance of bonds did not state that the bonds were to be issued to raise money for the benefit of the white children of the district held not to render the election invalid.—Taylor v. Sparks (Ky.) 970.

§ 97. Where the act authorizing a school tax is void, valid bonds cannot be issued in anticipation of a levy of taxes under the act.—Patching v. Hutchison (Tex. Civ. App.) 878.

§ 101. Sp. Act March 5, 1907 (Sp. Laws 1907, p. 176, c. 18), creating the Tulia independent school district, and a levy of taxes thereunder, held void, as in conflict with Const. art. 7, § 3, limiting taxation.—Patching v. Hutchison (Tex. Civ. App.) 878.

§ 103. Under the express provisions of Ky. St. 1909, § 4458 (Russell's St. § 5672), widows and spinsters who are taxpayers of common school districts are entitled to vote in elections to raise taxes for the use of such districts.—Taylor v. Sparks (Ky.) 970.

SECONDARY EVIDENCE.

In civil actions, see Evidence, § 158.

SECRETARY OF STATE.

Conclusiveness of certificate as to contents of legislative journals, see Statutes, § 60.

SEDUCTION.**II. CRIMINAL RESPONSIBILITY.**

Negating exceptions in statute, see Indictment and Information, § 111.

§ 36. Under Ky. St. 1909, § 1214 (Russell's St. § 3790), punishing seduction, one may be indicted and punished for seduction, though prior to the indictment he had married the female seduced.—Commonwealth v. McNutt (Ky.) 978.

§ 39. One charged with seduction in violation of Ky. St. 1909, § 1214 (Russell's St. § 3790) held entitled to show any statutory ground for abandoning the female seduced after his marriage to her.—Commonwealth v. McNutt (Ky.) 978.

SELF-DEFENSE.

See Homicide, §§ 190, 300.

SEPARATE ESTATE.

Of married women, see Husband and Wife, §§ 133-150.

SEQUESTRATION.

§ 15. Where persons having no rights in land gained possession by wrongfully obtaining a writ of sequestration and having it executed, they acquired no rights by the possession so gained.—Knox v. McElroy (Tex. Civ. App.) 1142.

§ 21. To entitle a party to exemplary damages for wrongfully suing out of a writ of sequestration, both malice and want of probable cause must exist.—Webb v. J. L. Wiginton & Co. (Tex. Civ. App.) 856.

§ 21. A special charge requested by defendant in a suit wherein they reconvened for maliciously and wrongfully suing out sequestration held misleading as suggesting that malice alone

Of paper, *appeal and error*, see *Appeal and Error*, § 622.
Of process, see *Process*, § 87.

SERVICES.

See *Master and Servant*, §§ 79, 82; *Work and Labor*.

SERVITUDES.

See *Easements*.

SET-OFF AND COUNTERCLAIM.

In action for price of goods sold, see *Sales*, § 348.

II. SUBJECT-MATTER.

§ 28. A cause of action in assumpsit not arising out of the same contract as that sued on by plaintiff *held* available as a set-off but not as a counterclaim.—*Cranor Smith Lumber Co. v. Frith* (Ky.) 307.

§ 29. Under Civ. Code Prac. § 96, a defendant in an action for preventing plaintiff from completing a timber contract could counterclaim damages for cutting trees other than those sold and for injuring defendant's fencing and crops.—*Cranor Smith Lumber Co. v. Frith* (Ky.) 307.

SETTLEMENT.

See *Compromise and Settlement*; *Payment*; *Release*.

By executor or administrator, see *Executors and Administrators*, § 496.

By guardian of infant, see *Guardian and Ward*, §§ 137-163.

Of bill of exceptions, see *Exceptions*, *Bill of*, §§ 39, 59.

SEWERS.

Defects or obstructions, see *Municipal Corporations*, § 827.

SICKNESS.

Of juror, effect on right to summon *talesman*, see *Jury*, § 149.

SIGNATURES.

Of county superintendent to notice of election on question of issuing school district bonds, see *Schools and School Districts*, § 97.

To pleading, see *Pleading*, § 291.

SLANDER.

See *Libel and Slander*.

SODOMY.

§ 1. "Sodomy" and "buggery" defined.—*Commonwealth v. Poindexter* (Ky.) 943.

SPECIAL DAMAGES.

Liability of carrier for loss of or injury to goods shipped, see *Carriers*, § 135.

SPECIAL INTERROGATORIES.

See *Trial*, § 352.

Of being specifically enforced.—*Collins v. Harrell* (Mo.) 432.

§ 28. A contract, to be specifically enforced, must be definite and specific.—*Collins v. Harrell* (Mo.) 432.

§ 42. Part performance of a parol contract to convey real estate must be unequivocal and referable alone to the contract to warrant specific performance.—*Collins v. Harrell* (Mo.) 432.

§ 58. A vendor may enforce specifically a contract for the purchase of land, though it stipulates for a sum as liquidated damages on its breach.—*Moss & Raley v. Wren* (Tex. Civ. App.) 149.

§ 64. Certain statement *held* not to amount to a contract to convey a particular tract of land, capable of being specifically enforced.—*Collins v. Harrell* (Mo.) 432.

§ 65. A contract of sale of land negotiated by brokers will not be specifically enforced against the owner, where stipulating for a certain forfeiture by the owner not authorized by him.—*Hagler v. Ferguson* (Tex.) 133.

III. GOOD FAITH AND DILIGENCE.

§ 97. In a vendee's suit for specific performance, tender of performance by plaintiff in his pleadings without payment of the purchase money into court entitles him to go to the jury on the facts found.—*Erdtran v. Dunovant* (Tex. Civ. App.) 768.

IV. PROCEEDINGS AND RELIEF.

Right to jury trial, see *Jury*, § 14.

§ 121. To warrant specific performance of a parol contract to convey real estate, *held*, that the proof of the contract must be clear and convincing.—*Collins v. Harrell* (Mo.) 432.

§ 121. Evidence, in an action to compel specific performance of an alleged parol contract by a decedent to convey to a child a particular farm if she would stay with him, *held* to fail to establish such a contract.—*Collins v. Harrell* (Mo.) 432.

§ 121. Evidence in specific performance *held* to show that decedent only contemplated deeding land as a voluntary gift, prompted by affection, and not because of any contract obligating him to convey.—*Collins v. Harrell* (Mo.) 432.

SPIRITUOUS LIQUORS.

See *Intoxicating Liquors*.

STALE DEMAND.

See *Equity*, § 67.

STANDING TIMBER.

Sales and conveyances, application of statute of frauds, see *Frauds*, *Statute of*, § 56.

STARE DECISIS.

See *Courts*, §§ 89-116.

STATEMENT.

By witness inconsistent with testimony, see *Witnesses*, §§ 383-395.

Of case or facts for purpose of review, see *Appeal and Error*, §§ 544-549, 564, 572.

Of plaintiff's claim, see *Pleading*, § 49.

STATES.

Courts, see Courts.

Judicial notice of laws of other states, see Evidence, § 35.

Jurisdiction of state court of action against trustee in bankruptcy, see Bankruptcy, § 295.

Legislative power, see Constitutional Law, § 52.

Public lands, see Public Lands, §§ 173-178.

STATIONS.

Railroad stations, care required of carrier as to condition, see Carriers, § 236.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

Laws impairing obligation of contracts, see Constitutional Law, § 137.

Validity of retrospective or ex post facto laws, see Constitutional Law, § 191.

Statute of frauds, see Frauds, Statute of.

Statutes of limitations, see Limitation of Actions, §§ 5-39.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 18. Act No. 59, Gen. Assem. 1868, approved July 23, 1868 (Acts 1868, p. 214), held legally enacted.—State v. Bowman (Ark.) 711.

§ 19. Const. art. 5, § 21, relating to the final passage of bills, held mandatory.—State v. Bowman (Ark.) 711.

§ 60. Where a question arises as to the existence of a statute, the court may examine legislative journals.—State v. Bowman (Ark.) 711.

§ 60. The certificate of the Secretary of State as to the contents of the legislative journals is not conclusive.—State v. Bowman (Ark.) 711.

IV. AMENDMENT, REVISION, AND CODIFICATION.

§ 138. A section of the Kentucky Statutes may be amended by its section number.—Commonwealth v. McNutt (Ky.) 978.

§ 138. Acts 1906, p. 253, c. 25, held to properly amend section 1214, Ky. St. 1903, within Const. § 51.—Commonwealth v. McNutt (Ky.) 978.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 161. Acts 30th Leg. (Gen. Laws 1907, c. 18) pp. 479-489, levying an annual occupation tax upon street car companies on a basis of gross receipts, held not to repeal Sayles' Ann. Civ. St. 1897, art. 5049, subd. 54, levying an annual occupation tax on street car companies on a track mileage basis.—Dallas Consol. Electric St. Ry. Co. v. State (Tex. Civ. App.) 879.

VI. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

Statutes relating to actions for wrongful death, see Death, § 9.

Statutes relating to conduct of elections, see Elections, § 198.

§ 181. Courts cannot by construing a statute substitute their ideas of legislative intent for

that held by the Legislature and expressed in legislative words, and must not interpret where there is no need of it.—Clark v. Kansas City, St. L. & C. R. Co. (Mo.) 40.

§ 188. A construction should not be employed that would render the law absurd or meaningless, when a rational, expressive, and wholesome meaning may be ascertained.—Texas & P. Ry. Co. v. Taylor (Tex. Civ. App.) 1097.

§ 195. A statute which enumerates the particular things which shall be necessary to create a lien on real estate excludes the idea of the doing of other things as essential to the completeness of the lien.—Hughes v. Wallace (Ky.) 324.

§ 228. Where a statute repealing a pre-existing penal law contains a clause saving the rights of the state, the right of action only is preserved, and it must be prosecuted under the new law or under some law other than that repealed.—State v. Brady (Tex.) 128.

§ 228. The saving clause or proviso of a repealing statute, which preserves some right, must be strictly construed so as not to include anything not fairly within its terms.—State v. Brady (Tex.) 128.

(B) PARTICULAR CLASSES OF STATUTES.

Statute relating to mechanics' liens, see Mechanics' Liens, § 5.

§ 241. The rule of strict construction as to penal statutes does not consist in giving words the narrowest meaning susceptible, nor consist in adopting a strained construction obviously contrary to, or destructive of, the lawmakers' intention.—Texas & P. Ry. Co. v. Taylor (Tex. Civ. App.) 1097.

§ 241. The intention of the Legislature, even in penal statutes, when it can fairly be discovered, must in all cases control.—Texas & P. Ry. Co. v. Taylor (Tex. Civ. App.) 1097.

§ 241. The rule of strict construction as to penal statutes is, properly speaking, a requirement that plaintiffs' case must be brought strictly within the spirit and letter thereof.—Texas & P. Ry. Co. v. Taylor (Tex. Civ. App.) 1097.

§ 241. The courts cannot, and ought not to, deal with an act as a crime, unless plainly within the language used by the Legislature; but, when determining whether or not it is within it, a common-sense method to ascertain its real meaning should always be employed.—Texas & P. Ry. Co. v. Taylor (Tex. Civ. App.) 1097.

(D) RETROACTIVE OPERATION.

§ 263. Statutes will not be given a retrospective construction, unless the language precludes a reasonable doubt that the Legislature intended a prospective construction.—Louisville & N. R. Co. v. Mottley (Ky.) 982.

§ 267. The general rule that statutes will be construed to be prospective in operation does not apply to statutes affecting procedure or a legal remedy.—Clark v. Kansas City, St. L. & C. R. Co. (Mo.) 40.

VII. PLEADING AND EVIDENCE.

§ 279. Under Civ. Code Prac. § 119, held, that it was unnecessary in an action against a common carrier under Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1907, p. 909), known as the "Carmack amendment to the interstate commerce act," to refer

to that statute in his petition.—*Louisville & N. R. Co. v. Scott* (Ky.) 990.

§ 281. To be available in an action in the state, a statute of another state adopting the common law must be pleaded.—*Mathieson v. St. Louis & S. F. Ry. Co.* (Mo.) 9.

§ 281. In an action for injuries to an employé in another state, in the absence of any

showing that the law of such other state is different from the law of the forum, the latter will be applied.—*Atchison, T. & S. F. Ry. Co. v. Pickens* (Tex. Civ. App.) 1133.

§ 283. Where an act has been signed by the Governor, deposited with the Secretary of State, and duly published, it will be presumed that every requirement was complied with in its passage.—*State v. Bowman* (Ark.) 711.

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§ 16. Where the parties agree in open court to submit certain issues open to the jury, neither party can be heard to complain of the action of the court in submitting any of the issues.—Mecca Fire Ins. Co. of Waco v. Wilderspin (Tex. Civ. App.) 1131.

§ 18. In an action on an insurance policy, an objection that the evidence does not support a finding that the property destroyed was worth the amount alleged in the petition *held* not available after an agreement by the parties that certain issues should be the only ones submitted to the jury.—Mecca Fire Ins. Co. of Waco v. Wilderspin (Tex. Civ. App.) 1131.

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§ 69. Acts 30th Leg. (Gen. Laws 1907, c. 18) pp. 479-489, levying an annual occupation tax upon street car companies on a basis of gross receipts, *held* not to repeal Sayles' Ann. Civ. St. 1897, art. 5049, subd. 54, levying an annual occupation tax on street car companies on a track-mileage basis.—Dallas Consol. Electric St. Ry. Co. v. State (Tex. Civ. App.) 879.

§ 81. The care required of a motorman to avoid accidents with persons getting in the way of the car stated.—Dallas Consol. Electric St. Ry. Co. v. Chambers (Tex. Civ. App.) 851.

§ 93. A motorman, seeing that a traveler intends to cross the track ahead of the car, *held* required to make reasonable use of the means at hand to check the speed of the car, so as to

enable the traveler to cross in safety.—Dahmer v. Metropolitan St. Ry. Co. (Mo. App.) 496.

§ 93. A traveler and a motorman in charge of a street car *held* rightfully traveling on the public streets, and each must employ reasonable care to avoid a collision.—Dahmer v. Metropolitan St. Ry. Co. (Mo. App.) 496.

§ 98. A person need not always look and listen for approaching cars before going on a street railroad track, and the measure of ordinary care may be satisfied by the exercise of either the sense of hearing or sight.—Northern Texas Traction Co. v. Hunt (Tex. Civ. App.) 827.

§ 111. A petition, in an action for injuries in a collision with a street car, *held* sufficient to permit the introduction in evidence of a city ordinance relating to the speed of cars.—Northern Texas Traction Co. v. Hunt (Tex. Civ. App.) 827.

§ 113. In an action against a street railway company for personal injuries, the rules of the company governing the conduct of its employees *held* not admissible.—Louisville Ry. Co. v. Gaugh (Ky.) 276.

§ 117. In an action for injuries in a collision with a street car, evidence *held* to require submission to the jury of the company's negligence resulting from a failure to exercise proper care after the discovery of the traveler's peril.—Dahmer v. Metropolitan St. Ry. Co. (Mo. App.) 496.

§ 117. An instruction on the duty of a motorman as to the control over the speed of his car, which duty was not prescribed by ordinance, *held* erroneous, as the question was for the jury.—Dallas Consol. Electric St. Ry. Co. v. Chambers (Tex. Civ. App.) 851.

§ 117. Under a city ordinance requiring a signal light for street cars, the question of the motorman's negligence in running at a greater speed than would allow him to stop within the distance covered by the light thrown by his own headlight *held* for the jury.—Dallas Consol. Electric St. Ry. Co. v. Chambers (Tex. Civ. App.) 851.

§ 118. In an action against a street railroad company, *held* error not to give specified instruction.—Louisville Ry. Co. v. Gaugh (Ky.) 276.

§ 118. In an action for injuries in a collision with a street car, an instruction submitting the issue of contributory negligence *held* justified by the pleadings and the evidence.—North-

driving suddenly in front of the car proximately contributing to the injury, *held* properly refused.—Northern Texas Traction Co. v. Hunt (Tex. Civ. App.) 827.

§ 118. In an action for injuries in a street car collision, a requested charge on the issue of contributory negligence *held* properly refused in view of the pleadings.—Northern Texas Traction Co. v. Hunt (Tex. Civ. App.) 827.

§ 118. The petition and answer in an action for injuries in a collision with a street car *held* to authorize an instruction submitting the question of plaintiff's driving in close proximity to the track.—Northern Texas Traction Co. v. Hunt (Tex. Civ. App.) 827.

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§ 29. An allegation in an indictment under Rev. St. 1899, § 2240 (Ann. St. 1906, p. 1446), for Sabbath breaking, *held* to be a direct statement that the date alleged was Sunday.—State v. Nickelson (Mo. App.) 1192.

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II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

§ 47. Where it is shown that defendant has paid taxes on \$3,500 worth of personalty, such property being worth less than that amount, he should not be assessed separately on a library worth \$300.—Commonwealth v. Harris (Ky.) 294.

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(A) PRIVATE PERSONS AND PROPERTY IN GENERAL.

Liability of street railroad for occupation taxes, see Street Railroads, § 69.

§ 108. A sale and transfer of taxable property and the investment of the proceeds in non-taxable government bonds *held* not a trick on the part of the owner to escape taxation under St. 1909, § 4051 (Russell's St. § 5942).—Commonwealth v. Harris (Ky.) 294.

(B) CORPORATIONS AND CORPORATE STOCK AND PROPERTY.

§ 122. Under St. 1909, § 4088 (Russell's St. § 6061), where a public service corporation owning property both within and out of the state pays a tax on its property and franchises within the state, its corporate stock in the hands of stockholders is not assessable for taxation.—Commonwealth v. Harris (Ky.) 294.

(D) EXEMPTIONS.

§ 217. A waterworks system owned and operated by a city *held* exempt from taxation, under Const. § 170.—Ryan v. City of Louisville (Ky.) 992.

§ 251. Equity will interfere, by injunction, to prevent a threatened cloud on the title of the waterworks property of a city by an assessment of the property for taxation.—Ryan v. City of Louisville (Ky.) 992.

V. LEVY AND ASSESSMENT.

(E) ASSESSMENT ROLLS OR BOOKS.

§ 411. Under Rev. St. 1895, arts. 5098, 5103, 5126, 5127, *held*, that tax rolls are to be made

§ 453. Where the assessed valuation of property is excessive, or there is an attempted assessment of omitted property, the exclusive remedy is by an application to the board of supervisors, and to appeal from their action, except on the question of valuation.—*Ryan v. City of Louisville (Ky.)* 992.

VI. LIEN AND PRIORITY.

Abatement of action to enforce tax lien, death of defendant as ground of, see Abatement and Revival, § 58.

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

Payment of taxes as qualification of voter, see Elections, § 83.

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§ 529. Evidence in trespass to try title, in which defendants' defense was limitations, based on the payment of taxes on the land, *held* not to show a payment.—*Lofton v. Miller (Tex. Civ. App.)* 911.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 642. The citation served by publication in an action for delinquent state and county taxes may be addressed directly to defendants, and it need not be addressed to any officer nor require any officer to make return thereof.—*Gibbs v. Scales (Tex. Civ. App.)* 188.

§ 642. A citation under the delinquent tax law (Laws 1897, p. 138, c. 103, § 15) need not recite the file number of the suit under Rev. St. 1895, art. 1214, nor state the amount of the costs.—*Unknown Owner v. State (Tex. Civ. App.)* 803.

§ 643. In a suit to enforce a lien for taxes, a claim of lien for subsequent taxes on the same land was properly pleaded by amended petition, under Civ. Code Prac. § 694, subsec. 3.—*Board of Councilmen of City of Frankfort v. Herndon's Adm'r (Ky.)* 347.

§ 643. Gen. Laws 1905, p. 317, c. 129, § 2, relating to tax collectors' credits under Rev. St. 1895, art. 5170, *held* inapplicable to collectors' fees in suits to collect taxes under such act.—*Unknown Owner v. State (Tex. Civ. App.)* 803.

§ 647. A judgment for delinquent state and county taxes *held* not wholly invalid because it contains improper provisions.—*Gibbs v. Scales (Tex. Civ. App.)* 188.

§ 648. A judgment for delinquent taxes *held* not subject to collateral attack.—*Gibbs v. Scales (Tex. Civ. App.)* 188.

§ 674. *Sayles' Ann. Civ. St. 1897, art. 5232g, held* not to render a purchase by the county attorney of land at a tax foreclosure sale void as contrary to public policy.—*Gibbs v. Scales (Tex. Civ. App.)* 188.

§ 689. A direction by the court to the sheriff on the hearing of a motion to set aside a tax sale *held* not equivalent to a direct finding that the sheriff promised to notify an attorney of the sale.—*State ex rel. Hartley v. Innes (Mo. App.)* 1168.

§ 689. Though for inadequacy of price a sale for taxes will not be set aside, gross inadequa-

of his client's lot, and was thereby led to make no further inquiry or watch for advertisement of the sale, which was made for an inadequate price, it should be set aside.—*State ex rel. Hartley v. Innes (Mo. App.)* 1168.

X. REDEMPTION FROM TAX SALE.

§ 709. One entitled to redeem from a tax sale is liable to the purchaser for interest on the amount due only from the date of the sale to the time he tenders such amount to the purchaser and offers to redeem.—*Blair v. Guaranty Savings, Loan & Investment Co. (Tex. Civ. App.)* 608.

XII. FORFEITURES AND PENALTIES.

§ 848. Ky. St. 1909, §§ 4076b-4076k (Russell's St. §§ 5970-5983) relative to forfeiture of land for continued failure to list for taxation, *held* not to apply to the facts.—*Lockard v. Commonwealth (Ky.)* 331.

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§ 15. One maintaining telephone poles along a highway *held* required to see that they are sound and serviceable and is liable for injuries to a traveler by the fall of a defective pole.—*Burton v. Cumberland Telephone & Telegraph Co. (Ky.)* 287.

§ 15. One maintaining telephone poles along a highway without permission from the fiscal court *held* not liable for injuries to a traveler in consequence of the fall of a pole during a severe windstorm.—*Burton v. Cumberland Telephone & Telegraph Co. (Ky.)* 287.

II. REGULATION AND OPERATION.

§ 31. Certain regulation of telegraph company fixing office hours *held* reasonable.—*Western Union Telegraph Co. v. Cobb (Tex. Civ. App.)* 717.

§ 32. Telegraph company *held* not bound by unauthorized contract of agent as to delivery of certain telegram.—*Western Union Telegraph Co. v. Cobb (Tex. Civ. App.)* 717.

§ 38. Facts *held* to show actionable negligence on the part of a telegraph company in delaying a telegram.—*Western Union Telegraph Co. v. Barrett (Tex. Civ. App.)* 1089.

§ 65. In an action against a telegraph company for nondelivery of a message, the petition *held* sufficient to authorize the admission of evidence that the sendee would have complied with the request made in the message.—*Western Union Telegraph Co. v. Powell (Tex. Civ. App.)* 226.

§ 65. A petition in an action against a telegraph company *held* sufficient as against the general demurrer.—*Western Union Telegraph Co. v. Hughey (Tex. Civ. App.)* 1130.

§ 66. In an action against a telegraph company for mental anguish, *held*, that the burden of proof was on plaintiff.—*Western Union Telegraph Co. v. Long (Ark.)* 405.

§ 66. Evidence in an action against a telegraph company for mental anguish *held* insufficient to establish a cause of action.—*Western Union Telegraph Co. v. Long (Ark.)* 405.

§ 66. Evidence, in an action against a telegraph company for delay in delivery of a tele-

gram, *held* to show that the messenger intrusted therewith was negligent.—*Western Union Telegraph Co. v. Cobb* (Tex. Civ. App.) 717.

§ 66. Evidence in an action against a telegraph company *held* to show negligence but for which plaintiff would have reached the bedside of his dying wife about 15 hours sooner than he did.—*Western Union Telegraph Co. v. Hughey* (Tex. Civ. App.) 1130.

§ 66. In an action against a telegraph company for failure to deliver a telegram, *held*, that there was no burden on plaintiff to show that had he arrived home at the time he could have arrived had the telegram been promptly delivered, that his wife, who was unconscious when he arrived, was conscious 15 hours earlier.—*Western Union Telegraph Co. v. Hughey* (Tex. Civ. App.) 1130.

§ 67. A telegraph company failing to deliver a telegram *held* liable for injuries sustained by the sender and his wife.—*Western Union Telegraph Co. v. Powell* (Tex. Civ. App.) 226.

§ 68. A telegraph company *held* not liable for the failure to deliver an answer to a telegram, where the answer would not have alleviated the plaintiff's mental anxiety already occasioned by the delay in the delivery of a telegram.—*Western Union Telegraph Co. v. Barrett* (Tex. Civ. App.) 1069.

§ 71. Verdict for \$1,200, in action against telegraph company for mental anguish caused by negligent delay in delivering telegram, *held* not excessive.—*Western Union Telegraph Co. v. Cobb* (Tex. Civ. App.) 717.

§ 74. An instruction in an action against a telegraph company for nondelivery of a message *held* to properly submit the issue of contributory negligence of the sender.—*Western Union Telegraph Co. v. Powell* (Tex. Civ. App.) 226.

§ 74. In action against telegraph company for delay in delivery of message, *held* error to submit issue of negligence in failing to deliver it at a certain time.—*Western Union Telegraph Co. v. Cobb* (Tex. Civ. App.) 717.

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§ 18. To preserve the legal effect of a tender, it must be kept good.—*Abbott v. Herron* (Ark.) 708.

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For particular acts in or incidental to judicial proceedings.

Filing assignment of errors, see Appeal and Error, § 744.

Filing bill of exceptions, see Exceptions, Bill of, § 39.

Filing transcript on appeal or writ of error, see Appeal and Error, § 622.

Motion for new trial, see New Trial, § 119.

Taking appeal or suing out writ of error, see Appeal and Error, § 339.

§ 9. Where an order filed November 28th, for cars to be furnished on December 2d, was complied with by furnishing cars on December 13th, *held* that only 10 days remained for which a penalty for delay should be allowed.—*Texas & P. Ry. Co. v. Taylor* (Tex. Civ. App.) 1097.

TITLE.

Best and secondary evidence of title, see Evidence, § 158.

Color of title, see Adverse Possession.

Dedication affecting title, see Dedication, § 51.

Estoppel to assert title, see Estoppel, §§ 38, 47.

Removal of cloud, see Quieting Title.

Sufficiency of title in abutting owner to maintain action for obstruction of street, see Municipal Corporations, § 671.

Sufficiency of title of vendor of land, see Vendor and Purchaser, § 129.

Title of lessor, see Landlord and Tenant, § 63.

TORTS.

Causing death, see Death, §§ 9-99.

Liabilities of particular classes of persons.

See Municipal Corporations, §§ 739-827.

Agents, see Principal and Agent, § 159.

Particular torts.

See Assault and Battery, §§ 3-43; False Imprisonment, § 20; Forcible Entry and Detainer, §§ 5, 32; Libel and Slander; Malicious Prosecution; Negligence; Nuisance; Trespass; Trover and Conversion.

Remedies for torts.

See Trespass, §§ 44-52; Trover and Conversion, §§ 13-40.

Limitations, see Limitation of Actions, § 55.

Measure of damages, see Damages, §§ 95, 112.

§ 4. It is no defense to an action for a wrongful act that defendant did not know that any injury or loss would result.—*Kentucky Heating Co. v. Hood* (Ky.) 337.

§ 28. In an action for injuries to plaintiffs' business, the refusal of instructions that there could be no recovery for loss other than that resulting from acts of defendant, *held* not error.—*American Freehold Land Mortgage Co. of London v. Brown* (Tex. Civ. App.) 1106.

TOWER HOUSES.

Maintenance near railroad crossing as constituting negligence, see Railroads, § 314.

TOWNS.

See Counties; Municipal Corporations; Schools and School Districts, §§ 13-103.

TRANSCRIPTS.

As evidence, see Evidence, § 342.
Of record for purpose of review, see Appeal and Error, §§ 597, 601; Criminal Law, §§ 1090-1097.

TRANSFERS.

Of causes for trial, see Trial, § 11.

TRANSITORY ACTIONS.

See Venue, § 7.

TREES.

See Logs and Logging.

Application of statute of frauds to contract for sale of growing trees, see Frauds, Statute of, § 56.

TRESPASS.

Ejection of trespasser, see Carriers, §§ 363-384.
Injuries to trespassers, see Railroads, §§ 273½-282.

To the person, see Assault and Battery, §§ 3-43; False Imprisonment.

I. ACTS CONSTITUTING TRESPASS AND LIABILITY THEREFOR.

§ 12. Every unauthorized entry on the land of another is trespass, and it is willful trespass if deliberately done.—Riply v. Less (Tex. Civ. App.) 1084.

II. ACTIONS.

(C) EVIDENCE.

§ 44. Where, in an action for timber trespass, plaintiff elected to treat the manufacture of the timber into lumber as the period of conversion, the burden was on her to prove that the timber was so manufactured.—Riply v. Less (Tex. Civ. App.) 1084.

§ 46. Evidence held to support a finding that defendants committed a timber trespass intentionally, and not through mistake in the land lines.—Riply v. Less (Tex. Civ. App.) 1084.

(D) DAMAGES.

§ 52. Where timber is cut on the land of another the trespasser is liable for the full value of the property at the time and place of demand or of suit brought.—Riply v. Less (Tex. Civ. App.) 1084.

TRESPASS TO TRY TITLE.

I. RIGHT OF ACTION AND DEFENSES.

§ 10. A bond for title to land after the payment of the purchase price is an equitable title, which is sufficient on which to base trespass to try title against the grantor.—Wright v. Riley (Tex. Civ. App.) 1134.

II. PROCEEDINGS.

Conformity to pleading, see Judgment, § 251.
Submission of questions of law to jury, see Trial, § 199.

§ 25. Rev. St. 1895, art. 3360, limiting the time for suing for specific performance of a contract to convey land, does not apply to an action of trespass to try title for the recovery of

and want of consideration for the contract on which plaintiff's title is based, have the legal effect of admitting possession in plaintiff.—Wright v. Riley (Tex. Civ. App.) 1134.

§ 38. A plea of not guilty as to the part of land not disclaimed by defendant put plaintiff on proof of his title, and on his failure to show title defendant would be entitled to a judgment denying a recovery of the land not disclaimed.—Gaffney v. Clark (Tex. Civ. App.) 608.

§ 38. Where, in trespass to try title, defendant pleaded not guilty, and, in a cross-action sought to have the boundary established between himself and plaintiff, the burden was on defendant to prove that the boundaries were as alleged by him, even though plaintiff failed to sustain the burden of showing title in the principal action.—Gaffney v. Clark (Tex. Civ. App.) 606.

§ 38. Under the presumption of the validity of the land commissioner's award and sale of land, held that it will be presumed that one purchasing school land in addition to his home section was owner of his home section when he applied.—McKee v. West (Tex. Civ. App.) 1135.

§ 39. In trespass to try title, certain evidence held inadmissible as a collateral attack on a lease of public lands not involved in the case.—McGill v. Sites (Tex. Civ. App.) 220.

§ 41. In trespass to try title, certain evidence held not to show that there was any outstanding title against the land in controversy.—Hoencke v. Lomax (Tex. Civ. App.) 817.

§ 45. Term "prior claim" used in a charge held referable to "prior deed" used therein; the terms as used being practically synonymous.—La Brie v. Cartwright (Tex. Civ. App.) 785.

§ 45. In trespass to try title, the exclusion of evidence that plaintiff's grantor attempted to get a third person to execute a deed of the land to him which she refused held not error.—Robertson v. Hefley (Tex. Civ. App.) 1159.

§ 47. Defendant in trespass to try title, after pleading not guilty as to a part of the land not claimed by plaintiff, could seek affirmative relief by having disputed boundaries between them established.—Gaffney v. Clark (Tex. Civ. App.) 606.

§ 47. Defendant in trespass to try title held bound by his admission in his cross-action to establish the boundaries between himself and plaintiff, that plaintiff owned the land up to a certain boundary, notwithstanding the fact that plaintiff failed to prove title to the land in controversy.—Gaffney v. Clark (Tex. Civ. App.) 606.

§ 47. Parties in actual possession of land until wrongfully dispossessed by others held entitled to recover possession, in the absence of evidence tending to show title in the others.—Knox v. McElroy (Tex. Civ. App.) 1142.

TRIAL.

See New Trial; Reference; Witnesses.

Trespass to try title to real property, see Trespass to Try Title.

Proceedings incident to trials.

Conformity of judgment to verdict or findings, see Judgment, § 256.

Entry of judgment after trial of issues, see Judgment, §§ 199-256.

Place of trial, see Venue, §§ 32, 71.

Right to trial by jury, see Jury, § 14.

Summoning and impaneling jury, see Jury, § 58.

Corporations, §§ 821-822.

Trustee in bankruptcy, see Bankruptcy, § 304.

Trial of particular civil actions or proceedings.

See Forcible Entry and Detainer, § 32; Libel and Slander, § 123; Negligence, §§ 136-139; Torts, § 28; Trespass to Try Title, § 45.

For breach of contract, see Contracts, § 353.

For breach of contract to convey land, see Vendor and Purchaser, § 352.

For delay in shipment, see Carriers, § 106.

For fraud of agent, see Principal and Agent, § 79.

For injuries caused by operation of railroad, see Railroads, §§ 400-401.

For injuries to passenger, see Carriers, §§ 320-321.

For injuries to servant, see Master and Servant, §§ 284-296.

For injuries to shipment of live stock, see Carriers, § 230.

For injuries to traveler on city street, see Municipal Corporations, §§ 821, 822.

For loss of or injury to shipment, see Carriers, §§ 136-137.

For malpractice, see Physicians and Surgeons, § 18.

For money received, see Money Received, § 19.

For price of goods sold, see Sales, § 364.

For rent, see Landlord and Tenant, § 233.

Probate proceedings, see Wills, § 321.

To foreclose vendor's lien, see Vendor and Purchaser, § 284.

Trial of criminal prosecutions.

See Criminal Law, §§ 589-603, 621-864; Homicide, §§ 268-309; Larceny, § 70; Rape, § 59.

II. DOCKETS, LISTS, AND CALENDARS.

Review of rulings as to transfer of cause as dependent on objections made in lower court, see Appeal and Error, § 237.

§ 11. The trial judge is not required to transfer a case involving a complicated account to the equity side of the docket on his own motion.—Stevenson v. Moore (Ky.) 951.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

Review of remark of judge as dependent on prejudicial nature of error, see Appeal and Error, § 1046.

§ 29. A remark by the court, after evidence had been received without objection that the question was not proper, related only to the admissibility and not to the weight of the testimony.—Houston & T. C. R. Co. v. Shapard (Tex. Civ. App.) 596.

IV. RECEPTION OF EVIDENCE.

(A) INTRODUCTION, OFFER, AND ADMISSION OF EVIDENCE IN GENERAL.

§ 41. Under Kirby's Dig. § 3142, the exclusion of witnesses from the courtroom *held* within the discretion of the court.—St. Louis, I. M. & S. Ry. Co. v. Pate (Ark.) 260.

§ 54. In a suit to recover rents, part of the consideration for the conveyance of land, certain evidence *held* admissible only for the purpose of affecting the credibility of the witness, and not for the purpose of proving plaintiff's case.—Tipton v. Tipton (Tex. Civ. App.) 842.

though it should have been introduced in rebuttal.—Camden Interstate Ry. Co. v. Lester (Ky.) 268.

(C) OBJECTIONS, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

§ 75. Irrelevant testimony *held* not rendered admissible by admission of other irrelevant testimony.—Hall v. Parry (Tex. Civ. App.) 561.

§ 76. An objection to the testimony of a witness, not made until after plaintiff had finished his opening argument to the jury, was too late.—Gulf, C. & S. F. Ry. Co. v. Gillespie & Carlton (Tex. Civ. App.) 628.

§ 85. An objection, urged as a whole to evidence admissible in part, is properly overruled.—Southern Kansas Ry. Co. of Texas v. McSwain (Tex. Civ. App.) 874.

§ 103. A bill of exceptions to the exclusion of testimony should state what it was expected the witness would answer, and the objections to the testimony.—McMillion v. Cook (Tex. Civ. App.) 775.

§ 105. In an equity case the court may disregard hearsay evidence, though it was admitted without objection.—Jones v. Plummer (Mo. App.) 109.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 110. The conduct of counsel for the successful party in persistently pursuing a line of interrogation of witnesses which the court ruled to be wrong, *held* reversible error.—Louisville & N. R. Co. v. Payne (Ky.) 352.

§ 119. In a servant's injury action, statements by plaintiff's counsel in argument that plaintiff would suffer mental anguish whenever he went into a public place, etc., because of his injuries, *held* error.—Gulf, C. & S. F. Ry. Co. v. Dickens (Tex. Civ. App.) 612, 618.

§ 120. Counsel should not state in his argument his knowledge of the facts, unless he has testified thereto as a witness.—Southwestern Telegraph & Telephone Co. v. Taylor (Tex. Civ. App.) 188.

§ 133. The improper argument of counsel for plaintiff *held* not ground for reversal, in view of the action of the court.—Wellman v. Metropolitan St. Ry. Co. (Mo.) 31.

§ 133. Refusal to instruct the jury to disregard improper argument of plaintiff's counsel *held* ground for reversal.—Southwestern Telegraph & Telephone Co. v. Taylor (Tex. Civ. App.) 188.

§ 133. The remarks of plaintiff's attorney in his address to the jury *held* not prejudicial.—St. Louis Southwestern Ry. Co. of Texas v. Browning (Tex. Civ. App.) 245.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) QUESTIONS OF LAW OR OF FACT IN GENERAL.

As to particular facts, issues, or subjects.

See Boundaries, § 40; Dedication, § 45; Negligence, § 136.

Contributory negligence of passenger, see Carriers, § 347.

Contributory negligence of person injured by operation of railroad, see Railroads, § 282.

Contributory negligence of servant, see Master and Servant, § 239.

Negligence of master, see Master and Servant, § 286.

For injuries caused by operation of street railroad, see Street Railroads, § 117.
 For injuries from fire caused by operation of railroad, see Railroads, § 484.
 For injuries to animals caused by operation of railroad, see Railroads, § 446.
 For injuries to passenger, see Carriers, § 320.
 For injuries to person on city street, see Municipal Corporations, § 821.
 For injuries to servant, see Master and Servant, §§ 284-289.
 For loss of or injury to shipment, see Carriers, § 136.
 On insurance policy, see Insurance, § 668.

§ 139. If there is any evidence warranting a finding for plaintiff, the question is for the jury, though one of plaintiff's witnesses may contradict his other witnesses.—*Bruton's Adm'r v. Eddington-Griffiths Const. Co. (Ky.)* 1001.

§ 139. Unless the evidence is of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it, the question is for the jury.—*First Nat. Bank v. Thomas (Tex. Civ. App.)* 221.

§ 139. Where the evidence raised issues which the court was required to submit, a peremptory charge for defendant was properly refused.—*Boardman v. Woodward (Tex. Civ. App.)* 550.

§ 139. It is not error to direct a verdict for plaintiff, where defendant's evidence is so weak that it raises only a surmise or suspicion of the existence of facts sought to be established in support of his offset.—*Dayton Lumber Co. v. Stockdale (Tex. Civ. App.)* 805.

§ 139. It is only when a cause is susceptible of but one just opinion that the trial judge may take it from the jury.—*Missouri, K. & T. Ry. Co. of Texas v. Bratcher (Tex. Civ. App.)* 1091.

§ 140. Where the testimony of one witness is inconsistent with that of others, it is a question for the jury to decide which witness they will believe.—*Bruton's Adm'r v. Eddington-Griffiths Const. Co. (Ky.)* 1001.

§ 141. Where the only defense pleaded was *res judicata* which was not proved, the court should have directed a verdict for plaintiffs.—*Kerr v. Blair (Tex. Civ. App.)* 791.

§ 143. A summary instruction should not be given the jury as to an issue on which the evidence is conflicting.—*Texas & P. Ry. Co. v. Taylor (Tex. Civ. App.)* 1097.

(B) DEMURRER TO EVIDENCE.

§ 156. If there was no evidence to go to the jury, a demurrer thereto should have been sustained at the close of plaintiff's evidence, without considering defendant's evidence.—*Quinn v. Metropolitan St. Ry. Co. (Mo.)* 46.

§ 156. The court, in ruling on a demurrer to plaintiff's evidence, must consider the evidence in a light most favorable to him.—*Parsons v. Louisville & N. R. Co. (Mo. App.)* 101.

§ 156. The court in passing on a demurrer to plaintiff's evidence must consider the proof in the light most favorable to the maintenance of the action pleaded.—*Dahmer v. Metropolitan St. Ry. Co. (Mo. App.)* 496.

VII. INSTRUCTIONS TO JURY.

Instructions on issue of settlement, see *Compromise and Settlement*, § 25.

Questions presented for review as to rulings on instructions, see *Appeal and Error*, § 699.

Review of rulings on instructions as dependent on assignment of errors, see *Appeal and Error*, § 739.

review, see *Appeal and Error*, § 216.
 As to particular issues or subjects.
 See *Adverse Possession*, § 116; *Negligence*, §§ 138, 139.
 Assumption of risk by servant, see *Master and Servant*, § 295.
 Contributory negligence of passenger, see *Carriers*, § 348.
 Contributory negligence of servant injured, see *Master and Servant*, § 295.
 Negligence of master, see *Master and Servant*, § 293.

In particular civil actions or proceedings.

See *Trespass to Try Title*, § 45.
 For assault, see *Assault and Battery*, § 43.
 For ejection of passenger, see *Carriers*, § 384.
 For failure to deliver telegram, see *Telegraphs and Telephones*, § 74.
 For injuries caused by operation of railroad, see *Railroads*, §§ 282, 351, 401, 485.
 For injuries caused by operation of street railroad, see *Street Railroads*, § 118.
 For injuries to passenger, see *Carriers*, § 321.
 For injuries to person on city street, see *Municipal Corporations*, § 822.
 For injuries to servant, see *Master and Servant*, §§ 291-296.
 For loss of or injury to shipment, see *Carriers*, § 137.
 For malpractice, see *Physicians and Surgeons*, § 18.

(A) PROVINCE OF COURT AND JURY IN GENERAL.

§ 191. In an action for injuries, an instruction *held* not objectionable as assuming that plaintiff had endured mental and physical suffering.—*Illinois Cent. R. Co. v. Smith (Ky.)* 933.

§ 191. Where, in an action against alleged partners for work done, the court instructed that the relationship between defendants made them *prima facie* partners, but there was evidence tending to show that one of them was not a partner in fact, an instruction *held* erroneous, as directing a verdict for plaintiff on the ground that an actual partnership existed.—*Bowen v. Epperson (Mo. App.)* 528.

§ 191. In an action against a railroad for damages from an overflow alleged to have resulted from defendant's failure to maintain proper culverts, a charge read in connection with a prior charge *held* not on the weight of the evidence.—*Ft. Worth & D. C. Ry. Co. v. Suter (Tex. Civ. App.)* 215.

§ 191. In an action by a wife for conversion of corporate stock by a sale thereof, under execution against her husband, an instruction authorizing a recovery *held* erroneous for a failure to require a finding that the stock was the wife's separate property.—*First Nat. Bank v. Thomas (Tex. Civ. App.)* 221.

§ 191. A requested instruction, which was upon the weight of the evidence in that it assumed one of the principal facts in issue, was properly refused.—*Boardman v. Woodward (Tex. Civ. App.)* 550.

§ 191. In an action for injuries to a railroad fireman by his locomotive running into an open switch, an instruction *held* not objectionable as assuming defendant's negligence in not keeping the switch closed.—*Houston & T. C. R. Co. v. Shapard (Tex. Civ. App.)* 596.

§ 191. In an action for injuries to a railroad employé, an instruction *held* not erroneous as assuming that defendant's servants were

negligent in not properly closing a switch.—*Houston & T. C. R. Co. v. Shapard* (Tex. Civ. App.) 596.

§ 191. In an action against connecting carriers for loss of an automobile, a charge assuming that the machine had been totally destroyed *held* error.—*St. Louis Southwestern Ry. Co. v. Patton* (Tex. Civ. App.) 798.

§ 192. An instruction is not objectionable because it assumes an uncontroverted fact or one conclusively proved.—*Board of Councilmen of City of Frankfort v. Downey* (Ky.) 284.

§ 192. The court in its charge may assume a fact established by uncontradicted evidence.—*Suderman-Dolson Co. v. Hope* (Tex. Civ. App.) 216.

§ 194. An instruction in an action against a railroad company for the destruction of property by fire *held* not on the weight of the evidence.—*Missouri, K. & T. Ry. Co. of Texas v. Neiser* (Tex. Civ. App.) 166.

§ 194. Where the undisputed evidence establishes a fact, it is not error for the court to so instruct.—*Brunner Fire Co. v. Payne* (Tex. Civ. App.) 602.

§ 194. A requested charge was properly refused which stated that certain facts would amount to contributory negligence when the question was for the jury.—*Gulf, C. & S. F. Ry. Co. v. Dickens* (Tex. Civ. App.) 612, 618.

§ 194. An instruction *held* erroneous as impressing the jury with the court's view of the importance of certain evidence.—*Rainey v. Kemp* (Tex. Civ. App.) 630.

§ 194. An instruction *held* erroneous as on the weight of evidence.—*Parlin & Orendorff Co. v. Glover* (Tex. Civ. App.) 731.

§ 194. In an action against a railroad for damages caused by the overflow of plaintiff's land claimed to have resulted from impounding water by the negligent construction of the roadbed, an instruction *held* not upon the weight of the evidence as excluding any other issue than the impounding of the water by the construction of the roadbed.—*Missouri, K. & T. Ry. Co. of Texas v. Chilton* (Tex. Civ. App.) 779.

§ 194. In a street car conductor's action for injuries caused by coming in contact with a coal car on a railroad switch near the street car track, a requested instruction *held* properly refused as upon the weight of the evidence.—*Rapid Transit Ry. Co. v. Edwards* (Tex. Civ. App.) 838.

§ 194. A charge *held* on the weight of evidence.—*Webb v. J. L. Wiginton & Co.* (Tex. Civ. App.) 856.

§ 194. Requested instructions as to contributory negligence in an action for injuries to an employe *held* properly refused.—*Houston & T. C. R. Co. v. Johnson* (Tex. Civ. App.) 1150.

§ 199. There is no error in the court declaring the legal effect of uncontroverted facts.—*Sessinghaus v. Knoche* (Mo. App.) 104.

§ 199. A charge in trespass to try title *held* properly refused, as submitting a question of law as well as of fact.—*Wall v. Lubbock* (Tex. Civ. App.) 886.

§ 200. In a suit for the negligent handling of cattle, a charge informing the jury of the care that devolved on defendant, and that if they had not exercised that care they would be guilty of negligence, *held* not to invade the domain of the jury.—*St. Louis & S. F. R. Co. v. Lane* (Tex. Civ. App.) 847.

§ 200. A trial judge should not be deprived of power to apply the law to the issues of a case and permitted only to give abstract dis-

sertations on the law to be applied by the jury as they may see fit.—*St. Louis & S. F. R. Co. v. Lane* (Tex. Civ. App.) 847.

(B) NECESSITY AND SUBJECT-MATTER.

§ 203. Where the court submitted all of the issues which related to the disputed questions of fact and which were necessary to the determination of the case, it was not error to refuse to submit issues requested by the parties.—*Colville v. Colville* (Tex. Civ. App.) 870.

§ 203. Where, in an action for injuries to a servant, the evidence tends to show contributory negligence, it is error to refuse a special charge on that issue.—*Texas & P. Ry. Co. v. Johnson* (Tex. Civ. App.) 1117.

§ 208. On repetition of excluded testimony, the court should again caution the witness and admonish the jury not to consider the evidence.—*United States Health & Accident Ins. Co. v. Jolly* (Ky.) 281.

(C) FORM, REQUISITES, AND SUFFICIENCY.

§ 228. The use of the abbreviation "etc." in a charge on damages *held* not to be commendable.—*Dallas Consol. Electric St. Ry. Co. v. Chambers* (Tex. Civ. App.) 851.

§ 232. A charge on the form of verdict *held* not objectionable as misleading the jury to believe that they were not free, if they disagreed, to refuse to find for either party.—*Southworth v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.) 861.

§ 234. Where a contract between appellant and the other defendants was admissible to show that he was not a partner, it was error to instruct, in an action against defendants for work claimed to have been done for them as partners, that if plaintiff did not know of the existence of the written contract when he made the goods, it should not be considered by the jury.—*Bowen v. Epperson* (Mo. App.) 528.

§ 236. An instruction upon the credibility of plaintiff's testimony *held* improper.—*Quinn v. Metropolitan St. Ry. Co.* (Mo.) 46.

§ 237. An instruction *held* erroneous, because imposing on plaintiff a greater burden than the establishment of his case by a preponderance of the evidence.—*Green v. Kegans* (Tex. Civ. App.) 173.

§ 240. The instruction was erroneous as argumentative.—*Parlin & Orendorff Co. v. Glover* (Tex. Civ. App.) 731.

§ 243. Where the court had properly instructed that defendant could not be held liable as a partner unless his conduct led plaintiff to believe he was such, a subsequent instruction, submitting the case upon the theory of an actual partnership, was erroneous and confusing.—*Bowen v. Epperson* (Mo. App.) 528.

§ 244. The same matter of defense should not be submitted by separate instructions as assumed risk and contributory negligence, thus giving unnecessary prominence to the group of facts.—*Waggoner v. Sneed* (Tex. Civ. App.) 547.

§ 244. An instruction *held* erroneous as giving undue prominence to a particular fact, and as being argumentative and upon the weight of testimony.—*Parlin & Orendorff Co. v. Glover* (Tex. Civ. App.) 731.

(D) APPLICABILITY TO PLEADINGS AND EVIDENCE.

§ 251. In an action for the balance due under a contract for railroad construction work, *held* error to refuse to instruct that plaintiff could not recover for certain work under the contract.—*A. G. Brown & Co. v. McKnight* (Ark.) 409.

contract to pay him half commissions on a sale of real estate, defendant could not have the cause submitted on the theory of implied contract in quantum meruit.—*McMillion v. Cook* (Tex. Civ. App.) 775.

§ 252. The evidence in an action for injury to an employé held not to authorize instructions as to its not being his duty not to inspect machinery.—*Williams Coal Co. v. Jones* (Ky.) 342.

§ 252. In an action for a passenger's death from heart disease, claimed to have been caused by being thrown against a stove in a street car derailment, evidence held not to require an instruction as to whether such an injury could have been possibly anticipated from the derailment.—*MacDonald v. Metropolitan St. Ry. Co.* (Mo.) 78.

§ 252. In an action for work performed under a contract, a contract between defendant and another who had abandoned it held to have no place in the issues to be submitted.—*Suderman-Dolson Co. v. Hope* (Tex. Civ. App.) 216.

§ 252. It is error to charge on an issue not presented by the pleadings or on which there is no evidence.—*Houston & T. C. R. Co. v. Shapard* (Tex. Civ. App.) 596.

§ 253. In an action for injury to a servant operating a mangle, an instruction held erroneous for ignoring the master's evidence.—*Wilcox v. Hebert* (Ark.) 402.

§ 253. The evidence in an action for injury to an employé held not to authorize instructions as to its not being his duty not to inspect machinery.—*Williams Coal Co. v. Jones* (Ky.) 342.

§ 253. An instruction held erroneous, because ignoring an issue.—*Green v. Kegans* (Tex. Civ. App.) 173.

§ 253. An instruction in an action against a master for injuries held not defective.—*St. Louis Southwestern Ry. Co. of Texas v. Brown* (Tex. Civ. App.) 245.

§ 253. An instruction in an action against a master for injuries held not defective.—*St. Louis Southwestern Ry. Co. of Texas v. Brown* (Tex. Civ. App.) 245.

(E) REQUESTS OR PRAYERS.

§ 256. Where an instruction given is correct as far as it goes, a party failing to request other instructions cannot complain that none were given.—*Loughridge v. Ball* (Ky.) 321.

§ 256. Defendant's failure to offer correct instructions, while not curing error in those given, is persuasive that they were not regarded as prejudicial.—*Illinois Cent. R. Co. v. Smith* (Ky.) 933.

§ 256. Where a charge as to the burden of proving the contract alleged, though obscure, could not have misled the jury, if the other party desired a clear presentation of the question, he should have asked it.—*Suderman-Dolson Co. v. Hope* (Tex. Civ. App.) 216.

§ 256. A charge, though not as favorable to defendant as he would be entitled to have, held not for that reason alone erroneous.—*Waggoner v. Sneed* (Tex. Civ. App.) 547.

§ 260. Refusal of instruction covered by one given held not error.—*Johnson v. Daily* (Mo. App.) 530.

§ 260. An instruction covered by the charge is properly refused.—*Texas & N. O. R. Co. v. Geiger* (Tex. Civ. App.) 179.

§ 260. It is not error to refuse a requested charge substantially embraced in the charge given.

§ 260. Where the court's main charge sufficiently presented the law of the case, the court did not err in refusing defendant's special request.—*Houston & T. C. R. Co. v. Malloy* (Tex. Civ. App.) 721.

§ 260. It is not error to refuse a requested charge embraced in the charge given.—*Northern Texas Traction Co. v. Hunt* (Tex. Civ. App.) 827.

§ 260. In an action for damages for putting plaintiff's wife and daughter off a train at an improper place, a requested instruction held sufficiently covered by the one given.—*International & G. N. R. Co. v. Hood* (Tex. Civ. App.) 1119.

§ 260. The refusal of a requested special charge fully covered by the main charge is not error.—*International & G. N. R. Co. v. Ford* (Tex. Civ. App.) 1137.

§ 260. It is error to refuse to give an instruction which is contained in the court's main charge.—*Houston & T. C. R. Co. v. Johnson* (Tex. Civ. App.) 1150.

§ 261. A charge which contained an improper statement of law was properly refused.—*Boardman v. Woodward* (Tex. Civ. App.) 550.

§ 261. A party submitting a request embracing several paragraphs which could not be given as a whole could not complain of the court's refusal to charge a single paragraph therefrom.—*Wall v. Lubbock* (Tex. Civ. App.) 886.

§ 263. Where, in an action for injuries to a passenger, defendant requests several instructions on the issue of contributory negligence, it cannot complain that the court gave only one of them, or that the court should have chosen another one.—*International & G. N. R. Co. v. Ford* (Tex. Civ. App.) 1137.

§ 266. One asking a number of special charges based on any group of facts held not entitled to complain that only one, and that not the most favorable, is given.—*Waggoner v. Sneed* (Tex. Civ. App.) 547.

(F) OBJECTIONS AND EXCEPTIONS.

§ 278. The intent of an instruction as a whole to charge properly being apparent, held, that specific objections, pointing out failure to do so by proper words, is necessary.—*Ames Shovel & Tool Co. v. Anderson* (Ark.) 1013.

(G) CONSTRUCTION AND OPERATION.

§ 295. Error in submitting the case upon the theory of an actual partnership, after properly instructing that defendant could only be held liable as a partner by estoppel, held not cured by the fact that the first instruction given was proper.—*Bowen v. Epperson* (Mo. App.) 528.

§ 295. The instructions must be considered as a whole with reference to their application to the pleadings and evidence in determining whether or not they are erroneous or misleading.—*Missouri, K. & T. Ry. Co. of Texas v. Redus* (Tex. Civ. App.) 208.

§ 295. The instructions, when considered as a whole, held not objectionable as giving undue prominence to plaintiff's side of the cause.—*Dallas Consol. Electric St. Ry. Co. v. Chase* (Tex. Civ. App.) 783.

§ 295. In an action for injuries to plaintiffs' business, an instruction authorizing a recovery held not erroneous in view of other instructions

given.—American Freehold Land Mortgage Co. of London v. Brown (Tex. Civ. App.) 1108.

§ 296. In an action for injury to a railway passenger, any error in an instruction failing to define "carelessly" and "negligently" *held* cured by another instruction.—Leach v. St. Louis & S. F. R. Co. (Mo. App.) 510.

§ 296. In an action against a carrier for injuries to a passenger alighting from a train at an intermediate point, the error in an instruction *held* not prejudicial in view of other instructions.—Missouri, K. & T. Ry. Co. of Texas v. Redus (Tex. Civ. App.) 208.

§ 296. An error in an instruction as not being based on the evidence *held* cured by the giving of another instruction.—International & G. N. R. Co. v. Ford (Tex. Civ. App.) 1137.

IX. VERDICT.

(B) SPECIAL INTERROGATORIES AND FINDINGS.

In action to cancel deed, see Cancellation of Instruments, § 52.

§ 352. A special issue *held* based on the pleadings and evidence.—Uecker v. Zuercher (Tex. Civ. App.) 149.

X. TRIAL BY COURT.

(B) FINDINGS OF FACT AND CONCLUSIONS OF LAW.

§ 395. Where a court made findings as to the terms of a contract based on the instrument as written, it was not bound to make other findings based on parol testimony with reference thereto.—Maury v. McDonald (Tex. Civ. App.) 812.

§ 395. Where the evidence is conflicting, the court is only required to find such facts as are deduced from such evidence.—Maury v. McDonald (Tex. Civ. App.) 812.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 412. Error in refusing to permit the immediate cross-examination of an impeaching witness *held* waived by defendant's failure to cross-examine the witness when an opportunity was later afforded.—McMillion v. Cook (Tex. Civ. App.) 775.

TROVER AND CONVERSION.

Conversion of logs, see Logs and Logging, § 35.

II. ACTIONS.

(A) RIGHT OF ACTION AND DEFENSES.

§ 13. Where the taking of timber is intentional and wrongful, the owner may elect to fix the time of conversion, and proceed, according to the circumstances, to recover.—Ripy v. Less (Tex. Civ. App.) 1084.

§ 13. A wrongful taking of property does not change the title thereto, and it may be recovered so long as its identity is perceptible, though its form has been changed.—Ripy v. Less (Tex. Civ. App.) 1084.

(B) JURISDICTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

Jurisdiction of particular courts, amount or value in controversy, see Courts, § 121.

§ 32. Allegations of complaint for conversion of property on which plaintiff claimed a lien for wages *held* not to bring plaintiff within any one of the classes to whom the statute gives a lien for wages.—Lindale Brick Co. v. Smith (Tex. Civ. App.) 568.

(C) EVIDENCE.

§ 36. In trover for cattle, in view of the defense, plaintiff *held* entitled to show that defendant owed him a certain sum.—Boardman v. Woodward (Tex. Civ. App.) 550.

§ 40. A tortious taking of property is sufficient proof of a conversion.—Ripy v. Less (Tex. Civ. App.) 1084.

(D) DAMAGES.

Evidence of *res gestae* on issue of right to exemplary damages, see Evidence, § 121.

TRUST DEEDS.

See Chattel Mortgages; Mortgages.

TRUSTS.

Creation by will, see Wills, §§ 681, 693.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) EXPRESS TRUSTS.

§ 1. "Express trust," defined.—Stevens v. Fitzpatrick (Mo.) 51.

§§ 17, 18. The declaration of an express trust in land must be in writing under Rev. St. 1899, § 3416 (Ann. St. 1906, p. 1949); section 3417 (Ann. St. 1906, p. 1950) applying only to trusts arising by implication of law.—Bosch v. Miller (Mo. App.) 506.

(B) RESULTING TRUSTS.

§ 62. "Implied trusts" defined.—Stevens v. Fitzpatrick (Mo.) 51.

§ 62. "Resulting trust" defined.—Stevens v. Fitzpatrick (Mo.) 51.

§ 81. Where one purchased and paid for land, but for convenience had it conveyed to his father, the latter *held* to hold the land in trust for his son.—Stevens v. Fitzpatrick (Mo.) 51.

§ 86. Where the vendee, after foreclosure of a vendor's lien, continued in possession, it would be presumed that the purchaser *held* the land for the vendee.—Howard v. Howard (Ky.) 367.

§ 88. The death of one in whose name title is taken to land purchased and paid for by another, does not prevent the latter from showing by parol the trust relationship.—Stevens v. Fitzpatrick (Mo.) 51.

§ 89. The death of the one in whose name title was taken to land purchased and paid for by another, makes it necessary for the court to use greater care in weighing and considering the evidence of the trust relation.—Stevens v. Fitzpatrick (Mo.) 51.

§ 89. In order to enforce a resulting trust in land claimed to have been purchased and paid for by plaintiff's husband and title taken in another's name plaintiff must prove her case by a high standard of proof.—Stevens v. Fitzpatrick (Mo.) 51.

§ 89. In a suit to quiet title and enforce a trust in land claimed to have been purchased and paid for by plaintiff's husband but deeded to his father, through whom defendants claim, evidence *held* to show beyond a reasonable doubt the purchase and conveyance of the land in the manner alleged.—Stevens v. Fitzpatrick (Mo.) 51.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 198. One occupying a fiduciary relation to an estate *held* not entitled to purchase the prop-

§ 378. A bond of one appointed a testamentary trustee *held* binding as a common-law obligation notwithstanding the act of 1908 (Acts 1908, p. 125, c. 49).—Hite v. Hite's Ex'r (Ky.) 357.

UNDUE INFLUENCE.

Procuring making of will, see Wills, §§ 163-168.

UNITED STATES.

See Territories.

Courts, see Courts, § 489; Removal of Causes. Judicial notice of laws of, see Evidence, § 34.

UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) NATURE AND VALIDITY.

§ 26. The redemption by the employer at bimonthly pay days of checks issued to employees for services at a reduction of 10 per cent. of their face value is a violation of the usury law. Ky. St. 1909, § 2219 (Russell's St. § 1815).—Kentucky Coal Mining Co. v. Mattingly (Ky.) 350.

(B) RIGHTS AND REMEDIES OF PARTIES.

Reference in action to recover usury paid, see Reference, § 8.

§ 100. Where a contract stipulates for usurious interest, all interest payments in excess of 10 per cent. on final settlement will be applied to the principal.—Baum v. Daniels (Tex. Civ. App.) 754.

§ 102. One who pays usury, in the absence of statutory provision, may recover the excess over the legal rate and interest from the date of the payments.—Baum v. Daniels (Tex. Civ. App.) 754.

§ 110. A person who loaned the money, who received all the interest paid, and who owns the notes given for the loan, is the only necessary or proper party in an action at law to recover usurious interest together with the penalty imposed by the act of 1905 (Laws 1905, p. 172 [Ann. St. 1906, § 3708]).—Snyder v. Crutcher (Mo. App.) 489.

§ 117. Evidence *held* to warrant a finding that a loan of money stipulated for 18 per cent. interest payable in advance, and was therefore usurious.—Baum v. Daniels (Tex. Civ. App.) 754.

II. PENALTIES AND FORFEITURES.

§ 138. In an action for double usurious interest payments under Rev. St. 1895, arts. 3105, 3106, plaintiff *held* not entitled to recover interest until after judgment.—Baum v. Daniels (Tex. Civ. App.) 754.

§ 142. An action to recover usurious interest payments under Rev. St. 1895, art. 3106, *held* a civil action, and the judgment rendered a civil recovery.—Baum v. Daniels (Tex. Civ. App.) 754.

§ 146. Under Const. art. 16, § 11, and Rev. St. 1895, art. 3104, the words "usurious in-

Mortgage sale, see Mortgages, § 529.

VACATION.

Of particular acts instruments, or proceedings.

See Attachment, §§ 228, 232; Execution, § 171; Judgment, §§ 143, 170, 336-382.

Sale on execution, see Execution, §§ 238-256.

VALUE.

Limits of jurisdiction, see Appeal and Error, §§ 61, 64.

Of personal property, opinion evidence, see Evidence, §§ 472, 474.

Of property, opinion evidence, see Evidence, §§ 472, 474.

Opinion evidence, see Evidence, § 543.

VARIANCE.

Between pleading and proof in civil actions, see Pleading, §§ 376, 380.

Between pleading and proof in criminal prosecutions, see Indictment and Information, § 169.

VENDOR AND PURCHASER.

See Sales.

Parol or extrinsic evidence as to contract for sale of land, see Evidence, § 400.

Purchase of property held in trust, see Trusts, § 198.

Requirements of statutes of frauds, see Frauds, Statute of, §§ 56-60.

Specific performance of contract, see Specific Performance.

I. REQUISITES AND VALIDITY OF CONTRACT.

Parol evidence as to consideration, see Evidence, § 419.

Sufficiency on which to base trespass to try title against grantor, see Trespass to Try Title, § 10.

§ 3. "Option" defined.—Hamburger & Dreyling v. Thomas (Tex. Civ. App.) 770.

§ 3. An instrument *held* a contract for the sale of real estate, and not a mere option.—Hamburger & Dreyling v. Thomas (Tex. Civ. App.) 770.

§ 27. Where the purchase price has been paid, a bond for title to land operates to convey to the grantee an equitable title.—Wright v. Riley (Tex. Civ. App.) 1134.

§ 33. A vendee, seeking to cancel a contract for the sale of land for misrepresentations by the vendor as to its location, *held* not required to prove that the misrepresentations were with a fraudulent intent, though so alleged.—Stevenson v. Cauble (Tex. Civ. App.) 811.

§ 34. Where defendant claimed the right to cancel a land contract for misrepresentation as to the location of the land conveyed, it was no defense that before the contract had been made plaintiff offered to point out the corners of the land, but defendant declined to go.—Stevenson v. Cauble (Tex. Civ. App.) 811.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) BY AGREEMENT OF PARTIES.

§ 84. A contract for the sale and purchase and sale of real estate *held* to permit either par-

§ 180. A consideration for the rescission of a contract for the purchase of land *held* sufficient.—*Mayes v. Miller* (Tex. Civ. App.) 725.

§ 86. The vendor under a contract to convey *held* entitled to treat the contract as abandoned and sell to others on such terms as he saw fit.—*Dobson v. Zimmerman* (Tex. Civ. App.) 236.

§ 87. Where there is no offer of performance by either party of a contract to convey land and to pay for the same, neither party has a right of action for the amount deposited as liquidated damages for breach of the agreement, unless, before the date set for the performance of the contract, one party notifies the other that he will not perform.—*Wead v. Helpert* (Tex. Civ. App.) 1112.

(B) RESCISSION BY VENDOR.

§ 105. Where the sale of land was rescinded by agreement of the parties on the discovery that by mutual mistake the land described in the deed was not the land intended to be conveyed, the purchaser cannot afterward claim any interest in the land actually described.—*McMillan v. Morgan* (Ark.) 407.

(C) RESCISSION BY PURCHASER.

§ 127. While a purchaser may either rescind a contract for the purchase of land induced by false representations or affirm it, and sue for the difference between its value as represented and as it was, and his election to rescind would prevent him from recovering for such difference, it would not prevent him from recovering money expended in attempting to utilize the land before discovering the falsity of the representations.—*Holland v. Western Bank & Trust Co.* (Tex. Civ. App.) 218.

IV. PERFORMANCE OF CONTRACT.

(A) TITLE AND ESTATE OF VENDOR.

§ 129. One contracting to convey land *held* not bound to procure a probate order authorizing a sale, when such order was unnecessary.—*Dobson v. Zimmerman* (Tex. Civ. App.) 236.

§ 129. "Perfect title" defined.—*Dobson v. Zimmerman* (Tex. Civ. App.) 236.

(D) PAYMENT OF PURCHASE MONEY.

§ 168. A purchaser taking an indefeasible title with the understanding that, if missing deeds were discovered, they would be placed on record cannot, after taking possession and holding the land as her own, refuse to pay the balance due because of a missing deed.—*Travis v. Taylor* (Ky.) 988.

§ 176. Where a sale is in gross, the price will not be abated for a shortage, unless so great as to show that the parties could not have contemplated such a difference in the acres actually conveyed and that mentioned in the deed.—*Travis v. Taylor* (Ky.) 988.

§ 176. Where a sale of two tracts of land was in gross, the price will not be abated because of a shortage of 12 acres in the 149 acres which the deed purported to convey.—*Travis v. Taylor* (Ky.) 988.

§ 184. Where the purchase-money note was paid by the purchaser, the legal title to the land became vested in him.—*Gray v. Tribue* (Tex. Civ. App.) 808.

Possession, § 63.

§ 191. Where a corporation was in possession of land under a contract of sale from plaintiff's husband, its possession was that of his heirs and devisees.—*Stevens v. Fitzpatrick* (Mo.) 51.

(B) AS TO THIRD PERSONS IN GENERAL.

§ 218. Purchasers of property *held* to have right of action for injuries caused by water flowing on the property through ditches dug on a railroad right of way before the purchase.—*St. Louis Southwestern Ry. Co. of Texas v. Clayton* (Tex. Civ. App.) 248.

(C) BONA FIDE PURCHASERS.

§ 229. If a purchaser of land had knowledge of facts that would have put a prudent man upon inquiry, which is pursued with ordinary diligence would have led to actual notice of a prior conveyance to another, he would not be a bona fide purchaser for value without notice.—*La Brie v. Cartwright* (Tex. Civ. App.) 785.

§ 229. Where a fact is known sufficient to put a subsequent purchaser upon inquiry as to his grantor's title, he cannot excuse himself from pursuing the inquiry by taking the opinion of an attorney upon an abstract of the record title.—*La Brie v. Cartwright* (Tex. Civ. App.) 785.

§ 231. A registration of an instrument, either not acknowledged or defectively acknowledged, and so not entitled to registration, *held* not constructive notice.—*Childers v. Wm. H. Coleman Co.* (Tenn.) 1018.

§ 232. Actual and visible possession of land by a person claiming to be the owner thereof is notice to all the world of his title, and the fact that he had not recorded his deed would not make one, who had purchased the land of the heirs of the former grantor without notice of the deed, an innocent purchaser.—*Hughes Bros. v. Redus* (Ark.) 414.

§ 233. In the absence of a statute providing for the recording of instruments creating liens on real estate, the rule of caveat emptor applies to intending purchasers.—*Hughes v. Wallace* (Ky.) 324.

§ 233. Under Ky. St. 1909, §§ 3248, 3274, 3452 (Russell's St. §§ 1254, 1291, 1430), an unrecorded lien for a street improvement *held* to exist as against a subsequent purchaser.—*Hughes v. Wallace* (Ky.) 324.

§ 235. Payment of consideration is essential to entitle one to protection as a bona fide purchaser.—*Stevens v. Fitzpatrick* (Mo.) 51.

§ 239. Under a title bond, vendee *held* to take title subject to vendor's lien, and one thereafter taking an assignment of the bond and a deed from the vendor, with notice of a conveyance of mineral rights by the original vendee to plaintiff, took subject to plaintiff's rights.—*Asher v. Tennis Coal Co.* (Ky.) 955.

§ 239. Where a link in the title of purchasers of land was a deed from an agent which was void because of the prior death of his principal; the purchaser could not claim protection as an innocent purchaser, since he was holding under a void title.—*Wall v. Lubbock* (Tex. Civ. App.) 886.

§ 242. Where a person purchased land from heirs which had been previously deeded to a third person by the ancestor, the burden was upon a person claiming title through the heirs to show that the purchaser from them was a purchaser for value without notice of the prior

purchaser.—McAdoo v. Williams (Tex. Civ. App.) 625.

§ 245. Whether a purchaser of land purchased without notice of a prior conveyance thereof to a third person *held* under the evidence to be for the jury.—*La Brie v. Cartwright* (Tex. Civ. App.) 785.

VI. REMEDIES OF VENDOR.

(A) LIEN AND RECOVERY OF LAND.

§ 284. In a suit to recover a portion of the consideration for the conveyance of land, and to foreclose a vendor's lien, a verdict construed, and *held* to apply to the whole land in controversy, and not to an undivided one-half interest therein.—*Tipton v. Tipton* (Tex. Civ. App.) 842.

§ 298. In order to constitute a forcible detainer under Sayles' Ann. Civ. St. 1897, art. 2519, the relationship of landlord and tenant must exist.—*Francis v. Holmes* (Tex. Civ. App.) 881.

§ 298. Under Sayles' Ann. Civ. St. 1897, art. 2519, forcible detainer *held* not to lie to recover possession of premises from purchaser on failure to perform his contract.—*Francis v. Holmes* (Tex. Civ. App.) 881.

VII. REMEDIES OF PURCHASER.

(B) ACTIONS FOR BREACH OF CONTRACT.

Venue of action dependent on place of delivery of goods sold, see Venue, § 7.

§ 342. A vendee in case of the vendors' breach of a contract which does not specify the damages he is entitled to under such circumstances may either enforce specific performance, or recover such damages as he has sustained.—*Hamburger & Dreyling v. Thomas* (Tex. Civ. App.) 770.

§ 342. Where a vendee on failure of title was entitled to a return of the earnest money under the contract, he was entitled to recover such sum, with interest, and any special damages incurred by being induced to make the contract.—*Hamburger & Dreyling v. Thomas* (Tex. Civ. App.) 770.

§ 343. In the sale of land in gross, there can be no recovery for an unsubstantial deficiency, in the absence of fraud or mistake, but in a sale by the acre a recovery may be had for any deficiency.—*Anderson v. Dawson* (Ky.) 953.

§ 343. A purchaser of real estate in gross *held* not entitled to recover for a deficiency in the quantity.—*Anderson v. Dawson* (Ky.) 953.

§ 350. One suing for breach of a contract to convey has the burden to show the breach.—*Dobson v. Zimmerman* (Tex. Civ. App.) 236.

§ 350. Evidence in an action for breach of a contract to convey *held* to show that a firm of brokers was trustee for both parties, and not an exclusive agent of the vendor.—*Dobson v. Zimmerman* (Tex. Civ. App.) 236.

§ 351. Measure of damages for breach of an agreement to convey stated.—*Dobson v. Zimmerman* (Tex. Civ. App.) 236.

§ 351. Effect of intent of parties to a contract to convey respecting the title to pass on the measure of damages for a breach stated.—*Dobson v. Zimmerman* (Tex. Civ. App.) 236.

§ 352. Evidence, in an action by a purchaser to recover money deposited to secure perform-

Change of venue of suit in justice court, see Justices of the Peace, § 73.

Of action against corporation, see Corporations, § 503.

Of suit for injunction, see Injunction, § 111.

I. NATURE OR SUBJECT OF ACTION.

§ 7. Evidence *held* insufficient to prove contract for delivery of goods to purchaser in a certain county so as to entitle him to sue for breach of the contract in such county.—*J. J. B. McCullar Lumber Co. v. Higginbotham Bros. & Co.* (Tex. Civ. App.) 885.

II. DOMICILE OR RESIDENCE OF PARTIES.

§ 21. The evidence failing to show fraud committed in a certain county giving the county court therein jurisdiction over defendant under Sayles' Ann. Civ. St. 1897, art. 1194, subd. 7, defendant *held* entitled to assert his privilege against suit in such county.—*J. J. B. McCullar Lumber Co. v. Higginbotham Bros. & Co.* (Tex. Civ. App.) 885.

§ 22. An action on a note against the maker and the independent executrix of the deceased payee indorsing it may be brought in the county of the residence of the independent executrix, though the maker resides in another county.—*Goodwin & McFarland v. Burton* (Tex. Civ. App.) 587.

§ 22. Under Rev. St. 1895, art. 1194, subd. 4, an action against the trustee of a bankrupt and the bankrupt's agents may be brought in the county in which the trustee resides.—*Gardner v. Planters' Nat. Bank of Honey Grove* (Tex. Civ. App.) 1146.

§ 26. Persons *held* improperly joined as parties defendant.—*Brant v. Lane* (Tex. Civ. App.) 229.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 32. Under Gen. Laws 1907, p. 248, c. 133, *held* that, where an action for conversion was brought in the wrong county, the court upon sustaining defendants' pleas of privilege to the venue should order the case to be transferred to the proper court and county.—*Brant v. Lane* (Tex. Civ. App.) 229.

§ 71. The court may determine whether the petition states a cause of action before acting on plaintiff's motion for a change of venue.—*Carpenter v. Kone* (Tex. Civ. App.) 203.

VERDICT.

In civil actions, see Trial, § 352.

Judgment non obstante veredicto, see Judgment, § 199.

Necessity of conformity of judgment, see Judgment, § 256.

Operation and effect as curing defects in pleadings, see Pleading, § 433.

Review on appeal or writ of error, see Appeal and Error, §§ 1001-1002.

VERIFICATION.

Of pleading, see Pleading, § 291.

VESTED REMAINDERS.

Creation, see Wills, § 629.

VILLAGES.

See Municipal Corporations.

VOTERS.

See Elections.

WAGES.

See Master and Servant, §§ 79, 82.

WAIVER.

See Estoppel.

Of rules of court, see Courts, § 82.

Of objections to particular acts, instruments, or proceedings.

See Appearance; Indictment and Information, § 196; Pleading, §§ 408, 409; Trial, § 412.

Jurisdiction of state court in action against trustee in bankruptcy, see Bankruptcy, § 295.

Of rights or remedies.

Exemption of homestead, see Homestead, §§ 161-181.

Forfeiture of insurance, see Insurance, §§ 388, 755.

Forfeiture provisions in contract for sale of land as affecting right to specific performance, see Specific Performance, § 65.

New trial in civil actions, see New Trial, §§ 102-108.

New trial in criminal prosecutions, see Criminal Law, § 946.

WARDS.

See Guardian and Ward.

WARRANTY.

By insured, see Insurance, §§ 255-282, 330, 335.

WASTE.

Right to attorney's fees on dissolution of injunction, see Injunction, § 252.

WATER PIPES.

Prescriptive right to maintain in street, see Easements, § 8.

WATERS AND WATER COURSES.

See Drains.

Taking water rights under exercise of power of eminent domain, see Eminent Domain, § 84.

Water courses in cities, see Municipal Corporations, § 827.

II. NATURAL WATER COURSES.

(B) OBSTRUCTION AND DETENTION.

Liability of railroad company for injuries caused by overflow, see Railroads, § 114.

III. SUBTERRANEAN AND PERCOLATING WATERS.

§ 107. In an action for polluting the waters of a subterranean stream by emptying sewage therein, evidence of the prior pollution of the waters by surface waters *held* admissible, not to justify the act, but to show that plaintiff suffered no injury.—Kevil v. City of Princeton (Ky.) 363.

ages is the difference between the market value of the land immediately before and immediately after the injury.—Missouri, K. & T. Ry. Co. of Texas v. Chilton (Tex. Civ. App.) 779.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

Assumption by judge as to facts in instructions in action for injuries, see Trial, § 191.
Limitation of action for injuries, see Limitation of Actions, § 55.

Right of purchaser of land to sue for injuries resulting from wrongful acts prior to purchase, see Vendor and Purchaser, § 218.

§ 168. A railroad company *held* negligent in constructing ditches by the side of its track, resulting in overflow of adjoining land.—St. Louis Southwestern Ry. Co. of Texas v. Clayton (Tex. Civ. App.) 248.

§ 178. The measure of damages to land by a railroad company *held* to be the difference between the market value just before and just after the injury.—St. Louis Southwestern Ry. Co. of Texas v. Clayton (Tex. Civ. App.) 248.

IX. PUBLIC WATER SUPPLY.

(A) DOMESTIC AND MUNICIPAL PURPOSES.

Exemption of municipal waterworks system from taxation, see Taxation, §§ 217, 251.

Liability of municipal corporation, see Municipal Corporations, § 739.

§ 183. The transfer of property by a corporation owning a waterworks system to the city owning the capital stock of the corporation *held* valid.—Ryan v. City of Louisville (Ky.) 992.

§ 189. One maintaining under a revocable license pipes in the streets of a city to deliver water to customers cannot recover damages from the city for not allowing him to carry on the business.—Kevil v. City of Princeton (Ky.) 363.

§ 206. A contract between a city incorporated under Rev. St. 1895, art. 418, and a water company, *held* not for the benefit of the inhabitants of the city, so as to entitle them to sue for the breach thereof.—Greenville Water Co. v. Beckham (Tex. Civ. App.) 889.

§ 206. A water company *held* not liable on the ground of assumption of a public duty for the destruction of the property of an inhabitant of the city because of the failure to furnish water to extinguish a fire.—Greenville Water Co. v. Beckham (Tex. Civ. App.) 889.

§ 206. A water company supplying an individual with water from its waterworks *held* not liable as on a contract with a houseowner for the destruction of the owner's building by fire because of the failure to supply water to extinguish the fire.—Greenville Water Co. v. Beckham (Tex. Civ. App.) 889.

WAYS.

Private rights of way, see Easements.

Public ways, see Highways; Municipal Corporations, §§ 665-671, 755-822.

WEAPONS.

§ 17. Evidence *held* not sufficient to sustain a conviction of unlawfully carrying a pistol.—Gay v. State (Tex. Or. App.) 534.

WIDOWS.

Dower, see Dower.

Of mortgagor as necessary party in foreclosure suit, see Mortgages, § 427.

Right of widow of defendant in mortgage foreclosure proceedings to redeem, see Mortgages, § 594.

WILLS.

See Descent and Distribution; Executors and Administrators.

Construction and execution of trusts, see Trusts.

II. TESTAMENTARY CAPACITY.

§ 38. An insane delusion cannot be founded on facts, and if the idea entertained has any substantial basis it is not a delusion.—Fulton v. Freeland (Mo.) 12.

§ 55. Evidence *held* not to show an insane delusion on the part of a testator.—Fulton v. Freeland (Mo.) 12.

IV. REQUISITES AND VALIDITY.**(F) MISTAKE, UNDUE INFLUENCE, AND FRAUD.**

§ 163. The fact that testator's wife is the chief beneficiary raises no presumption of undue influence.—Fulton v. Freeland (Mo.) 12.

§ 163. A will in favor of a mistress or one with whom testator's relations have been meretricious raises no presumptions of undue influence.—Fulton v. Freeland (Mo.) 12.

§ 163. The burden is on one contesting a will to show undue influence.—Fulton v. Freeland (Mo.) 12.

§ 164. Evidence of illicit relations between testator and his second wife before marriage is too remote to prove undue influence as to a will drawn about eight years thereafter.—Fulton v. Freeland (Mo.) 12.

§ 166. Where evidence of illicit relations before marriage to show undue influence by a wife as to her husband's will is admitted, it must be followed by acts of undue influence after marriage.—Fulton v. Freeland (Mo.) 12.

§ 166. Evidence in will contest *held* not to show undue influence.—Fulton v. Freeland (Mo.) 12.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

Pendency of contest as ground for abatement of action to determine title to land claimed under the will, see Abatement and Revival, § 14.

(A) PROBATE AND REVOCATION IN GENERAL.

Note executed in consideration of withdrawal of contents, see Bills and Notes, § 92.

(H) EVIDENCE.

§ 800. Requirements of Rev. St. 1895, art. 1904, respecting the probate of wills, *held* not subject to waiver.—Green v. Hewett (Tex. Civ. App.) 170.

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